



briefing

Procurement - November 2009

The Remedies Directive: now is the time to prepare

The final draft of the Regulations¹ implementing the Remedies Directive was laid before Parliament last Thursday and will come into force on **20th December 2009**. The new Regulations will necessitate major changes in the way procuring authorities run tender processes.

Background

The EU's intention in making the Directive was to encourage greater transparency in the procurement process and to cut down on the number of "direct awards" – i.e. contracts let without an OJEU advert. The means they have chosen to do this is to encourage litigation by aggrieved bidders. Therefore this is not just a ratcheting up of the "Alcatel" regime, but a whole culture change designed to increase the number of claims that go to Court.

This, coupled with the economic downturn (which has itself led to a noticeable rise in the number and persistence of complaints) means that authorities need to act now, and adapt their practices to avoid claims.

The new remedies

The consequences of breaching the regulations are now potentially more serious than ever before. If grounds exist (see below), a Court must render any contract which has been awarded ineffective, and must impose a fine. A Court may also shorten contract terms, award damages to the aggrieved bidder and to a contractor who has lost out by having the contract taken away from them.

The Regulations make three main sets of changes:

¹ The Public Contracts (Amendment) Regulations 2009, SI No. 2992

- Enhanced notice requirements
- Stronger "standstill" provisions
- Tougher remedies

Enhanced notice requirements (Reg 32)

There is now a requirement to issue an "award decision notice" to all economic operators who submitted bids. This has to be done **as soon as possible** after making the decision to award, and **by the most rapid means possible**.

The notice must contain:

- the award criteria (following the **Newham** case, this must also include all sub-criteria and weightings used);
- the score of the recipient and the winning bidder (this should also be broken down as against the criteria, sub-criteria and weightings used);
- reasons for the decision, including the characteristics and relative advantages of the successful bid. Under the current regime, you only have to give these if asked – from 20 December you will have to give them right at the start whether asked for or not;
- if the bid was held not to be compliant with any technical specification, the reasons for that decision;
- the name of the winner;
- a precise statement of when the standstill period starts and ends, including how it may be affected by any "contingencies" (e.g. complaints or challenges);
- the date after which the contract may be entered into.

Obviously, this is a lot more detail than authorities are used to providing under "Alcatel" and therefore creates more risks, especially as getting it wrong can



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mean that the “standstill” period has not validly been commenced. This then puts any subsequent contract award at risk.

The “two-stage” approach under the current regime, where bidders may ask for more information within two working days, has been dispensed with. All the information above has to be given “up-front”. Bidders may however request reasons as to why they were unsuccessful (as opposed to characteristics and advantages of the winning bid). If requested, this information must be given within 15 days. It is not clear why the two sorts of information are treated differently. However, in order to avoid error, it is probably safer to give this information as well in the award decision notice, so that the authority has complied with all its obligations in one go.

The new Regulations have tidied up one area of doubt, that is, regarding the sort of notice that has to be given to participants who fail to qualify or who are excluded before submitting bids. Those who fail to qualify must be notified at the time of making the decision. Whilst it is not set out in the Regulations, it is likely that the transparency principle would require that they should be given some reasons for the decision (although these probably need not be as detailed as those given to someone who has submitted a bid). As regards a participant who has not submitted a bid (e.g. through voluntary withdrawal, non-compliance or weeding out during Competitive Dialogue) and who hasn't previously been notified, then they receive the same notice as under Reg 32 (see details above), except that the reasons given are just those as to why the bidder was unsuccessful – obviously, if they failed to submit a bid, there is nothing “relative” to compare the winning bid against.

Standstill period

The new Regulations (Reg 32A) now state that the authority **cannot** enter into a contract (where there is a requirement to give an award decision notice), without first allowing a standstill period.

The timing of the standstill period is clarified. It ends at midnight on the 10th day after the date on which the notice was sent. (NB. This is extended to 15 days if you serve the notice by non-electronic means.) If the period ends on a non-working day, it must be extended to midnight at the end of the next working day.

Breach of the standstill period may lead to the contract being ineffective (see below). It is also a

good idea to observe the standstill period for many types of contract where an OJEU notice is not required (such as Part B services contracts) as this reduces the risk of ineffectiveness.

Remedies

Statutory duty (Reg 47A and 47B)

Authorities now owe economic operators a statutory duty to comply with the obligations under the Public Contracts Regulations (except for certain minor reporting obligations). Therefore, all infringements of the rules may lead to a claim.

Who can sue? (Reg 47C)

A claim can be brought in the High Court by any economic operator who suffers, or risks suffering, loss or damage as a result of a breach of the Regulations.

What are the time limits? (Reg 47 D and 47E)

As now, claims must be brought promptly and in any event within 3 months from the date when the breach arose. The language of the Regulations suggests that this is an absolute date, irrespective of when the claimant found out about the breach. However, the European Court of Justice has held that time runs from the date when the claimant became **aware** of the breach. UK judges have also been willing to allow extra time to claimants where they have only found out about a breach much later (e.g. *Henry Brothers*). The Court has the power under the new Regulations to extend the time period for challenge, but not where the claimant is asking for the contract to be declared ineffective (see below).

Special time limits apply where the claimant seeks the remedy of ineffectiveness:

- If **either** the authority has complied with its notice and standstill obligations under Regs 32 and 32A, **or** it has voluntarily done so where the tender process did not have to be commenced by an OJEU notice (e.g. Part B services, call-offs under a framework), then the time limit is **30 days from receipt of the notice**;
- In all other cases, it is **6 months from the date of entry into the contract**.

