



SUBSTANTIAL AMENDMENTS TO THE DE-BRIEF AND REMEDIES PROVISIONS OF THE PUBLIC CONTRACTS REGULATIONS 2006

Public Contracts Regulations 2006 Amended

The Public Contracts (Amendment) Regulations 2009¹ (the “Amendments”) came into force on the 20 December 2009 amending the current rules as contained in the Public Contracts Regulations 2006² (the “Regulations”). These amendments implement the EU Remedies Directive³.

Headline Points

- 1 There is a new remedy of ineffectiveness which is available where contracts are entered into without certain basic procedural steps having been taken – most importantly: failure to issue a contract notice and failure to abide by the standstill period.
- 2 The Alcatel de-brief process is now a one-step procedure with all information to be provided up front.
- 3 If a contract is challenged prior to signature the contract award process is suspended and so the contract must not be entered into until the suspension is lifted.

Which procurement processes will the amended rules apply to?

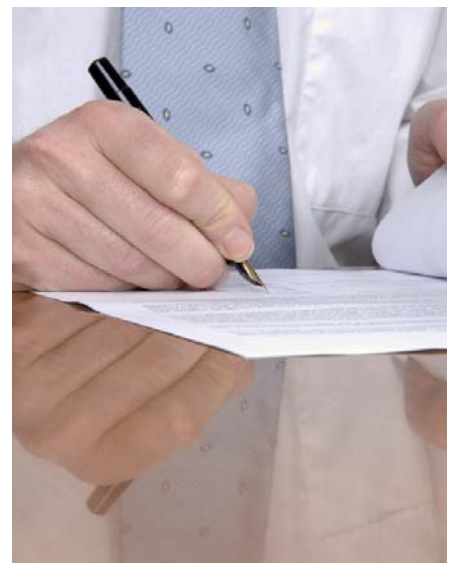
The Amendments do not affect any contract award process which was commenced before 20 December 2009. Processes will certainly be deemed to have been commenced if a contract notice has been published in the Official Journal although most other forms of public advertisement should also suffice.

Awards of specific contracts made under framework agreements or dynamic purchasing systems are not covered by the Amendments where the underlying framework agreement or dynamic purchasing system was established before 20 December 2009 or under a procedure that was commenced before that date.

The de-brief procedure

Prior to the Amendments contracting authorities were required to issue a notice (an “Alcatel Notice”)⁴, containing specified information, notifying those involved in the process of their intention to award the contract. The recipients of the Alcatel Notice

could then, within a limited time-frame, request further specified information in a process often referred to as an “*accelerated de-brief*”. This period of the process was generally termed the “*standstill*” period and the contracting authority was obliged to refrain from entering into the contract during this period. The purpose of this provision was to allow unsuccessful tenderers an opportunity to review the award process and, if they thought there were grounds, to challenge the process in court.



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

²The Public Contracts Regulations 2006 SI 2006 No. 5

³Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts

⁴Introduced following case C-81/98 Alcatel Austria v Bundesministerium für Wissenschaft und Verkehr

Under the Amendments there is still a standstill period which contracting authorities must respect before entering into the contract. However, under the Amendments the Alcatel Notice must now contain considerably more information – essentially everything that under the old process would have been provided in the initial notice and the accelerated de-brief together. It follows that requests for an accelerated de-brief are now a thing of the past – although an entity involved in the process may still revert to the contracting authority if it does not believe that it has received all the information it is entitled to in the Alcatel Notice.

It should be noted that the provisions for a normal de-brief remain⁵ and so allow an unsuccessful entity to request de-brief information more generally to the extent it has not already been provided with the information.

III Requirements for an Alcatel Notice after the Amendments

The Alcatel Notice needs to be in writing and sent by the most rapid means of communication possible. The Alcatel Notice must contain the following information:

- Notice of the decision to award the contract or conclude the framework agreement;
- The criteria for the award of the contract;
- The reasons for the decision including the *“characteristics and relative advantages of the successful tender”*;
- The scores obtained by the addressee and the winner(s) as well;
- The name of the winner(s);

⁵ Regulation 32(9)

- A precise statement of when the standstill period is expected to end and whether there are any factors that may have an impact on this, or alternatively the date before which the contracting authority will not enter into the contract; and
- It is also important to recall that Regulation 32(10) provides that the reasons given in the feedback must also include, where relevant, reasons as to why the economic operator did not meet the technical specifications.

