House of Commons Public Bill Committee

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Dear Public Bill Committee

Procurement Bill: Response to Call for Evidence

We welcome the opportunity to respond to the Committee's call for evidence. As one of the only UK 'Band 1' ranked procurement law firms; having a specialist procurement litigation team; and a non-contentious team advising a wide array of public and private sector clients on complex procurements, our observations are based upon experience of the practical application of the current procurement regulations and the approach the Courts have developed in applying them.

As with all specialist procurement teams we work regularly with procuring authorities and commercial bidders. We hold no political or policy view of our own in this respect. However, we have identified the procurement remedies regime as an area we believe would benefit from clarification in the finalised Bill. Our aim in making this submission is solely to contribute to the consideration of options in the remedies system to operate effectively in the interests of the UK overall and for both procuring authorities and suppliers.

1 SUMMARY

1.1 Our submission relates to Part 9 of the Procurement Bill (Remedies for Breach of Statutory Duty).

1.2 There are two 'primary' remedies available for failure to comply with procurement regulations:

- The award can be stopped until the court determines who should be awarded the contract; or
- The contract can be awarded, but a bidder who should have (but was not) awarded the contract *should* then be compensated in damages for their losses.

1.3 The former outcome introduces delay but should produce the 'right' supplier. The latter outcome is quick but may result in government paying damages to a losing bidder as well as the winning bidder ("pay twice")

1.4 An effective global procurement system will logically be underpinned by a policy decision as to which of those options is the default choice and which is a 'fall back' to be used in exceptional circumstances.

1.5 Current regulations and case law have favoured the second approach. i.e. public authorities can often proceed with their contracts but may have to pay twice if they are later found to have awarded wrongly.

1.6 This has not arisen from a policy decision (that we know of). It is the result of the sequential development of the law through court cases. There is currently an opportunity through the Bill to clarify the policy on which approach should be preferred and to give effect in the Bill's drafting to achieve this.

1.7 Secondly, very recent court cases identify a further anomaly in the remedies available for breaches of procurement obligations:

- The court will not prevent signature of a contract – i.e. it proceeds notwithstanding a claim it has been wrongly awarded – if damages (compensation) would be an '*adequate remedy'* for a wronged bidder.
- However, compensation for breach is only awarded if a breach is considered '*sufficiently serious'.* This is the result of the continuing application of particular European principles, preserved despite Brexit.

1.8 This results in the possibility (which the courts have expressly noted) that no effective remedy will be provided to a wrongly treated bidder: (i) the contract award is not delayed because damages would be adequate for the bidder; but (ii) damages are not awarded because the breach is not 'sufficiently serious'. This outcome appears unjust and unlikely to incentivise public authorities to ensure compliance with the procurement regime, if they consider they both *will* be likely to be permitted to proceed with the award – even if to the 'wrong' bidder – and *may* also be insulated from damages.

The rest of this submission provides background and description of these issues and how they have arisen.

2 THE VALUE OF AN EFFECTIVE REMEDIES SYSTEM

2.1 Having an effective remedies system underpins the effectiveness of the overall system and structure of regulated procurement. A system in which remedies are correctly calibrated can reinforce and incentivise behaviours which best meet the objectives of the Procurement Bill.

2.2 A system in which the balance of remedies is *not* correctly calibrated will:

(a) reduce the drivers on contracting authorities to give proper effect to the objectives embedded in the regime including achieving value for money, maximising public benefit and acting with integrity;

(b) facilitate adverse behaviours by insulating contracting authorities from the legal impacts (via effective remedies) of poor practices;

(c) reduce the incentives for bidders to 'play by the rules' when submitting bids; and

(d) undermine faith in the system, if not only is the Most Advantageous Tender not awarded the contract, but also the bidder that submitted that tender is denied an effective remedy.

2.3 Where a bidder challenges the outcome of the procurement – seeking to establish that it submitted the Most Advantageous Tender and should be awarded the contract – the remedies regime[1] (in the Bill and currently) creates two tracks (assuming the challenge is made before the contract has been entered into). In both cases, the challenge triggers the 'automatic suspension' preventing the contract signature. Then either:

(a) **Pre-Contractual Remedies Track**: The challenge proceeds to a hearing where the Court determines that the suspension should remain in place until the challenge is determined; the main benefit being that if the challenger succeeds in showing it should have won then the contract can be awarded to it; but the main disadvantage being delaying/deferring the benefits of the procurement during the suspension period until the claim is determined.

