

TCC GUIDANCE NOTE ON PROCEDURES FOR PUBLIC PROCUREMENT CASES

(Appendix H to the TCC Guide)

Introduction

1. This protocol provides guidance on the management of public procurement claims. This is a rapidly developing area of law; while this guide should assist, practitioners must ensure that they are aware of the most recent relevant case law.
2. Public procurement cases, particularly those involving claims which seek to set aside the decision to award the contract in question, raise singular procedural issues and difficulties. The claimant commonly feels that it has insufficient evidence or documentation fully to particularise its case or otherwise prepare for trial, while the short limitation and mandatory standstill periods mean that proceedings are necessarily issued hastily. The provision of pleadings and documentation on disclosure often gives rise to serious difficulties in connection with confidentiality, particularly where there is a real risk that there will have to be a re-tendering process. Confidentiality rings will often need to be set up by agreement or order.
3. The issue and notice of proceedings challenging a contract award decision before the contract has been entered into, results in automatic suspension of the conclusion of the contract with the successful tenderer. The latter has a particular interest in the protection of the confidential information in its documents, many of which will be in the possession of the contracting authority¹, and may wish to make representations in relation to confidentiality and other matters. It is therefore not unusual for the successful tenderer to make an application to be joined in the proceedings or to have its interests protected by some other means.

¹ This protocol refers to contracting authorities, but the same issues arise in relation to utilities under the relevant Utilities Contracts Regulations.

Pre-Action Process and ADR

4. Given the short limitation period, the time for any pre-action process is limited. As the mandatory standstill period is only 10 days, a potential claimant may need to commence proceedings without delay to obtain automatic suspension of the award of the contract. Whilst a claimant is not bound to comply with the Protocol, it aims to enable parties to settle the issues between them without the need to start proceedings, by encouraging the parties to exchange information about the claim, and to consider using Alternative Dispute Resolution (ADR) to resolve cases before or during proceedings. Litigation should always be a last resort. Therefore, to the extent that this is practical and does not make it unreasonably difficult to issue and serve proceedings within the limitation period, the parties are encouraged to use a pre-action process.

5. The pre-action process which is recommended is as follows:
 - (1) The potential claimant will send a letter before claim to the contracting authority. This should identify the procurement process to which the claim relates; the grounds then known for the claim (both factual and legal); any information sought from the authority; the remedy required, and any request for an extension of the standstill period and/or a request not to enter into the contract for a specific period of time and/or not to do so without a specified period of notice to the potential claimant. The letter should propose an appropriate, short, time limit for a response.

 - (2) The authority should promptly acknowledge receipt of the letter before claim, notify its solicitors' details and (if requested) indicate whether the standstill period will be extended and if so, by how long. The authority should then provide any information to which the claimant may be entitled as soon as possible, and send a substantive response within the timescale proposed by the claimant, or as soon as practical thereafter.

 - (3) Having exchanged correspondence and information, the parties should continue to make appropriate and proportionate efforts to resolve the dispute without the need to commence proceedings.

6. The parties should act co-operatively and reasonably in dealing with all aspects of the litigation, including requests for extensions of time, taking into account the expiry of the

standstill period and/or any limitation periods. The parties should also act co-operatively and reasonably in dealing with all aspects of the litigation, including amendments following further disclosure.

7. The parties should also act reasonably and proportionately in providing one another with information, taking into account any genuine concerns with regard to confidentiality, whether their own, or those of third parties. The parties should consider the use of confidentiality rings and undertakings to support resolution of the dispute prior to the issue of proceedings (as to confidentiality rings and undertakings see below). The aim should be to avoid the need to issue proceedings simply to obtain early specific disclosure. The authority is strongly encouraged to disclose the key decision materials at an early stage where relevant to the complaint made².
8. ADR processes are encouraged, both before and during proceedings. The Court may order a stay of proceedings, direct a window in the timetable leading up to trial to enable mediation or other ADR to take place, or make an ADR order in the terms of **Appendix E** (see **paragraph 7.3.2**) particularly if (due to the claim being or becoming limited to damages) there is less urgency in fixing an early trial date.

