

Procurement Brief

March 2010



“Readers should be thinking very carefully about how the Remedies Directive will affect the procurement of works and services post December 2009.”

In this issue

Clarification on the Time Limit for Bringing Procurement Challenges by Robert Winrow	3
The Automatic Injunction – How Will it Work? by Mark London	4
Buyer Beware – Declarations of Ineffectiveness by Joseph Dalby	6
Preparing for Ineffectiveness by Robert Winrow	8
The New Remedies Directive - Notification Requirements, Award Decision Notices & the Standstill Period by Kris Kelliher	10

Welcome

Welcome to the spring edition of the Procurement Brief. The Remedies Directive has been ‘live’ for two months now and we are anxiously awaiting the first batch of cases setting out how the Courts will interpret some of the more novel changes to the Regulations. Although that is still some time away, readers should be thinking very carefully about how the Remedies Directive will affect the procurement of works and services post December 2009. To help readers try and make sense of it all we have a number of contributions in this month’s edition on those significant aspects

of the Remedies Directive that all involved in procurement should have at the forefront of their minds. Kris Kelliher takes us through the minefield that is the new standstill period, and our guest this month, barrister Joseph Dalby of 4-5 Gray's Inn, provides a commentary on the new remedy of ineffectiveness. Rob Winrow offers a series of tips on how procurement documents can (and should) be amended to lessen the impact of the new remedy of ineffectiveness and I describe the effect of

would like us to help. Alternatively we will be running some further seminars on the remedies Directive in March 2010 (details enclosed). We hope to see you there. The Remedies Directive will require all Contracting Authorities to tread carefully and wearily, it also necessitates a number of changes to current procurement practice. Our aim is to make these as painless for you as possible.

Mark London, Partner, Devonshires

the new automatic injunction. It's not all about the Remedies Directive. The Court of Justice of the European Union has just released its much anticipated judgment in the *Uniplex* case. The upshot of the decision is that contracting authorities will have to very clearly communicate the reasons for a contractor's elimination from a procurement process if they wish to rely on the strict time limits contained within the Regulations.

As always our procurement team are ready willing and able to run tailored in house training programmes for your procurement officers. Get in touch with any member of the team if you

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Clarification on the Time Limit for Bringing Procurement Challenges

On 28 January 2010 the Court of Justice of the European Union (“CJEU”) handed down its judgment in *Uniplex (UK) Ltd v NHS Business Services Authority (C-406/08)*. The judgement concerns the date from which the period for bringing a procurement challenge starts to run.

Under Regulation 47(7)(b) of the Public Contracts Regulations 2006 (the “Regulations”), proceedings must be brought “promptly and in any event within three months from the

The CJEU held that:

- i. The period for bringing proceedings seeking to have an infringement of the Regulations established or to obtain damages for the infringement of the Regulations should start to run from the date upon which the claimant knew, or ought to have known, of that infringement. The CJEU provided that it is only once a claimant “has been informed of the reasons for its

“The judgement concerns the date from which the period for bringing a procurement challenge starts to run.”

3

date when grounds for the bringing of the proceedings first arose....”

The CJEU considered two questions:

1. Whether the limitation period runs from the date of the alleged infringement or from the date on which the claimant knew, or ought to have known, of that infringement, and
2. How the national law requirement that proceedings be brought promptly should be interpreted and whether national courts have discretion to extend the national limitation period for the bringing of such proceedings.

elimination from the public procurement procedure that it may come to an informed view as to whether there has been an infringement.”

- ii. EU law precludes a national provision allowing a national court to dismiss proceedings for being out of time on the basis that those proceedings must be brought promptly as this “gives rise to uncertainty” and “does not ensure effective transposition” of the EU Remedies Directive. As for extending the limitation period, the CJEU held that a national court must exercise its discretion to extend the limitation period

in such a manner as to ensure that a claimant has a period equivalent to that which it would have had if the period provided for by national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rules.

The judgement gives unsuccessful applicants who wish to make a claim for infringement of the Regulations more certainty. Contracting

authorities should ensure that they provide unsuccessful applicants with details of the reasons for their elimination from a public procurement procedure at the date that they notify them of the decision, such that the unsuccessful applicants know, or ought to know, whether there has been any infringement which may form the subject matter of proceedings. Where contracting authorities fail to do so, the time frame for initiating proceedings may be extended.

The Automatic Injunction – How Will it Work?

