

**A ticking time bomb for
procurement challenges**

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Public Procurement Case Study

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The recent High Court judgment in [Riverside Truck Rental Ltd v Lancashire County Council \[2020\] EWHC 1018 \(TCC\)](#) reminded us that the timescales for challenging an alleged breach of the procurement regulations are strict. Any party who wishes to challenge irregularities in a procurement procedure must move quickly and should not wait until the ultimate decision to award is made before proceeding with a challenge.

HHJ Eyre QC's judgment provides guidance in relation to:

- the time limits for commencing court proceedings in relation to procurement challenges;
- when the power to extend such time limits should be exercised; and
- whether contracting authorities have a duty to correct a challenger's mistaken belief as to the relevant time limits.

Key points

Contracting authorities will welcome this reaffirming of the strict time limits for challenges of procurement challenges and will take some comfort that, in the absence of a claim for a declaration of ineffectiveness and any good reason to extend time, that once 30 days from any potential breach has expired that they are in relatively safe waters.

Contracting authorities will also note the judge's confirmation that there is no obligation on them to correct a challenger's mistaken belief as to the applicable time limits for pursuing a claim or to advise the challenger as to the best way to proceed with a claim.

Any party who wishes to challenge any irregularities arising out of a procurement should:

- not wait until the conclusion of the procurement process or the award of the contract before taking action or steps to investigate the breach;
- not delay because of any tactical or commercial considerations; and
- take steps (including instructing legal advisors) immediately upon becoming aware of the potential breach. Time limits for claims for different breaches will start ticking at different times.

The facts

Riverside Truck Rental Ltd ("**Riverside**"), supplied and maintained fleets of tractor cabs and trailers. Lancashire Renewables Ltd ("**LRL**") was wholly owned by the defendant, Lancashire County Council (the "**Council**") and operated the Council's waste processing facilities.

Riverside was the existing supplier of the cabs and trailers used by LRL and the existing contract was due to end in October 2020.

The following timeline is relevant:

<p>19 September 2019</p>	<p>The Council commenced the procurement process for a new contract for the provision of vehicles to LRL from October 2020 and published the Invitation to Tender. A deadline of 29 October 2019 was set for the return of tenders.</p> <p>The ITT included a mandatory requirement in the specification that the tractor cab had to be a "Sleeper Cab" with "Single Bunk, standing height". On 25 September 2019, the Council issued a clarification which provided that the mandatory requirement would be scored on a pass or fail basis and if a bid was unacceptable and failed any of the criteria, the tender submission would be non-compliant and disqualified.</p>
<p>28 October 2019</p>	<p>Riverside submitted its tender which provided for a cab with an interior height of 1,600mm (approximately 5' 3").</p>
<p>29 November 2019</p>	<p>The Council wrote to Riverside saying that Riverside's tender was non-compliant and had been disqualified because the interior height of 1,600mm was not standing height. The letter said that Monks Contractors Ltd ("Monks"), had been successful and that LRL would observe a ten-day standstill period until 9 December 2019.</p>
<p>2 December 2019</p>	<p>Riverside responded in writing to the Council and stated that the height requirement was an ambiguous technicality and open to interpretation. The letter requested that LRL evaluate its submission in the light of its view that the cab height should have stated a minimum height.</p>
<p>6 December 2019</p>	<p>The Council replied saying that the evaluation of Riverside's tender had been discontinued when it was found to be non-compliant and that the Council had been entitled to disqualify the tender.</p> <p>The Council agreed an extension of the standstill period until midnight on 12 December 2019.</p>