Institution of Proceedings

Service of the Claim Form

9. The Claim Form must be served on the Defendant within 7 days after the date of issue, the first day of the 7 being the day following the day on which the Court seals the Claim Form: accordingly, a claim form issued on Wednesday must be served no later than the following Wednesday. “Service” for the purposes of the regulations requires the claimant to complete the step constituting service under CPR 7.5(1) within 7 days of issuing the Claim Form³.

Service of the Particulars of Claim

10. Parties should be aware of the provisions of CPR 7.4 (1) and (2). CPR 7.4(2) requires that the Particulars of Claim be served no later than the latest time for serving the Claim Form.

² *Roche Diagnostics Limited v the Mid Yorkshire Hospitals NHS Trust* [2013] EWHC 933

³ *Heron Bros Ltd v Central Bedfordshire Borough Council* [2015] EWHC 604 (TCC)

11. If the Particulars of Claim (or other pleadings) contain confidential information, the party serving the pleading should lodge with the Court (a) a non-confidential version of the pleading redacted so as to preserve confidential information and (b) an unredacted version marked as confidential and sealed in an envelope also marked as confidential and seek an order by letter, copied to the other party and any relevant third parties, that the access to the Court file be restricted. Wherever possible, confidential information should be contained in a self-contained schedule or annex. Where a pleading is served electronically, the party serving it should ensure that redaction is effective and should give consideration to methods of protecting confidentiality, such as password protection. The continued arrangements to protect confidentiality should be addressed at the first CMC pursuant to paragraph 22 below.

Judicial Review

12. Sometimes claimants find it necessary to bring proceedings for Judicial Review in the Administrative Court as well as issuing a claim under the Regulations in the TCC. This usually happens where the claimant's right to bring a claim under the Regulations is or may be disputed, but there may be other reasons.
13. Where this happens the claim for Judicial Review will, unless otherwise ordered by the Judge in Charge of either the Administrative Court or the TCC, be heard and case managed together with the related claim in the TCC before a TCC judge who is also a designated judge of the Administrative Court.
14. In this situation claimants are to take the following steps:
 - (1) At the time of issuing the claim form in the Administrative Court the claimant's solicitors are to write to the Administrative Court Office, with a copy to the Judges in Charge of both the Administrative Court and the TCC, to request that the claim be heard alongside the related claim in the TCC.
 - (2) The letter is to be clearly marked
"URGENT REQUEST FOR THE HEARING OF A PUBLIC PROCUREMENT CLAIM BY A JUDGE OF THE TCC WHO IS A DESIGNATED JUDGE OF THE ADMINISTRATIVE COURT"
 - (3) If they are not notified within 3 days of the issue of the claim form that the papers will be transferred to the TCC, the claimant's solicitors should contact the Administrative Court Office and thereafter keep the TCC informed of the position.

15. This procedure is to apply only when claim forms are issued by the same claimant against the same defendant in both the Administrative Court and the TCC almost simultaneously (in other words, within 48 hours of each other, excluding non-working days).
16. When the papers are transferred to the TCC by the Administrative Court Office the Judge in Charge of the TCC will review the papers immediately to ensure that it is appropriate for the two claims to be case managed and/or heard together by a judge of the Administrative Court who is also a judge of the TCC.
17. The Judge in Charge of the TCC will then notify the claimants and the Administrative Court Office whether or not both claims should proceed in the TCC. If it appears that the claim for Judicial Review should not be heard by a judge of the TCC, the Judge in Charge of the TCC will, after consultation with the Judge in Charge of the Administrative Court, transfer the case back to the Administrative Court and give his/her reasons for doing so.
18. If it is directed that the claim for Judicial Review should be heard by a judge of the TCC, the Judge in Charge of the TCC will ensure that the application for permission to apply for Judicial Review is determined at the earliest opportunity by a judge of the TCC who is also a designated judge of the Administrative Court.
19. If permission is granted, the claim will be case managed and heard by a TCC judge who is a designated judge of the Administrative Court, save that routine directions may, if it is appropriate and expedient to do so, be given by a judge of the TCC who is not a designated charge of the Administrative Court.
20. At all stages of the proceedings the titles of all documents filed in the JR proceedings are to bear the Administrative Court title and case number and are to state that the claim is being heard and managed together with TCC Case No HT-[]-[].

