



HM Courts &  
Tribunals Service

# The Technology and Construction Court Guide

**Second Edition**

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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.<sup>8</sup>

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:

(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.

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<sup>8</sup> The provision of such advice is to be distinguished from acting as an expert witness.



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 costs<sup>9</sup>.

### **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 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.

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<sup>9</sup> 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 W.L.R. 1176.