

## Legal Updates & News

### Bulletins

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## UK Public Procurement Law Digest: Remedies Directive

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by [Alistair Maughan](#), [Masayuki Negishi](#)

### UK prepares for implementation of the New Remedies Directive

**UK central and local government bodies need to be ready for the increased scrutiny to which their internal processes and procedures will be subjected under the new public procurement remedies regime, which is due to be implemented in the UK by 20 December 2009. The Office of Government Commerce has just published details of the proposed changes to the remedies regime.**

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#### 1. What is the development?

In December 2007, the EU issued a new directive designed to improve the effectiveness of review procedures concerning the award of public contracts (the “**New Remedies Directive**”).<sup>[1]</sup> The New Remedies Directive, which amends the existing public procurement remedies regime, needs to be implemented in EU member states by 20 December 2009.

In the UK, the New Remedies Directive will be implemented by way of amendments to Public Contracts Regulations 2006 (“**PCR**”) and Utilities Contracts Regulations 2006 (“**UCR**”), the two regulations that implement the controlling EU directives in the UK.

On 30 April 2009, the UK’s Office of Government Commerce (“**OGC**”) which oversees, among other things, the procurement activities by public bodies in the UK and the implementation of public procurement law, published details of the draft amendments that it proposes to make to PCR and UCR; it also invited comments from interested parties.

#### 2. Why is this development important?

The implementation of the New Remedies Directive will result in a comprehensive overhaul of the existing remedies regime set out in the PCR (and also the regime for utilities set out in the UCR, but there is little difference between the two regimes). Some of these changes will have a profound consequence for the bidders and the contracting authorities alike. Contracting authorities in particular need to ensure that their internal processes and procedures are ready for the increased scrutiny to which they will be subjected under the new regime.

Most importantly, once the proposed regulations are implemented in the UK:

- a. a public body will no longer be able to assume that the courts in the UK are limited to awarding damages in respect of an improperly concluded contract;
- b. the set-aside of contracts will become mandatory in certain prescribed instances of impropriety;
- c. public bodies will face the prospect of being fined for breach of the procurement rules, or having the terms of an improperly awarded contract shortened; and
- d. a contracting authority will be compelled to suspend its procurement process where an aggrieved bidder challenges the contracting authority's decision.

These are welcome changes for the bidders on public contracts; but bidders should note that, despite the extensive powers granted to the courts under the new remedies regime, bidders will still likely be required to act efficiently and expeditiously within a very tight time limit, if they wish to apply for the more draconian remedies to be granted to the courts under the new regime.

### 3. What are the changes introduced by this development?

Among other things, the New Remedies Directive amends the existing European directive, which currently governs remedies in public procurement (other than in a utilities context). The New Remedies Directive changes the way in which aggrieved bidders may challenge a contracting authority's decision, and the ultimate redress that aggrieved bidders may seek from the courts, in a number of important ways.

#### 3.1 Current remedies regime

Under Regulation 32 of PCR, once a contracting authority has decided to whom it intends to award a contract or framework agreement, it must notify all of the bidders (including the unsuccessful ones) of its decision using "*the most rapid means of communication practicable*", and then allow at least 10 days to elapse before it actually concludes the contract or framework agreement.

The purpose of this 10-day standstill period is to allow the aggrieved bidder(s) to challenge the contracting authority's decision to not award the contract or framework agreement to him or her. However, the 10-day standstill period does not apply to all contract awards, and notably, it does not apply to award of specific contracts under a framework agreement, nor does it apply to award of contracts that relate to procurement of services that are not fully covered by the Public Contracts Directives (e.g., the so-called "Part B" services under PCR).

Once it is informed of the contracting authority's decision, an aggrieved bidder is entitled to request in writing an explanation for the decision from the contracting authority, and the contracting authority must respond to such request within 15 days of the receipt of request, unless such request was received by midnight at the end of the second working day of the 10-day standstill period, in which case the contracting authority must respond at least three working days before the end of the 10-day standstill period; and if it cannot do so, the 10-day standstill period must be extended to allow for the delay.

