Understanding Public Procurement Judicial Review

Clear, Stephen

Published: 17/09/2013

Cyswllt i'r cyhoeddiad / Link to publication

Dyfnyiad o'r fersiwn a gyhoeddwyd / Citation for published version (APA):

Hawliau Cyffredinol / General rights
Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal

Take down policy
If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.
Benefits:
The consultation process responses did not favor a reduction in the time limit. (73% disagreed with the recommendations in relation to promptness)

Nevertheless, the Government introduced the Reform in July 2013, disregarding the concerns highlighted in the responses to that same consultation. It is likely that issues pertaining to time will continue to rise. (In a similar fashion to that in 2009)

From the sample identified, the judiciary, on the whole, refused or rejected more public procurement judicial review applications brought by or on behalf of private individuals than other types of applicants. The rate of applications dismissed on the basis of timeliness was between 27% and 18%.

Analytical Findings from the Case Law Analysis

From the case law findings, the following propositions were identified:

- Questioning Motive: Restrictive views on claims as third parties
- Contrary to the Reform’s intentions

In (Not the total number of public procurement judicial review claims within the UK.)

Regulations

- Benefits: A reduction to 30 days for bringing JR claims mirrors the time period for bringing order under the EU Regulations. (Thus creating greater certainty for public procurers as to the period within which a challenge can be brought)
- Consequences: The benefits must be weighed against the possible impact the Reform will have on third parties as to who can bring a JR claim for example third party claimants seeking to challenge public procurement decisions on the basis of the Regulation.

Consequences:
- Potential problems and uncertainties associated with time limits for bringing a JR claim to the Administrative Court
- New regulations may be needed to provide time limits for bringing JR claims
- The time limit might also cause an increase in JR claims

Summary

In December 2012 the Ministry of Justice conducted a consultation exercise entitled Judicial Review Pre-action for Reform. The Reform proposed a package of measures that the Government felt would see the growth in applications for judicial review dwindle. The objectives of the Reform were to create a more certain legal environment for public procurers; to streamline the public procurement judicial review process; to enhance the role of the Administrative Court in clarifying what types of challenges are being brought to the Administrative Court. It does so by:

i) advancing understanding of what types of challenges are being brought to the Administrative Courts.

ii) providing a critical insight into the benefits, disadvantages and consequences of the Reforms to public procurement.

The Purpose of Judicial Review in Resolving Public Procurement Disputes:
The role of public procurement judicial review is to hold public bodies to account in ensuring they fulfill their public obligations and duties within their procurement exercises.

- Reality: Public procurement judicial review is used as a means of resolving disputes most commonly in 3 different circumstances: (i) when the contract value is below EU thresholds (ii) by economic operators where a more suitable means of resolution for them exists such as private arbitration or mediation. (iii) By third parties well as in more general situations where the contract award rules are followed.

Today procurement is no longer a purely domestic matter: instead there are tensions between international European and domestic law.

EU’s Union Law cannot control public law principles and public obligation all have a role to play in resolving such disputes. (These questions are recognised as being more complex than for issues public procurement judicial review legislation)

Findings

The Rise in Public Procurement Judicial Review Claims:
The high number of public procurement judicial review claims in the sampled period from 1992 to 2010, was 94.5%. In 2010 and 2011 rising to 11.5% of cases identified in the sample. The rate of applications rejected or dismissed on the basis of timeliness was between 20% and 14%.

Reasons for Growth in 2009-2010:
- Problems with the Time Limits for Bringing Claims (Prior to July 2013 Reform)
- Judges and the Ministry of Justice are yet to resolve the issues for bringing a claim within the new time limits.

Primary Public Procurement Judicial Review Issues by Year

Primary JR Challenges: Percentages

Claims at the UK Level:
From the sample, 84% of cases arose in England, 6% in Wales, 4% in Scotland and 2% in Northern Ireland. From these regional samples, 42% received positive judicial treatment in England, 6% in Wales, 25% in Scotland and 25% in Northern Ireland.

Beyond Reform?

Conclusions and Future Research:

The Government intended for the reform to help reduce the number of public procurement judicial review claims going to the Administrative Courts, so that only legitimate, genuine claims can proceed promptly. However the overall number of public procurement judicial review claims at the Administrative Court has remained static or even increased, with a greater number of claims in 2011 than in any of the previous years in sampled reports.

Nevertheless, the overall number of claims are minimal. The role and function of public procurement judicial review legislation has changed in recent years; there is evidence to suggest more allegations are cleared and challenged through judicial review. Consequently, the administrative courts are being used to challenge issues that are sometimes better handled by invoking public law obligations.

Future Research: To look at the impact and differences in public procurement judicial review, compared with commercial judicial review (Using public procurement as a case study for analysis).

Cases

- In Watters (2009) EWHC 1175 (QB), the applicant, a contractor in Northern Ireland, was refused to develop an online bid preparation system. This was to include finding propositions that would be sought for a prospective administration by Sport Northern Ireland. Problems arose over a 3 minute rule has placed the applicant in breach of contract. While this is regarded as a quasi-judicial case, it is the potential for legal action under the Regulations, that the legal questions were deemed to be more appropriately addressed by public law and judicial review.

- In (2009) EWHC 1175 (QB), the applicant, a contractor in Northern Ireland, was refused to develop an online bid preparation system. This was to include finding propositions that would be sought for a prospective administration by Sport Northern Ireland. Problems arose over a 3 minute rule has placed the applicant in breach of contract. While this is regarded as a quasi-judicial case, it is the potential for legal action under the Regulations, that the legal questions were deemed to be more appropriately addressed by public law and judicial review.

- In (2009) EWHC 1175 (QB), the applicant, a contractor in Northern Ireland, was refused to develop an online bid preparation system. This was to include finding propositions that would be sought for a prospective administration by Sport Northern Ireland. Problems arose over a 3 minute rule has placed the applicant in breach of contract. While this is regarded as a quasi-judicial case, it is the potential for legal action under the Regulations, that the legal questions were deemed to be more appropriately addressed by public law and judicial review.

- In (2009) EWHC 1175 (QB), the applicant, a contractor in Northern Ireland, was refused to develop an online bid preparation system. This was to include finding propositions that would be sought for a prospective administration by Sport Northern Ireland. Problems arose over a 3 minute rule has placed the applicant in breach of contract. While this is regarded as a quasi-judicial case, it is the potential for legal action under the Regulations, that the legal questions were deemed to be more appropriately addressed by public law and judicial review.

- In (2009) EWHC 1175 (QB), the applicant, a contractor in Northern Ireland, was refused to develop an online bid preparation system. This was to include finding propositions that would be sought for a prospective administration by Sport Northern Ireland. Problems arose over a 3 minute rule has placed the applicant in breach of contract. While this is regarded as a quasi-judicial case, it is the potential for legal action under the Regulations, that the legal questions were deemed to be more appropriately addressed by public law and judicial review.