One of the more interesting changes to emerge from the Remedies Directive is the introduction of what in effect is an automatic injunction. Previously, where a disgruntled contractor wanted to stop the award of a contract he was required to apply to the Court for an injunction. In doing so he was obliged to satisfy the Court that he had an arguable case, that the balance of convenience lay with him (as opposed to the Contracting Authority), that damages were not an adequate remedy and that it was in the interest of justice to grant the injunction. Crucially, he was also required to give an undertaking to the Court that in the event

the injunction was subsequently overturned, he would pay damages to the Contracting Authority against whom the injunction had been obtained. This need for what lawyers call a 'cross undertaking in damages' gave many a contractor pause for thought. The consequences of getting it wrong could result in a monumental bill.

Under the Remedies Directive the position has now reversed. There is no need to apply for an injunction, as one is granted automatically. All a contractor needs to do is issue proceedings alleging a breach of the Regulations and the Contracting Authority is prevented from

awarding the contract until the proceedings are compromised or by further Order of the Court.

Unfortunately, at the date of writing, there are no decided cases setting out how the Courts will deal with the effect of the automatic injunction. Those responsible for drafting the Remedies Directive did not feel it necessary to give the Court any guidelines as to what it should do. The OGC has stated that it will be a matter for the Courts to settle upon a body of principles over time. For present purposes, all we can do is guess at what those principles

convention. It remains unclear why it was deemed necessary to move away from the normal mantra that he who wants the injunction must prove to the Court that he is entitled to it.

But the problems do not end there. What if the injunction cannot be set aside? Or what if the Court requires the parties to go through the pre-trial process of disclosure and exchange of witness statements before hearing an application to set it aside. Absent a friendly incumbent who is prepared to carry on the services/works while the dispute winds

“The Remedies Directive has placed Contracting Authorities in an odd position where there are currently no guidelines or settled case law.”

might be.

It is the writer's opinion that a Contracting Authority that suddenly finds itself prevented from awarding a contract will be required to make an application to set aside the injunction. Ironically, it will be on precisely the same basis that the Contractor had previously used to obtain one. Therefore the Contracting Authority will have to show that it has a good arguable defence to the claim, that there would in any event be unjust consequences in keeping the injunction in place (high cost of temporary services/works being one example) and that even if the contractor is correct, damages are an adequate remedy. This reversal of the burden of proof is slightly at odds with legal

its way through the Courts, it will cost the Contracting Authority an arm and a leg to bring on board interim contractors while the dispute is resolved. It enables a Contractor to place maximum pressure on the Contracting Authority to agree an early compromise.

The Remedies Directive has placed Contracting Authorities in an odd position where there are currently no guidelines or settled case law. That will change in due course when Judges at the Chancery Division of the High Court start hearing cases. Watch this space.

Buyer Beware – Declarations of Ineffectiveness

Under the new Remedies Regulations, a procurement contract can now be rendered ineffective, which means set aside, even after it has been signed or being performed if a specified transgression has occurred. Only the High Court can declare a contract ineffective, but should it do so then the consequences can be severe.

There are three specified transgressions that can attract a declaration of ineffectiveness. Firstly, a breach of transparency, by failing to

consequences can follow for the contracting authority. Firstly, it will have no option but to re-tender the contract for those goods, services or works that have yet been supplied or delivered. Meanwhile, the contracting authority would still be bound by contract with its contractor up to that point. Thus work done to date would have to be paid for as the ineffectiveness is prospective and not ab initio or retrospective – on a quantum meruit basis if no other measure is feasible. Furthermore, the contracting authority may be hit with a order

publish a prior contract award notice if one was required by law. Secondly, a breach of procedure, by signing a contract either during the standstill period or, in the event of a challenge to the award, whilst the statutory suspension imposed by regulation or a court-ordered interim injunction is in force. Thirdly, a breach of competition, in the theoretically narrow, but practicably very possible, instance of an above-EU threshold contract being awarded by way of the call-off mechanism in a framework contract (FWC) or dynamic purchasing system (DPS).

When the court makes a declaration of ineffectiveness, a number of sanctions and

for penalties. Finally, it will be exposed to any valid claim for costs and or damages from the the winning candidate (or perhaps other losing tenderers if parallel proceedings are running) on account of the breach of the procurement rules.

However, it is possible for the court to uphold the contract notwithstanding the transgression. The contracting authority will need to satisfy the court of overriding reasons in the general interest requiring that the contract stay in place. General interest is not defined. Logistical interests, such as emergency, the compelling needs of third parties, are probably legitimate reasons. But economic interests,

such as the cost of delay, re-tendering, disruption in performance, or the level of damages for which the authority is liability can, according to the regulations, only count as overriding in exceptional circumstances when ineffectiveness would lead to disproportionately adverse consequences. Contracting authorities will need to quickly and thoroughly estimate the cost of re-tendering compared to continuing.