After it has received the explanation from the contracting authority, if it is dissatisfied with the explanation, an aggrieved bidder may challenge the contracting authority's decision in the High Court under Regulation 47 of PCR, on the ground that the contracting authority breached its statutory duty to comply with the provisions of PCR. However, in most cases, such challenge will need to be launched within three months from the date when the grounds for challenge first arose, and crucially, "*the Court does not have power to order any remedy other than an award of damages... if the contract in relation to which the breach occurred has been entered into.*"

Under certain circumstances, particularly in respect of framework agreements, a court may still take the view that it is entitled to grant to an aggrieved bidder a remedy that goes beyond the award of mere damages, including the setting aside of an already-awarded framework agreement.<sup>[2]</sup> but generally speaking, under the existing remedies regime, an aggrieved bidder has very little time within which to prepare and mount a legal challenge, and if it does not act promptly, it cannot expect to receive any meaningful remedy.

#### 3.2 The remedies regime under the New Remedies Directive – mandatory changes

The changes to be introduced by the New Remedies Directive consist of two types of changes; namely, the compulsory changes that must be implemented by all EU member states, and the discretionary changes that may or may not be implemented by EU member states. The key mandatory changes that will affect the existing remedies regime in the UK are as follows:

3.2.1 Under the new regime, where a legal challenge is brought by an aggrieved bidder (whether an application for an interim injunction or a full review of the contracting authority's decision), a contracting authority can no longer conclude a contract with the successful bidder until the relevant court proceedings are concluded.

3.2.2 The standstill period, which is an EU-wide mandatory obligation under the new regime, is already a part of the current remedies regime in the UK. However, under the new regime:

(a) a contracting authority will be required to give "a precise statement of the exact standstill period applicable" when it notifies the bidders of its decision; and

(b) the minimum standstill period<sup>[3]</sup> could be either 10 days or 15 days, depending on the method of communication the contracting authority uses to notify the bidders of its final decision (10 days if fax or email is used, and 15 days if other means of communication, e.g. postal mail, is used). This means that a contracting authority in the UK will have the option to use a less expeditious method of communication at the expense of having a longer standstill period.

3.2.3 The new regime extends the powers of the courts to set aside a flawed decision made by a contracting authority. Crucially, under the new regime, the courts *must* set a contract aside where:

(a) the contract was awarded without the contracting authority publishing a contract notice, in spite of a requirement to do so; and

(b) the contracting authority: (i) commits a breach of the procedural rules set out in the Public Contracts Directive, which breach deprives the aggrieved bidder of its chances of success; and (ii) the contracting authority fails to comply with procedural requirements of the new regime (e.g., standstill period, prohibition on conclusion of contract before the determination of outcome of a legal challenge), which failure deprives the aggrieved bidder of the chance to pursue pre-contractual remedies.

### 3.3 The remedies regime under the New Remedies Directive – discretionary changes

In light of the responses it received to the first round of public consultation, the OGC decided not to implement a number of the optional changes set out in the New Remedies Directive. For example, the OGC decided not to implement the option to require aggrieved bidders to ask the contracting authority to review its decision before initiating a formal legal challenge. Therefore, not all of the potential changes set out in the New Remedies Directive will be implemented in the UK.

The optional changes that the OGC has decided to implement and that will affect existing remedies regime in the UK are as follows:

3.3.1 The option to derogate from the mandatory standstill period where: (i) no prior publication of contract notice is required under the Public Contracts Directive Public Contracts Directives (e.g., the "Part B" services under PCR); (ii) the bidder who wins the contract was the only bidder; and (iii) specific contracts that exceed the prescribed threshold value are called off under a framework agreement or a dynamic purchasing system. The OGC's decision to implement this optional derogation means that the aforementioned mandatory set-aside by the courts of flawed decisions (see paragraph 3.2.3 above) will also apply to the call-off of specific contracts under a framework agreement or a dynamic purchasing system.

