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UK Public Procurement Law Digest: New Remedies Regime

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by Alistair Maughan, Masayuki Negishi

New Public Procurement Remedies in the UK

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UK central and local government bodies, and utilities, 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 came into force on 20 December 2009. Some of the new rules will change the dynamic between authority, winning bidder and losing bidders in public contract awards.

1. What is the development?

On 20 December 2009, the Public Contracts (Amendment) Regulations 2009[1] and the Utilities Contracts (Amendment) Regulations 2009[2] entered into force. These two Regulations, which amend the Public Contracts Regulations 2006 ("PCR") and the Utilities Contracts Regulations 2006 ("**UCR**") respectively, implement Directive 2007/66/EC of 11 December 2007 ("**New Remedies Directive**"),[3] which is designed to the improve the effectiveness of review procedures concerning the award of public contracts. In a previous update, we provided an overview of the draft amendments to the remedies regime proposed by the UK Office of Government Commerce.[4] In this update, we provide an overview of the new regime and explain the key implications for contracting authorities, winning bidders and losing bidders.

2. Why is this development important?

These amendments implement a comprehensive overhaul of the existing remedies regime set out in PCR and UCR. Some of these changes have a profound consequence for bidders and 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 subject under the new regime.

Most importantly:

- a public body can no longer assume that the courts in the UK are limited to awarding only damages in respect of an improperly concluded contract;
- the set-aside of contracts has become mandatory in certain cases of impropriety;
- public bodies now face the prospect of being fined for breach of the procurement rules, or having the term of an improperly awarded contract shortened; and

- a contracting authority will now 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 need to act promptly and within a very tight time limit, especially if they wish to apply for the more draconian remedies granted to the courts under the new regime.

Contracting authorities that wish to minimise their exposure to the potentially onerous consequences of the new regime will be well advised to ensure that they adhere strictly to procedural formalities of the procurement rules and, more importantly, to ensure that they comply with the fundamental requirements to treat all bidders equally and in a non-discriminatory way, and maintain as much transparency as possible in their dealings with bidders.

3. What are the changes introduced by this development?

As a result of the amendments made pursuant to the New Remedies Directive, the way in which aggrieved bidders may challenge a contracting authority's decision under PCR and UCR, and the ultimate redress that aggrieved bidders may seek from the courts under PCR and UCR, have changed in a number of important ways.

3.1 The previous remedies regime

Previously, once a contracting authority decided to whom it intended to award a contract or framework agreement, it had to 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 concluded the contract or framework agreement.

The purpose of this 10-day standstill period was 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 did not apply to all contract awards and, notably, it did not apply to award of specific contracts under a framework agreement.

Once informed of the contracting authority's decision, an aggrieved bidder was entitled to request in writing an explanation for the decision from the contracting authority, and the contracting authority had to 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 had to respond at least three working days before the end of the 10-day standstill period; and if it couldn't do so, the 10-day standstill period had to be extended to allow for the delay.

After it received the explanation from the contracting authority, if it was dissatisfied with the explanation, an aggrieved bidder could challenge the contracting authority's decision in the High Court, on the ground that the contracting authority had breached its statutory duty to comply with the procurement rules. However, in most cases, such challenge had to be launched within three months from the date when the grounds for challenge first arose, and crucially, prior to the recent amendment, the law provided that "*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 could still take the view that it was entitled to grant to an aggrieved bidder a remedy that went beyond the award of mere damages, including the setting aside of an already-awarded framework agreement,[5] but generally speaking, under the previous remedies regime, an aggrieved bidder had very little time within which to prepare and mount a legal challenge, and if it did not act promptly, it could not expect to receive any meaningful remedy.

