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# A practical guide to public procurement challenges under the Procurement Act 2023

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# Introduction

This guide provides a summary of practical steps and the legal procedures involved in a procurement challenge under the Procurement Act 2023 (the “**PA23**”). It is a guide for both contracting authorities and potential challengers.

The PA23 replaces the previous procurement regulations in England and Wales, including particularly the Public Contracts Regulations 2015, the Utilities Contracts Regulations 2016, the Concession Contracts Regulations 2016 and the Defence and Security Public Contracts Regulations 2011. The substantive provisions of the PPA take effect from February 2025<sup>1</sup>.

The remedies regime and the procedures for seeking remedies under the PA23 are similar in many respects to those under the previous regulations. However, there are some significant differences.

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<sup>1</sup> Procurements commenced under the previous legislation must continue to be procured and managed under that legislation.

## Who can bring a claim?

A contracting authority's duty under the PA23 is enforceable by way of court proceedings<sup>2</sup>. Proceedings may be brought by a supplier that *"has suffered, or is at risk of suffering, loss or damage in consequence of a breach of the duty."*<sup>3</sup>

The jurisdiction for hearing public procurement challenges in England and Wales lies with the High Court. In practice, proceedings are generally brought in the Technology and Construction Court ("**TCC**"), which is a specialist court within the King's Bench Division and is also part of the Business and Property Court.

Appendix H of the Technology and Construction Court Guide ([The Technology and Construction Court Guide \(judiciary.uk\)](#)) contains the TCC Guidance Note on Procedures for Public Procurement Cases (the "**TCC Guide**"), which sets out helpful guidance on the conduct of procurement proceedings. The TCC Guide is drafted with reference to the previous legislation. Therefore, care should be had in referring to the TCC Guide, although many of the principles it contains remain applicable to challenges under the PA23. We anticipate the TCC Guide will be updated in due course. Note particularly that the requirement to serve the Claim Form within seven days (referred to in paragraph 9 of the TCC Guide) does not apply under the PA23.

## What remedies are available?

If proceedings are started during the applicable standstill period following award of a contract (see below) and the contracting authority is notified of that fact, a contracting authority may not enter into the contract<sup>4</sup>. This situation is typically described as the "automatic suspension".

The court has power to order interim remedies including orders to lift the automatic suspension or to suspend the procurement or any part of it<sup>5</sup>.

The court may award pre-contractual remedies, including setting aside the contracting authority's contract award decision and/or damages<sup>6</sup>.

The court may also award damages after the contract has been entered into. If certain conditions are met, the court may make an order setting aside the contract<sup>7</sup>.

<sup>2</sup> Reg 100(1).

<sup>3</sup> Reg 100(2).

<sup>4</sup> Reg 101.

<sup>5</sup> Reg 102.

<sup>6</sup> Reg 103.

<sup>7</sup> Reg 104.



## Preparing for a challenge

The most usual time for a bidder to contemplate challenging aspects of a public procurement process is after receipt of a contract award notice informing it that it has been unsuccessful. This guide focusses upon challenges to a contract award decision.

The lawfulness of a procurement process may be challenged at an earlier stage<sup>8</sup>, but regard must be had to the very short time limit under the PA23 for bringing claims (see further below).

An example timeline of proceedings and including points in summary for consideration by contracting authorities and challengers is set out in Appendix 1 of this guide.

### Time constraints

A challenger must act quickly following receipt of a contract award notice, if it has concerns about the award. Two time constraints need to be considered:

- a) The Standstill Period – the PA23 requires the contracting authority to allow a period of at least eight working days following the contract award notice before entering into the contract (counting as day one the date the notice is published)<sup>9</sup>. After the end of the Standstill Period, the contracting authority is free to enter into the contract unless it has become aware beforehand that proceedings have been started challenging the award decision during the standstill period<sup>10</sup>. If a challenger fails to start proceedings within the Standstill Period and the contracting authority then enters into the contract, the challenger's remedies will generally be restricted to damages (there are only limited grounds for setting aside a contract).
- b) General 30 day limitation period – under the Regulations, proceedings must be started within 30 days of the date upon which the challenger

knew or ought to have known that grounds for starting proceedings had arisen<sup>11</sup>. (When counting 30 days, the first day of knowledge is generally considered to be day one rather than day zero.)