3.3.2 In situations where the courts are empowered to set aside a contract, two options were available: either a retrospective cancellation (i.e., annulment of *all* contractual obligations), or a prospective cancellation (i.e., annulment of future, unperformed contractual obligations only). The OGC decided *against* retrospective cancellation,<sup>[4]</sup> and has instead opted to implement the option for prospective cancellation only, which will have to be accompanied by the alternative penalties described at paragraph 3.3.4 below.

3.3.3 The option to grant the courts discretion not to set aside an illegally awarded contract, even in circumstances where the courts would otherwise be obliged to set it aside (see paragraph 3.2.3 above), if “*overriding reasons relating to a general interest require that the effects of the contract should be maintained*”. Any courts that exercise this discretion must also apply the alternative penalties described at paragraph 3.3.4 below.

3.3.4 In addition to the power to set aside a contract, the new regime will provide for the option to enable courts to impose alternative penalties, namely “*the imposition of fines on the contracting authority*” and “*the shortening of the duration of the contract*”, where the contracting authority fails to comply with procedural requirements of the new regime (e.g., standstill period, prohibition on conclusion of contract before the determination of outcome of a legal challenge). OGC decided that mere breaches of procedural rules do not warrant the draconian penalty of contract cancellation and only the alternative penalties of fines and/or contract shortening may be considered in such situations.<sup>[5]</sup> Here, it is to be noted that:

- (a) these alternative penalties must be imposed where the Courts exercise the discretion to not set aside a contract even where it could be set aside (see paragraph 3.3.3 above);
- (b) a fine to be imposed as an alternative penalty will have to be imposed in addition to any damages the courts may award to an aggrieved bidder, and cannot be substituted with an award of damages; and
- (c) a fine has to be imposed as an alternative penalty *in addition to* prospective cancellation of contracts (see paragraph 3.3.2 above).

3.3.5 The option to impose a time limit on the making of the relevant application, where an aggrieved bidder seeks the mandatory set-aside of contract (see paragraph 3.2.3 above).<sup>[6]</sup> OGC decided to impose the minimum time limit prescribed by the New Remedies Directive, which is:

- (a) 30 days following the publication of contract award notice;
- (b) 30 days after the contracting authority notified the bidders of its final decision; or
- (c) six months following the conclusion of the contract in question, where the contracting authority failed to publicise the award of contract or otherwise failed to notify the relevant bidders.

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## Footnotes

[1] Directive 2007/66/EC of 11 December 2007.

[2] For further discussion on this point, see [Sourcing Update, January 15, 2009](#)

[3] In implementing the mandatory standstill period, the OGC had the option to extend the minimum standstill period prescribed by the New Remedies Directive, but the OGC concluded that the minimum standstill period did not have to be extended because such extension “*could detrimentally affect large numbers of straightforward procurements*”.

[4] It is to be noted that none of the respondents to the OGC’s first round of public consultation supported the option for retrospective cancellation. Whether or not any of the other EU member states opts for this rather draconian option remains to be seen.

[5] Interestingly, this decision by the OGC is made in spite of the majority of the respondents to the OGC’s first round of public consultation that preferred to give the courts discretion to decide the appropriate penalty to be imposed in cases of breaches of procedural rules under the new regime.

[6] Where an aggrieved bidder does not seek the mandatory set-aside of contract, the member states are free to impose a time limit on the making of the application as they see fit, provided that it is at least 10 or 15 days long

(see 3.2.2(b) above). The OGC has not specifically dealt with this aspect of the New Remedies Directive, and therefore, the current position in the UK whereby an aggrieved bidder is required to make an application to the courts "*promptly and in any event within 3 months*" is basically going to remain the same, although it is worth noting that the draft regulations proposed by the OGC makes it clear that applications in such circumstances (i.e., where the bidder does not seek the set-aside of contract) need not be made within the 10- or 15-day period.

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