

FTB PUBLIC PROCUREMENT LAW UPDATE

NEW REMEDIES FOR UNSUCCESSFUL TENDERERS

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The Public Contracts (Amendment) Regulations 2009

1. The *Public Contracts (Amendment) Regulations 2009*, SI 2009/2992 (“the 2009 Regulations”) amend the *Public Contracts Regulations 2006*, SI 2006/5 (“the Regulations”). The 2009 Regulations give effect in English law to Directive 2007/66/EC, which amends Directives 89/665 and 92/13. The 2009 Regulations therefore implement what may be termed the ‘revised Remedies Directive’ on public contracts.
2. There were essentially three reasons underlying the revised Remedies Directive:
 - the law’s inadequate requirements for information on which aggrieved tenderers could decide to challenge award decisions;
 - the ECJ’s decision in *Alcatel*, Case C-81/98 [1999] ECR I-7671, requiring a standstill period between an award decision and the contract signature, so as to avoid a ‘race to signature’;
 - the need for effective remedies (i.e. beyond damages) against breaches of the public procurement rules.
3. Previously, the domestic arrangements meant that an unsuccessful tenderer had one of two remedies: an interim injunction seeking to halt the contract-making process (or require the tender to be re-run); or damages.

4. The revised Remedies Directive addresses the perceived difficulties with this position. It grapples with the practical reality that the most effective remedy is to ensure that the procurement process is done properly.

a. Information for Aggrieved Tenderers

5. New regs. 32(1) and (2) of the Regulations now require up-front reasons for the award decision. All tenderers which have participated in the bid must be given an ‘award decision notice’ containing the following information:
 - the award criteria
 - the successful tenderer’s name
 - when the standstill period is expected to end.
6. In addition, a tenderer which made an offer at the end of the procurement process must be told:
 - the reasons for the decision and why their bid was not preferred
 - the relative scores obtained by it and the successful bidder.
7. The sending of an ‘award decision notice’ begins the standstill period. But what if the notice is defective? Does the standstill period ever begin if a defective notice was sent?

b. Stopping the Race to Signature

8. Article 2a of the Directive now requires a standstill period of 10 or 15 days, depending on the means of communicating with tenderers. The UK Regulations already provided for a 10 day standstill period: see now, reg.32A.
9. Reg.47G(1) now bars an authority from concluding the contract with the successful tenderer where proceedings “in relation to the award of the contract” have been brought by a disappointed tenderer: the authority must “refrain from entering into the contract”.

10. Query: is it “unlawful” for the authority to press on with signing the contract notwithstanding that this is “suspended” by reg.47G(1)? Probably not: but not without “sanctions”. Even in the face of a clearly unmeritorious claim, the authority will have to consider its position carefully.
11. Unmeritorious challenges: see reg.47H. In effect, the bar on concluding the contract is akin to an interim injunction (albeit not a court order). If the authority wants the suspension lifted, it must apply to the Court and persuade it to do so. When deciding whether to lift the suspension, the Court must “consider whether...it would be appropriate to make an interim order” that the contract not be concluded. So the issue is to be approached in the same way as a party seeking to have an interim injunction lifted.

But note: the boot is now on the other foot.

12. Time Limits: reg.47D(2). Proceedings must be started “promptly and in any event within 3 months beginning with the date when the grounds for starting the proceedings first arose”. But see *Uniplex (UK) Ltd v. NHS Business Services Authority*, Case C-406/08. Court may extend time: reg.47D(4) (Cf. time limit for a declaration of ineffectiveness).
13. Starting the Claim: reg.47F(1). After filing the claim it must be served on the contracting authority. Generally must also serve it on each person who is a party to the contract in question.

c. (More) Effective Remedies

14. Regulations 47J – 47O provide for the new remedy of a Declaration of ineffectiveness against a concluded public contract.
15. Grounds for ineffectiveness. Reg.47K:

- (i) an “illegal direct award” – i.e. tender not published in OJ where this was required. Examples?
 - (ii) an authority’s disregard of the implications of the standstill period or a challenge to the award decision. But here, ineffectiveness not automatic;
 - (iii) breach of certain requirements in relation to contracts concluded under a dynamic purchasing system or framework agreement.
16. The normal time limit for seeking a Declaration of ineffectiveness is 6 months. In certain circumstances this can be shortened to 30 days, e.g. reg.47E(5) (notifying all participants in procurement process of contract award).
17. In addition, the awarding authority can publish a “voluntary transparency notice” stating its intention to enter into the contract directly : reg.47K(3), (4). After doing so, it must wait 10 days before signing the contract. Amounts to a notice to potential objectors – ‘bring it on’.
18. Where a ground for ineffectiveness is established, the Declaration is mandatory. But if the challenge is that the contract has been concluded in breach of the standstill rules (ground (ii) above), the matter is not straightforward. The Court must decide whether the authority has breached the rules; then in effect engage in a ‘loss of chance’ analysis: what effect has the authority’s breach had on the challenger’s chances of winning the contract. See reg. 47K(5).
17. The Court must refuse a Declaration of ineffectiveness if satisfied that “general interest grounds” apply: reg. 47L. But in that case, the authority is subject to additional penalties: reg. 47N(2)(a), (3) – contract shortening and/or a civil “penalty”.
18. Consequences of Ineffectiveness: Tricky. Regulation 47M
- Prospective, not retrospective ineffectiveness;
 - Restitution, etc between “parties to proceedings”, as Court considers just;
 - But Court cannot generally interfere with parties’ prior agreement about consequences if contract declared ineffective: Regulation 47M(6).

19. Query: whether the latter restriction, albeit subject to the overriding requirements of ineffectiveness, is compatible with the Directive? Cf. Article 2d(2); general principle on effective remedies?
20. Scope for ineffectiveness “relief” beyond the Regulations? Part B contracts? EU principle of effective remedies?
21. Time Limits for seeking ineffectiveness remedy. Reg. 47E: 6 months, but can be shortened to 30 days on authority’s initiative. Time limits cannot be extended.

Other Remedies

22. Continuing scope for Injunctive relief?
 - e.g. challenges to below threshold contracts (with cross-border effects) for breach of general principles of EU law (such as legitimate expectation, transparency etc); challenges to early stages of bid process.
23. In practice, even under the new Regulations, the law on interim injunctions will continue to apply. As to the law, see *National Commercial Bank Jamaica Ltd v. Olint Corp. Ltd* [2009] 1 WLR 1405, at paras 16-20.

“In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irreparable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irreparable prejudice to one party or the other”. [Para 17]

See: *Apcoa Parking (UK) Ltd v. Westminster CC* [2010] EWHC 943 (QB)
24. But the application of the law may have to be reviewed by reference to the need to ensure the full effectiveness of EU law.
25. Additional Penalties on contracting authorities: reg.47N. Implications of contract shortening for the “successful” tenderer?

Judicial Review of Tender & Award Decisions

26. The Regulations concern “economic operators”. For them, the Regulations will usually be a sufficient basis to challenge contract award decisions and processes. But judicial review may still be relevant to them. Clearly it is a potential remedy for those who are not economic operators.
27. Where local authority contracting decisions are subject to a special statutory regime, e.g. under the Local Government Act 1988, part II, judicial review is available: *First Real Estates (UK) Ltd v. Birmingham CC* [2009] EWHC 817 (Admin)
28. More generally, an historical ambivalence on availability of judicial review against contracting decisions, e.g. *R v. Lord Chancellor, ex parte Hibbit & Saunders* [1993] COD 326; and *Mass Energy Ltd v. Birmingham CC* [1994] Env L R 298.
29. Even recently, a mixed picture, e.g. *R (Cookson & Clegg) v. MOD* [2005] EWCA Civ 577 (public law not excluded entirely from the contract awarding process); *R (Menai Collect Ltd) v. Dept for Constitutional Affairs* [2006] EWHC 727 (Admin) (no relevant public law obligation in issue where decision is to place contract with one bidder rather than another).
30. See now *R (Chandler) v. Camden LBC* [2009] EWCA Civ 1011: failure to comply with the Regulations gives rise not only to a private law claim

“...The failure to comply with the regulations is an unlawful act, whether or not there is [an] economic operator who wishes to bring proceedings under reg 47, and thus a paradigm situation in which a public body should be subject to review by the court. We incline to the view that an individual who has a sufficient interest in compliance with the public procurement regime in the sense that he is affected in some identifiable way, but is not himself an economic operator who could pursue remedies under reg 47, can bring judicial review proceedings to prevent non-compliance with the regulations or the obligations derived from the Treaty, especially before any infringement takes place....” [para 77]
31. So judicial review appears to be open to everyone, subject to standing requirements being satisfied and, in the case of an economic operator, the usual alternative remedies arguments.



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32. Issues: legal certainty? What if the problem arises collaterally, some years later? Or the public authority decides, some years later, to repudiate the contract on the ground of a breach of the procurement rules?

Conclusion

33. The revised Remedies Directive certainly offers a more comprehensive remedial system for disappointed tenderers. However, it is clear that there are many unclear issues yet to be resolved in the case law. Among these, is the relevance of judicial review in challenging public authority procurement decisions.

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