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briefing

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The new EU Remedies Directive: prudent procurement is of the essence

Revised EU rules will improve access suppliers have to a review when it is alleged that public authorities have breached procurement rules. The aim of this *Briefing* is to raise awareness amongst NHS managers involved in procurement of the key changes to the rules and to highlight new provisions in the law which public authorities can use to protect themselves from the risk of challenge.

Key points

- Revised EU rules will improve access to rapid and effective review procedures for suppliers who allege that public authorities have not acted in accordance with EU public procurement rules.
- NHS bodies that fall foul of the rules will be subject to dissuasive new fines, the possibility of having contracts shortened and, where there are serious breaches of public procurement rules, having their contracts overturned (ie, rendered 'ineffective').
- Ineffectiveness will apply where there has been a direct illegal award of a contract. It will also apply where there has been a serious breach of procurement rules, coupled with a failure to give suppliers access to their rights to review procedures.
- The ten-day 'standstill' period before a contract can be awarded will now require public authorities to provide the full reasons for the award decision at the start of the standstill period rather than upon request. A formal challenge brought during the standstill period must result in the immediate suspension of contract award proceedings.
- Derogations from the standstill period are provided for certain types of contracts, including Part B services which cover health and social services. However, recent case law suggests that such an obligation may be required by EU Treaty principles.
- NHS bodies can protect themselves from the risk of challenge through considered use of derogations, smart contract clauses, use of a new voluntary transparency mechanism and scrupulous adherence to public procurement rules.

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'The new rules aim in particular to tackle the direct illegal award of contracts and to improve the effectiveness of pre-contractual remedies'

Introduction

New EU rules will make it easier for suppliers to access more rapid and effective review in cases where it is alleged that public authorities have not acted in accordance with EU public procurement rules. The EU Remedies Directive[1] amends the UK Public Contract Regulations and will affect all procurement contracts commenced after 20 December 2009.[2]

The new rules aim in particular to tackle the direct illegal award of contracts and to improve the effectiveness of pre-contractual remedies. Key changes include a new mandatory requirement for review bodies to suspend, under certain circumstances, award decisions taken by public authorities. Another change is the introduction of a more harmonised EU requirement for a ten-day 'standstill' period.

1. See **eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1989L0665:20080109:EN:PDF**
2. Call-offs from framework agreements agreed before the 20 December will still be subject to the old remedies regime.

It should be noted that the Government has opted to make use of derogations from the standstill period for certain types of contracts, including for Part B services which cover health and social services and which are only partly covered by public procurement rules. However, recent case law suggests that the absence of certain requirements under EU procurement rules, such as a standstill period, does not necessarily mean that such obligations are not required by EU Treaty principles.

The aim of this *Briefing* is not to provide legal advice to NHS bodies, but rather to raise awareness of the key changes these rules entail, and to highlight new provisions in the law which public authorities can use to protect themselves from the risk of challenge.

The standstill period

The right of an unsuccessful bidder to challenge the award decision of a public authority is already firmly established in European Court of Justice case law, in the UK implementing regulations, and is rooted in the EU Treaty principles of fairness and transparency. The ten-day 'standstill' period starts from the day after the contract award notice is sent to all economic operators and gives them a reasonable amount of time to assess the decision and to decide whether to challenge it. Accordingly, the standstill period ensures that suppliers can make effective use of the pre-contractual remedies available to them and allows contracts to be suspended at a stage where errors can still be corrected.

The new Remedies Directive harmonises the application of the standstill period in order to address inconsistencies in the way it has been applied across the EU. Although the basic requirements of the standstill period will remain much the same in the UK, the new rules introduce some procedural changes including obligations to:

- provide all economic operators[3] with a full set of reasons (including scores) for the contract award

3. Economic operators include both tenderers and candidates. Tenderers must be included in the standstill if they have not been notified and definitively excluded from the tendering process. Candidates must be included if information about their exclusion has not been made available to them before the notification of the award decision.
4. Key information to include in standstill notices issued to tenderers includes the award criteria, reasons for the decision (including relative advantages of the successful tender), the name of the economic operator to be awarded the contract/or admitted to the framework agreement, the scores (if any) obtained by both parties and a precise statement of the timing of the standstill period. Candidates should be told why they were unsuccessful and given the same information as above with the exception of the relevant advantages of the successful tender.

decision at the start of the standstill period rather than upon request[4]

- allow extra time for the standstill notice to be received in situations where the notice has been sent using non-electronic means (ie, 15 days following the date the award notice is sent).

