



briefing

Procurement - June 2009

The Remedies Directive

The “incoming tide” becomes a flood

Lord Denning famously likened European law to “an incoming tide”. With the Remedies Directive, the tide appears to have reached flood proportions and will necessitate major changes for procuring authorities.

OGC has published the draft regulations to implement the Remedies Directive for consultation. The consultation, which began on 30 April and will last 12 weeks, will close on 24 July 2009. The purpose of the consultation is to seek feedback on the draft Regulations, plus some other key issues. Once the consultation is complete, OGC will re-draft the Regulations and they will then be made and will come into force on 20 December 2009.

The new rules will apply to all public contracts, frameworks and call-offs under them, but not (at this stage) to Part B services contracts (e.g. health and social care services).

Effects

The new Regulations will amend the Public Contracts Regulations 2006 and the Utilities Contracts Regulations 2006. The purpose of the new Remedies Directive is to increase the sanctions available for breach of the public procurement rules. The EU Commission’s stated intention is to punish authorities for making “direct awards” (i.e. not tendered in accordance with OJEU procedures) and it easier for bidders to bring claims. There are three main areas of change:

- the introduction of “ineffectiveness” as a sanction for breaches of the procurement rules. This over-rides long-established common law, and means that a contract can now be set aside even after it has been signed;
- new, longer time limits for claimants to bring a challenge; and

- ramping up the “standstill” obligations pre-contract award.

These new provisions will seriously undermine commercial certainty and create major new risks for both authorities and contractors. Procurement practices will need to be amended in order to mitigate the worst effects but even so, these changes will mean devoting substantially more cost and resources at a time of constrained budgets.

Ineffectiveness and fines

Under the new regulations, a court **must** declare a contract ineffective if satisfied that any of the following grounds apply (**unless** it considers there to be overriding public interest reasons – an example of this might be a contract for vital medical supplies). The Court **must** also impose a fine on the authority and may in addition award damages to the claimant and its legal costs. The grounds are:

- the contracting authority has failed to publish, when required to do so, a contract (OJEU) notice **unless** all the following apply:
 - the authority considers that an OJEU Notice is not required; **and**
 - publishes its intention to enter into the contract to all bidders and participants (including those who failed at PQQ); **and**
 - holds a 10-day standstill period;
- the contract has been entered into without complying with the “standstill” obligations thus depriving bidders of the chance to claim pre-contract award; or
- for call-off contracts under a framework agreement, where the authority has not followed the rules for awarding call-offs for above-threshold contracts, **unless** the authority believes the rules to have been followed **and** observes a standstill period (similar rules apply to dynamic purchasing systems).



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Where a contract is declared ineffective by a court, the ineffectiveness will be prospective. In other words, the parties will be discharged from any obligations arising under the contract after the date of the declaration. Where there are overriding public interest grounds, or there is a procedural breach of the rules (e.g. standstill provisions) but no substantive breach, the court must still either order the contract to be shortened or impose a fine (or both).

Time limits for challenge

If the claimant does not seek an ineffectiveness order, then the time limits remain the same (i.e. the claim must be brought promptly and in any event within three months of the date when the grounds arose, provided that the time for claiming can never be **less** than the “standstill” period, if applicable).

If the claimant wants the contract rendered ineffective, the time limits vary according to the degree of publicity which the authority has given the award:

- where the authority did not publish a contract notice at the start in the OJEU, but has published a contract **award** notice in the OJEU, the time limit will be 30 days from the date of publication of the award notice;
- where the authority issues a “standstill” notice to all bidders and participants (including at PQQ), the time limit will be 30 days from the date of receipt or (if not simultaneous) the date of receipt by the last of them. Therefore it is very important to remember to include all the failed PQQ applicants as well as otherwise the time limit could be indefinitely extended until they have all received it);
- in all other cases, 6 months.

It is therefore advisable to fully comply with the “standstill notice” rules and/or issue an award notice as quickly as possible, even if an OJEU notice was not issued at the start, since that will reduce the window for challenge from 6 months to 30 days.

