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## THE EU PUBLIC PROCUREMENT CHALLENGE: PART 1 – THE OPTIONS

By Jon Olson-Welsh.

Love them or hate them, you cannot avoid the EU public procurement rules. As recent *Construction News* articles have highlighted, there is a growing trend towards challenging decisions of contracting authorities made in contravention of the rules. This article is the first of two summarising the available remedies and how you go about obtaining them. Being well prepared and meeting the tight timescales is crucial for the success of any claim.

Why bother making a challenge, you might ask? Well, if contractor McLaughlin & Harvey had not challenged a recent decision of the Northern Ireland Executive, it would not have overturned a decision to award a framework agreement worth £800 million to other parties. There is clearly a lot at stake here.

Under the rules remedies are available to those affected by a contracting authority's failure to apply the rules correctly. Claims can be brought by any "economic operator" that suffers, or risks suffering, loss or damage as a consequence of a breach of duty under the rules.

As an interim remedy, the court may suspend either the contract award procedure or the implementation of any decision or action taken by the contracting authority in following a procedure.

As a final remedy, if the court is satisfied that a decision or action was in breach of the rules, it can either order the setting aside of that decision or action or the amendment of any document, or award damages to an economic operator which has suffered loss or damage as a consequence of the breach (or do both).

If the contract concerned has, however, already been entered into, the court only has power to award damages but in the *McLaughlin* case, the court held that a concluded framework agreement did not constitute a "contract" and therefore could be set aside.

Whilst the rules are silent on the issue, damages which the courts have awarded in the past have included the amount of profit that the tenderer would have made had it been awarded the contract or framework agreement, but reduced according to the tenderer's chance of success.



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