(b) **Damages Track**: The Court determines the suspension should be lifted; the main benefit being that the contracting authority can proceed immediately with the procured contract; but the major risk being that, if the challenger succeeds, the contracting authority may have to 'pay twice'[2]. This payment often nullifies or even negatives the VfM / cost saving which a procurement and competitive tension was intended to generate, since the authority has had to pay twice.

(Some of the further benefits and detriments in each scenario are summarised in ***Appendix 1***)

2.4 Both tracks serve a legitimate purpose. For example, there will be procurements where the delivery of the benefits of the contract are paramount or urgent, and trump the 'pay twice' risk and the benefits of ensuring the contract is awarded to the 'right' bidder. There will be others were the converse is true.

2.5 However, there is a need for clear and logical rules, which create reasonably predictable outcomes (reasonably consistent with each other), and are founded on appropriate policy decisions, to determine which track is appropriate for which case.

2.6 The current regime favours the Damages Track largely because of the way case law has developed by applying the American Cyanamid test[3] (which is the relevant tests to determine the track, but which was not a test developed specifically to deal with suspensions in procurement cases but a more general test for injunctions), rather than as the result of any policy decision about how a coherent system should work.

Note: Coloured words in this letter provide hyperlinks to the original source document. However, so that these links can be followed when this document is printed the website address is also provided in a footnote

[1] Part 3 (Remedies) of the Public Contracts Regulations 2015 (c.f. similar provisions of the Utilities and Concessions Contracts Regulations respectively).

[2] Paying (often sizeable) damages to the challenger, but also having to pay the bidder to whom it incorrectly awarded the contract for performing that contract.

[3] https://www.bailii.org/ew/cases/EWHC/TCC/2022/2471.html#para11 – See paragraph 11 of the judgment in InHealth Intelligence Ltd v NHS England [2022] EWHC 2471 (TCC) (06 October 2022) which restates the American Cyanamid test.

3 CLARITY ON THE TEST FOR DAMAGES IN PROCUREMENT CASES

3.1 Additionally (as further described below), if the remedies system is calibrated to favour the Damages Track then this must be consistent with the 'gateway test' which determines when a ***successful*** Claimant should then receive damages. The current system allows for a category of cases in which a successful Claimant receives no effective remedy at all. In particular, this category exists because:

(a) The current test for determining if the automatic suspension should be upheld (*American Cyanamid* and a cross undertaking in damages) creates a high hurdle for a Claimant seeking to persuade the Court to maintain the suspension. Therefore the majority of cases proceed down the Damages Track;

(b) In particular, the suspension can be lifted where the Court determines that damages would be "*an adequate remedy*" for the Claimant[4] (the logic being that in such cases there is no need to hold up the contracting authority entering the contract, even if the Claimant succeeds in establishing at trial that the contract was awarded to the 'wrong' tenderer);

(c) However, damages are only payable where the Claimant can show there has been a "*sufficiently serious breach*" of procurement law. The Court has determined that this is a "*fairly high threshold*"[5] test. This is a principle derived solely from European Law (the *Francovich* Principle and *Factortame* factors which each relate to the founding Treaty of the European Union).Therefore, in some cases, a successful Claimant may be left with no remedy.

3.2 In the *Braceurself Litigation*[6], the Claimant submitted that, in its view, the tests applied in the existing PCR 2015 regime appear to result in a 'system error' where a meritorious Claimant can end up with no meaningful remedy. It stated: *"[A]s it was a fundamental part of the Court's reasoning when lifting the statutory stay on the award of the contract that damages were considered to be an adequate remedy, it would be unjust and incoherent to leave the Claimant without a remedy in damages for its losses were the Court now to conclude that the breach was not sufficiently serious".* The Court nevertheless held that damages were not available.

3.3 The retention of the "sufficiently serious breach" test for damages in procurement law is anomalous. The European Union (Withdrawal) Act 2018 specifically provided for an end to this rule in all UK domestic legislation save for specific cases, one of which was the procurement remedies regime[7].

