

Remedies Directive – summary of the changes

December 2009

When does the new Remedies Directive apply?

The new Remedies Directive is implemented in England, Wales and Northern Ireland by the Public Contracts (Amendment) Regulations 2009. These apply to any procurement process commenced on or after 20 December 2009.

A procurement process will have "commenced" for these purposes if:

- A contract notice has been sent to the Official Journal in order to invite offers or requests to be selected to tender for or to negotiate in respect of the proposed contract or framework agreement;
- The contracting authority has had published any form of advertisement seeking offers or expressions of interest in the proposed contract or framework agreement; or
- The contracting authority has contacted any supplier in order to (i) seek expressions of interest or offers in respect of the proposed contract or framework agreement; or (ii) respond to an unsolicited expression of interest or offer received from that supplier in relation to the proposed contract or framework agreement.

The new provisions do not apply to call-off contracts under framework agreements which were themselves established under a procurement process commenced before 20 December 2009.

What are the key changes under the new Remedies Directive?

The table below provides a summary of the main changes under the Public Contracts (Amendment) Regulations 2009.

| Old Regulations (procurements commenced before 20 December 2009) | New Regulations (procurements commenced on or after 20 December 2009) |
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| Award notification letters need to contain: <ul style="list-style-type: none">• the award criteria;• the name of the successful bidder(s);• the score of the recipient; and• the score of the successful bidder(s). | Award notification letters also need to contain: <ul style="list-style-type: none">• details of the reason for the decision, including the characteristics and relative advantages of the successful tender; and• confirmation of the date before which the contracting authority will not enter into the contract or framework agreement (ie, the date after the end of the standstill period). |
| Award notification letters should be sent to all suppliers that expressed an interest in the procurement. | Award notification letters do not need to be sent to any suppliers who are excluded at an earlier stage of the procurement process and who have been given the reasons for their exclusion. |

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| Old Regulations (procurements commenced before 20 December 2009) | New Regulations (procurements commenced on or after 20 December 2009) |
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| <p>The minimum standstill period is 10 days.</p> | <p>The minimum standstill period is 10 days where award notification letters are sent by fax or electronic means; and up to 15 days otherwise. In either case, the last day of the standstill period must be a working day.</p> |
| <p>Bidders may request details of the reasons why they were unsuccessful and are entitled to receive this “debrief” three working days before the end of standstill period if the debrief is requested within two days of the start of standstill.</p> | <p>No “debrief” of this type is required under the new legislation as the information is contained in the award notification letter sent to the relevant bidder.</p> |
| <p>A supplier must obtain an injunction to prevent a contracting authority proceeding to a proposed contract award following standstill.</p> | <p>A supplier only needs to serve any relevant court proceedings on the contracting authority to prevent the authority proceeding to a proposed contract award following standstill. There is no requirement for an injunction.</p> |
| <p>Generally the only remedy a supplier has for a breach of the Public Contracts Regulations 2006 following contract award is damages.</p> | <p>In addition to damages, the award of ineffectiveness is available where a contracting authority has:</p> <ul style="list-style-type: none"> • failed to place a mandatory OJEU notice; • breached requirements relating to standstill thereby denying a supplier the opportunity to challenge an award decision; or • failed to follow call-off requirements under a framework for a call-off over the EC procurement threshold. <p>There are time limits for any ineffectiveness claim. As an alternative to ineffectiveness, a court may also make an order shortening the term of a contract.</p> |
| <p>There is no provision for fines for breach of the Public Contracts Regulations 2006.</p> | <p>A court must impose a fine on the contracting authority whenever it declares a contract ineffective.</p> |