

The Engineering & Construction Risk Institute: The Remedies Directive: risks and opportunities

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2 June 2010



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The Remedies Directive: background

- Directive 2007/66/EC
- Formally adopted on 15 November 2007
- Date by which Member States should have implemented the Directive: 20 December 2009
- Applies to new procurements under:
 - Directive 2004/17/EC: utilities operating in the water, energy, transport and postal services sectors
 - Directive 2004/18/EC - public works contracts, public supply contracts and public service contracts
- New remedies extend to signatories of the WTO Government Procurement Agreement



The Remedies Directive – key provisions

- Standstill minimum 10 days
 - 15 days (decision not notified by fax or electronically)
- Suspension of contract award
- Infringement of standstill/suspension or illegal awards
 - Contract ‘rendered ineffective’ – discretion left to Member States as to whether this is retrospective or prospective cancellation of the contract
 - Query call-offs under a framework agreement
- Unless ‘overriding reasons in general interest’
- Alternative sanctions: fines/contract shortening eg to allow time for a compliant tender procedure to be followed
- Damages



The Remedies Directive: Declaration of ineffectiveness

- Critical feature of the Remedies Directive giving rise to new risks and opportunities for
 - bidders in public sector or utility procurements; and
 - existing contracting parties where material amendments are proposed which require a fresh procurement

is that for the first time (in the majority of jurisdictions) there will be a remedy other than damages once a contract has been concluded

- Courts are required to make a **declaration of ineffectiveness** where these contracts (or extensions to existing contracts) have been awarded in breach of certain fundamental EU public procurement rules



The Remedies Directive – when will a declaration of ineffectiveness be made?

- Cancellation/ineffectiveness will be ordered where:
 - Contract awarded without prior publication of a contract notice
 - Contract awarded:
 - in breach of the mandatory standstill; or
 - following the start of proceedings to challenge the purchaser's award decision
 - Contract is entered into under a framework agreement or dynamic purchasing system in breach of such arrangements
- Where a court has made a declaration of ineffectiveness, the Court **must** also impose a financial penalty



The Remedies Directive –removing the risk of ineffectiveness: publication and standstill

- Ineffectiveness is not available as a remedy if the purchaser
 - In case of use of negotiated procedure without notice:
 - Considers an award without contract notice is permitted and
 - Publishes a voluntary ‘transparency’ notice and
 - Does not enter into the contract prior to expiry of the 10 day standstill (counting from the ‘transparency notice’)
 - In case of call-off in breach of framework/dynamic purchasing system:
 - Publishes voluntary notice of decision to award call-off
 - Does not enter into call-off prior to expiry of 10 day standstill period



The Remedies Directive – reducing the risk of ineffectiveness – shortening risk period and controlling consequences

- Time limit for a challenge for ineffectiveness reduced from 6 months to 30 days if:
 - Contract award notice – published within 48 days
 - Bidders informed of the award
- Consequences of termination – may be agreed up front
 - Opportunities to mitigate effects



Remedies Directive: Winners & Losers?

Winners: The Unsuccessful Bidder?

- The challenge process:
 - greater transparency earlier in the challenge process
 - submission of an application for review results in immediate suspension precluding the conclusion of the contract. No longer for bidder to injunct
 - time limits for challenge clarified: ECJ decision in Uniplex (UK) Ltd v NHS Business Services Authority (C-406/08)
- Range of available remedies – negotiation leverage?
- Prospect of rendering a contract ineffective – commercial driver to challenge where the alternative is lock out from valuable or long term contract?



Remedies Directive: Winners & Losers? [Opportunities & risks?]

Losers :The successful bidder or existing incumbent?

- New and existing contracts which are materially amended and/or extended are vulnerable
- Potential risk for up to 6 months following conclusion of a contract or amendment/extension to an existing contract
- Commercial difficulties with third parties:
 - funders: will they fund during challenge period?
 - subcontractors and/or suppliers: will look for full compensation if orders are cancelled



Remedies Directive: Winners & Losers? [Opportunities & risks?]

Losers: The successful bidder or existing incumbent?

▪ Risk assessment:

- delay to the contract whilst challenge in process –will purchaser suspend pending outcome?
- the risk of ineffectiveness for extensions or amendments to existing contracts judged by a court to be material despite bona fide belief based on legal advice of immateriality
- advisability of seeking to establish an audit trail with the contracting authority on the award of new contracts
- generally refusal by purchasers to offer indemnity or legal opinion as to full compliance with procurement rules. Full due diligence is impossible due to confidential nature of the process



Remedies Directive: Winners & Losers? [Opportunities & risks?]

Losers: The successful bidder or existing incumbent?

- Mitigation measures
 - press for indemnity from the purchaser?
 - provision for loss in the event of ineffectiveness: pre-agreed damages v gamble as to potential court award?
 - should the mechanism for recovery of loss appear in the principal contract or a collateral agreement?



Remedies Directive: Implementations in Spain

- Draft implementation act recently submitted to Parliament in Spain
- Implementation process under close scrutiny of EU Commission
- Two objections of European Court of Justice in its decision of 3rd April 2008.
 - Absence of mandatory term to notify award
 - Absence of independent body to resolve
- Absence of effective mandatory notification term.
 - Prior dual stage award process: provisional and definitive
 - Perfection of contract through definitive award: ability to commence execution.
 - Change in perfection rule: now formalisation of contract.



Remedies Directive: Implementations in Spain

- Absence of independent body to resolve
 - Two possible options: judicial or administrative
 - Option to create a special body: central Administrative Tribunal of Contractual Remedies
 - Justification: current work loads of courts
 - Highly criticised option due to:
 - Model in which it is inspired
 - Allocation to Ministry of Economy
 - Current budgetary constraints
 - The effectiveness of supplementary sanctioning system
 - Simplification of decentralised system: one type of body vs. several



Remedies Directive: Implementations in Spain

- Impact of decentralised government structure
 - Regional governments to create own independent bodies
 - Local governments subject to a separate provincial body



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