3.4 The House of Lords' *Library Briefing on the Procurement Bill*[8] summarises the importance of a "*remedies regime which allows the challenge of perceived deficiencies on the part of contracting authorities".*

3.5 If contracting authorities consider they are sufficiently insulated from the risk of the procurement award being 'held up' (because the suspension will be lifted) and/or from the risk of having to pay damages even when found to have breached procurement law, then there is less incentive for them to diligently adhere to the spirit or letter of the procurement regime.

3.6 If disappointed bidders face significant uncertainties and risks as to whether they can obtain an effective remedy (either the contract or damages) in a situation in which the Court has established that they should have been awarded the contract, then, aside from the failure of justice, they may be dissuaded from bringing even highly meritorious claims (giving rise to a failure of the incentive objectives of remedies outlined at the start of this letter). This is compounded by the risks and significant cost that already exist in procurement litigation. These may mean the cost/ benefit metric no longer favours action.

3.7 The Outsourcing Playbook Chapter on Risk Allocation (see page 46) recognises that *"Inappropriate allocation of risk remains one of the main concerns of suppliers looking to do business with government."*[9] This is also reflected in the associated Guidance Note on Risk Allocation (see Section

[4] One of the limbs for determining if the suspension should be lifted, meaning the claim is then on the Damage Track, is: "Would damages be an adequate remedy for the Claimant, if it succeeds at trial?" If so then the suspension will be lifted on the logic that the Claimant's effective remedy will be damages.

[5] Braceurself Ltd v NHS England [2022] EWHC 2348 (TCC)at [90]. https://www.bailii.org/ew/cases/EWHC/TCC/2022/2348.html#para90

[6] As per footnote 5 above.

[7] Schedule 1 to the Explanatory Note to the European Union (Withdrawal) Act 2018 states at paragraph 214 that: "*The right to claim damages against the state for breaches of EU law (Francovich damages) **will not be available after exit**. This provision does **not** affect any specific statutory rights to claim damages in respect of breaches of retained EU law (for example, under the Public Contracts Regulations 2015) or the case law which applies to the interpretation of any such provisions*." See https://www.legislation.gov.uk/ukpga/2018/16/notes/division/42/index.htm

[8] https://bills.parliament.uk/publications/46488/documents/1791 in particular Section 2.9 on remedies for breach of statutory duty.

[9] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/987353/The_Sourcing_Playbook.pdf

2.2) which states that: "*Effectiveness and value for money of contracted services will only be achieved where risk allocation is equitable and where the party managing the risk is the one most reasonably able to do so.*"[10]. Having an effective remedies regime – to compensate bidders who have committed considerable physical and financial capital to developing and submitting the Most Advantageous Tender but are not then awarded the contract due to contracting authority breaches of procurement law (outside of the bidder's control) – is an area where there must be a fair balance of risk and reward for the effective functioning of competitive markets.

4 CLARIFYING POLICY ON CONTINUITY OR CHANGE

4.1 It is not clear whether the Procurement Bill's slight alterations (and only to some parts) of the wording of the existing remedies regime are intended to result in continuity with the current balance of the existing remedies regime, or if a departure is intended, and if so to what extent. In particular:

(a) The overall structure and 'toolset' of the existing regime is materially unchanged, although there have been terminology changes (see ***Appendix 1***).

(b) Recent comments of the Court of Appeal in the *Camelot Litigation*[11] suggest that Court may interpret the revised suspension lifting test (Clause 98[12] of the Bill) as simply being a rewording of the existing test but ultimately requiring all the same factors to be weighted in the balance (i.e. the new wording would produce no practical change).

(c) Whether the Bill intends to retain the "sufficiently serious breach" test based on EU law as a threshold for unlocking a successful claimant's right to damages appears uncertain, but absent any specific provision to the contrary the test would appear to be retained (see ***Appendix 1***).

4.2 The current Parliamentary scrutiny of the Procurement Bill is a unique opportunity to ensure there are clear and logical rules, delivering reasonably predictable outcomes, founded on appropriate policy decisions about: (a) when suspensions should remain in place until the judgment on the claim, and when they can be lifted; and (b) when damages should be payable.

4.3 In particular, there is a need for clarity – whether provided in the wording of the Bill, subordinate legislation or guidance – on the following issues:

(a) Whether the new test for the lifting of automatic suspension is intended to be applied differently, or have any different weightings, in comparison to the existing American Cyanamid test.