Sometimes a contracting authority may agree to extend the 30 day limitation period. A contracting authority may also agree to extend the Standstill Period, or not to enter into the contract before the expiry of a period beyond the end of the Standstill Period. It may be beneficial for a contracting authority to agree extensions to allow time for further communication regarding the contract award, which may avert proceedings. If the contracting authority does not agree to an extension, it is important for challengers to consider bringing proceedings before the expiry of the Standstill Period.

### Analysis of the available information

Before entering into a public contract, a contracting authority must publish a contract award notice<sup>12</sup>, with some exceptions<sup>13</sup>, and an assessment summary to each supplier that submitted an assessed tender<sup>14</sup>, containing information about the contracting authority's assessment of the tender and, if different, the most advantageous tender. A potential challenger will need to review information provided carefully and quickly, having regard to the time constraints. In practice, the amount of information provided by contracting authorities varies significantly. Deficiency in the information provided may give a standalone ground for challenge, separate from concerns about the substantive assessment.

Contracting authorities owe bidders duties to comply with relevant provisions of the PA23, including particularly to treat bidders equally<sup>15</sup>. Contracting authorities must not make manifest errors of assessment. Bid teams often have good instincts for areas in which tenders may have been treated

8 Challenges may also be brought in respect of modifications alleged to be unlawful under Reg.

9 Reg 51.

10 Reg 101(1).

11 Reg 106(2). The court may extend time limit where it considers there is good reason for doing so (Reg 106(3)). Special time limits apply where a declaration of ineffectiveness of an awarded contract is sought. There is a long stop of six months for a claim for a remedy of set aside (Reg 106(1)).

12 Reg 50(1).

13 Reg 50(6).

14 Reg 50(3).

15 Reg 12(2).

unfairly and their insight is usually critical in analysis of the information provided by a contracting authority.

### **Engaging external legal counsel**

If the challenger considers there to be any prospect that it will make a challenge, it will be prudent to identify and appoint external legal counsel without delay. It may be necessary to commence proceedings within a matter of days following contract award in order to prevent the awarded contract being entered into.

Contracting authorities will also wish to consider appointing external counsel to advise on responding to correspondence and proceedings, if they do not already have appropriate counsel engaged.

### **Provision of further information by the contracting authority**

The challenger's analysis of the information provided will often give rise to questions, including to fill in gaps in information provided to the challenger. The challenger should prepare as comprehensive a set of questions as possible and provide this to the contracting authority. Consideration should also be given to requesting documents that it would be helpful to see, especially relating to the evaluation exercise carried out.

The TCC Guide encourages parties to act reasonably and proportionately in providing one another with information. Generally, it will be in the interests of the contracting authority to engage with reasonable requests, because clear answers to potential complaints raised may dissuade a challenger from starting proceedings.

A challenger may conclude that a contracting authority's answers to its requests for information adequately address its concerns. However, if a contracting authority is or becomes unwilling to agree additional time to explore issues, a challenger may need to start legal proceedings to obtain the benefit of the automatic suspension and/or avoid exceeding the limitation period.

## **Starting legal proceedings and early stages**

### **Starting legal proceedings**

Proceedings are started by filing a claim form with the court and paying the appropriate fee. The claim form must contain brief details of the claim made and identify the remedies sought, but full "particulars of claim" may be served up to 14 days after service of the claim form.

The Regulations do not require the challenger to send a letter to the contracting authority, summarising the claims to be made, before filing the claim form. In practice, it is often sensible for the challenger to do so, if time allows. The claim form is typically drafted in general terms, and a letter before claim will serve to summarise the claims being advanced.