The amended UK Public Contract Regulations also clarify that there is an obligation for public authorities to notify participants excluded at an earlier stage of the procurement process before the actual award decision is taken. This reduces the risk of public authorities falling foul of the new rules because they have failed to notify all candidates and tenderers of the standstill period.[5]

Mandatory suspension of contract award proceedings

When a supplier decides to challenge a decision taken by a public authority, the powers available to the Court to address infringements before a contract has been awarded remain much the same. Notably, Courts have the possibility to set aside unlawful decisions, such as the inclusion of discriminatory technical specifications in tender documents, and the ability to award damages.

'For Part B contracts, which cover healthcare, it would be imprudent for NHS bodies to assume that absence of a standstill requirement absolves them entirely from this obligation'

However, the new rules seek to address the problem of a 'race to signature', whereby a contracting authority renders pre-contractual remedies less effective by rushing to conclude a contract despite knowledge of a legal challenge. Such conduct avoids the public authority having to restart the whole award procedure and limits the potential risks solely to the payment of damages. To address this issue, the new rules impose a mandatory suspension of proceedings whenever an award decision is formally challenged.

Derogations from the standstill period

The Remedies Directive provides the possibility of several derogations from the standstill period which the UK has opted to make use of. Derogations from the standstill requirement are admissible if:

- no prior publication of the contract notice in the *Official Journal of the European Union (OJEU)* is required (for example, a Part B service, sub-threshold contract or service concession)
- there is only one tenderer and no other candidates are concerned
- the contract is based on a framework agreement or a dynamic purchasing system.

It should be noted that for contracts which do not require the publication of a contract notice in the *OJEU*, such as a Part B contract, it would be imprudent for NHS bodies to assume that the absence of a specific standstill requirement absolves them entirely from this obligation. Recent UK case law, *Federal Securities Limited vs Chief Constable of the Police Service of Northern Ireland*, highlights that under certain circumstances a standstill period may be required for a Part B service contract.

In this case, the Court deemed that the cross-border interest and the value of the contract meant that basic EU Treaty principles such as transparency and equal treatment applied and that the contracting authority should have observed a standstill period before awarding the contract in order to comply with them. Moreover, although the

5. The standstill period only starts when all economic operators have been informed and given full reasons for the award decision. If through an administrative error a public authority has forgotten to inform a candidate of the standstill and proceeds to award the contract, the candidate would have up to six months to make a claim for ineffectiveness.

contract had already been awarded, the Court decided that it was within its remit to overturn this decision as the contract had not been awarded in conformity with EU Treaty principles.

Although the UK has made use of a derogation for Part B contracts and therefore the detailed rules relating to standstill period requirements do not in principle apply, it is still worth noting that UK case law is being established which may under certain circumstances require at least some form of a standstill obligation.

With regard to the derogation for contracts based on framework agreements, if the derogation is invoked for an above threshold call-off contract and there is a breach of mini competition rules, this would give grounds for the contract to be overturned (ie, rendered ineffective). Although applying a standstill period to call-off contracts may negate the time and cost benefits of using framework agreements, given the new risk of ineffectiveness NHS bodies may still wish to consider observing the ten-day standstill period for these contracts.

When does ineffectiveness apply?

The new rules aim in particular to tackle the direct illegal award of contracts and to improve the effectiveness of pre-contractual remedies. Previously, once a contract was concluded, aggrieved bidders were in principle only able to claim damages. However, a key change to the rules now makes it a *requirement* for the Court to render ineffective award decisions where there has been:

- a contract award without publication in the *OJEU* where this is not permissible (ie, a direct illegal award of a contract)
- a breach of public procurement rules, which has affected the chances of the tenderer to win the contract, coupled with an infringement of pre-contractual remedies including:
  - the award of a contract before a Court has taken a decision on review or interim measures
  - non respect of the standstill period
- a breach of procurement rules where a derogation from the standstill period has been invoked for call-off contracts under framework agreements or dynamic purchasing systems.

While contracts meeting the above conditions must, in principle, be declared ineffective, EU rules do provide some flexibility for Courts to maintain an illegally awarded contract in exceptional circumstances where there is an overriding public interest. In such cases, economic interests can only be considered if they lead to disproportionate consequences, but they cannot be linked to the contract itself (for example, the costs relating to launching a new procurement procedure).