18 December 2019	By now Riverside have instructed solicitors who send a letter of claim to the Council. This letter stated that Riverside had 3 months – that is until 28 February 2020 – to issue court proceedings. Riverside's solicitors latter accept that they were at that time mistaken as to the relevant time limits.
10 January 2020	In response to a letter from Riverside's solicitors, the Council explained that the price tendered by Monks was £7,878,000 as opposed to the price of £6,991,000 from Riverside. The scoring of the respective tenders was also disclosed showing that Riverside and Monks had scored at equivalent levels. Riverside would later contend that the time limits for bringing a claim only started on the 10 th January 2020, as it is was only on this date that they learnt the amount of Monks' tender that they learnt that but for their exclusion it would have been the MEAT and therefore should have been awarded the contract.
13 January 2020	<p>Riverside's solicitors wrote to the Council attaching a draft of an application to extend time for commencing judicial review proceedings.</p> <p>The Council replied on the same day saying that, while it had no objection in principle to an extension, it did not consider it appropriate for claims such as this to be brought by way of judicial review proceedings and questioned whether this was permissible in light of the specific procedure provided for under the PCR 2015. The letter further stated that, under the PCR 2015, proceedings must have been started within 30 days beginning with the date when the bidder first knew or ought to have known that grounds for proceedings had arisen, meaning that, in this case, the 30-day limit expired on 30 December 2019 at the latest (being 30 days following the rejection letter on 29 November 2019).</p>
16 January 2020	Contract was awarded to Monks.
24 January 2020	In the event, the draft application for an extension of time for bringing judicial review proceedings was not in fact issued. Instead, on 24 January 2020, Riverside commenced two sets of proceedings.

Riverside's claim

The court proceedings issued by Riverside on 24 January 2020 were two-fold:

- **Procurement Claim** - the first was a claim in the Technology and Construction Court (TCC) alleging that the Council had breached its duty under the Public Contracts Regulations 2015 (the "**PCR**") which sought a declaration and damages. This claim was on mainly on the basis that the Council's decision to reject its Tender failed the most basic standards of transparency, equality, non-discrimination, and objectivity because (i) the "standing height" requirement and the consequences of a failure to meet that requirement were not set out sufficiently clearly (ii) evaluation criteria had been applied inconsistently; (iii) a failure to provide sufficient reasons (iv) there had been a manifest error in assessment. Riverside also alleged that the Council was influenced by a desire to penalise Riverside for their 2013 complaint in relation to its award of a contract to a joint venture between the Council and British Telecom which led to a police investigation – no criminal charges have been brought to date. Riverside alleged that the requirements laid down by the Council were deliberately imprecise with a view to using those to exclude the Riverside as a result;
- **Judicial Review** - the second set of proceedings were judicial review proceedings commenced proceedings in the Administrative Court which sought to review of the Council's decision to disqualify it from the procurement process. Riverside identified the decision to be reviewed as being the "decision to disqualify the Claimant from the procurement process and to award the contract to Monks" and gives the date of that decision as 29th November 2019.

While Riverside did not concede that either set of proceedings was commenced out of time, it issued applications for extensions of time in both claims. Riverside contended that the time limits for bringing a claim only started on the 10th January 2020, on which date they learnt the amount of Monks' tender that they learnt that but for their exclusion it would have been the MEAT and therefore should have been awarded the contract.

Riverside also alleged that the Council ought to have realised that Riverside were mistaken as to the time limits for issuing proceedings and should have pointed out those errors to Riverside and that the time limits for any claims were fast approaching.

The Council's defence

The Council stated that the claims had been brought out of time and there was no good reason to extend the time limits and therefore the claims automatically failed.

The issues

HHJ Eyre QC was asked to determine the following issues:

- whether the claim was issued either (i) out of time so as to automatically fail (in the absence of an extension) or (ii) in time so as to have no need of an extension of time;
- whether there is power to extend time; and
- If there is a power to extend time whether it should be exercised in the Riverside's favour

The law

Regulation 91 states that a breach of the duty owed by a contracting authority under the PCR is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage.

Regulation 92 of the PCR states that (where no declaration of ineffectiveness is sought) that proceedings for any breaches of the PCR 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.

The Civil Procedure Rules ("**CPR**") states that, generally, a claim for judicial review must be filed promptly and in any event within three months of the decision under challenge. However, the CPR goes on to state that where the application for judicial review relates to a decision governed by the PCR, the proceedings must be filed within the time within which an economic operator would have been required by regulation 92 of PCR – 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 judge's decision

HHJ Eyre QC decided that both the Procurement and Judicial Review claims were out of time and that he would not exercise any power to extend time in favour of Riverside.