Therefore, observing the notice and standstill provisions, even where you do not have to, reduces the period of risk from 6 months to 30 days.



In order to come within the time periods, the claimant must actually start proceedings in Court and serve a claim form on the authority. A mere written complaint is not enough.

Suspension and setting aside – where contract not entered into (Reg 47G and I)

If legal proceedings are served on the authority and the contract has not been entered into, then the authority must not enter into the contract until the Court has heard the matter. The authority can apply to have this suspension removed (e.g. if the contract is urgent).

The Court has a wide discretion to make interim decisions at this stage. It can release the suspension or re-impose or vary it. The Court can also suspend implementation of any decisions or actions relating to the award, and it can impose undertakings or conditions (e.g. requiring the deposit of money, or inserting “shortening” or suspension provisions into the contract to make it temporary).

Where the contract has not been entered into, and one of the [grounds for ineffectiveness](#) exists (see below), the Court can (at the final hearing) order the setting aside of the decision to award the contract, order the amendment of any documents or decisions, and award damages.

Where the contract has been entered into – ineffectiveness (Reg 47J)

Where the contract has been entered into, and one of the [grounds for ineffectiveness](#) exists, the Court **must** declare the contract ineffective (unless the limited scope for relief under Reg 47L applies). In such circumstances, the Court **must** also impose a fine on the authority (to be paid to the Treasury), and may award damages to the claimant.

The grounds for ineffectiveness (Reg 47K)

First ground – where the authority has failed to publish an OJEU notice, **unless** the authority considered that this was not required AND placed a voluntary “transparency notice”² in the OJEU indicating its intention to award **and** allowed 10 days standstill period. Therefore, even if you believe that the contract does not have to be tendered via an OJEU notice, it may be wiser to give notice and observe the standstill period anyway, since this gives you a defence to a claim for ineffectiveness.

² A standard “transparency notice” will be provided

Second ground – where the authority has entered into a contract in breach of the standstill period or any suspension period, AND, in addition:

- there has been a breach of the Regulations other than under Reg 32A (standstill period). That is, the authority has to have done something else wrong **as well as** entering into the contract during the standstill period; **and**
- the claimant has been deprived of the chance of bringing proceedings before the contract was entered into; **and**
- the breach has affected the claimant’s chances of winning the contract.

Third ground – where, in relation to a framework, the authority has failed to comply with the “mini-competition” rules, or (under a dynamic purchasing system or DPS) the rules for letting contracts under a DPS, BUT this ground does not apply where the authority:

- considered that it had complied with the requirements; **and**
- served an award decision notice under Reg 32; **and**
- observed a standstill period under Reg 32A.

Therefore, again, it cuts the risk if you voluntarily issue an award decision notice and observe a standstill period, even though you are not required to do so when awarding call-offs under a framework or contracts under a DPS.

Relief from ineffectiveness (Reg 47L)

The Court has limited power only to decline to render a contract ineffective. This can only be done where exceptionally, there is an over-riding reason in the general interest why the contract should not be rendered ineffective. Mere economic reasons will not be enough. Urgency (e.g. a contract for vital medical equipment) is likely to be a strong reason for not rendering the contract ineffective.

Note however that (in line with previous cases), urgency caused by the authority’s own delay in the tender process will not be a sufficient reason. If the Court decides not to render the contract ineffective, it **must** still impose a fine, and may impose terms shortening the duration of the contract. It may also award damages to the claimant.



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Consequences of ineffectiveness (Reg 47M)

The effect of a contract being rendered ineffective is prospective, not retrospective. That is to say, obligations which have already been performed will not be overturned, but those which remain to be performed must **not** be carried out.

The Court can also award restitution and compensation to the contractor who suffers loss and damage by having the contract taken away. However, the Court cannot do so where the parties have set out in the contract for the consequences of ineffectiveness. Therefore it is wise to insert wording limiting the authority's liability and setting out the consequences, so as to minimise exposure on this front.

Ineffectiveness and frameworks (Reg 47O)

The rules on this are complex, but in summary, where a framework agreement has been declared ineffective, then any call-offs awarded under it can also be rendered ineffective, provided that the proceedings are started within the relevant time limits as regards those call-offs. Therefore, this is another reason to follow the notice and standstill provisions in relation to call-offs, since it makes the time for challenge as short as possible.

Application

The new Regulations will **not** apply to:

- any tender process started before 20 December 2009
- any framework set up before 20 December 2009; or
- any call-off contract awarded under a framework set up before 20 December 2009.

How can you reduce the risk?

Some tactics which may help to reduce the risk are as follows:

- Always publish an OJEU notice and observe the notice and standstill requirements, unless it is clear beyond any doubt that you don't have to;
- Even if you think an OJEU notice is not needed, publish a "transparency notice" and observe the notice and standstill requirements, then at least you have a defence against ineffectiveness;

- With contracts not requiring an OJEU notice, also consider publishing an award notice as soon as possible and observing the notice and standstill requirements – this can cut the "at risk" period from 6 months to 30 days;
- With major, high-value contracts, it may be advisable to build in a 6 months delay to the start of the contract (where timescales permit), so that the period for potential ineffectiveness has passed before the contract begins to be performed;
- Build into the contract provisions dealing with the consequences of ineffectiveness and limiting the authority's liability, so as to limit exposure to the contractor if the contract is rendered ineffective.

These Regulations are designed to create more litigation, therefore the best defence is to make sure that your practices and procedures are thoroughly reviewed before 20 December 2009 and brought into compliance with the new rules.

If you have any queries, please contact a member of our Commercial team.



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