



Remedies Directive A wake-up call

5 March 2010

Simon McCann, Partner

www.morgan-cole.com

delivering high quality legal services from offices in wales and southern england



Remedies Directive - what is it?

- EU public procurement law - part of Single Market rules
- Aim - level playing field to suppliers from all EU nations
- Main tool - “transparency”
- Means both open tendering **and** open remedy process when things go wrong
- New rules:
 - more rights to information for bidders
 - stronger rights to challenge awards and tougher penalties



Remedies Directive - what is it?

- EU concerned about perceived lack of transparency and “direct awards” - i.e. those where no OJEU advert or inadequate post-award information
- EU also specifically concerned about UK lack of procurement litigation - sees this as a measure of transparency
- This is a measure **designed** to encourage more litigation
- UK Regs. - the Public Contracts (Amendment) Regs. 2009 (No.2992). Laid before Parliament - in force **20 Dec 2009**



Why should we be bothered?

- As bidders for public contracts
 - you have more rights to feedback - valuable
 - you have stronger rights to challenge
- As winners of public contracts
 - you could have the contract taken away if another bidder successfully challenges
- As advisers to public authorities
 - you could be negligent if you do not warn of a procurement defect/risk



What are the main risks?

- Public clients will be penalised in particular for not issuing OJEU advert when should have done and not issuing proper post-tender information/following proper “standstill” period
- Penalties include **mandatory** ineffectiveness of contract and fines (with limited exceptions) plus **discretionary** damages
- Also risk of damages to innocent third party who loses an awarded contract



What are the main risks? (cont.)

- Failing to spot a contract which should be advertised in OJEU
- Failing to allow proper standstill period/lack of proper debrief info
- If contract set aside by Court - wasted costs, costs of re-tender, damages paid to third parties - could all come back on authority (and thus the adviser/project manager)
- Banks may ask for confirmation that tender process has been duly complied with in PFI/PPP cases
- Remember, the EU's aim is expressly and unashamedly to "get" transgressors and there will be pressure for early scalps



The detail - what do the new Regs. do?

- Enhanced rights of bidders to receive notice/reasons for decisions
- “Standstill” period reinforced
- Remedies - ineffectiveness, fines, damages, compensation to third parties
- Application - applies to all new tender processes started after 20 Dec 2009. Does **not** apply to processes underway before 20 Dec 2009, or to frameworks (or call-offs under them) where set up before 20 Dec 2009



Enhanced notice requirements (Reg 32)

- Before awarding a contract (to which Regs. apply) **must** give an “award decision notice” - by **most rapid means possible** - to all tenderers and candidates
- Notice must contain:
 - the award criteria used (including all sub-criteria and weightings)
 - reasons for the decision, including characteristics and relative advantages of winning bid
 - reasons for any decision that technical specification not met
 - scores of winner and recipient (fully broken down)
 - identity of winner
- NB. critical to get it right - failure to give reasons can extend time period for challenge (see later)



Standstill period (Reg. 32A)

- Familiar concept - now with extra teeth
- Where Reg. 32(1) (award decision notice) applies, can't conclude contract until after midnight at end of tenth day after the date of sending
- 15 days if use non-electronic means, so **don't**
- If period ends on a non-working day, must extend to midnight at end of next working day
- Breaching it carries serious penalties (see later)



Remedies - Reg. 47 - who can sue?

- 47A - duty owed to economic operators to comply with Regs. (save for minor reporting obligations). Therefore breach = breach of statutory duty
- 47C - actionable in the High Court by an economic operator which in consequence of the breach suffers, or risks suffering, damage.
- NB. not necessarily limited to participants in tender process - non-participant who feels unfairly discriminated against could also sue



Who can sue? (cont.)