Ordinarily, the contracting authority is free to enter into the contract on expiry of the Standstill Period. However, if the contracting authority is notified during the Standstill Period that legal proceedings challenging the contract award have been started, the Regulations prohibit the contracting authority from entering into the contract. This is commonly referred to as the automatic suspension.

Therefore, to avoid the risk that the contracting authority will enter into the contract immediately upon expiry of the Standstill Period, the challenger must start proceedings and notify the contracting authority that it has done so before then. The challenger will need to allow sufficient time for preparing the claim form, receipt and issue of the claim form by the court, and notifying the contracting authority.

The Civil Procedure Rules governing court proceedings require parties to take steps to preserve documents potentially relevant to a dispute when legal proceedings are contemplated. Therefore, it is important for both the contracting authority and the challenger to issue internal notices to relevant personnel advising them not to delete documents. Failure to do so leading to loss of documentary evidence may lead to adverse inferences being drawn at trial.

## Early stages of the proceedings

It may be appropriate to agree a stay of proceedings, if there is a prospect that further exchange of information may resolve the dispute. A stay may be put into effect by means of a consent order filed with the court. However, if no stay is agreed, the challenger must prepare and serve detailed particulars of claim. Under the previous procurement regulations, a challenger had to serve the claim form within seven days. This meant that detailed particulars of claim also had to be served by then (because the Civil Procedure Rules require particulars of claim to be served by no later than the date for service of the claim form). The PA23 does not impose a time limit for service of the claim form. The period for service is therefore the period set by the Civil Procedure Rules, which is four months. The omission of a time period within the PA23 is probably an oversight and may be corrected in due course. In the meantime, the guidance issued by the Government is that the contracting authority may call for service of the claim form within 14 days, following which the challenger will have a further 14 days to serve particulars of claim, i.e. after 28 days. This period remains significantly more generous than the seven days applicable under the earlier regime.

After any agreed stay is lifted, or after issue of the claim form if no stay is agreed, a number of issues typically fall to be addressed in the early stages of proceedings:

- The challenger may make a court application seeking an order for provision of information and/or disclosure of documents, if the contracting authority resists requests (which it may do if it considers the requests to be too wide).
- The challenger may make an application to have the case tried in an expedited timeframe (this will normally be appropriate if the challenger wishes the automatic suspension to be maintained to trial).
- The contracting authority may make a court application to lift the automatic suspension, to allow it to enter into the contract with the winning tenderer.
- The winning or other tenderers may seek to become involved in the proceedings as an “interested party”.
- It may be necessary to deal with confidentiality issues.

The sequencing of the above steps can be contentious and may need to be resolved by the court, on written application or at a case management conference attended by the parties. In practice, a hearing of the application to lift may not take place until several weeks after proceedings are started, although it is open to the contracting authority to pursue an application very quickly.

## Application for an order for disclosure of documents

Early specific disclosure may be justified to enable the challenger to plead its case properly. However, requests must be sufficiently narrow and focussed. If the challenger and the contracting authority disagree about whether requested information or documents should be provided, the challenger may pursue an application for disclosure at an early stage. The application will normally be heard at an oral hearing, generally lasting in the region of a couple of hours. Generally, the court will allow requests for “core evaluation materials”. If these include confidential information of the winning or another bidder, the parties may need to put a confidentiality ring in place (see below).

Requests for information under the Freedom of Information Act 2000 may also be considered.

## Application to lift the automatic suspension

The automatic suspension must be lifted before the contracting authority may enter into the contract. Lifting must be by order of the court, either by the parties filing a consent order or following a successful application by the contracting authority. In a contested application, the court must have regard to<sup>16</sup>:

- The public interest in, among other things, upholding the principle that contracts should be awarded and modified in accordance with the law, and avoiding delay in the supply of goods, services or works provided for in the contract.

- The interests of suppliers, including whether damages are an adequate remedy for the claimant.
- Any other matters that the court considers appropriate.