'NHS bodies can limit potential liabilities by including contract clauses which specify what will happen if a contract is declared ineffective'

If the Court determines there is an overriding reason to maintain the contract then it will be obliged to impose alternative penalties, which could include either civil financial penalties and/or a shortening of the contract term.

Equally, alternative penalties must be applied where there has been a breach of review procedures but no serious infringement of public procurement rules.

What are the consequences of ineffectiveness?

The consequences of a contract being declared ineffective are a matter for national law. This includes decisions about whether ineffectiveness involves the cancellation of all contractual obligations (retrospective

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cancellation) or if it should be limited to those contractual obligations yet to be performed (prospective cancellation).

The UK has opted for the prospective cancellation of contracts, which avoids the difficulty of trying to 'undo' things like services that have already been performed or buildings that are already partly constructed. However, this choice comes with an obligation for Courts to impose civil financial penalties which must be effective, proportionate and dissuasive and in addition to any claims for damages.

Moreover, the amended UK regulations give the Court considerable flexibility to deal with the knock-on effects of a contract being declared ineffective and take account of the need to unwind complex contractual agreements in a structured way. This is particularly important for private finance initiative agreements where a sensible period of time would be needed to unwind the contract and more certainty is required for stakeholders in order to avoid the risk of funding being undermined.

How can the NHS protect itself from the risk of challenge?

The possibility of having a contract rendered ineffective will not hang indefinitely over public authorities. The time available to suppliers to claim ineffectiveness can be limited to 30 days by ensuring that all candidates and tenderers are notified of the conclusion of the contract and given a full set of reasons for the award decision.

The reduced time limit also applies to contracts that are not required to be advertised in the *OJEU* provided a justification for this is published with the award notice. Office of Government Commerce (OGC) guidance suggests that this may be useful as double protection in cases where a contracting authority has used a voluntary transparency notice. In all other cases, suppliers will have up to six months to make a claim for ineffectiveness.

For contracts which a public authority believes do not require prior publication of a contract notice in the *OJEU*, the new regime provides a further possibility to remove the risk of ineffectiveness by publishing an early voluntary 'ex ante transparency notice' expressing its intention to conclude a contract and by observing a ten-day standstill period from the date the notice is published. This is a particularly useful protective measure in cases where there may be ambiguity about whether a contract is covered in full or only in part by public procurement rules. The European Commission has amended the standard forms for the publication of notices to take account of this new transparency mechanism.[6]

NHS bodies can also limit potential liabilities by including contract clauses which specify what will happen if a contract is declared ineffective. Although the Court will have flexibility to deal with the knock-on effects of ineffectiveness, provision has been made to ensure that contract terms agreed during the procurement process are respected in so far as they do not undermine or seek to evade the contract being declared ineffective.

The new remedies regime should serve as a reminder of the need for good practice and prudence with regard to all contracts which are covered either in full or in part by public procurement rules. While the penalties for non-compliance under the new law could entail quite punitive

6. See **simap.europa.eu/buyer/forms-standard/remedies_en.pdf** and for further information **ec.europa.eu/internal_market/publicprocurement/docs/20091128_standard_forms_en.pdf**

consequences, it is important to bear in mind that NHS bodies can take steps to protect themselves from the risk of challenge through considered use of derogations, smart contract clauses, use of the new voluntary transparency mechanism and scrupulous adherence to public procurement rules.

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Further information

The Office of Government Commerce (OGC) is the lead Government department responsible for the implementation of this law and has published detailed guidance on the practical implications of the new rules.

The guidance and training toolkits can be accessed on the OGC website:
www.ogc.gov.uk

For further information please see the NHS European Office website:
www.nhsconfed.org/europe

The NHS European Office

The NHS European Office has been established to represent NHS organisations in England to EU decision-makers. The office is funded by the Strategic Health Authorities and is part of the NHS Confederation. EU policy and legislation have an increasing impact on the NHS as a provider and commissioner of healthcare, as a business and as a major employer in the EU.

Our work includes:

- monitoring EU developments which have an impact on the NHS
- informing NHS organisations of EU affairs
- promoting the priorities and interests of the NHS to European institutions
- advising NHS organisations of EU funding opportunities.

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