(b) Whether the "sufficiently serious breach" gateway for damages should continue under the damages regime in the Bill or whether this hangover from EU law will be expressly removed.

(c) Alternatively, whether legislation or guidance will provide for a continuation of the "sufficiently serious breach" test or provide some other test to determine the circumstances in which a Court "may" award damages to a bidder that has established a breach of procurement law.

(d) If the "sufficiently serious breach" test is retained, how this should feed back into the decision on suspension lifting to ensure that meritorious claimants are not left without an effective remedy.

We are grateful for having had the opportunity to make this submission

Yours faithfully

Burges Salmon LLP

BURGES SALMON LLP

[10] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/987140/Risk_allocation_and_pricing_approaches_guidance_note_May_2021.pdf

[11] Camelot UK Lotteries Ltd & Anor v Gambling Commission & Ors [2022] EWCA Civ 1020 (14 July 2022) http://www.bailii.org/ew/cases/EWCA/Civ/2022/1020.html. In particular: "*[T]he Procurement Bill sets out provisions on this issue which use different words and terminology from those currently used by the courts, but – as a number of commentators have pointed out – it by no means follows that, even assuming that the Bill stays in this form, the test that will be applied by the courts will be very different to that which is currently applied.*"

[12] https://publications.parliament.uk/pa/bills/cbill/58-03/0218/220218.pdf

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Appendix 1 – Further supporting information and analysis

See footnote on clause references used in this appendix[13]

Summary of the 'System Design' of the Remedies Regime

1 The House of Lords' Library Briefing on the Procurement Bill[14] summarises the importance of a "*remedies regime which allows the challenge of perceived deficiencies on the part of contracting authorities …[with] the effect of reducing the time taken to resolve legal challenges and allow contracting authorities to proceed to award public contracts*" whilst also ensuring that an unsuccessful bidder is not *"denied a proper opportunity to seek a remedy under section 100 [i.e. pre-contractual remedies]"*.

2 As summarised in the Library Briefing, Part 9 of the Procurement Bill is broadly similar to the existing regime in Chapter 6 of the Public Contracts Regulation 2016 ("**PCR 2015**"). In fact, it many respects it is materially identical.

3 This is relevant when considering what the 'system design' of the remedies regime under the Bill should be. This is because the **intent** behind the PCR 2015 remedies regime (of which the Bill regime is largely a continuation) was characterised by the Courts as:

(a) placing "*a definite emphasis on remedies which strive to allow an unsuccessful bidder to challenge a proposed contract before it has been let*" (emphasis per original)[15]; and

(b) also providing an effective remedies regime in cases where it is right to enable the contract award to proceed, and the contract to be entered into, notwithstanding that the challenger might establish at trial that it should have 'won'.

4 It follows from this system design intent that the structure of the remedies regime under both the PCR 2015 and the Part 9 of the Bill includes:

(a) **Provision of specific assessment information** to an unsuccessful bidder about the contracting authority's assessment of the tender and the winning tender (Bill Clause 50, PCR Regulation 86);

(b) **A standstill period during which the contract cannot be entered into**, enabling the unsuccessful bidder to consider this information and assess whether to seek further information from the contracting authority or to seek a review of the authority's decision by the Courts (Bill Clause 51, PCR Regulation 87), but also very short time limits for bringing a claim (Bill Clause 103, PCR Regulation 92)

(c) **An automatic suspension preventing the contract being entered into** if the unsuccessful bidder decides to seek a review by the Courts, so that the status quo and possibility of award of that contract to the unsuccessful bidder is preserved, at least until the Court has had the opportunity to consider the case at an interim hearing (Bill Clause 98, PCR Regulation 95);

(d) **An assessment of whether the automatic suspension should remain in place** meaning that the unsuccessful bidder retains the possibility of being awarded the contract if it goes on to establish at trial that it should have been evaluated as the winning bidder (Bill Clause 99(2), replacing the application of the American Cyanamid principles[16] applied by the Court to determine whether it should lift the automatic suspension pursuant to PCR Regulation 96(1)(a)).