The tests are newly stipulated in the PA23 and on the face of it reflect a departure from the previous public procurement legislation, which required the court to apply the same principles as apply upon the application of an injunction. However, the factors identified in the PA23 to be taken into account by the court are factors which the court has taken into account in applications under the previous legislation. Therefore, it may be that in practice there will be little difference in the application of the new regulations.

The contracting authority must issue an application notice together with witness statements in support of the application, setting out the facts upon which the contracting authority relies in support of its case addressing the factors to which the court must have regard. The challenger will have an opportunity to file witness statements in response and the contracting authority may have an opportunity to file a further round of statements. There will then be a hearing typically lasting one day, consisting of oral argument in front of a Judge. Witnesses are not required to give evidence orally.

The court is likely to impose two requirements if minded to order the continuation of the automatic suspension:

- The trial will be expedited so that the substantive hearing takes place as soon as possible, keeping the duration of the automatic suspension to a minimum.
- The challenger will probably be required to provide a “cross-undertaking in damages” in favour of both the contracting authority and the winning bidder. The cross-undertaking applies if the case proceeds all the way to trial, the challenger is unsuccessful, and the contracting authority or winning bidder are able to demonstrate they have suffered losses due to the suspension remaining in place.

## Interested parties

It is accepted by the courts that the winning bidder has a legitimate interest in protecting its confidential information in documents disclosed or to be disclosed to the challenger by the contracting authority and in a cross-undertaking in damages if the automatic suspension is continued. Often the winning bidder is admitted to the proceedings as an interested party by consent, for limited purposes. These purposes may go beyond confidentiality. However, if the interested party seeks to duplicate arguments made by the contracting authority, that is likely simply to increase costs and is unlikely to be sensible (or acceptable to the court).

## Confidentiality issues

Confidentiality is not a bar to disclosure. However, procurement cases raise particular issues because of concerns about sensitive information being released to competitors. In procurement cases, documents or information asserted by a party (most often the winning bidder) to be confidential are disclosed only into a “confidentiality ring”.

Initially, a confidentiality ring may be set up involving only the challenger’s external legal advisers, to allow confidential documents disclosed by the contracting authority to be reviewed at an early stage. However, generally it will be important for at least one direct client representative to be able to review confidential documents, to facilitate the giving of advice by and instructions to a client’s external lawyers. Direct client representatives will usually only be permitted to review confidential information upon accepting restrictions in their involvement in similar procurements within specified geographical limits and for a specified time period. Identifying appropriate representatives is important and often challenging on account of the restrictions. Recently retired senior personnel can make good candidates, because the undertakings do not impact their activities.

Sometimes it is necessary to refer to confidential material in pleadings. Since pleadings are generally open to the public on the court file, it is necessary to take steps to ensure that outside access is given only to non-confidential versions, with appropriate redactions for confidentiality.



## Beyond the early stages of the proceedings

### Timetable

A timetable to trial may be set at the first case management conference. In summary, the key stages to trial are: pleadings, disclosure, exchange of witness statements and the trial itself. It is common practice in procurement claims for the court to provide for a trial on liability first, with a trial on the assessment of damages to follow if required.

A normal timetable to trial may be in the order of 12 to 18 months. If the automatic suspension is maintained, an expedited trial may be ordered, which could involve a timetable leading to trial in, say, three to six months.

### Pleadings

The contracting authority must serve a defence within 28 days after receipt of the particulars of claim, to which the challenger responds with a reply 21 days later. Often the contracting authority may wish to have set out its position in a defence in advance of the application to lift, although this is not strictly necessary.

Amendments to pleadings are frequently required as a result of disclosure of additional information and documents to the challenger. The challenger must consider documents provided by the contracting authority and put forward any amendments required to the pleadings quickly, because of the 30 day limitation period. Care is required in managing the time limits, particularly where disclosure is provided in different tranches.

