

Contracts in the public sector – a summary of the new remedy provisions

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The Public Contracts (Amendment) Regulations 2009, SI 2009 No 2992, an amendment to the existing Public Contracts Regulations 2006, came into force on the 20th December 2009. The new regulations are the UK's response to the EU Remedies Directive 2007/66/EC.

This briefing summarises the changes made by the regulations and highlights issues which need to be considered by contracting authorities and those contractors engaging in the EU procurement process.

The regulations provide remedies to unsuccessful contractors where a contracting authority has breached certain requirements. They provide for an automatic suspension of the contract award procedure when proceedings alleging breach of the public procurement rules are issued and served on a relevant public sector contracting authority. A new remedy post award of contract has also been created where on certain grounds contractors can request a "declaration of ineffectiveness". This new remedy is a major departure from the public sector rule that once a contract has been awarded it cannot be set aside by the courts, damages being the only available remedy.

Transitional provisions

The new rules do not affect any contract award procedure commenced before the 20th December 2009.

Standstill period

Where a contracting authority has been through the tender process and has got to the stage where it wishes to make an award to a successful contractor the contracting authority must observe what is known as a "standstill" period before it enters into the contract or framework agreement.

The standstill period expires 10 days after the contracting authority informs all candidates of its decision, if it informs candidates by electronic means or fax. If the contracting authority informs candidates by other means, the standstill period expires after 15 days, or 10 days from the date when all the candidates have received their notice.

The standstill period:

- applies only to framework awards, not to call off appointments;
- does not apply to part B service contracts;
- does not apply where the only candidate is the one to be awarded the contract or who is (if relevant) to become a party to the framework agreement and there are no other candidates; and
- does not apply to contracts which are below EU thresholds.

Pre contract

Where no contract has been entered into, the courts may do one or more of the following:

- set aside the decision or action to make the award;
- amend any documents; and/or
- award damages for loss or damage suffered due to the breach.

Post contract

- Declaration of Ineffectiveness

Where a contract has been entered into, the court is able to make a declaration of ineffectiveness

The basic grounds on which such a declaration can be founded are as follows:

- No contract notice has been advertised; or
- combined breaches of the procurement and review procedural rules by the contracting authority have adversely affected the bidders chances of obtaining the contract; or
- a defective framework or dynamic purchasing system has been used.



The declaration of ineffectiveness is not discretionary, therefore once the court is satisfied that any of the grounds exists it must (subject to the general interest exceptions set out in regulation 47L) make such a declaration. Once a declaration of ineffectiveness is made by the court the contract is to be considered ineffective from the time of that declaration. Any obligations that have already been performed will not be affected.

■ Penalty

A civil financial penalty is also available in addition to, or instead of, the declaration of ineffectiveness.

The regulations state that a penalty must be ordered where a declaration of ineffectiveness is granted. Where a declaration of ineffectiveness is not granted due to the reasons stated in regulation 47N (2), the court must order at least a penalty and may additionally shorten the contract. The courts may also make an award of damages where the contractor has suffered loss or damages as a consequence of the breach.

Time Limits

There are general time limits for starting actions under the regulations. Proceedings must be started promptly and in any event within 3 months beginning with the date when grounds for starting the proceedings first arose.

The declaration of ineffectiveness has a special time limit, which is 30 days from the day after the date on which the contract notice was published or when the contracting authority informed the bidder of the conclusion of the contract and sent them a summary of relevant reasons. In other circumstances the proceedings must be commenced within 6 months beginning with the day after the date on which the contract was entered into.

Analysis

Contracting authorities should at least consider building a check list into their internal process so that those making the decision can be satisfied that the proper procurement process has been observed. A simple solution may be to redesign reports to include a compliance section which could perhaps consist of tick

boxes. The decision makers who may not have been part of the procurement process can then address and keep abreast of any compliance issues on a continual basis.

Where a declaration of ineffectiveness has been granted, identifying the issues and dismantling the parties' rights under the contract is not a simple task. Whether you are a contracting authority or a contractor bidding for public sector contracts Stephenson Harwood can advise you on the effect of the changes made by the regulations, and the practical steps you need to take.

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