In relation to the Procurement Claim, the judge dismissed Riverside's argument that time only began to run on 10th January 2020. The judge held that the Council were correct that the breaches Riverside complained of had occurred on the 25 September 2019, 29 November 2019, at the very latest. The judge also decided that Riverside had requisite knowledge of the breaches on those dates. Therefore any claims ought to have been commenced within 30 days of those dates (i.e. by the 30th December 2019 at the very latest).

Having reviewed previous court decisions, the judge outlined key points when considering the time limits for pursuing claims for breaches of the PCR:

- There can be multiple challenges in respect of a single procurement process. That is because there can be multiple decisions which are in breach of the contracting authority's duty and which cause loss or the risk of loss to the economic operator.
- Time can begin to run at different dates in respect of different breaches.
- Time could start running before the conclusion of a procurement exercise and from the date when a party had all the necessary information to know that it had a claim.
- It is not correct to say that the date of the contracting authority's entry into a contract with a competing economic operator is typically the date when time begins to run for a claim by an economic operator under the PCR. Indeed, the converse is the case and typically time will have begun to run at a stage rather earlier than the entry into the contract because it is at that earlier stage that the authority's breach of duty causing loss or a risk of loss is likely to have occurred.
- The court has to consider what decision is in truth being challenged or is being said to be the relevant breach of duty. If the claim is in reality founded on an earlier decision of the authority then a later decision giving effect to it does not set time running again.
- 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.
- A claimant which issued a letter of claim intending it to be a genuine statement that there had been a breach of the regulations and that it was proposing to commence proceedings, would find it difficult to deny that it had sufficient knowledge to start time running, at least as regards the breach identified in the letter.

Whilst the judge had the power to extend time so as to allow the claims to proceed if there was good reason for doing so, he refused to do so. Previous case law has emphasised that such grounds would include factors which prevent service of the claim within time which are beyond the control of the claimant, these could include illness or detention of the relevant personnel. Such case law has also stated that "strong commercial reasons why it would have been reasonable for [the claimant] not to start proceedings until the tender process had been completed" will not amount to a good reason. Neither will mistakes made by a party's legal representatives usually amount to good reason.

The judge refused to extend time on the basis that Riverside did not point to matters outside its control as having prevented it from commencing proceedings in time. The reality was that Riverside had 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 those amounted to a good reason for an extension

The judge also decided that the Judicial Review claim was also out of time for similar reasons as the Procurement Claim.

The CPR required different considerations when considering whether to extend the time limits, namely:

- whether there is a reasonable objective excuse for the claim having been commenced out of time;
- the presence or absence of prejudice to the Defendant and/or third parties; or
- whether the public interest requires that the claim be allowed to proceed.

The judge decided there was no basis on which it would be appropriate to extend time for the commencement of the Judicial Review claim. There was no reasonable objective excuse for the failure to issue the Judicial Review Claim in time simply because Riverside failed to appreciate that the relevant time limit was 30 days from 29th November 2019. There was also a real risk of prejudice to Monks if the claim was to proceed as they had already commenced works and incurred expenditure in relation to the contract (including engaging staff and placing orders for vehicles). Finally, there was no public interest in extending time to allow the claim to proceed – whilst addressing the concern that the exclusion of the Riverside was motivated by an improper animus amounting to a vendetta is a public interest consideration which might be capable of warranting an extension of time in a case where there are sufficient grounds for believing that there had been such impropriety, this was very far from being such a case as no charges have been brought.

Finally, the judge also confirmed that there was there was no obligation on the Council to advise Riverside that the time limits for any claim were fast approaching or as to the best way in which to bring a claim against the Council. There was no obligation on the Council to act in that way and its failure to point out the errors of the Claimant's lawyers was not a breach of its obligation of candour or of any other duty.





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