CMC

21. An early CMC may be appropriate, so that the Court may assess the urgency and fix appropriate dates for trial, specific anticipated applications (such as applications for lifting the statutory suspension, or applications for specific disclosure or expedited trial) and other stages of trial or other matters such as disclosure, witness statements and expert reports (the deployment of expert evidence will require clear justification). Either party may request the Court to fix the first CMC and the Court will endeavour to accommodate such requests.

22. The parties should be aware of the pilot scheme for Shorter and Flexible Trial Procedures and Practice Direction 51N and to address their minds to the question of whether either scheme might be appropriate for their case. These issues should be addressed at the first CMC.

Cost budgeting

23. The provisions in the CPR about preparation of costs budgets (CPR Part 3.13 and Practice Direction 3E) and electronic disclosure (Practice Direction 31B) apply. However, if there is uncertainty as to the course the proceedings may take so that it is not possible to prepare a realistic costs budget, or if the speed at which proceedings are being pursued is such that there is insufficient time for the parties to prepare and file sensible costs budgets or to take the steps required in connection with electronic disclosure in time for the CMC fixed by the Court, it is recommended that the claimant apply to the Court in writing, either before or at the same time as applying to fix the CMC, for an urgent order that the parties do not have to serve costs budgets 7 days before the CMC or dis-applying the provisions of 31BPD.4 in relation to disclosure of electronic documents. Unless one party objects, the Court will deal with such applications on paper.

Specific and Early Disclosure

24. Early disclosure may be justified to enable the claimant to plead its case properly or to secure finalised pleadings if and when expedited trials are ordered.
25. Contracting authorities are encouraged to provide their key decision making materials at a very early stage of proceedings or during any pre-action correspondence. This may include the documentation referred to in Regulation 84 of the Public Contracts Regulations 2015 (“the 2015 Regulations”).
26. The question of disclosure will be considered at the first CMC. Applications which are likely to be contested should be brought on promptly; early hearings can be fixed if required. The parties’ attention is drawn to the general provisions on disclosure in this **Guide** at **Section 11** and to the protocol for e-disclosure prepared by TeCSA of 9 January 2015.

Confidentiality generally

27. Public procurement claims frequently involve the disclosure of, and reliance upon, confidential information. Confidentiality is not a bar to disclosure.⁴ However, the need to protect confidential information needs to be balanced by the basic principle of open justice. Managing the use of confidential information in the proceedings tends to increase both the cost and complexity of the litigation. The Court will seek to manage the proceedings so that confidentiality is protected where genuinely necessary but ensuring that the issue of confidentiality does not give rise to unnecessary cost or complexity. Assertions of confidentiality should only be made where properly warranted.
28. Once a case has been allocated to a particular TCC judge, papers and communications, particularly those which are to be treated as confidential, should generally be passed through the relevant Judge's Clerk to limit the risk of inadvertent disclosure.
29. Papers delivered to and communications with the Court and the Judge's Clerk should be marked as "Confidential" if they are confidential.
30. It is recommended that documents containing confidential material are provided on coloured paper so that their confidential status is immediately apparent (practitioners are asked to take care that the print remains legible when printed on a coloured background). Where relevant, the level of confidentiality should be identified either by a stamp or mark (e.g. "Confidential 1st Tier"⁵) or by a particular colour of paper.
31. Where necessary to protect confidential information the Court may, if requested, make an order restricting inspection of the Court files. Requests to restrict inspection should only be made where necessary. Any member of the public may seek an order from the Court varying any such restrictions. Consideration should be given to providing appropriately redacted pleadings for the Court file so as to permit public access to them. As to the management of confidential information in pleadings generally, see paragraph 11 above.

