

Defective contract award notices may preserve Procurement Act set-aside claims: *Apasen v. Tower Hamlets*

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In *Apasen Limited v. London Borough of Tower Hamlets* [2026] EWHC 2239 (TCC), the High Court refused to strike out a claim seeking the set-aside of interim domiciliary care contracts that had been awarded directly under the Procurement Act 2023, indicating that defects in a contract award notice may leave completed contracts vulnerable to set-aside claims.

In refusing a strike-out application, the court held that it was arguable that a contract award notice should be treated as unpublished if it failed to provide accurate information about the basis for a direct award. It was also arguable that the urgency justification had to appear in the contract award notice itself, rather than only in an earlier transparency notice. The ruling is preliminary and it does not decide that the contract awards were unlawful, the notice was inaccurate or the contracts must be set aside.

Why this judgment matters

Contracting authorities relying on direct award grounds should ensure that their justification is fully and accurately reflected in the contract award notice itself. Failure to do so may leave completed contracts exposed to set-aside claims. This is so even where a contract award notice has been published and a voluntary standstill period has been observed.

Overview

The contracting authority, the London Borough of Tower Hamlets, abandoned a competitive procurement for domiciliary care services after challenges by Apasen Limited (Apasen) and other tenderers. On 13 March 2025, the contracting authority published a transparency notice stating that it intended to make seven interim direct awards on grounds of "extreme and unavoidable urgency". It published a contract award notice later that day, but that notice did not identify or explain the urgency justification.

Two of the proposed direct awards were initially intended for Apasen. Tower Hamlets subsequently decided not to proceed with the awards to Apasen and instead entered into contracts with other providers. Apasen challenged those decisions and sought orders setting aside the contracts in question.

Tower Hamlets applied to strike out Apasen's set-aside claim. It argued that none of the set-aside conditions in Section 105 of the Procurement Act 2023 (2023 Act) could be met because it had published a contract award notice and waited until the end of an eight-working-day voluntary standstill

period before entering into the contracts.

The key legal issue

Under Section 104 of the 2023 Act, where the court finds a relevant breach after the contract has been entered into, it must set aside the contract if a Section 105 condition is met, unless an overriding public interest requires the contract to remain in place. Those conditions address cases where the claimant was denied a proper opportunity to seek a precontractual remedy. Section 105(4) of the 2023 Act treats a published notice that did not provide accurate information about the contract as not having been published.

The strike-out application therefore turned on whether Apasen had an arguable case that the contract award notice published by Tower Hamlets was inaccurate or failed to contain information required by the Procurement Regulations 2024, and hence should be treated as never having been published.

The High Court decision

Inaccuracy may not be apparent from the face of a notice

Despite the different statutory terminology and notice framework that apply under the 2023 Act and the Public Contracts Regulation 2015 that it replaced, the court treated *R (Faraday Development Ltd) v. West Berkshire Council* [2018] EWCA Civ 2532; [2019] PTSR 1346, which had been decided under the 2015 regulation, as a useful guide to the information needed in a procurement notice. Drawing on Faraday, the court considered that a notice should provide a clear explanation and enough objective detail for interested third parties to make a properly informed decision on whether to challenge.

An inaccuracy may not be apparent from the face of a notice. The court may need to examine the underlying facts and contract documentation. Omitted facts may also be so

extensive or misleading that the notice becomes inaccurate. The judgment does not set a general test under Section 105(4) of the 2023 Act, and the answer will be fact specific.

An unsupported urgency justification may render a notice inaccurate

Apasen alleged that the urgency was neither extreme nor unavoidable and arose from Tower Hamlets' own actions or omissions. The court did not decide whether those allegations were correct. It held that, if the urgency justification was not factually well founded, it was at least arguable that a notice asserting that the urgency condition was met would not provide accurate information.

The justification may need to appear in the contract award notice

For a direct award under Section 41 of the 2023 Act, Regulation 27(2)(u) of the Procurement Regulations 2024 requires the contract award notice to contain the relevant direct award information specified in Regulation 26, including the applicable Schedule 5 justification and an explanation of why the contracting authority considers that it applies.

In this case, that explanation appeared in the transparency notice but not the contract award notice. The court held that Apasen's argument that the contract award notice itself had to contain the explanation was arguable. Although not clearly pleaded, the point could be added by amendment without injustice.

The court therefore refused to strike out the parts of Apasen's claim seeking set-aside orders. Whether the urgency ground applied, whether the contract award notice was inaccurate and whether any contract should be set aside remain for later judicial determination.

Practical implications

Contracting authorities

Before making a direct award, a contracting authority should:

- Verify that the factual basis that justifies the direct award is fully documented
- Review whether urgency was genuinely unforeseeable and not self-inflicted
- Ensure that the contract award notice itself contains all information required by the Procurement Regulations 2024
- Not assume that information contained elsewhere, such as in a transparency notice, will cure deficiencies in the contract award notice

Suppliers

Suppliers considering a challenge should review the notices and the facts behind the stated justification. Publication alone may not be decisive. Missing required information, a justification that does not match the facts, or material omissions, may support an argument that the notice should be treated as unpublished under Section 105(4) of the 2023 Act. A claimant must still prove the relevant breach and establish a set-aside condition under Section 105 of the 2023 Act.

Looking ahead

The decision leaves open important questions on the operation of sections 104 and 105 of the Procurement Act 2023. A substantive hearing may provide further guidance on when inaccuracies in procurement notices are sufficiently serious to justify treating a notice as unpublished.

If it reaches full trial, any decision may clarify the circumstances in which suppliers can seek a set-aside remedy after a contract has been entered into, particularly where challenges focus on the adequacy or accuracy of procurement notices rather than the fact of publication alone.

Contacts



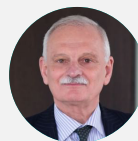
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