Concluded contracts are, in principle, open to challenge for a period of thirty days, in the case

FWC or DPS can still be rendered ineffective.

With the new remedies regime, contracting authorities have a great deal to acclimatise to. The declaration of ineffectiveness is one measure to be wary of.

“When the court makes a declaration of ineffectiveness, a number of sanctions and consequences can follow for the contracting authority.”

of proper publication of a contract notice or notification of reasons to an excluded bidder, or within a long stop period of six months in any other case. The latter would apply in the case of a complete lack of transparency.

The remedy is available in respect of any contract entered into pursuant to a procurement process commenced after 20 December 2009. But it should not be assumed that a procurement process commenced before that date is beyond challenge if, say, it has been interrupted by delay and in effect re-commenced, possibly in an altered state, after. Equally, it is more probable that any current, above-threshold, call-off contracts under an old



Preparing for Ineffectiveness

Introduction

In light of the serious consequences of a declaration of ineffectiveness (a “Declaration”) being made under the Public Contracts Regulations 2006 (the “Regulations”), that is, prospective obligations under the contract in question being cancelled (regulation 47M(1)), what can contracting authorities and their contractors do to ‘second guess’ and protect themselves from a Declaration?

between the parties or indeed for the parties to agree as much between themselves ‘after the event’. Pre-agreed terms not only allow for clarity as to how the parties will exit a contract upon a Declaration and provide transparency and assurance as to risk and who owes what to whom, but should have the effect of focusing the parties’ minds from the outset on the possibility of a Declaration being made.

The Office of Government Commerce (“OGC”) and Collateral Contracts

The OGC, in its publication ‘Implementation of

Pre-Agreed Terms

When making a Declaration, the Court can make any order that it considers appropriate to address the implications and consequences of as much (regulation 47M(3)). However, the Regulations recognise that parties may have agreed contractual terms that regulate their mutual rights and obligations upon a Declaration being made, and they seek to protect these where they do not conflict with the Regulations. For example, terms which seek to extend the life of an ineffective contract would be overruled.

Suitably drafted pre-agreed terms can therefore survive a Declaration and avoid the need for a court determination as to appropriate restitution

the Remedies Directive: OGC Guidance on the 2009 Amending Regulations’, recommends that pre-agreed terms be contained in a collateral contract, which would co-exist alongside the main contract that is the subject of a Declaration. This would ensure that despite the main contract coming to an end, the pre-agreed terms would continue. The OGC has yet to offer model clauses for inclusion in collateral contracts, but have suggested some principles and items that may be suitable for inclusion, more particularly:

1. The Basis on Which Compensation is Payable from One Party to Another

Consideration should be given as to how

compensation for termination compares to the termination provisions contained in the main contract. Complex contracts will normally provide for prescribed levels or rates of compensation that are payable on termination, and a collateral contract could provide that sums payable upon a Declaration are equivalent to that payable, for example, for Default/Voluntary Termination by the Authority under the main contract. Where the main contract is silent on compensation on termination, the direct loss of a Declaration should be considered.

5. Settlement

Payment of compensation/adjustment of rights should be provided as being in full satisfaction of any claim, to ensure that the matter is not subsequently opened up again by the parties.

Care should also be taken in considering any warranties and indemnities that a contracting authority provides.

The OGC advises that ideally, collateral contract terms should be considered as early as possible, so that the contracting authority is

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2. Treatment of Assets

A contracting authority may want the option of having the assets provided under the main contract transferred back to it and, if so, payment for as much could be covered in the compensation payment detailed above.

3. Date of Payment

A longstop date for payment could be included.

4. Dispute Resolution

For ease going forward, a dispute resolution procedure could be included, addressing the costs of using the procedure, appointment of a third party adjudicator/mediator and any experts, and the confidentiality of the procedure.

clear on risk and its prospective contractors can factor them into their proposals. Indeed, a draft collateral contract could be included as part of a contracting authority's tender documentation.

Conclusion

Until such time as model drafting is published by OGC, this is an area that will lead to much discussion between contracting authorities and their contractors. Both contracting authorities and contractors should ensure that they limit their exposure to risk upon a Declaration being made as much as possible, and we at Devonshires will be more than happy to help on this front when it comes to drafting pre-agreed terms or collateral contracts as part of tender documentation.

The New Remedies Directive - Notification Requirements, Award Decision Notices & the Standstill Period

Introduction

The Remedies Directive introduces some important changes to the notification, award decision notice, and standstill period requirements under the Public Contracts Regulations 2006 (the “Procurement Regulations”). This article explores the key changes in this important area of the legislation.

