MANAGEMENT BOARD

The new Remedies Directive and the House of Commons

Note by the Commercial Services Directorate and the Legal Services Office

Purpose

This note sets out the issues raised by the new Remedies Directive in respect of procurement activities carried out by the House of Commons.

Action required

2. No action is required: this note is for information. The Board and RMG will wish to note that the Commercial Services Directorate have put into effect the approach suggested in paragraph 17. It is vital that all procurements with a value of £25,000 or more are discussed with CSD before the procurement begins in order to keep the risk of successful challenge to a minimum.

Background to the remedies rules

3. The reason for the new procurement remedies was a determination by the European Commission to afford economic operators greater opportunities to challenge contracts before they were awarded and also to challenge contracts that had already been awarded but which significantly breached the existing procurement rules.

4. On 20 December 2009, the new Remedies Directive was implemented into UK law by the Public Contracts (Amendment) Regulations SI 2009 No 2992 (the amending regulations) which amend the existing Public Contracts Regulations SI 2006 No. 5 (the regulations). The amendments do not apply to award procedures which were commenced before 20 December 2009 in which case the "old regime" will continue to apply.

5. It is not the purpose of this document to give a detailed overview of the changes introduced by the amending regulations. Instead it will focus on the key changes that will increase the potential for challenges to be made by unsuccessful tenderers.

"Automatic Injunction"

Pre 20 December 2009

6. For procurements started **before** 20 December 2009, contractors who wish to hold up contract award have to apply to the court for an injunctive order usually as an emergency measure during the standstill period. This includes satisfying the court that the principles set out below are satisfied:

- there is a serious issue to be tried
- damages are an inadequate remedy; and
- the "balance of convenience" favours holding up the procurement.

However, if the contract had been awarded, other than in exceptional circumstances such as where fraud could be proved, the contract could not be set aside. The only remedy available to the court was to award damages.

Post 20 December 2009

7. The new rules apply to procurements begun on or after 20 December 2009. Under Regulation 47G (1) of the amending regulations, if the contract **has not been entered into** and the claimant serves a claim form on the contracting authority (i.e. starts court proceedings), the contracting authority **must not enter into the contract**. This is referred to informally as the"automatic injunction" and, although it does not arise by order of the court, it can truly be said to be **automatic as it has immediate effect**. The contract award is suspended until the court orders otherwise or the proceedings (including any rights of appeal) come to an end.

8. Contracting authorities may find that their procurement grinds to a halt, with very little, if any notice. Starting a court application is expensive and is unlikely to be made unless the claimant believes there to be good grounds. However, legal advice will be sought from the Legal Services Office whenever a claim is served on the House and we will consider whether to seek an order to secure costs when the claim is thought to lack merit. The new OGC guidance on the amending regulations issued on 15 December 2009 warns authorities against rushing to sign a contract when it knows that service of a claim is imminent. This advice complies with the common law duty not to thwart potential litigation.

Ineffectiveness

9. This new remedy causes the most concern because of the severe consequences. However, contracting authorities need to have carried out a procurement in a particularly unprofessional way for this remedy to be imposed and as such it is important to keep things in perspective.

10. Under the **old regime**, subject to one or two limited exceptions, once the contract had been entered into it could not be set aside.

11. A declaration of ineffectiveness under the **new regime** will have two major implications for a contract:

- Prospective ineffectiveness: this means that any obligations under the contract that have not yet been performed will be cancelled and should not be performed.

- A civil financial penalty: the court will impose a civil financial penalty on the contracting authority, the level to be decided on a case by case basis.

The Regulations permit the courts to be flexible and refrain from ordering ineffectiveness but it would appear that this will only happen when there are important public interest reasons for that specific contract to continue. In such circumstances the court will impose alternative penalties consisting of either or both contract shortening and/or a civil financial penalty. It is therefore important that contracting authorities enter into collateral contracts with contracting parties which address how they will exit the contract in the event of an ineffectiveness or contract shortening ruling. ***This is a practice we intend to ensure is followed***.

When will a contractor be able to obtain a declaration of ineffectiveness?

12. Under the amending regulations there are three grounds that if satisfied allow for a declaration of ineffectiveness to be granted by the court:

- *Failure to advertise*: where a contract is awarded without prior publication of an OJEU contract notice (in circumstances where prior publication was required) (Regulation 47K(2));
- *Combined breaches of the procurement rules and the review procedural rules:* where a contract is entered into in breach of the standstill period, automatic injunction or court order depriving the challenger of pre-contractual remedies and where there is also an additional breach of the procurement rules (other than the rules on standstill periods and remedies) which has affected the chances of the challenger winning the contract (Regulation 47K(5)); and
- *Call-off procedural breach*: where call-off contracts above the relevant EU financial threshold are awarded (without running a standstill period) following a mini-competition under a framework agreement or dynamic purchasing system and where the mini-competition rules (or rules for awarding specific contracts) have been breached (Regulation 47K(6)). **This is an area that has an impact on the House of Commons**. We are vulnerable when we use any frameworks started on or after 20 Dec 2009 or any collaborative contract such as OGC Buying Solutions, HRMC's Sprint for IT etc. All must be checked to ensure the date they were started and to apply the new rules as necessary.

Guarding against a finding of ineffectiveness

13. Ultimately the best protection against a contract being declared ineffective is for contracting authorities to comply with the procurement regulations. Contracting authorities have been advised to take extra precautions such as publishing a voluntary transparency notice in the Official Journal in situations where they understand that there is no requirement to

advertise the contract and also to apply a standstill period voluntarily for example to Part B Services.

14. Contracting authorities can also reduce the limitation period for applying for such a declaration from six months to 30 days by properly publicising the award of the contract in the the Official Journal (when no prior advertising has taken place) or by notifying the relevant economic operators of the conclusion of the contract award in accordance with regulation 47E. The tender process carried out by the Transactional Team in Commercial Services Directorate (CSD) will ensure that all relevant contact awards they process are publicised as set out above.

Conclusion

15. Under the new Remedies Directive it will be easier for unsuccessful tenderers to delay and ultimately prevent the award of contracts. As a result, claimants are likely to have more bargaining power at debrief stage i.e.. before the contract is finally awarded. An increase in litigation is almost certain as more contractors seek to utilise the tools provided by the new regime to delay the award and also to set aside contracts.

16. Authorities who enter into contracts in defiance or ignorance of advertising requirements or standstill periods will be at risk of the court cancelling all obligations not yet performed and imposing potentially significant fines.

17. We recommend that all House of Commons procurements above the Resource Framework threshold for competitive tenders, currently £25,000, are discussed with CSD before starting the procurement. We also recommend that all tenders above the threshold for competitive tenders are run through the e-tendering tool (InTend) managed by CSD to ensure consistency, transparency and auditability of all competitive tenders carried out for the House.

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