III Tenderers, Candidates and Applicants

Tenderers are defined as those entities that submit an offer. The Amendments provide useful clarity on how to deal with those entities that did not submit an offer but nevertheless participated in the process. These entities are termed *“Candidates”* or *“Applicants”*. Candidates are those entities that applied to be selected to tender, to be selected to negotiate or to be party to a framework. If Candidates have not been excluded at a prior stage then they must be sent an Alcatel Notice with all the information set out above although, in

relation to the third point above, rather than being provided with the *“characteristics and relative advantages of the successful tender”* they must be provided only with the *“characteristics of the successful tender”*.

Prior to the award decision stage (by which point all entities remaining in the process will be *“Tenderers”* or *“Candidates”*) the Amendments refer to entities which are excluded as *“Applicants”*. Applicants can be excluded if they fail to satisfy the criteria for rejection of economic operators (i.e. as set out in Regulation 23), or if they do not meet the minimum standards of economic and financial standing or technical or professional ability that have been set. Applicants can also be excluded if they are not selected for the short-list for the second stage of the two stage process provided for in the restricted, negotiated and competitive dialogue procedures. Applicants must be informed of their exclusion and the reasons for it but need not be given the fuller information that Tenderers and Candidates must be given.



Duration of the standstill period

Where the Alcatel Notices are sent by fax or electronic means (e.g. e-mail) the standstill period is 10 calendar days from the date of sending and comes to an end at midnight at the end of the final day of the period. The first day of the standstill period is the day after the Alcatel Notice is sent. If notices are sent on different dates it is necessary to count from the date of the last notice to be sent out. If the last day of the period is not a working day then the standstill must be extended until midnight on the next working day. So, in most cases the standstill period will, in practice, be of the same duration as prior to the Amendments.

If the Alcatel Notices are not sent by fax or electronic means but rather by any other means then the standstill period is either 15 calendar days from the day after the date of sending or, if it is shorter, 10 calendar days from the day after the date on which the last of the notices that were required to be sent is received. Again, in both cases the period would expire at midnight at the end of the last day of the period.

Where some notices are sent out by fax or electronic means and some others are sent out by other means care needs to be taken as, essentially, the standstill period will be the longest possible period rather than the shortest.

Challenges to procurement processes

The most important change under the Amendments is the introduction of a new remedy of “ineffectiveness” which may be applied to contracts that have been entered into. This is a very significant change as, prior to the Amendments, concluded

contracts could generally not be set aside.

Another important innovation is that where a contract has not been entered into but court proceedings are initiated the contracting authority is prohibited from entering into the contract. The contract is suspended until the matter is resolved.

A small, but important change, is that there is now no requirement to notify the contracting authority of the intention to make a challenge before commencing court proceedings. To commence proceedings the economic operator must file the claim form and serve it on the contracting authority. If the economic operator is seeking a declaration of ineffectiveness or is alleging a breach of the standstill or suspension provisions and the contract in question still has time to run then a copy of the claim form must also be sent to each party to the existing contract.

Remedies where the contract has not been entered into

Remedies

Where the contract has not been entered into the remedies available remain as prior to the Amendments. The remedies available are therefore: an order setting aside the award decision and/or an order that the contracting authority amend documents, and an award of damages to an economic operator that has suffered loss.

Suspension of contract award

As noted above, if proceedings are started in relation to an award decision before the contract has been entered into then the contracting authority must not enter into the

contract. Award of the contract must remain suspended until the proceedings are determined at first instance, or discontinued, or the court makes an interim order to end the suspension. The court cannot order the lifting of the suspension before the end of the standstill period.

Time-limits – remedies other than ineffectiveness

Proceedings for any claim other than one for a declaration of ineffectiveness must be started “promptly” and in any event within three months of the breach in question. These time limits can be extended in contrast to those relating to ineffectiveness which cannot.

The Amendments contain new provisions that provide a lower threshold as to what may constitute “promptly”. It is clear that where the proceedings relate to a decision sent by the contracting authority to the economic operator in question “promptly” cannot now mean less than 10 calendar days from the date on which the decision is sent. 10 calendar days is the shortest possible period for the time-limit and would apply if the decision has been sent by fax or electronic means and also provides a summary of the reasons for the decision. A minimum period of 10 calendar days would also apply if the decision were published. However, if the decision is sent by other means (which includes post) and/or the summary of reasons for the decision is sent later then the minimum period may be longer. The effect of these new provisions is that applicants will have some certainty as to the meaning of “promptly” and therefore the speed at which they need to prepare for proceedings.