⁴ *Science Research Council v Nasse* [1980] AC 1028.

⁵ As to the use of tiers in confidentiality rings see paragraphs 41 and 42

Redactions

32. Redaction of disclosed documents, statements or pleadings can be justified on the grounds that the redactions cover privileged and/or confidential material. In the latter case, redactions may be justified to enable documents to be more widely disclosable to people outside any confidentiality rings. In such cases, a schedule should be prepared which explains the justification for the redactions. The schedule should list the information in respect of which confidential treatment is claimed and the reasons for the claim for confidentiality. The schedule should contain two columns: the first giving the relevant page and paragraph reference (a line number should be added if there are a number of pieces of confidential information in one paragraph in the document concerned); and the second setting out the reasons for asserting confidentiality. For example:

| Document Title | |
|-----------------------------|--|
| Location in Document | Reason for assertion of confidentiality |
| Page 15, paragraph 4.2 | The deleted material relates to ABC Limited's confidential costs and prices The information is in the nature of a business secret |

33. Save in exceptional circumstances or where redacted material is irrelevant, the Court should, at the appropriate stage, be provided with the redacted documents also in unredacted form with the redactions highlighted in a prominent colour which does not obscure the information beneath it, together with the schedule of redactions. This can be important on specific disclosure applications as well as at trial. Each page of the document must include the header "CONTAINS CONFIDENTIAL INFORMATION".

Confidentiality Rings and Undertakings

34. Confidentiality rings may be established where necessary to facilitate the disclosure of confidential information. A confidentiality ring comprises persons to whom documents containing confidential information may be disclosed on the basis of their undertakings to preserve confidentiality.

35. It is highly desirable that any confidentiality ring is established as early as feasible. Agreements or proposals for confidentiality rings, their scope and limitations should be put before the Court at the first CMC or application for specific disclosure, whichever is earlier, with explanations as to why they are justified. The Court may make orders implementing, approving or amending the parties' agreements or proposals.
36. The terms of any confidentiality ring will depend on the circumstances of the particular case, including the matters in dispute and the nature of the material to be disclosed. Generally, however, it will be necessary to determine (1) who should be admitted to the ring and (2) the terms of the undertakings which any members of the ring may be required to give.
37. As to personnel, a party's external legal advisors (solicitors and counsel) will need to be admitted to any ring that is established.
38. Parties, and in particular the claimant, may also wish to include certain of their own employees in the ring, who may be in house lawyers or other personnel. This will usually be for the purpose of understanding material disclosed into the ring and/or for giving instructions to external lawyers.
39. Where a party proposes to admit an employee representative, and the ring contains material which is confidential to a commercial competitor of that party, relevant factors are likely to include that party's right to pursue its claim, the principle of open justice, the confidential nature of the document and the need to avoid distortions of competition and/or the creation of unfair advantages in the market (including any retender) as a result of disclosure.
40. In considering whether a particular person should be admitted to the ring, the Court will take account of his/her role and responsibilities within the organisation; the extent of the risk that competition will be distorted as a result of disclosure to them; the extent to which that risk can be avoided or controlled by restrictions on the terms of disclosure; and the impact that any proposed restrictions would have on that individual (for example by prohibiting them from participating in a re-tender or future tenders for a period of time).