3.2 The new remedies regime after 20 December 2009

3.2.1 The applicability of the New Regime

In respect of both utilities and non-utilities procurement, the new regime only applies to procurements that are

initiated on or after 20 December 2009.[6]

Specific contracts awarded under a framework agreement (or a dynamic purchasing system) are excluded from the scope of the new regime if the underlying framework agreement (or a dynamic purchasing system) was:

- concluded/established before 20 December 2009; or
- concluded/established after 20 December 2009, but the underlying procurement was initiated before 20 December 2009.[7]

3.2.2 Standstill Period and Contract Award Notice

Once a contracting authority decides to whom it intends to award a contract or framework agreement, it still has to notify all of the bidders (including the unsuccessful ones) of its decision using "*the most rapid means of communication practicable*", and the standstill period remains unchanged at 10 days if the notice is sent by e-mail or fax, but there is also a new, longer standstill period of up to 15 days that will apply in circumstances where a contract authority elects to send the notice by any other means.[8]

Under the new regime, the requirement on notification is also more front-loaded than before. Previously, there was no requirement to include in the contract award notice the reasons for the decision or the relative advantages of the winning bid; aggrieved bidders had to request them separately from the contracting authorities after the notices were received. Now, under the new regime, the notice must include more information up-front, and must set out the reasons for the decision, the relative scores, and the characteristics as well as relative advantages of the winning bid.[9] It is in this area where contracting authorities may trip up: there are no firm guidelines on exactly how much information must be given, so contracting authorities who seek to summarise rather that provide all information may expose themselves to claims.

In addition, when a contracting authority sends such notice, it will now have to include in the notice an exact statement of the standstill period by specifying when the standstill period is expected to end, or specifying the date before which the contracting authority will not enter into a contract or conclude a framework agreement.[10] This is another new requirement, which all contracting authorities will need to be aware of to avoid the possibility of a contract award being jeopardised through exposure to a procedural breach.

What this means for…	
Contracting authority	Use e-mail — but then who relies on fax/post nowadays? Work out the dates exactly, and take clear legal advice. Be very clear about all the reasons for the decision. Overall, remember that breach of the standstill rules is now an important component of the new set-aside remedy, so a breach here can have major consequences.
Winning bidder	Consider requiring the right to sign-off or approve the standstill notice. Beware all activity during standstill — ramping up resources during standstill, or caving in to demands of the contracting authority to begin work during standstill, will lead to greater exposure to risk than before.
Losing bidder	More information, more quickly. No need to file supplementary requests to get the "real" reasons. Potential to exploit uncertainty around how much information is required to be given.

3.2.3 Mandatory suspension of contract-making

If a losing bidder commences legal proceedings in respect of a contracting authority's award decision, the contracting authority is not allowed to enter into the contract in question until an interim order lifting the ban is granted by the court (such an order is granted only under certain circumstances), or the proceedings in question are determined, discontinued or otherwise disposed of and the court makes no order to keep the ban in place (*e.g.* pending an appeal).[11] This is a new requirement under the new regime.

Here, it should noted an aggrieved bidder who wishes to prevent the contracting authority from entering into the contract upon expiry of the standstill period must serve the claim form on the contracting authority as soon as practicable, as proceedings are deemed to be "commenced" for the purposes of the aforementioned rule only

where the claim form is actually served on the contracting authority.[12] No longer can one simply issue (but not serve) a "protective" claim form to stop time running.

What this means for…	
Contracting authority	Probably more of a potential head-ache than the set-aside remedy. Little that authorities can do to prevent claims designed to waste time or disrupt projects. Be prepared and have lawyers on stand-by to apply quickly to strike out frivolous claims or apply for court's permission to proceed despite the claim.
Winning bidder	Consider requiring the authority to disclose all losing bidder correspondence and include winning bidder in process of defending the claim. Winning bidder will have no contract at this stage, remember, so consider agreeing separately the basis for participation. Given the nature of the remedy, even an interim ITP (instruction to proceed) on the contract in question probably needs court permission.
Losing bidder	The right to issue proceedings always existed and is not new, but the "automatic-ness" of the freeze on contract signing shifts the balance of power and increases likelihood of use of this remedy. Formalities for other injunctions (*e.g.*, cross-undertaking in damages) not required. Much less to lose than applying for set-aside.