The New Notification Requirements

The Remedies Directive introduces a new

obligation, a failure to comply with which will be a breach of the Procurement Regulations.

The Procurement Regulations do not prescribe what form the notification should be in, but written notification is obviously preferable. If following receipt of this notification a bidder submits a written request for the reasons why it was unsuccessful, the contracting authority must provide the bidder with such reasons within 15 days of the date of the request.

The Award Decision Notice

Regulation 29A into the Procurement Regulations. Under this Regulation, contracting authorities have an explicit obligation to notify an “applicant” that is excluded prior to the award decision stage of its exclusion from the procurement process. An “applicant” for this purpose is any bidder who submitted a Pre Qualification Questionnaire (PQQ) or a tender.

The effect of this new Regulation is that the contracting authority will have to notify a bidder if it is eliminated at the PQQ stage, or at any stage of a competitive dialogue procedure prior to the final tender stage. In practice, contracting authorities probably do this anyway, but the new provisions make it an express

Regulation 32 of the Procurement Regulations (which deals with the procedure on contract award) has been substantially amended by the Remedies Directive. Once the contracting authority has decided which bidder to award the contract to it must send the Award Decision Notice (“ADN”) to the bidders that submitted a tender (referred to as the “tenderers”) and the bidders that were unsuccessful at the PQQ stage (referred to as the “candidates”). The ADN must be sent “by the most rapid means of communication practicable”.

The ADN to the tenderers must include:

- The name of the successful tenderer;

- The contract award criteria;
- The score obtained by the successful tenderer;
- The score obtained by the recipient of the ADN;
- The reasons for the decision, including the characteristics and relative advantages of the successful tender; and
- Details of when the standstill period is expected to end and how the timing

of its ending may be affected by any contingencies.

The key thing to note about the requirements of the ADN is that the reasons for the decision, including the characteristics and relative advantages of the successful tender must be fully set out in the ADN. Prior to the implementation of the Remedies Directive, contracting authorities only had to provide this information to bidders that asked for it.

This could be quite an onerous requirement for contracting authorities to comply with,

“A failure to include the appropriate information in the ADN will render it defective for the purposes of the Procurement Regulations.”

of its ending may be affected by any contingencies.

The ADN to the candidates must include:

- The reasons why the candidate was unsuccessful;
- The name of the successful tenderer;
- The contract award criteria;
- The score obtained by the successful tenderer;
- The reasons for the decision, including the characteristics of the successful tender; and
- Details of when the standstill period is expected to end and how the timing

particularly where the contract being procured is a large scale Framework Agreement with numerous successful and unsuccessful bidders.

A failure to include the appropriate information in the ADN will render it defective for the purposes of the Procurement Regulations.

This is in turn could lead to an allegation from an unsuccessful bidder that the contracting authority has failed to implement a proper standstill period, as the standstill period cannot begin to run until proper ADNs have been issued to the bidders. If the contracting authority were to enter into the contract with the successful bidder in circumstances where it has not implemented a proper standstill period, an unsuccessful may have grounds for

bringing an “ineffectiveness” claim to get the contract set aside / cancelled. The grounds on which a bidder can bring an ineffectiveness claim are explained in more detail elsewhere in this Procurement Brief.

Regulation 32 makes it clear that there is no need to issue an ADN where:

- the contract can be awarded without prior publication of an OJEU Notice (eg a below threshold contract or one for Part B services);

Where the ADN is sent to all bidders by other means only, the standstill period ends on the first to occur of:

- midnight at the end of the 15th day after the sending date;
- midnight at the end of the 10th day after the date on which the last bidder received the AND

Where the last day of the standstill period is not a working day the standstill period must be extended to midnight at the end of the next working day.

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- there is only one tenderer and no candidates; or
- the contract is being awarded under a Framework Agreement or Dynamic Purchasing System.

The Standstill Period

Under Regulation 32A of the Procurement Regulations the contracting authority must not enter into the contract with the successful bidder before the end of the standstill period.

Where the Award Decision Notice is sent electronically or by fax to all bidders the standstill period ends at midnight at the end of the 10th day after the sending date.

Summary

There is little doubt that the changes introduced by the Remedies Directive can be viewed as “bidder friendly” changes in that they provide for greater transparency when it comes to providing unsuccessful bidders with details of why they have been unsuccessful, thus giving bidders greater opportunity for challenging the decision. The standstill period between notification of the award decision and entry into the contract has always been important, but the new rules make its significance even greater, not least because a failure to comply with the standstill requirements could put the contract at risk of being declared to be “ineffective” by the court.