

# Automatic suspensions

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- What counts and what will sway the courts over lifting the automatic suspension under section 102 of the Procurement Act?
- Same old, same old or watch this space?

## Issues:

- Will the new test change anything?
- Other interim remedies in section 102
- A surprising development

## Green Paper (Dec 2020)

- *“The end of the Transition Period provides a historic opportunity to overhaul our outdated public procurement regime....”*
- *“For too long, modern and innovative approaches to public procurement have been bogged down in bureaucratic, process-driven procures. We need to abandon these complicated and stifling rules and unleash the potential of public procurement .....”*

- *“We propose amending the test....so that it is no longer based on the test applied when granting an injunction, but is a more appropriate, procurement-specific test....The introduction of a fast track procedure where required should reduce the need to rely on this test as the reduction in Court timescales will allow more contracts to remain suspended while the case is heard....”*

## Consultation Response:

- *“We ....envisage that the new test will be a simple, single limb test which provides for suspensions to be lifted where there are overriding consequences for the various interest concerned. This will include the impact on public service delivery.”*

- Automatic suspension when proceedings are started (Reg 95)
- Authority applies to bring an end to the requirement (Reg 96)
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- Test is *American Cyanamid* (Reg 96(2) and (3))
- Authorities usually win e.g.
  - *Camelot UK Lotteries Ltd v Gambling Commission* [2022] EWHC 1664 (also see [2022] EWCA Civ 1020);
  - *Teleperformance Contact Ltd v Sec of State for Home Department* [2023] EWHC 2481

- Automatic suspension (section 101)

*“A contracting authority may not enter into a public contract, or modify a public contract or a convertible contract, if during any applicable standstill period –*

*(a) Proceedings under this Part are commenced in relation to the contract, and*

*(b) The contracting authority is notified of that fact”*

- Standstill period on award of contracts (section 51):
  - CA may not enter into a public contract before:
    - The end of the mandatory standstill period or
    - If later, the end of another standstill period provided for in the contract award notice
    - The end of any voluntary standstill period provided for in the contract notice
  - Mandatory standstill period – 8 working days beginning with day on which contract award notice is published
  - Voluntary standstill period – not less than 8 working days beginning with day on which contract award notice is published

- Standstill period on modification of contracts (section 76):
  - CA may not modify a public contract or convertible contract before the end of any voluntary standstill period provided for in a contract change notice
  - Voluntary standstill period – not less than 8 working days beginning with day on which the contract change notice is published

- *“...the court must have regard to:*
  - (a) the public interest in, among other things-*
    - (i) upholding the principle that public contracts should be awarded, and contracts should be modified, in accordance with the law*
    - (ii) avoiding delay in the supply of the goods, services or works provided for in the contract or modification (for example, in respect of defence or security interests or the continuing provision of public services)*
  - (b) the interests of suppliers including whether damages are an adequate remedy for the claimant*
  - (c) any other matters that the court considers appropriate”*

## Public interest in lawfulness:

- *Edenred (UK Group) Ltd v HMT* [2014] EWHC 3555, para 31 (strong public interest in compliance with the law outweighed public interest in avoidance of delay)
- Stuart-Smith J in *Openview, Kent and Alstom* (undoubted public interest in procurement being carried out properly does not tend of itself to support the maintenance of the automatic suspension)

- *Sysmex (UK) Ltd v Imperial College Healthcare NHS Trust* [2017] EWHC 1824, para 19 and 25 (if accepted there is a serious issue, parties should, except in exceptional circumstances, resist any further temptation to argue the merits; *Edenred* didn't mean PI in lawfulness trumped everything else, not automatically point in C's favour)
- *Camelot UK Lotteries Ltd v Gambling Commission* [2022] EWHC 1664, para 128 (no dispute that public interest in awarding licence lawfully but question of lawfulness is the very issue court will be required to determine at trial, parties agree serious issue, dispute can only be resolved at trial and therefore does not assist in determining where the balance of convenience lies)

## Adequacy of damages:

- Almost always adequate in large procurements?
- *Teleperformance*, para 42 (primary loss of a commercial contract will be the loss of profits sustained by the losing bidder and the loss of profits will generally be capable of assessment by way of damages; therefore, more often than not damages will be an adequate remedy)

- Leads to arguments about:
  - Unique/highly prestigious contracts (*Vodafone Ltd v FCDO* [2021] EWHC 2793)
  - Reputational harm (*Camelot* – para 98, no compelling evidence that reputation or business would suffer harm so as to reduce prospects of obtaining future contracts)
  - Redundancies
  - Impact on global companies/group companies (*Teleperformance*, para 42)

## Differences:

- No 3-stage test
- No requirement for serious issue to be tried? – but see GCF Guidance on Remedies, para 25 (the test in section 102(2) requires the court to consider the merits of the case to ensure the interests of suppliers are considered alongside the public interest)
- The adequacy of damages for the C is no longer a gateway

## Similarities:

- The adequacy of damages is still a factor (if not a gateway)
- All the same factors are to be considered

# What will the courts do?



- *Camelot* [2022] EWCA Civ 1020, paras 6 and 7:

*“there is a dearth of appellate guidance on the correct approach to applications to lift.....There are often two conflicting interests: the need to do justice, and the need for speed... the arguments....demonstrated the potential importance of such guidance.*

*We acknowledge ...that the Procurement Bill sets out provisions on this issue which use different words and terminology from those currently used by the courts, but ....it by no means follows that....the test that will be applied by the courts will be very different to that which is currently applied....”*

Reg 96 – possible interim orders:

- *Bringing to an end the AS*
- *Restoring or modifying the AS*
- *Suspending the procedure leading to the award of the contract or determination of design contest*
- *Suspending the implementation of any decision or action taken by the CA in the course of following such a procedure*

## Section 102 – possible interim orders:

- Lifting or modifying the AS
- Extending the AS or imposing a similar restriction
- Suspending the effect of any decision made or action taken by the CA in carrying out the procurement
- Suspending the procurement or any part of it
- Suspending the entry into or performance of a contract
- Suspending the making of a modification of a contract or performance of a contract as modified

Explanatory Note, para 629

# A surprising development



## Current law:

- Service of Claim form within 7 days of issue (Reg 94)
- Means POC is also required under the CPR

## New law:

- No provision in the Act for service of Claim form (within 7 days or otherwise)
- See Guidance on Remedies, August 2024, para 20
- But see Guidance on Remedies, September 2024, paras 50 and 51
  - Service within 4 months under CPR
  - Expect C to serve CF where wishes AS to apply but not strictly required
  - CA can call for service of CF within 14 days (CPR 7.7)
  - C has 14 days from service of CF for POC under CPR

- Automatic suspension:
  - Small adjustments, rather than radical new test for AS?
  - Clear guidance from the Courts was always required and still is
- New interim order suspending performance of contract or modification
- Radical change in service of Claim Form
- Seizing historic opportunity for overhaul?