3.2.4 Ineffectiveness

Where the contract in question has not been entered into, the remedies available to an aggrieved bidder under the new regime are no different from the remedies that used to be available under the previous regime; *i.e.*, a court can still "*order the setting aside of the decision or action concerned*", "*order the contracting authority to amend any document*", or "*award damages to an economic operator which has suffered loss or damage as a consequence of the breach*".[13]

The most significant feature of the new regime is the availability of mandatory declaration of ineffectiveness or "set-aside" as a remedy after the contract in question has been entered into. Under the previous regime, both PCR and UCR specifically stated that a court did not have the power to order any remedy other than an award of damages if the contract in question had been entered into.[14] On the other hand, under the new regime, where one of the three grounds for ineffectiveness exists, the court *must* declare a contract or a framework agreement as ineffective and set it aside even if the contract or framework agreement in question has been entered into.[15]

The three grounds that could trigger ineffectiveness are as follows:

- the award was made without prior advertisement, despite the requirement for a prior advertisement;[16]
- the award was made in breach of one of the primary provisions of the procurement rules (*i.e.,* a traditional breach, such as failure to treat all bidders equally and in a non-discriminatory fashion), and such primary breach is accompanied by a secondary breach of standstill period[17] or mandatory suspension of contract-making,[18] which secondary breach deprives the bidder of "*the possibility of starting proceedings* [in respect of the primary breach] *or pursuing them to a proper conclusion, before contract was entered into*"[19]; or
- the award was for a specific contract under a framework or dynamic purchasing system, and such award was made in breach of the rules governing the award of specific contract (*e.g.* failure to hold a mini-competition under a framework where required or to adhere to the rules that specifically apply to such mini-competition[20]) and the estimated value of the specific contract in question exceeds the relevant threshold.[21]

Note that, whilst in ordinary civil proceedings a claimant is required to serve the claim form only on the defendant(s) who are named in the claim form, under the new regime, the bidder must "*as soon as practicable, send a copy of the claim form to each person, other than the contracting authority, who is a party to the contract in question*" where an aggrieved bidder: (a) seeks ineffectiveness as a remedy; or (b) claims that the contracting authority breached the standstill requirement, or the contracting authority entered into a contract when the contract award should have been suspended and the contract in question "*has not been fully performed*".[22]

What this means for…	
Contracting authority and Winning Bidder	Worrying uncertainty. Especially note that the first ground could include a "direct award" undertaken via a change to an existing contract through re-negotiation, which alters the original economic balance between the incumbent and the authority – see *pressetext*.[23]
Losing bidder	It's not a slam-dunk but at least it's a real remedy at last. Previously, the only practical remedy was to pursue damages, which in most cases would not be worth the cost/risk/damage to reputation involved. The onus is on the losing bidder to prove that a breach has occurred.

3.2.5 Consequences of Ineffectiveness

Where a contract is declared ineffective, the court will ordinarily be obliged to set aside the contract in question. However, the court does have the discretion not to set aside a contract even in circumstances where a declaration of ineffectiveness ought to be made. Nevertheless, this discretion can be invoked only where "*the Court is satisfied that overriding reasons relating to a general interest require that the effects of the contract should be maintained*".[24]

In deciding whether or not such an "overriding reason" exists, a court is entitled to take into account "*economic interests in the effectiveness of the contract*" but only where "*in exceptional circumstances ineffectiveness would lead to disproportionate consequences*",[25] and it is also made explicit that costs resulting from the delay of contract execution, costs resulting from holding a fresh procurement, costs resulting from the appointment of a different bidder, as well as "*costs of legal obligations resulting from the ineffectiveness*" cannot constitute such an "overriding reason".[26] Thus, the mere fact that it will be very expensive to cancel a contract will clearly not, without more, be sufficient to defeat a declaration of ineffectiveness which may otherwise be made.