- EU Commission itself cannot sue, but can investigate (and they do encourage reporting by bidders of complaints) and bring infraction proceedings against UK if sufficiently serious



Time limits

- 47D - proceedings must be brought:
 - promptly; and in any event
 - within 3 months of when the cause of action arose
- Note language - “arose”. However, ECJ has taken approach that time runs from when claimant knew/ought to have known
- Court has discretion to extend time (and has done where claimant could not have been aware of breach earlier)
- **But** - NB. discretion to extend does not apply to claims for ineffectiveness



Time limits - Ineffectiveness

- Contract can be made ineffective for up to **6 months** after entered into
- Time can be cut to 30 days:
 - by giving notice of conclusion of contract and reasons to all bidders
 - by publishing award notice in OJEU
- Voluntarily issuing conclusion or award notice cuts down the “at risk” period from 6 months to 30 days
- All other cases - note you are at risk for 6 months, even after contract signed and being performed



Contract suspension (47G and H)

- If proceedings served and contract **not** entered into, authority must not enter into contract until order of Court - authority must apply to release from suspension
- Court has wide power to make interim orders, e.g. :
 - end, restore or continue suspension
 - suspend implementation of any other decision or action
 - require undertakings or conditions
- On final hearing, Court can order setting aside of decision, order amendment of any document, and/or award damages



Ineffectiveness (47J)

- Where contract **has** already been entered into, then:
 - **if** there has been a breach of the 47A duty; **and**
 - **if** a ground for ineffectiveness exists
- **then** Court **must**:
 - declare contract ineffective (unless limited relief in 47L applies); **and**
 - impose penalty
- The Court **may** also award damages



Grounds for ineffectiveness

- 1st ground - no publication of OJEU advert **unless**:
 - authority considered was not required; **and**
 - placed a voluntary “transparency notice” notifying of award decision in OJEU; **and**
 - allowed 10-day “standstill period”
- 2nd ground - contract entered into in breach of “standstill” period or any suspension period **and**
 - has been breach of a provision of Regs. other than Reg. 32; **and**
 - failure to allow “standstill” deprived economic operator of the chance of commencing proceedings before contract entered into: **and**
 - breach has affected economic operator’s chances of winning



Ineffectiveness - grounds (cont.)

- 3rd ground - frameworks
 - authority did not comply with mini-competition requirements
- unless:
 - authority considered it had complied; and
 - award decision notice served on all participants in accordance with Reg. 32; and
 - authority observed a 10-day standstill period
- Therefore is wise to serve award decision notice and allow standstill in all cases. Even if not required



Relief from ineffectiveness

- Court has very limited discretion
- May decline to order contract ineffective if:
 - authority or another party to the proceedings (e.g. contractor) objects; **and**
 - exceptionally, there is an over-riding reason in the general interest (e.g. urgent public health engineering works)
- The Court may only deem it “exceptional” where ineffectiveness would lead to disproportionate consequences (not including economic)
- Court can still shorten contract/fine/award damages
- NB. previous cases - authority can't rely on urgency caused by its own delays



Consequences of ineffectiveness

- Prospective, not retrospective. Therefore obligations not yet performed cannot be performed
- Court can provide for restitution and compensation to contractor who loses out
- Court cannot do so if parties have addressed the matter in the contract - therefore authorities may have to limit liability for these costs
- Frameworks - where call-offs have been awarded, Court can also hold them ineffective if framework held ineffective, provided time limits have not expired in respect of individual call-off contracts



Mitigation measures

- Use OJEU advert and observe notice/standstill requirements unless clear beyond any doubt that they don't apply
- With high-value contracts - consider building in 6-month delayed start (like 3-month judicial review period in PFIs)
- Limit liability and provide for consequences of ineffectiveness



Mitigation measures (cont.)

- Even if think not needed - place voluntary “transparency notice” and observe standstill period - ineffectiveness cannot then be ordered
- Notice of conclusion of contract reduces challenge period for ineffectiveness from 6 months to 30 days
- Frameworks - observe notice/standstill provisions for call-offs - may give defence against ineffectiveness



Remedies Directive A wake-up call

22 March 2010

Simon McCann, Partner

www.morgan-cole.com

delivering high quality legal services from offices in wales and southern england