(e) **Provision for a contract to be declared ineffective if entered into in breach of a standstill or suspension**. The purpose of such provisions being that "*In order to prevent serious infringements of the standstill obligation and automatic suspension, which are prerequisites for effective review, effective*

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[13] So that relevant clauses can be hyperlinked for reference we have used the HTML version of the Procurement Bill. This version still uses the old clause numbering as some additional clauses were added between this HTML version of the PDF version of the Bill as it left the House of Lords. However, the HTML version does not allow hyperlinking to specific provisions of the Bill so could not be used for this purposes

[14] https://bills.parliament.uk/publications/46488/documents/1791 in particular Section 2.9 on remedies for breach of statutory duty.

[15] Covanta Energy Ltd v Merseyside Waste Disposal Authority [2013] EWHC 2922 (TCC) at paragraph 33: https://www.bailii.org/ew/cases/EWHC/TCC/2013/2922.html#para33

Cf. This follows from the fact that our domestic remedies regime in the PCR 2015 implements Directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32007L0066&from=EN which had the stated purpose (in its Recitals) of ensuring there could be an effective review of the decision to award **prior to** the entry into the contract in question.

[16] See this test as articulated in Camelot UK Lotteries Ltd v The Gambling Commission [2022] EWHC 1664 (TCC) at paragraph 47 https://www.bailii.org/ew/cases/EWHC/TCC/2022/1664.html#para47

sanctions should apply"[17]. This purpose is reflected in the new wording of Clause 102: "*A set aside condition is met if the court is satisfied that the claimant was denied a proper opportunity to seek a remedy under section 100 [i.e. pre-contractual remedies]*" (Bill Clause 102, PCR Regulation 99).

(f) **Remedies** available to the unsuccessful bidder if it establishes at trial that there have been breaches of procurement law, where in the absence of those breaches it would have been the successful bidder. These remedies are either:

(i) **Pre-Contractual Remedies**, where the contract has not been entered into, including the ability to set aside the procurement decision, enabling the authority to award the contract to a claimant which has succeeded in showing it should have 'won', or to run a new or revised procurement (Bill Clause 100; PCR Regulation 97); or

(ii) **Post-Contractual Remedies**, where the suspension has been lifted and the contract entering into, where the primary remedy is in damages for the losses suffered by the unsuccessful bidder (Bill Clause 101; PCR Regulation 98).

5 The remedies regime has two separate suits of remedies because is that they serve different purposes.

(a) **Pre-Contractual Remedies** are available where the automatic suspension has been upheld (i.e. the awarded contract is not signed, pending determination of the litigation).

This keeps alive, for the benefit of the contracting authority as well as the Claimant, the prospect that the Claimant could be awarded the contract if its challenge is ultimately successful – i.e. the Claimant establishes it did submit the Most Advantageous Tender, and the contracting authority has awarded the contract to the 'wrong' tenderer.

For the contracting authority, it avoids the 'pay twice' risk and enables it to award the contract to the bidder that 'should have won' and submitted the Most Advantageous Tender as measured against the authority's requirements. This is turn affects the PR optics around the procurement, noting that an award of damages (i.e. the primary post-contractual remedy where the suspension is lifted) is often characterised by the media as an example of a waste of taxpayer money, and evidence of public sector failure to carry out a compliant procurement.

It comes at the expense, however, of delaying delivery of the contract whilst the litigation proceeds to trial and judgment, therefore deferring the benefits of that new contract.

(b) **Post-Contractual Remedies** are available where the automatic suspension has been lifted (i.e. allowing the contract to proceed, with the litigation proceeding in parallel).

In such cases, the contracting authority gets the benefit of being able to immediately proceed with the contract from the point the suspension is lifted. However, the contracting authority is at risk of having to pay the Claimant (as well as the winning bidder) if it is ultimately successful in establishing it should have won, and this often nullifies or even negatives the cost saving which a procurement and competitive tension was intended to generate, since the authority has had to pay twice.

In such cases, by awarding to the 'wrong' bidder, the contracting authority will necessarily have failed to award the contract to the Most Advantageous Tender, which was the very purpose of the procurement. This, and the payment of damages, often translate into negative PR / headlines, particularly if the damages (or out of court settlement) are high value. In turn this may lead to inquiries or other internal government processes to diagnose what went wrong.

Additionally, the Claimant is effectively left to pursue a 'damages only' action, but as examined in this submission the Claimant may end up with no damages and therefore no meaningful remedy, despite having put in the Most Advantageous Tender which best met the contracting authority's requirements.