41. In order to manage these risks employee representatives may be admitted to a confidentiality ring on different terms from external representatives. Employee representatives may also have access to some but not all of the material disclosed into the ring (for example, technical material but not pricing information). This is sometimes referred to as a “two tier” ring.
42. Under an alternative form of two tier ring, the external representatives of a party in the first tier may apply for an employee representative in the second tier to have access to a particular document or documents, whether in open form or partly redacted. One way of dealing with this is for notice to be given to any person affected by the proposed disclosure, identifying the document, the form in which its disclosure to members of the second tier is sought, and the reasons why disclosure to the second tier is sought, and for the person affected to consent or object within a fixed time. The person or persons affected may be the contracting authority and/or the owner of the confidential information. In cases subject to expedition the period for response may be short and, in appropriate cases, less than a working day. Two tier rings necessarily introduce additional cost and complexity and will need to be justified in the circumstances.
43. Other specialist advisors (such as accountants or those with other expertise) may also be admitted to the ring if that is demonstrated to be necessary, either in lieu of or in addition to employee representatives.⁶
44. As to the terms of disclosure, the Court will order that confidential documents, information or pleadings are only to be provided to members of the ring if undertakings are given to the Court. Such undertakings will preclude the use of the relevant material other than for the purposes of the proceedings and prevent disclosure outside the ring. They will also contain provisions controlling the terms on which confidential information must be stored and the making of copies, and requiring the receiving person to either return or destroy the documents in question, or render them practically inaccessible, at the conclusion of the proceedings.
45. Additional undertakings may be required, particularly where there are concerns that disclosure could have an impact on competition and/or any subsequent procurement. These may include terms:

⁶ The provision of such advice is to be distinguished from acting as an expert witness

- (1) Preventing employee representatives from holding copies of documents at their place of work and requiring them to inspect the material at a defined location (such as the offices of their external lawyers) ;
- (2) Limiting the involvement of a recipient of a document in any re-procurement of the contract which is the subject of the litigation;
- (3) Limiting the role which a recipient can play in competitions for other similar contracts for a fixed period of time in a defined geographic area; and/or
- (4) Preventing the recipient from advising on or having any involvement in certain matters, again for a fixed period of time.

46. Whilst the Court will give weight to the need to protect competition in the market, the more onerous the proposed restriction is, the more clearly it will need to be justified. Further, the terms of the ring will need to be workable taking account of the timetable for the litigation, including any order for expedition.

47. Confidentiality rings will also contain provisions which establish how confidential information is to be identified as such, and how claims to confidentiality may be challenged.

48. Where documents are disclosed into the ring in confidential form, further non-confidential versions of those documents should also be disclosed with necessary redactions.

Suspension lifting applications

49. The Court can lift the statutory suspension that prevents the contracting authority from entering into the contract in question. The timing of the application is a matter for the applicant but, if urgency in placing the contract is to form part of any balance of convenience test, the application needs to be brought on expeditiously. However, enough time needs to be provided for the respondent to submit evidence and for there to be any evidence in reply before any hearing.

50. If the Court orders that the suspension is to be lifted a stay of such an order will only be granted when it is appropriate to do so. The Court, if it considers that a stay is appropriate, and particularly when it has refused permission to appeal, will give consideration to a short

stay of 1-2 working days to enable the applicant to seek expedited permission and to enable the Court of Appeal to set a timetable; such a stay will often be accompanied by a requirement that any application for permission or for an extended stay should be on notice to the other party, to enable it to make representations to the Court of Appeal.

Interested Parties

51. Procurement claims frequently engage the interests of parties other than the claimant and the contracting authority (“interested parties”; in this protocol the term “interested party” is given a wider meaning than in CPR Part 54).
52. In particular, the successful bidder may be affected by the relief sought in a procurement claim, which typically claims an order setting aside the award decision in his favour. The successful bidder may also be affected by the disclosure of confidential information contained in his bid, as may other unsuccessful bidders.
53. Whilst an interested party may apply to become a full party to the proceedings, its interests can usually be considered and addressed by the Court without that being necessary.
54. The claimant and the defendant should take steps to ensure that an interested party is on notice of matters which affect its interests. It will often be appropriate for the defendant to ensure that other bidding parties are given such notice. However, particularly where applications are made as a matter of urgency, it may be appropriate for the claimant to ensure that the interested party has been given appropriate notice.
55. In order to allow an interested party to consider its position, it may be necessary to provide it with copies of any pleadings, redacted if necessary, any relevant application, supporting evidence and/or other relevant documentation.
56. An interested party needs to apply to be represented (if it so wishes) as soon as practicable. A written application, which may take the form of a letter to the Court, should be sent to the Court and served on all litigation parties (and any other interested parties). The application should clearly indicate the scope of the interested party’s proposed involvement. If the