Where a declaration of ineffectiveness is made, the contract affected won't become cancelled retrospectively — only the future obligations of the contract in question will become annulled.[27] In order to deal with the potentially far-reaching consequences of ineffectiveness, the court is empowered to make "*any order that it thinks appropriate*", for example by making an order for restitution or compensation, "*so as to achieve an outcome which the Court considers to be just in all the circumstances*".[28]

Therefore, in respect of any contract to which the new regime applies, in order to avoid giving hostage to fortune, a contracting authority and the successful bidder(s) ought to consider how to address the potential consequences of a declaration of ineffectiveness within the contract. This is, in fact, encouraged under the new regime. Where the contracting authority and the successful bidder have made, at any time before the declaration of ineffectiveness, a contractual arrangement "*for the purpose of regulating their mutual rights and obligations in the event of such a declaration being made*", a court cannot make an order which conflicts such an arrangement.[29] However, in accepting or offering specific terms and conditions dealing with the consequences of a declaration of ineffectiveness, a contracting authority will still need to take care to avoid falling foul of the fundamental requirements of equality, non-discrimination, and transparency.

Where a framework agreement is declared to be ineffective, this does not automatically render the specific contracts awarded under such framework ineffective as well. Where a given framework agreement is declared to be ineffective, the court must treat each specific contract separately and make a separate determination as to ineffectiveness — and the court will be required to do so only where the aggrieved bidder specifically asks for a declaration of ineffectiveness in respect of each of such specific contracts.[30]

In addition to the foregoing, where a court finds that grounds for ineffectiveness exist, the court *must*:

- impose a financial penalty in addition to ineffectiveness, where the contract in question is declared ineffective;[31] and
- impose a financial penalty and/or shorten the duration of the contract, if the court exercises its discretion not to set aside a contract even where it would otherwise be required to do so.[32]

This is another novel and potentially significant feature of the new regime because, in the worst case scenario, a

contracting authority would face not just the prospect of having the illegally awarded contract set aside, but also having to pay a potentially unlimited sum by way of a penalty.

Where a penalty is to be imposed, the court must impose a penalty that is "*effective, proportionate and dissuasive*", by taking in to account various factors, including the culpability of the contracting authority, the seriousness of the breach, and where relevant, the extent to which a contract is allowed to exist despite the existence of grounds for ineffectiveness[33].

Note that, as with situations where contracts are set aside, the court has power to make "*any order that it thinks appropriate for addressing the consequences of the shortening of the duration of the contract*".[34]

What this means for…	
Contracting authority	Don't panic. The three grounds of set-aside are quite limited and there should be ways to deal with each one so as to mitigate or eliminate the risk. In theory, real risks should only exist in extreme cases (*i.e.*, flagrant breach). Look to implement transitional provisions dealing with consequences of set-aside. Where proceedings are issued, address the grounds on which claim is made and identify overriding reasons why the contract should not be set-aside.
Winning bidder	Insist that the authority includes, in the contract, provisions dealing with the potential consequences of a declaration of ineffectiveness. Consider: authority warranties/indemnities on procedural compliance; right to participate (on indemnified basis) in litigation; "termination consequences" clause akin to break option compensation.
Losing bidder	Don't get carried away by the remedy: you still need to prove at least one significant breach of the rules and overcome the authority's arguments as to whether there is an overriding interest in letting the contract proceed.

3.2.6 Time Limits

The general rule for aggrieved bidders seeking formally to challenge a contracting authority's decision remains the same as before. Thus, in most cases, legal challenges still have to be brought "*promptly and in any event within 3 months beginning with the date when grounds for starting the proceedings first arose*",[35] although the court continues to have discretion to extend this time limit if "*there is a good reason for doing so*".[36]

However, where an aggrieved bidder seeks to obtain ineffectiveness/set-aside as a remedy, the basic rule is that the bidder, in most cases, has 6 months to bring legal proceedings. But this 6-month limitation period is subject to a large exception under the new regime,[37] which exception is likely to become the norm in future contract award procedures: that the time for applying for set-aside is reduced to 30 days if the authority also either publishes a contract award notice in the Official Journal, or serves on the losing bidders a secondary or voluntary award notice.