6 An overall 'system' that enables a choice between suspension and 're-run / award' or damages is also consistent with Article XVIII (Domestic Review Procedures)[18] of the GPA which provides that: *"where a review body has determined that there has been a breach or a failure as referred to in paragraph 1 [i.e. breach of the GPA or domestic legislation giving effect to it, then the domestic law must provide for] corrective action or compensation for the loss or damages suffered."*

[17] Recital 18 to the Remedies Directive: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:335:0031:0046:EN:PDF

[18] https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf

The balance struck by the current regime

7 An analysis of suspension judgments from 2017 to 2023 show that maintaining of the suspension was only ordered in 4 out of 16 cases, applying the existing (*American Cyanamid*) legal principles. In other words, only a quarter of *contested* cases proceed down Pre-Contractual Remedies Track.

8 These statistics are for *contested* cases only. There is another pool[19] of *uncontested* cases in which the automatic suspension is lifted by agreement between the parties, avoiding the need for the Court to determine the issue. This is often because:

(a) the Claimant recognises the uphill struggle of convincing a court to allow the suspension to remain in place;

(b) the Claimant's costs of defending the application to lift the suspension are high, particular because if the contracting authority wins its application to lift the suspension that the Claimant will often have to pay a large percentage of the contracting authority's costs, applying the 'costs follow the event' principle (aka 'loser pays'); and/or

(c) the cross-undertaking in damages sought by the authority in return for the suspension is too great a financial exposure to be commercially acceptable.

9 As recognised in the recent comments by the Court in *InHealth Intelligence*[20] it is often the case that what a disappointed bidder really wants is to have the contract re-awarded to it, and there are a number of reasons why this may also be the best result for the contracting authority.

10 Recent decisions, such as the recent *Mediquip*[21] decision demonstrate the very real difficulties faced by Claimants in convincing a court that the suspension preventing the contract succeeding should remain in place, provided the contracting authority is able to show that the new contract (even if later established to have been awarded to the 'wrong' bid) will deliver sufficiently great benefits as compared to the status quo. Of course, it would be hoped that one of the key purposes of a procurement is that the new contract would deliver benefits of the status quo, and it may therefore be questioned why this is give the weight it has often been given in determining that the suspension should be lifted, meaning the claim is confined to the Damages Track (Post-Contractual Remedies).

11 The recent decision in *Braceurself*[22] demonstrates that in Damages Track cases, a Claimant may proceed to trial, succeed in establishing they should have been awarded the contract, and yet not be entitled to damages unless it can also establish to the court's satisfaction that the breaches of procurement law were "sufficiently serious".

12 Presently, the Court determines whether breaches are "sufficiently serious" by applying an eight factor test, which (like the *American Cyanamid* principles for standstills) was not designed with the procurement regime specifically in mind but has become the applicable test because it has been imported from EU law, specifically the case of *Francovich v Italy, Case C-6 and 9/90 [1991] E.C.R. I-5357.*

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[19] The number of cases in which the Claimant agrees to lift the suspension by consent is hard to measure because (by definition) they do not proceed to a hearing and so would only be known about if a later hearing or judgment in the case mentioned that the hearing was lifted by consent.

[20] InHealth Intelligence Ltd v NHS England [2022] EWHC 2471 (TCC) (06 October 2022) http://www.bailii.org/ew/cases/EWHC/TCC/2022/2471.html. See in particular:

> *"Damages …are not always what an **aggrieved bidder** wishes to obtain….[A]n economic operator may indeed want, for a wide variety of commercial considerations, to be the winning bidder, rather than have damages. Some commercial organisations may prefer to conduct the economic operations that are the subject of the procurement rather than be excluded, or lose, with a competitor enjoying the profits of the operation in question. This may be more so in the case of an existing incumbent provider where services are put out to tender, but such considerations may apply in many cases."*
>
> *"Equally, **a contracting authority** may prefer to avoid exposure to a damages claim [by having the suspension remain in place]. [For example] Here, NHS England is a major provider of services, and has a very large annual budget. That public money is provided to supply healthcare and associated services, and sums paid out as damages to disgruntled bidders in litigation are, by definition, not being expended on the primary purpose of the NHS. Public bodies such as NHS England will want to award contracts to the most economically advantageous bidder who wins properly run procurement competitions leading to a lawful result*."