### Disclosure

The parties are each required to disclose documents to the other with reference to the matters set out in the pleadings. The extent of disclosure will be subject to agreement of the parties or order of the court. Disclosure is a significant exercise and needs careful consideration well before the disclosure deadline, including as to the custodians whose documents (including emails) will be collated, how documents will be collated, and the search terms or other search methods to be used.

Please see our separate note on “Disclosure in Civil Proceedings” for further information about the disclosure process.

### Witness statements

The practice in the TCC is for factual evidence to be provided in advance of trial in the form of written witness statements. Normally reply statements are also prepared. Anyone providing a witness statement may be cross-examined at trial, and witnesses will therefore need to be available on the dates of the trial.

Expert evidence is permitted only rarely in procurement cases. If it appears likely that expert evidence will be required, approval should be sought from the court.

### Trial

The length of the trial will depend upon the complexity of the issues involved and the number of witnesses. A trial is likely to last several days. It is an intensive period for clients and legal teams, and therefore an expensive part of the proceedings. However, the costs are often avoided as a result of cases settling.

### Settlement

In practice, most procurement challenges settle before trial. Either party may propose without prejudice discussions at any time. Often an independent facilitator, or mediator, may be engaged by the parties to help them explore options and encourage settlement. It may be appropriate to include sufficient time in the timetable to trial to allow mediation to take place, or even to programme for mediation explicitly.

Another means of promoting settlement is the use of the formal process under the court rules for making without prejudice offers referred to as “Part 36 offers”. Part 36 offers may be made by defendant or claimant. If a party refuses to accept a Part 36 offer and subsequently fails to do as well as the offer at trial, adverse cost consequences follow. Part 36 offers therefore create some incentive for the recipient to accept, or to negotiate.



# Key contacts

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# Timeline (indicative)

Considerations for contracting authority (“CA”)

- Prepare and issue contract award notice.
- Prepare responses to the queries from challenger.
- Consider extending the standstill (and limitation) period.
- Address any early disclosure requests.
- Set up confidentiality ring/undertakings for confidential information.
- Liaise with other bidders where necessary.

If proceedings likely and/or are issued:

- Consider disclosing relevant evaluation documents (NB confidentiality).
- Consider, if necessary, whether steps can be taken to resolve complaint through re-evaluation or unwinding part of the procurement process.
- Agree stay or call for service of Claim Form.
- Issue document preservation notice internally.

