

Group Briefing

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Tick-Tock: Baker J. provides fresh analysis on time limits for procurement challenges

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On 21 June 2018, Baker J. analysed the nature of the time limits applicable to the judicial review of public contracts in *Newbridge Tyre & Battery Company Ltd. v. Garda Commissioner* [2017] 964 JR. This is an important case which provides fresh analysis on the critical issue of time limits for public procurement challenges.

BACKGROUND

To understand this case it is necessary to set out the timelines in a bit of detail. On 22 June 2017 An Garda Síochána commenced a competition to procure garage services for vehicles kept by An Garda Síochána which were either damaged as a result of traffic collisions or seized and stored for further criminal investigation. Tenderers were informed of the outcome of the competition by letter dated 27 October 2017. Corcoran Autobody Works Limited (“**Corcoran**”) was identified as the preferred bidder. On the same date, Corcoran’s competitor, Newbridge Tyre and Battery Co Limited (“**Newbridge**”), wrote to An Garda Síochána complaining that Corcoran had not met the competition’s planning permission and did not have the necessary waste permits to provide the services and requested detailed information from An Garda Síochána.

An Garda Síochána provided a substantive response by letter dated

8 November 2017; and then again on 14 November 2017. Newbridge raised further queries by letter of 16 November 2017 and a response issued on 23 November 2017. In its response on 23 November 2017 An Garda Síochána acknowledged that Corcoran did not have the storage capabilities to fulfil the contract at either its primary or secondary facilities which was a tender requirement. Newbridge wrote again on 24 November 2017 with further complaints to which An Garda Síochána responded on 6 December 2017.

On 8 December 2017 (approximately 42 days after the notification of the outcome of the competition) Newbridge applied to bring judicial review proceedings on the grounds that sections 4.1 and 4.2 of the Request for Tender had not been met. These clauses expressly stated that having sufficient planning permission to enable performance of the contract was a “*condition precedent to the award of the tender*”. As a preliminary

matter, the High Court was first asked to determine whether these proceedings were time barred by regulation 7(2) of the Remedies Regulations (the European Communities (Public Authorities Contracts) Review Procedures Regulations 2010, S.I. 130 of 2010, as amended).

THE REMEDIES REGULATIONS - THIRTY DAY TIME LIMIT - A REFRESH

Regulation 7 of the Remedies Regulations affords a thirty day time limit within which applicants can appeal the award of public contracts. It provides the following two options for when time begins to run: (1) after the applicant was notified of the decision, or (2) when it knew or ought to have known of the infringement alleged in the application.

This is further softened by Regulation 10(2), which allows the court to extend the time within which an applicant is permitted to bring proceedings if there is “good reason to do so”.

On 21 June 2018 Baker J. gave a detailed analysis of the thirty day time limit for commencement of public contract judicial review proceedings along with a consideration of the criteria necessary for the court to find a “good reason” to extend the time within which to bring proceedings.

EXTENSIONS OF TIME - A STRICT OBJECTIVE TEST

Baker J. began her analysis by recognising the necessity for a comparatively strict approach to public procurement time limits. In so doing she referred to both *Dekra Eireann Teoranta v The Minister for the Environment* [2003]

2IR 270, 304; and *Forum Connemara Ltd v Galway County Local Community Development Committee* [2016] IECA 59. In *Dekra* and *Forum* the applicant sought to extend the time within which to bring proceedings under O. 84A RSC. In identifying the test to be applied in such circumstances, Baker J. stated:

“the test is to be objectively assessed, the burden to explain and justify is on the person who has delayed, and the reason must be sufficient, justifiable on the facts of the case, and the test is not readily satisfied by general assertions”

Review of point at which the applicant for judicial review “knew or ought to have known” that the competing tenderer had not met the competition requirements.

Baker J. distinguished the facts presented in *Dekra* and *Forum* from those before her. In the case at hand, the successful tenderer had not met the competition requirements and so the test was to ascertain “the point at which the applicant might have taken a reasonable view that the preferred bidder had not met the qualifying criteria”. (para. 38). Baker J. stressed that it was not necessary for the applicant to know all the facts; what was necessary was for the applicant to have reasonable grounds for challenging the improper award of the contract. The key question was when the relevant requested information was disclosed.

In assessing the facts at hand, Baker J. determined that the factors giving rise to the challenge were not ascertainable until 23 November 2017 (para. 62), when An Garda Síochána confirmed that there were issues around site capacity for Corcoran. By this time Newbridge had received two letters of clarification, and had sufficient information to be in

a position to reasonably assess whether it was appropriate to bring proceedings (para. 58). In coming to this conclusion, the judge rejected the argument that *Newbridge* had delayed issuing proceedings in an attempt to ascertain the strength of the case before bringing an application for judicial review, in other words Judge Baker said *Newbridge* was not trying to “have [his] cake and eat it”.

CONCLUSION

Newbridge raised issues with Corcoran’s compliance with planning permission requirements in its first engagement with An Garda Síochána on 27 October 2017 (which was the date it received notification of the appointment of Corcoran as preferred bidder). However, the court found that *Newbridge* was not on notice of the infringement alleged in the application (as required under Regulation 7) until a much later point in time when more detail of the tender requirement Corcoran had failed were reasonably known to *Newbridge*. This case suggests a more detailed and qualitative assessment of pre-litigation correspondence is required to determine when time will begin to run against a particular applicant. It is also interesting to note the emphasis placed by the Court on the state of knowledge of *Newbridge* in determining when time began to run against it.

Legal certainty in relation to the time limits for challenges to the award of public contracts is an important objective from the perspective of both awarding authorities and bidders alike. We will have to wait and see what impact this case has on the achievement of that objective.

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