[21] Medequip Assistive Technology Ltd v Royal Borough Of Kensington And Chelsea [2022] EWHC 3293 (TCC) (21 December 2022) http://www.bailii.org/ew/cases/EWHC/TCC/2022/3293.html

[22] Braceurself Ltd v NHS England [2022] EWHC 2348 (TCC) (16 September 2022), http://www.bailii.org/ew/cases/EWHC/TCC/2022/2348.html

Why there needs to be clarity as to whether the "sufficiently serious breach" test will still apply

14 Clause 101 of the Bill [23] closely contours the previous provisions of Regulations 98 and 100 PCR 2015[24].

15 In particular, they both provide in materially identical terms that where a court is satisfied that a decision made by a contracting authority breached the duty owed in accordance with Clause 97 (what was Regulation 89 PCR 2015):

(1) the Court "**must**" make order setting aside the contract (previously called a 'declaration of ineffectiveness); but

(2) the Court "**may**" award damages.

16 Where a new Act retains the wording used in the previous iteration of that legislation – in this case the word "may" – then a rule of statutory interpretation is that Parliament intended there to be continuity in the interpretation of that provision, subject to any evidence to the contrary[25]. Here the specific formulation that the Court "may" award damages has been retained. The word "may" suggests it is at the Court's discretion, and since there should be consistency in exercising that discretion it suggests that there must be test which the Court should apply to determine when it should award damages, and when it should not.

17 In respect of the previous iteration of this provision (PCR Regulation 98) the Supreme Court found that in the specific context of the public procurement remedies regime, the use of the word "may" means that, in determining whether or not to award damages to a bidder, *even if* the bidder has already established there has been a breach of procurement law, the court should award damages "*only upon satisfaction of the Francovich conditions.*"[26] The second and most important of these 'Francovich conditions, is (the court's assessment of) whether the breach is '*sufficiently serious'* to merit an award of damages.

18 The latest case to consider this is *Bromcom*[27] in which the Court (at paragraphs 369 to 387) provided a summary of the current law and the eight factor test the Court applies to determine whether a breach is '*sufficiently serious'* and therefore if damages should be award in a particular case.

19 This requirement for a bidder to show not only that there has been a breach or breaches but that these were '*sufficiently serious*' to merit damages is potentially unique to the public procurement damages regime. This is because the European Union (Withdrawal) Act 2018 specifically provided for an end to "*the rule in Francovich*" and "*Francovich damages*" save for specific cases, one of which was the procurement remedies regime.

20 Schedule 1 to the Explanatory Note to the European Union (Withdrawal) Act 2018 states at paragraph 214 that: "*The right to claim damages against the state for breaches of EU law (Francovich damages) will not be available after exit. This provision does not affect any specific statutory rights to claim damages in respect of breaches of retained EU law (for example, under the Public Contracts Regulations 2015) or the case law which applies to the interpretation of any such provisions*."

21 It is not clear, but it is important to have clarity on, whether Parliament's intention in retaining the materially identical wording of Regulation 98, and in particular the word "may", is that the current interpretation of that word, and therefore the threshold test for awarding damages should be retained, or whether alternative guidance or secondary legislation will be provided to address the circumstances in which damages "may" be awarded.

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[23] https://publications.parliament.uk/pa/bills/lbill/58-03/075/5803075_en_8.html#pt9-l1g101 - Note: An HTML version of the latest version of the Bill is not available. However, this hyperlink is to the identical wording of this Clause in the previous version of the Bill

[24] https://www.legislation.gov.uk/uksi/2015/102/regulation/98/made

[25] Heydon's Case (1584) 3 Co Rep 7, the starting point for interpretation of the provision being to consider what the law was immediately prior to that new provision becoming law. For modern authority see the Supreme Court case of R (Maughan) v HM Senior Coroner for Oxfordshire [2020] UKSC 46 and the explanation of the 'presumption against casual change' at paragraph 54:

https://www.bailii.org/uk/cases/UKSC/2020/46.html#para54

[26] https://www.bailii.org/uk/cases/UKSC/2017/34.html#para39

[27] Bromcom v United Learning Trust & Ors [2022] EWHC 3262 (TCC) https://caselaw.nationalarchives.gov.uk/ewhc/tcc/2022/3262