Understanding Public Procurement Judicial Review
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Summary

This research responds to recent Government Reforms, adopted in July 2013, concerning the role of public law judicial review in resolving public procurement disputes (public procurement judicial review). It is intended as a basis for further understanding of the intended benefits of such an approach and the way in which the Reforms were perceived. The main purpose of the Reforms was to achieve a more prompt resolution of disputes. This is achieved by setting out a clear and uniform time limit for bringing such claims.

This paper focuses on the questions of how much longer until a claim could be brought, rather than the question of whether such a reduction should be made. This is because the promptness of judicial review is achievable through the Reforms, and therefore the issue of how the time limit will be achieved is only academic. This paper also addresses the question of whether the proposed time limit is necessary, rather than the question of whether the time limit is necessary.

The Purpose of Judicial Review in Resolving Public Procurement Disputes:

- The purpose of judicial review is to hold public bodies to account in ensuring they fulfil their public obligations and duties within their procurement exercises.
- 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) in claims by economic operators; and (iii) in cases where the contract was awarded without adequate competitive procedures.
- Today, procurement is no longer a purely domestic issue but rather an international one due to cross-border issues and domestic domestic interests.
- European Union law constrains public law principles and public obligations all have a role to play in resolving such disputes. (These questions are recognized as being more complex than other issues for public law judicial review litigation).

The Role of Judicial Review in Resolving Public Procurement Disputes:

- From this sample of 70, 57 cases were primarily concerned with public procurement judicial review. A further 13 judicial reviews were concerned with procurement matters.
- The purpose of judicial review is to hold public bodies to account in ensuring they fulfil their public obligations and duties within their procurement exercises.
- European Union law constrains public law principles and public obligations all have a role to play in resolving such disputes. (These questions are recognized as being more complex than other issues for public law judicial review litigation).

Studying the Judicial Review of Public Procurement:

- In December 2012 the Ministry of Justice conducted a consultation exercise entitled Judicial Review Pre-Phase for Reform. The Reform proposed a package of measures that the Government felt would stop the growth in applications for public procurement judicial review. The Ministry of Justice also sought to clarify which cases would be brought before the courts.
- In light of such findings, what are the likely consequences of the Government’s reforms that reduce the time limit for action on claims arising under the Public Contracts Regulations 2006 (as amended) ("the time limit") was that public procurement reviews relating to terminating sole contracts would be for judicial review to address. Other recent changes include judicial review action being brought where other remedies were not available under the Regulations.

The Study of Judicial Review:

- The data analysis included a total of over 11,000 JR cases (45% of which were sampled). This means that the findings cannot be generalized to all judicial review claims.
- The analysis was conducted by looking at the impact and differences in both public and administrative law judicial review, compared with commercial judicial review (using public procurement as a case study for analysis).

Background

- In order to look beyond these Government reforms, this research identifies two broad areas for further investigation. Firstly, what types of public procurement judicial review are being challenged by the courts to the Administrative Court at least. Secondly, what are the likely consequences of the Government’s reforms that reduce the time limit for action?
- The findings are based on the assumption that the growth has slowed in budgetary pressures, while some courts are no longer as active as they were in the past. However, it is possible that the courts may continue to be active in resolving such disputes. (These questions are recognized as being more complex than other issues for public law judicial review litigation).

Findings

- The Reform proposed a package of measures that the Government felt would stop the growth in applications for public procurement judicial review. The Ministry of Justice also sought to clarify which cases would be brought before the courts.
- In light of such findings, what are the likely consequences of the Government’s reforms that reduce the time limit for action on claims arising under the Public Contracts Regulations 2006 (as amended) ("the time limit") was that public procurement reviews relating to terminating sole contracts would be for judicial review to address. Other recent changes include judicial review action being brought where other remedies were not available under the Regulations.

Rationale for the Time Limit of 30 Days:

- The research aims to evaluate how the courts have resolved disputes related to public procurement judicial review litigation. The main purpose of the Reforms was to achieve a more prompt resolution of disputes, which is achieved by setting out a clear and uniform time limit for bringing such claims.
- The purpose of judicial review is to hold public bodies to account in ensuring they fulfil their public obligations and duties within their procurement exercises.
- European Union law constrains public law principles and public obligations all have a role to play in resolving such disputes. (These questions are recognized as being more complex than other issues for public law judicial review litigation).

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Primary Public Procurement Judicial Review Issues by Year

- Analytical Findings from the Case Law Analysis
- From the case law findings the following concerns were identified:
  - Questioning Motive: Restrictive rules on claims by third parties
  - Improving access to judicial review
  - Reducing the time limit for bringing public procurement judicial review claims

Primary JR Challenges: Percentages

- By comparing this data with the findings of other studies, it is possible to identify that the proposed time limit of 30 days is necessary, given the increase in legal disputes.
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