Remedies where the contract has been entered into

As noted the main change made by the Amendments is the introduction of the remedy of ineffectiveness. If one of the three grounds below are made out the court must make a declaration of ineffectiveness unless there are “*overriding reasons relating to a general interest*”. In relation to grounds 1 and 3 there are steps that a contracting authority can take to prevent the possibility of a declaration of ineffectiveness. Where the remedy of ineffectiveness is applied the court must also impose a fine. Where a declaration of ineffectiveness is not made for certain specified reasons the court must order that the duration of the contract be shortened and/or impose a fine.

Where the contract has been entered into it is also open to the court to award damages to compensate losses incurred by an economic operator. The time-limit for such damages claims is as set out above in relation to remedies other than ineffectiveness.

III Grounds for ineffectiveness

The three grounds on which a declaration of ineffectiveness may be based are as follows.

Ground 1: Award of a contract without publication of a contract notice where the Regulations require publication

If the contract in question should have been advertised in the Official Journal but was not then the court must apply the remedy of ineffectiveness. This provision helps deal with the problem of intentional illegal direct awards but could of course also apply where

no contract notice is issued by mistake.

If the contracting authority considers that the Regulations do not require publication of a contract notice it may publish what is termed a “*voluntary transparency notice*” in the Official Journal notifying its intention to enter the contract. The contracting authority must then wait for 10 calendar days from the day following the date of publication of the notice before entering the contract. The requirements for a voluntary transparency notice are set out in the Amendments⁶ and essentially require basic details of the contract award and the justification for not publishing a contract notice.

Ground 2: Breach of standstill or suspension provisions

The remedy of ineffectiveness may also be applied if there has been a breach of the standstill provisions or a breach of the provisions requiring suspension of the contract where proceedings have been started. This provision helps to ensure that the wider pre-contractual remedies are not compromised by contract award.

For this ground to bite there must also be a breach of the Regulations in relation to which the economic operator in question could not bring proceedings due to the breach of the standstill or suspension provisions. Further, the breach in question must have affected the chances of the economic operator obtaining the contract.

Ground 3: Framework agreements and dynamic purchasing systems

If the contract is awarded under a framework agreement or a dynamic

purchasing system and the contract exceeds the applicable financial threshold for works, services or goods as appropriate then certain breaches may cause the remedy of ineffectiveness to be imposed.

In relation to framework agreements this provision is triggered where there is a breach of the regulations relating to the award of a contract under a framework agreement with more than one economic operator where not all the terms of the proposed contract are laid down in the framework agreement itself and it is therefore necessary to re-open the competition⁷.

In relation to dynamic purchasing systems it is breaches of the provisions for award of a specific contract that could cause the remedy of ineffectiveness to apply⁸.

However, there is an exception to this ground. If the contracting authority believes that it has not breached the provisions relating to framework agreements or dynamic purchasing systems but wants to make sure that the remedy of ineffectiveness could not be applied it may choose to apply the standstill provisions. If the contracting authority complies with the standstill provisions and does not enter the contract until the expiry of the standstill period then this exception can be applied.

III Situations where despite one of the three grounds being made out ineffectiveness cannot be applied - “*overriding reasons relating to a general interest*”

⁶Regulation 47K (4) a voluntary transparency notice must include: (i) the name and contact details of the contracting authority, (ii) a description of the object of the contract, (iii) a justification for awarding the contract without publication of a contract notice, (iv) the name and contact details of the operator to be awarded the contract, and (v) any other information the contracting authority considers it useful to include. This notice must also be in the correct form as prescribed by Commission Regulation (EC) 1564/2005.

⁷The relevant provisions that may be breached are Regulation 19(7)(b), Regulation 19(8) and Regulation 19(9)

⁸The relevant provisions that may be breached are Regulation 20(11) to and including Regulation 20(14)

If a party to the proceedings raises reasons which the court is satisfied amount to “*overriding reasons relating to a general interest*” that “*require that the effects of the contract should be maintained*” then a declaration of ineffectiveness cannot be made. A possible example of such overriding reasons could, for example, be vital reasons of public health or security.

Economic interests may only be considered as “*overriding reasons relating to a general interest*” if there are exceptional circumstances such that applying the remedy of ineffectiveness could lead to disproportionate consequences. The Amendments make it clear that economic interests, such as the costs of delay or rerunning the procurement procedure, which are directly linked to the award of the contract cannot amount to “*overriding reasons relating to a general interest*”.

It should be noted that even if “*overriding reasons relating to a general interest*” are found to exist, and the contract cannot therefore be declared ineffective, the court must still shorten the duration of the contract and/or impose a fine as described below.

III Consequences of ineffectiveness

Prospective ineffectiveness

A declaration of ineffectiveness means that those obligations under the contract which have not been performed, as at the time of the declaration, cannot be performed. Ineffectiveness is therefore applied on a prospective rather than retrospective basis.

