



# Projects and Construction

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## Warning: the new Public Contracts (Amendment) Regulations 2009 could seriously damage your contract's health!

The Public Contracts (Amendment) Regulations 2009 (the Regulations) implement the EU Remedies Directive (2007/66/EC) and came into force on 20 December 2009. The Regulations apply to procurement procedures which have commenced on or after 20 December 2009 and increase the remedies available to aggrieved bidders for public works, services and supplies contracts.

### What has changed?

#### Requirements on de-selection of a bidder

The Regulations provide that a contracting authority should notify a bidder of its exclusion from a process at the selection stage prior to the contract award decision. In the event that the contracting authority does not provide such information at the time they are excluded (i.e. at the time of short-listing in the Restricted, Negotiated or Competitive Dialogue procedures), it will have to do so when it issues the Award Decision Notice.

#### Feedback requirements

The Regulations now "front-load" the feedback requirement and place additional requirements on the content of the Award Decision Notices (also known as "Alcatel" notices) which must be issued by the contracting authority to all bidders when the successful contractor has been selected.

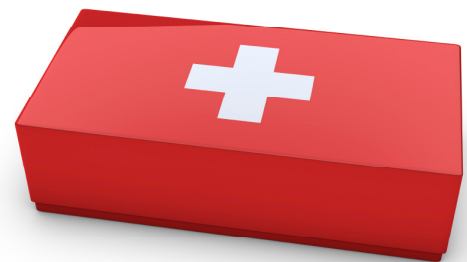
The Award Decision Notice must include enhanced information about the evaluation process and its results, including details of "the characteristics and relative advantages of the successful tender". Failure to include sufficient information in the Notices is likely to be viewed as a substantive breach under the second ground for ineffectiveness (see below) and therefore it is essential that these Notices are completed correctly.

#### Time-scales for the standstill period

The Regulations impose a mandatory standstill period of 10 calendar days (if the Award Decision Notice is sent by email or facsimile), rising to 15 calendar days if another method is used. The period runs from the date the award decision is communicated to all bidders. During this standstill period the contracting authority is not permitted to conclude the contract or framework agreement.

#### Challenging an award

Whereas previously an aggrieved bidder was obliged to issue a letter before action, effectively fore-warning the contracting authority of its intention to challenge, the Regulations scrap that procedure. Now, the issue of a claim form and service on the contracting authority automatically suspends the procurement and stipulates that the contracting authority must not conclude the contract. The burden has been placed on the contracting authority, who must apply to the court for an order to lift the suspension (this can only be granted after the standstill period has expired).



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#### Remedies

The Regulations include the new remedy of 'ineffectiveness', and associated penalties (previously, the only remedy available where the

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contract had been concluded was damages). Otherwise, the remedies available where the contract has not been concluded have not altered. The court can set aside the award decision, order the amendment of documents and may award damages to the aggrieved bidder.

A declaration of ineffectiveness applies from the date of the declaration and causes all future obligations under the contract to fall away. It is not retrospectively applied. There are three grounds for obtaining a declaration:

- The contract has been awarded without prior publication of an OJEU Notice (where this is required);
- Breach of the standstill period or court order suspending the award process, plus a pre-existing substantive breach; or
- Contracts have been called off under a framework agreement in breach of the call-off procedures set out in Regulation 19.

The Court may not make a declaration of ineffectiveness where the remedy is not applied for or where there are overriding reasons, relating to the "general interest", in maintaining the contract. What constitutes the "general interest" will depend on the subject-matter of the contract, but is likely to be interpreted narrowly and reasons linked directly to the contract itself (such as the costs of re-procurement or any compensation to be paid) cannot be overriding reasons.

## Additional remedies

The Regulations provide that the Court must impose a civil financial penalty (payable to HM Treasury) on the contracting authority whenever it makes a declaration of ineffectiveness. This fine must be 'effective, proportionate and dissuasive'.

Where a framework agreement is declared ineffective it is not possible to call-off further contracts under that framework. Any contracts which have already been

called-off and entered into before the declaration of ineffectiveness will, however, remain effective unless a declaration is applied for and granted in respect of each such contract.

Where the court does not make a declaration of ineffectiveness, either because one was not applied for, or the general interest exception applies, the court must either impose a civil financial penalty and/or shorten the duration of the contract. The court may also award damages to the aggrieved bidder.

## Conclusion

There remains a number of uncertainties in the drafting of the Regulations, (e.g. timings for ineffectiveness, exact contents of notification of exclusion and the amount of information required effectively to disclose the "characteristics and relative advantages" of a winning tender in an Award Decision Notice) which will need to be clarified in due course. Pending further clarification, possibly via case law, contracting authorities in particular need to be aware of the additional requirements and the increased risks of non-compliance.

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