Contract award notice

Standstill period 8 working days

Limitation period 30 days

Issue Claim Form and notify CA

Automatic suspension

Issue application for expedited trial

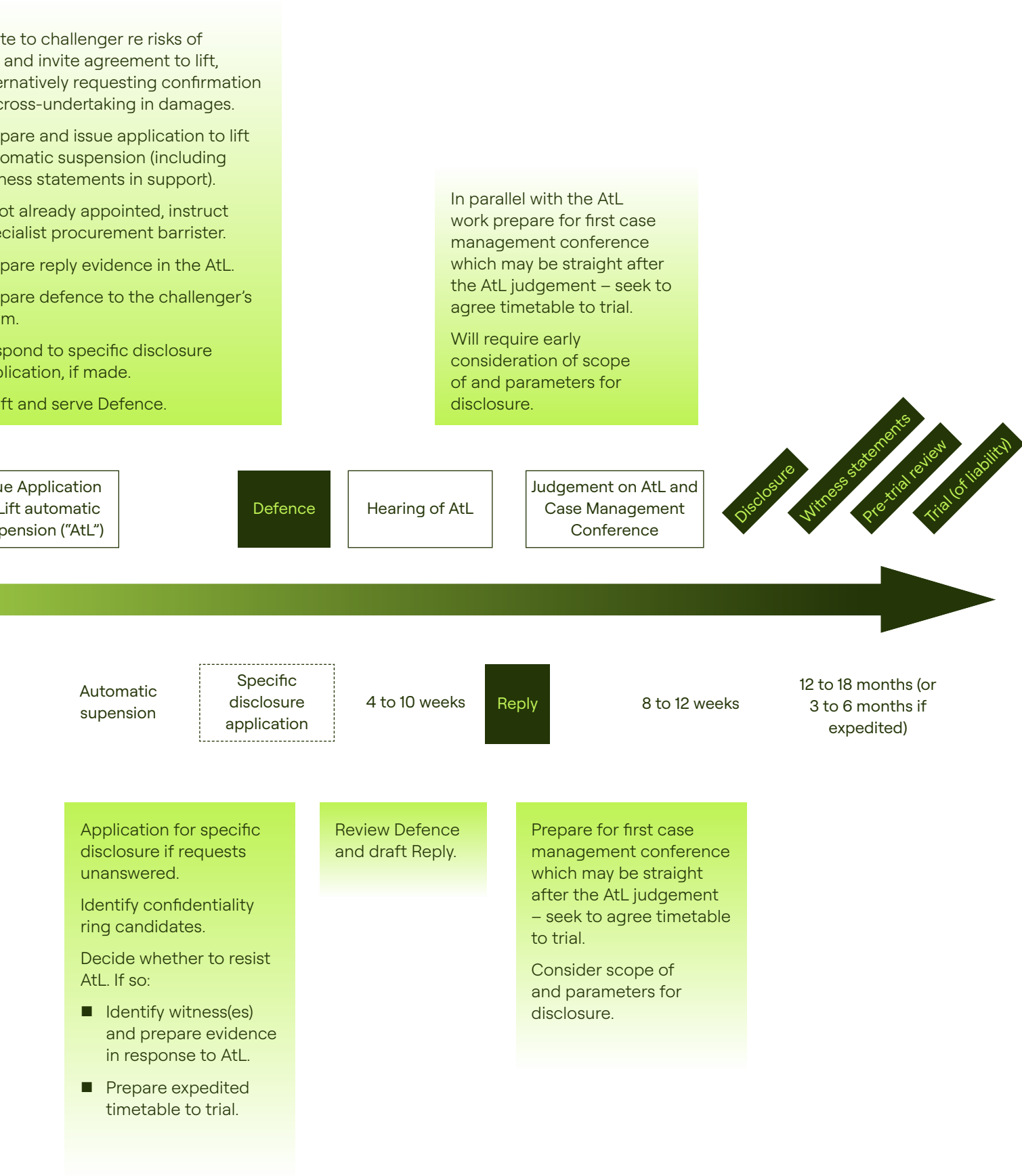
Particulars of Claim

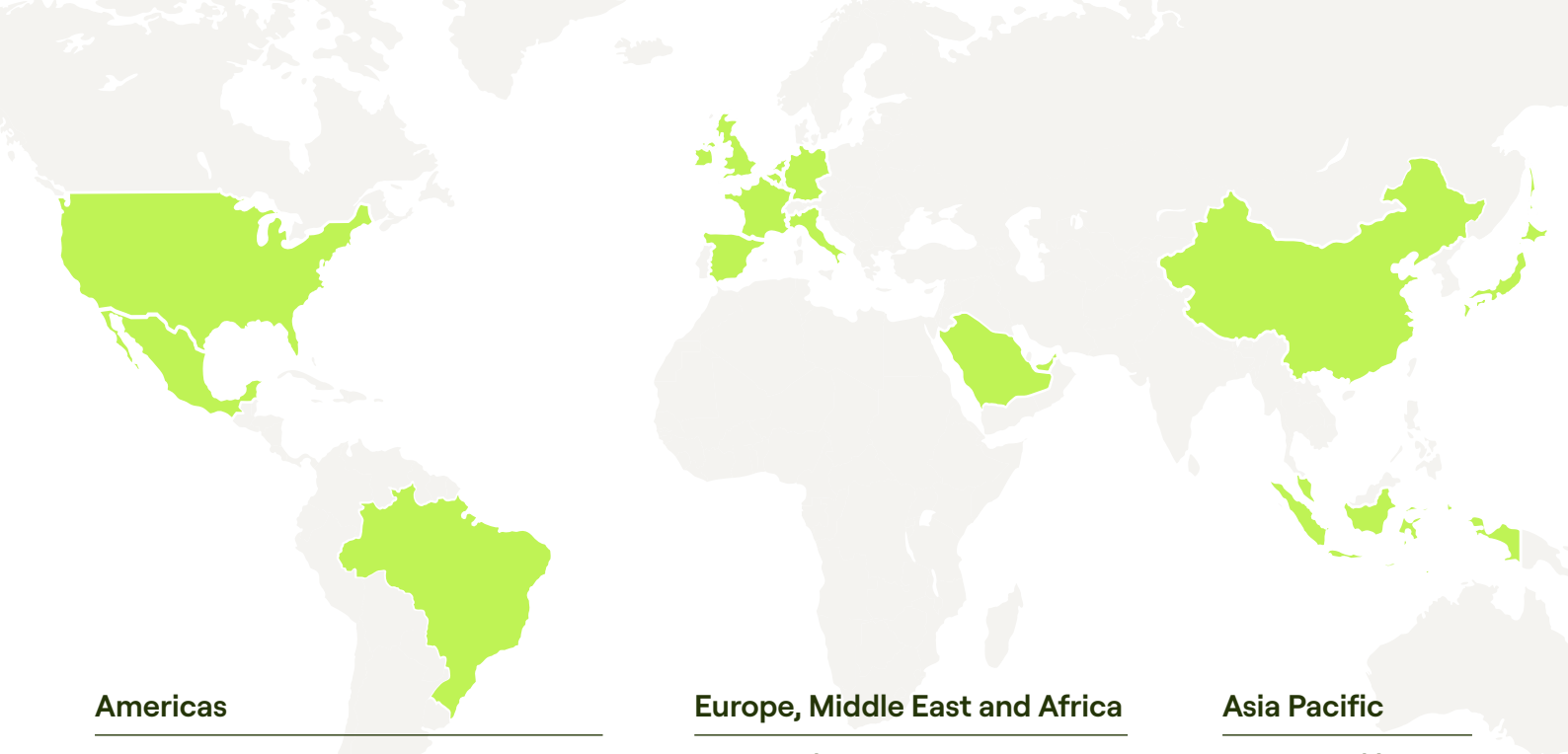
Considerations for challenger

- Review contract award notice with bid team.
- Request extension to standstill (and, if necessary, limitation) to address queries.
- Request information and core evaluation materials.
- Instruct counsel.

- If concerns remain, issue Claim Form and notify CA.
- Claim Form must be served within 4 months.
- Consider whether to issue application for an expedited trial.

- Propose stay of proceedings if further correspondence could resolve matters.
- Otherwise, prepare Particulars of Claim within 14 days of service of Claim Form.
- Issue document preservation notice internally.





## Americas

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- **Boston**
- **Denver**
- **Greater Washington, D.C.**
  - Baltimore
  - Washington, D.C. and Northern Virginia
- **Houston**
- **Los Angeles**
- **Miami**
- **Minneapolis**
- **New York**
- **Philadelphia**
- **Northern California**
  - San Francisco
  - Silicon Valley
- **Latin America**
  - Brazil
  - Mexico

## Europe, Middle East and Africa

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- **Amsterdam**
- **Brussels**
- **Dublin**
- **Germany**
  - Berlin
  - Düsseldorf
  - Frankfurt
  - Hamburg
  - Munich
- **London**
- **Luxembourg**
- **Madrid**
- **Milan**
- **Rome**
- **Paris**
- **Middle East**
  - Dubai
  - Riyadh

## Asia Pacific

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- **Greater China**
  - Beijing
  - Hong Kong
  - Shanghai
- **South East Asia**
  - Ho Chi Minh City
  - Jakarta
  - Singapore
- **Tokyo**

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