Standstill provisions

The current standstill period (10 days) is not varied, although it is clarified that the period starts running at midnight at the end of the day on which the notice was issued (by fax or e-mail) to all bidders and participants (including PQQ applicants). Therefore the contract cannot be signed until the eleventh day after the date of the notice.

However, the new Regulations require authorities to send with their “standstill” notices, the following extra information:

- the reasons for their decision, including the relative characteristics and advantages of the winning bid; and
- a detailed statement of the bidders’ rights and applicable dates, including the “standstill” period end date and the dates for requesting information.

As is currently the case, if a bidder/participant requests it before midnight at the end of the second working day after the “standstill” period started, they are entitled to certain debrief information, namely the reasons why they were unsuccessful and the characteristics and relative advantages of the winning bid. It is hard to see how this differs from the information which the authority will already have sent out with its “standstill” notice at the start of the period. Possibly this is meant to focus more on the reasons why the individual bidder/participant lost, rather than the reasons for awarding to the successful bidder.

As is currently the case, the authority must provide the debrief information so as to allow at least three clear working days before the end of the “standstill” period, or must extend the standstill period to make sure that time is allowed. If the bidder/participant requests the information outside the first two working days of the period, then the authority must provide the information within 15 calendar days, and need not extend the “standstill” period.

Note that if a legal challenge is commenced before the contract has been awarded, the authority **must** suspend the contract award until the Court has held a preliminary hearing.



Reducing the risk

There are some limited strategies available to reduce the risk (see below). However, the main way in which an authority will be able to reduce and manage the considerably increased risk of challenge will be by resourcing all procurements properly and ensuring staff are aware of the new rules. In particular, the new rules will make it easier to shine a light onto award procedures, including criteria, weightings and scoring methodologies. It is therefore essential to work out the full range of criteria, sub-criteria, weightings and scoring methods and disclose these in full to bidders no later than the stage when they receive the tender documents. By observing greater transparency around tender procedures, authorities can protect themselves from challenge.

Other ways of reducing the risk are:

- Ensuring that an award notice is published and/or standstill notice issued to all bidders and participants. This will reduce the challenge period from 6 months to 30 days;
- If you believed that an OJEU was not needed at the start, then issuing a voluntary “transparency” notice to all bidders and participants and observing the 10-day “standstill” period will mean that the Court cannot hold the contract ineffective (if no challenge is raised during the “standstill” period);
- Putting standard terms into all contracts which cater for the consequences of potential “ineffectiveness” – i.e. to make sure that aggrieved contractors who lose their contracts cannot turn round and sue the authority for damages as well.

Consultation

If you wish to participate in the consultation, the link to the consultation papers is:

www.ogc.uk/procurement_policy_and_application_of_eu_rules_european_procurement_directives.asp.

The consultation document comprises the following:

1. Remedies 2nd consultation document
2. Annex A - Draft Regulations: tracked amendments to Regulation 32
3. Annex B - Draft Regulations: entire redraft of Part 9 of the Public Contracts Regulations 2006
4. Annex C - 2nd draft impact assessment

The OGC is seeking views and comments on some key issues, including:

1. Transitional arrangements – OGC's preference is to apply the new rules only to new particular, call-off contracts where the framework agreement was concluded before 20 December 2009 should be subject to the original rules. This will avoid one set of rules applying to the framework and another to the call-off contract;
2. The implications for call-off contracts when a framework is declared 'ineffective' – OGC proposes various options for the status of call-off contracts that have already been awarded ('live' call-offs) in the event of the related framework agreement being declared ineffective.

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More information

To discuss your individual requirements, please contact Simon McCann on 029 2038 5400 or at simon.mccann@morgan-cole.com or any other member of the Procurement team.



Simon McCann, Partner

T: 029 2038 5400

E: simon.mccann@morgan-cole.com



Penri Desscan, Associate

T: 029 2038 5337

E: penri.desscan@morgan-cole.com



John Conder, Partner

T: 01865 262651

E: john.conder@morgan-cole.com



Mererid McDaid, Solicitor

T: 029 2035 5401

E: mererid.mcdaid@morgan-cole.com



Emyr Lewis, Partner

T: 029 2038 5420

E: emyr.lewis@morgan-cole.com