interested party's involvement is agreed with the litigation parties, then that should be made clear in the application. In general, the Court will expect to hear from interested parties who are affected by an application or claim.

57. The Court may direct that an interested party is to be treated as a respondent to an application (CPR 23.1) but a direction to this effect is not essential, particularly in cases of urgency. The Court may order that an interested party is permitted or entitled to participate in particular applications, hearings or issues and/or may order that the involvement of the interested party is to be limited in defined respects.
58. If expedition so demands, the application for the interested party to be represented may be heard immediately before the relevant substantive application. However, earlier resolution is preferable to allow orderly preparation for hearings and the preparation of relevant evidence or submissions.
59. Attention is drawn to the requirement under Regulation 47F(3) of the Public Contracts Regulations (As Amended) 2006 and Regulation 94(3) of the Public Contracts Regulations 2015 to the requirement to give notice to the party to whom the contract was awarded in relation to claims for ineffectiveness.
60. Other interested parties who may express interest in procurement claims include sector regulators, competition authorities and/or sub-contractors, and the Court will give directions in relation to their involvement as appropriate.
61. An interested party can recover or be required to pay costs⁷.

Expedition

62. Article 1 of Directive 89/665/EC (as amended by Article 1 of Directive 2007/66/EC) requires member states to ensure that decisions taken by contracting authorities may be reviewed "as rapidly as possible". Particularly in cases where the automatic suspension has been maintained, and subject to the principles set out in paragraph 1.1.4 of this Guide, the TCC is

⁷ See e.g. Section 51(3) of the Senior Courts Act 1981 and *Bolton Metropolitan District Council v The Secretary of State for the Environment* [1995] 1 WLR 1176

likely to support (and in appropriate cases may impose) rapid progress to a trial as early as is practicable. An expedited trial may in particular be appropriate where it will enable the contracting authority to enter into the contract without undue disruption to its timetable, or where the automatic suspension is maintained following an application for its termination.

63. In considering whether the trial should be expedited, it will be necessary to consider how the required procedural steps will be accomplished within the abbreviated timetable. In particular, adequate time will be required for disclosure and for the hearing of any interim applications which are expected. The Court may use its powers to control and define the scope of disclosure in cases where expedition is ordered.
64. The party applying for an expedited trial should do so on notice and at as early a stage as is practicable. The party applying should set out the reasons why expedited trial is appropriate and the party's proposals for the management of procedural steps. The Court should be provided with details of any third parties affected and third parties (in particular the successful tenderer) should be put on notice of the application. Where appropriate it will be part of the agenda for the first CMC.

Trial

65. Consideration needs to be given to confidentiality in terms of what may be reported, whether there should be restricted access to the Court recording of the proceedings and who can be present in the courtroom. The Court will as a matter of generality require as much of the trial as possible to be open to all who wish to attend and limit restrictions to those which are legitimate, fair and proportionate.

Judgments

66. Judgments in procurement cases will be handed down as open documents, save in the most exceptional circumstances (for instance in cases involving Official Secrets). Any confidential information will usually be contained in a separate schedule to the judgment (or such other form as appropriate) which will not be available more widely than the membership of any confidentiality ring (if applicable) without an order of the Court. Counsel should co-operate through the Judge's Clerk to agree what may be made publicly available.