



Fenwick Elliott Guide to the new Remedies Directive

Introduction

1. Public procurement law regulates the purchasing by public sector bodies of contracts for goods, works or services. EU law on public procurement aims to increase competition and transparency in order to create opportunities for all EU businesses, and to promote free movement of goods and services. To achieve these objectives, an EU-wide framework has been established under the following Directives:
 - (i) Directive 2004/17/EC (the "Procurement Directive") – the Procurement Directive coordinates procedures for the award of public works contracts, public supply contracts and public services contracts.
 - (ii) Directive 89/665/EC (the "Remedies Directive") – the Remedies Directive sets out the remedies available to aggrieved bidders if they consider that contracting authorities have entered into contracts in breach of the Procurement Directive.
2. In England, Wales and Northern Ireland, this EU-wide regime has been implemented by the Public Contracts Regulations 2006¹ (the "Regulations").
3. The current public procurement regime has been the subject of considerable criticism. Notably, the current regime does not address some of the most serious breaches of procurement law, such as illegal direct awards of public contracts without competition and the misuse of framework agreements. To resolve these issues, the EU has passed Directive EC 2007/66/EC (the "New Remedies Directive"), which must be implemented by Member States by 20 December 2009. In England, Wales and Northern Ireland, the incoming changes will be implemented by the Public Contracts (Amendment) Regulations 2009² (the "Amendment Regulations"), which will come into force on 20 December 2009.
4. This note briefly considers the key provisions of the current remedies regime, and summarises the incoming changes.

Position under the Remedies Directive

5. Under the existing remedies regime, bidders' remedies in the UK are limited to damages and/or injunctive relief³.
6. However, currently a public contract cannot be set aside once it has been entered into. As a result, the Regulations introduced the concept of a minimum 10 day "standstill" period during which contracting authorities would have to inform bidders of the proposed award decision and provide certain information regarding that decision⁴. Bidders could then seek an injunction during the standstill period, before the contract is entered into.
7. This approach, however, only applies to full, competed procurements. It does not cover single tender contracts, contracts placed under frameworks or partially regulated contracts such as low value contracts, concessions and "Part B" services contracts (e.g. contracts concerning educational, health, recreational or cultural services)⁵. Likewise there are no effective remedies for failures to comply with applicable standstill requirements.

¹ SI 2006/05

² SI 2009/2992

³ see Regulation 47(8)

⁴ see Regulation 32

⁵ see Regulation 47

Key Changes Introduced by the New Remedies Directive

More Information to be provided to Tenderers

8. The new regime will increase the level of detail contracting authorities are required to give to tenderers. Award letters will now have to state:
 - (i) the award criteria;
 - (ii) the bidder's score;
 - (iii) (in the case of an unsuccessful tenderer) name and score of the successful tenderer;
 - (iv) a statement of the standstill period; and
 - (v) a summary of the relevant reasons for the decision.
9. It is therefore likely that contracting authorities will now have to furnish unsuccessful bidders with reasons as to why the bidder was unsuccessful and the characteristics and relative advantages of the successful bid.

The Standstill Period

10. The New Remedies Directive retains the requirement for a standstill period and specifies that⁶:
 - (i) No contract should be concluded following an award decision under the procurement rules before the expiry of a "standstill period" of at least 10 days from the day following the date on which the contract award decision is sent to the "tenderers concerned". Tenderers are not "concerned" if they have previously been excluded and have already been notified of their exclusion.
 - (ii) The communication of the award decision should be accompanied by a summary of the reasons for the rejection of the tender, and the characteristics and relative advantages of the preferred bid and successful tenderer. The communication should also include a precise statement of the applicable standstill period.
11. In England, Wales and Northern Ireland, the above requirements will be implemented by the Public Contracts (Amendment) Regulations 2009⁷, which will come into force on 20 December 2009. The Amendment Regulations introduce a new Regulation 32A into the Regulations, which reflects the above changes.

Suspension of Contract-Making

12. In recognition of the need to allow the courts sufficient time to act within the standstill period, the New Remedies Directive requires that once an application for review has been made, the contract cannot be entered into until the court has made a decision regarding the application⁸. This requirement is reflected in the Amendment Regulations, pursuant to which the contracting authority will have to refrain from entering into a contract until "proceedings at first instance" are determined, discontinued or otherwise disposed of and "no order has been made continuing the requirement (for example, in connection with an appeal or possibility of an appeal)"⁹.

Ineffectiveness

13. The New Remedies Directive states that public contracts will be "ineffective" where there is a breach of the public procurement rules. By way of example, a contract will

⁶ see New Remedies Directive, Article 2a(2)
⁷ SI 2009/2992

⁸ see New Remedies Directive, Article 2(3)
⁹ see new Regulation 47G

be rendered “ineffective” in the following circumstances¹⁰:

- (i) If, in contravention of the procurement rules, the contracting authority awards a contract without prior publication of a notice in the Official Journal of the European Union.
 - (ii) A contract is entered into under a framework agreement or dynamic purchasing system in breach of the public procurement rules.
 - (iii) Where a contract is concluded without application of a proper standstill period, or where rules governing the suspension of a contract pending court proceedings have been breached, and (together with an infringement of procurement rules) has affected the chances of the claimant winning the contract.
14. In England, Wales and Northern Ireland, the court’s power to declare a contract “ineffective” and grounds for “ineffectiveness” are prescribed by new Regulations 47J and 47K. Where a declaration of ineffectiveness is made, the contract will be considered to be prospectively, but not retrospectively, ineffective as from the date of the declaration¹¹. Accordingly, those obligations under a contract which at that time remain outstanding shall not be performed. In addition, the court will be able to make orders for restitution and compensation “to achieve an outcome which the court considers to be just in all the circumstances”¹².
15. As an exception, the New Remedies Directive permits Member States to maintain a contract where there is a general overriding interest in its continued maintenance¹³. This exemption is embodied in the new Regulation 47L. However, economic interests directly linked to such contracts would not constitute overriding reasons.

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¹⁰ see New Remedies Directive, Article 2d

¹¹ see new Regulation 47M(1)

¹² see new Regulation 47M(4)

¹³ see New Remedies Directive, Article 2d(2)