

# Un-boxxed—Ministry of Justice gets the green light to award contract following successful application to lift an automatic suspension (Boxxe Ltd v UK Secretary of State for Justice)

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Public Law analysis: The Secretary of State for Justice (SoSJ) made an application to the court pursuant to regulation 96(1)(a) of the Public Contracts Regulations 2015 (PCR 2015), SI 2015/102, to lift an automatic suspension of the award of a call-off contract, following a challenge by an unsuccessful tenderer, Boxxe Ltd. Mr Justice Constable in the High Court granted the application to lift the automatic suspension. The case provides useful guidance on the application of PCR 2015, reg 96(1)(a), following a number of decisions dealing with the issue. The case also highlights the current lack of clarity in the interpretation of the proper calculation of the 30-day limitation period for bringing a procurement challenge under PCR 2015, reg 92. Written by Andrew Dean, director of Public Law, and Alex Hough, associate, at Clifford Chance LLP.

*Boxxe Ltd v Secretary of State for Justice* [2023] EWHC 533 (TCC)

## **What are the practical implications of this case?**

### Calculating the 30-day limitation period for bringing a claim under PCR 2015, reg 92

PCR 2015, SI 2015/102, reg 92 requires that challenges:

‘...must be started within 30 days beginning with the date when the economic operator first know or ought to have known that the grounds for starting the proceedings had arisen.’ (emphasis added)

SoSJ sought to argue that there was no serious issue to be tried on the basis that Boxxe's claims were out of time, having been issued 30 days from the date ‘after’ the decision was notified. Constable J declined to adjudicate on whether Boxxe's claims were out of time (this being an issue for further submission at trial), and the judgment leaves some uncertainty as to the proper interpretation of PCR 2015, SI 2015/102, reg 92. Further guidance on the point is likely to be forthcoming as SoSJ has applied to strike out Boxxe's claims.

More generally, the case serves as a reminder to unsuccessful tenderers to act quickly in preparing for any potential challenge. This will allow for more time to prepare a compelling case and mitigate the need for an extension of time which, in any event, are only granted by courts in exceptional circumstances.

### **Determining the adequacy of damages—adequacy of potential damages accruing to a subcontractor, in circumstances where the subcontractor is not a party to the claim**

Boxxe sought to rely on the alleged loss of revenue to its main subcontractor, Involve, in its arguments for why damages would be inadequate. The court found that it would be wrong in principle for Boxxe to seek to rely on potential damages accruing to Involve in this context, in circumstances where Involve opted not to join the claim

(referring to *Circle Nottingham Ltd v NHS Rushcliffe Clinical Commissioning Group* [2019] EWHC 1315 (TCC)).

## **What was the background?**

On 11 August 2022, SoSJ issued Boxxe and other framework suppliers (including Specialist Computer Centres plc (SCC)) with an invitation to tender for a call-off contract for the provision of digital and audiovisual (AV) equipment for use by His Majesty's Courts and Tribunals Service.

On 13 December 2022, SoSJ decided to award the contract to SCC and notified Boxxe of its decision together with feedback.

On 12 January 2023, Boxxe issued proceedings challenging the proposed award. The challenge related, in essence, to the weighting and score given to the tenderers' respective proposals on price for the storage of equipment. Boxxe contended that this amounted to an 'arithmetic quirk within the pricing model that led to a perverse outcome'. In light of Boxxe's challenge, SoSJ was automatically required to refrain from entering into the contract with SCC, pursuant to the automatic contract-making suspension provision in PCR 2015, SI 2015/102, reg 95(1). SoSJ applied to have the automatic suspension lifted pursuant to PCR 2015, SI 2015/102, reg 96(1)(a).

## **What did the court decide?**

It is well-established that the test to be applied in determining an application to lift an automatic suspension under PCR 2015, SI 2015/102, reg 96(1)(a) is the four-limb *American Cyanamid* test (*American Cyanamid v Ethicon* [1975] AC 396), as recently summarised in a similar context by Mrs Justice O'Farrell in *Camelot Global Lottery Solutions Ltd v Gambling Commission* [2022] EWHC 1664:

'(1) Is there a serious issue to be tried?;

(2) If so, would damages be an adequate remedy for Boxxe if the suspension were lifted and they succeeded at trial; is it just in all the circumstances that Boxxe should be confined to a remedy in damages?;

(3) If not, would damages be an adequate remedy for SoSJ if the suspension remained in place and it succeeded at trial?;

(4) Where there is doubt as to the adequacy of damages for either of the parties, which course of action is likely to carry the least risk of injustice if it transpires that it was wrong, that is, where does the balance of convenience lie?’

The court found that, while there was a serious issue to be tried, damages would be an adequate remedy for Boxxe, whereas (obiter) damages would be an inadequate remedy for SoSJ; and, accordingly, that the balance of convenience militated in favour of lifting the automatic suspension.

SoSJ argued that Boxxe’s claim disclosed no serious issue to be tried solely on the basis of limitation. This involved competing interpretations of the proper construction of PCR 2015, SI 2015/102, reg 92 which, as above, requires claimants to start proceedings ‘within 30 days beginning with the date’ that the claimant became aware of the grounds for proceedings.

SoSJ argued that the relevant start-date is the day that SoSJ notified Boxxe of its decision to award the contract to SCC and provided feedback (13 December 2022), such that the statutory limitation period expired on 11 January 2023, the day before Boxxe’s claim was issued on 12 January 2023. Boxxe argued that the start date is the day after it was notified (ie, 14 December 2022), relying on similar formulations in other statutory provisions and case law, so that its claim was issued on the final day of the statutory limitation period. The judge recognised the ‘formidable’ line of authority upon which SoSJ relied, but nonetheless declined to decide the issue. The judgment creates some uncertainty as to the proper interpretation of PCR 2015, SI 2015/102, reg 92 and it is hoped that this will soon be clarified.

## Case details

- Court: Technology and Construction Court, Business and Property Courts of England and Wales, King's Bench Division, High Court of Justice
- Judge: Mr Justice Constable
- Date of judgment: 13 March 2023

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