Judging Public Procurement Disputes: The Necessity of Commercial Judicial Review?
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Why ask this question?

- Both public procurement law and judicial review has been subject to several reforms and Regulation amendments in recent years.
- The Ministry of Justice identifies ‘the judicial review of public procurement disputes’ as one of the reasons for the overall growth in the number of JR applications.
- Looking at public procurement disputes, brought by means of JR, facilitates an opportunity to investigate all other areas of commercial JR concern.
- The Government has recently (5/09/2014) defended its judicial review reforms, saying it is ‘particularly keen to reduce the extent to which legal challenge unduly hinders economic development and regeneration’. There have been a number of judicial reviews which have resulted in considerable delays to development projects, including infrastructure, housing, retail and residential developments. This undermines the important role of judicial review in ensuring good governance and procurement practices.

What are the different possibilities for resolving a public procurement dispute?

Public Contract Regulations
- By bringing a claim, via the High Court, under the Public Contract Regulations 2006 (as amended by revisions in 2009 and 2011).

Implied Contract
- By finding an implied contract between the contracting authority and ‘would be’ economic operators, as per Blackpool & Fylde Aero Club v Blackpool Borough Council [1996] EWCA Civ 13

European Commission
- An investigation by the European Commission (Regulation right from 3 months to 30 days).

Judicial Review
- Most commonly used in situations where (1) the Regulations do not apply; (2) the economic operator seeks a resolution not available under the Regulations; (3) the claimant is not the economic operator e.g. ‘third parties’.

Methodology and Background

In order to address the question of the necessity of commercial JR, desk based investigations were carried out. There are contrasting views within the existing literature as to how many JR applications are made each year. For example, the Ministry of Justice’s figures document that public procurement accounted for 1.82% of the total number of JR claims in 2011 (approx. 200 public procurement claims of a total of over 11,000 cases). By contrast, public procurement practitioners have suggested the figure is below ten (Bowsher, 2013). This investigation advances existing knowledge as to the current number of JR applications and the scale suggested by the existing literature as to the current number of JR applications.

Highest number of judicial review challenges outside England/London.
Highest number of internal disputes.
Highest levels of positive treatment by the judiciary.
Non-JR legislative reform.
No reported JR cases since 2006.
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No reported JR cases since 2006.

Challenges for Now and the Future?

- MoJ identified judicial review of public procurement disputes as one of the areas where further reform was needed.
- In Feb 2014 the Govt reduced the time limit for instigating a JR claim to 3 months (from 6 months).
- The aim was to align the time limit for bringing a JR claim with the other remedial possibilities; promote certainty, and limit the scope for unmeritorious claims.

Judicial Review Reform

- The current system dis-incentivises challenging procurement practices.
- The average lay person has to invest significant amounts of money in a highly speculative outcome.
- For the average lay person, to decide upon the appropriate remedial route, gather the required documentation/ evidence, and finance their claim, within 30 days, is a significant burden.
- Biting the hand that feeds you’ argument is still prevalent in Britain.

Conclusions:

- The Role and Necessity of Commercial Judicial Review in Resolving Public Procurement Disputes:
  - Public law has an important role to play in the resolution of public procurement disputes; judicial review offers a remedial route that ensures the principles of good public office are enforced when needed.
  - Yet there are significant disincentives and barriers for approved parties to challenge malpractice by judicial review.
  - Prior to consultation CP 25/12/2012, there were no recorded statistics onJR cases handled by the MoJ. There is no available statistics on JR cases handled by the MoJ. The Ministry of Justice recently announced that a regulatory right of JR has been implemented. EU Member States have 2 years to transpose the changes.
  - The government is aiming to implement these Directives quickly, so that the UK can benefit as soon as possible from the benefits of the improved flexibilities they offer.
  - Future consequences for public procurement remedies currently unknown (still being considered).
  - Within the wider context of the future of public procurement law, a new EU Directive (2014/24/EU) has recently been implemented. EU Member States have 2 years to transpose the changes.
  - The government is aiming to implement these Directives quickly, so that the UK can benefit as soon as possible from the improved flexibilities they offer.
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Non-Challenge Culture

- The Future: New EU Directives
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