At the time of making the declaration of ineffectiveness, or afterwards, the court may also make orders to deal with the implications of ineffectiveness and consequential matters. Such matters may

include restitution and compensation between the parties to the contract and the proceedings to achieve a result that the court considers just. However, if the parties to the contract have made contractual provision, before the declaration of ineffectiveness is made, as to what would happen in the event that such a declaration were to be made then the court is under a general obligation to respect those provisions. The court will only be able to depart from the arrangements made between the parties if it considers that they are incompatible with the purpose and nature of the declaration of ineffectiveness.

It follows from the above that contracting authorities should consider including provisions dealing with the possibility of ineffectiveness (and also contract shortening as detailed below). Potential contractors also need to check what provisions will apply and may wish, if possible under the procedure being used, to suggest that suitable provisions are included. Even if it seems very unlikely that the remedy of ineffectiveness will be applicable because a contract notice will be issued and the standstill provisions will be respected it may nevertheless be prudent to include such provisions. This is because amendments made to the contract during its term that are sufficiently material may result in a new contract that itself should be subject to a procurement process and consequently failure to issue a new contract notice and abide by a standstill period could be used as grounds for ineffectiveness at a later stage.

Fines and shortening of the contract duration

If the court makes a declaration of ineffectiveness it must also order the contracting authority to pay a fine.

If the court does not make a declaration of ineffectiveness because: (a) although one of the grounds for ineffectiveness exists, there are “*overriding reasons relating to a general interest*”; or (b) the court finds a breach of the standstill or suspension provisions but no ground for ineffectiveness is raised or the court is not satisfied that one of the grounds applies; then the court must impose either a fine and/or shorten the duration of the contract.

The penalties that the court imposes must be “*effective, proportionate and dissuasive*”. The court must look at all the relevant factors but is specifically required to take into account the seriousness of the breach, the behaviour of the contracting authority and, if the contract still remains in force, the extent to which it does so.

In a similar manner to its powers in relation to dealing with the implications of ineffectiveness the court may when ordering the shortening of a contract, or afterwards, make additional orders to deal with the consequences of shortening the contract. As in relation to a declaration of ineffectiveness the court will generally be required to follow any prior contractual provisions made by the parties to deal with this eventuality.



III Time limits - ineffectiveness

Generally the time-limit for seeking a declaration of ineffectiveness is 6 months from the date of signature of the contract. However, this may be reduced to 30 calendar days if the contracting authority takes one of the two following courses of action.

- If the contract was awarded without prior publication of a contract notice (i.e. ground 1 may apply) but a contract award notice has been published in the Official Journal, which includes the justification for not issuing a contract notice, then the time-limit is shortened to 30 days running from the day after the date of publication of the notice.
- A period of 30 days is also applied where the economic operator seeking the declaration has been informed of the decision and also provided with a summary of the relevant reasons. The period of 30 days runs from the day after the date on which the economic operator was provided with this information.

contract under a framework agreement that has been declared ineffective to be dealt with separately. The application of these provisions runs alongside, although with slightly different results from, the provisions relating to ground 3 which apply where the framework agreement has not, or has not as yet, been declared ineffective.

Under these provisions if a framework agreement is found to be ineffective this does not mean that a specific contract which was entered into under that framework agreement, before the declaration of ineffectiveness in relation to the main agreement, is itself ineffective. For each specific contract to be declared ineffective a separate claim for a declaration must be made. The time-limits for bringing claims must be applied in relation to each specific contract.

Where a specific contract (made under a framework agreement which has been found to be ineffective) is found to be ineffective the consequences of that ineffectiveness will be as for any other contract, however, the

court will not be required to impose a fine. If a declaration of ineffectiveness is not made in relation to a specific contract (made under a framework agreement which has been found to be ineffective) because of “*overriding reasons relating to a general interest*” then the duration of that contract must be shortened by the court.

Note:

This practice note provides a summary of complex issues and should not be relied upon in relation to specific matters. You are advised to take legal advice in relation to particular issues and we would be happy to assist. If you have any questions about this practice note or a specific issue, please contact:

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A framework agreement is found to be ineffective – what happens to the specific contracts made under that agreement?

A framework agreement could be found to be ineffective under grounds 1 and 2 above. A specific contract may be found to be ineffective under ground 3 and could also possibly be attacked under ground 2 in certain circumstances. However, the issue remains as to what happens to a specific contract made under a framework agreement that has subsequently been found to be ineffective. The Amendments contain specific provisions that require each specific