In order to trigger the reduced 30-day limitation period, the contracting authority must give not just a notice of the fact that it has decided to make an award, but also a summary of the reasons which a bidder would have been entitled to receive if it were to specifically request a debrief following the announcement of the award.[38] Thus, if a contracting authority wishes to benefit from the reduced 30-day limitation period, the contracting authority must:

- first issue a contract award notice which includes more information up-front by setting out the reasons for the decision, the relative scores, and the characteristics as well as relative advantages of the winning bid; and
- subsequently issue a supplementary notice setting out a summary of: (i) the reasons which were originally set out in the contract award notice; and (ii) any additional information which was not originally included in the contract award notice (*i.e.* additional information which bidders would have been entitled to, had they asked for a debrief). Such a supplementary notice is easier to get right than the original contract award notice because it requires only a "summary" of the reasons for the decision, not a complete justification.[39]

If the award was made in circumstances where no prior advertisement was required (*e.g.*, use of negotiated procedure without prior advertisement), the contracting authority will be able to rely on the 30-day limitation period

only if the contract award notice includes "*a justification of the decision of the contracting authority to award the contract without prior publication of a contract notice*".[40]

Contracting authorities and winning bidders will obviously prefer the certainty of the shorter 30-day limitation period as opposed to the 6-month limitation period. They may choose to submit an OJEU award notice very quickly after the contract award decision or serve such a voluntary notice — either of which would trigger the shorter 30-day limitation period. They may then delay signing the contract until after expiry of that 30-days limitation period, or sign the contract but impose a condition precedent on its effectiveness that the 30 days expires with no procurement challenge having been made.

What this means for…	
Contracting authority	Consider always whether to take action to reduce the set-aside remedy application period to 30 days — and whether the contract can be put on hold during that time. Consider a rapid OJEU contract award notice or voluntary award notice.
Winning bidder	Prompt the authority to take risk mitigation actions. But don't forget about "unwind" contract provisions just in case.
Losing bidder	Watch out for authority taking steps to shorten application period. If it does, does it have something to hide or is it just being cautious? Adjust speed of response accordingly.

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Footnotes

[1] SI No. 2009/2992

[2] SI No. 2009/3100

[3] See Official Journal of the European Union OJ L 335/31, 20 December 2007.

[4] See Sourcing Update, May 7, 2009

[5] For further discussion on this point, see Sourcing Update, January 15, 2009

[6] See Regulation 11(1) of the Public Contracts (Amendment) Regulations 2009 and Regulation 13(1) of the Utilities Contracts (Amendment) Regulations 2009.

[7] See Regulations 11(3) and 11(4) of the Public Contracts (Amendment) Regulations 2009 and Regulation 13(3) and 13(4) of the Utilities Contracts (Amendment) Regulations 2009.

[8] See Regulation 32A of PCR, as amended (also see Regulation 33A of UCR, as amended).

[9] Compare Regulation 32(2)(b) of PCR, as amended, against Regulation 32(2)(b) of PCR prior to the amendment (also compare Regulation 33(2)(b) of UCR, as amended, against Regulation 33(2)(b) of UCR prior to the amendment).

[10] See Regulation 32(2) of PCR, as amended (also see Regulation 33(2) of UCR, as amended).

[11] See Regulation 47G of PCR, as amended (also see Regulation 45G of UCR, as amended).

[12] See Regulation 47G(3) of PCR, as amended (also see Regulation 45G(3) of UCR, as amended).

[13] Compare Regulation 47I of PCR, as amended, against Regulation 47(8) of PCR prior to the recent amendment (also compare Regulation 45I of UCR, as amended, against Regulation 45(6) prior to the recent amendment). Also note that in respect of procurement by a utility, the court continues to retain the power to award to an aggrieved bidder "*damages amounting to its costs in preparing its tender and in participating in the procedure leading to the award of the contract or its costs of participating in the procedure leading to the award of the contract*", if it can be shown that the aggrieved bidder had "*a real chance of being awarded the contract*" but for the breach of procurement rules by the utility concerned (compare Regulation 45I(3) of UCR, as amended, against Regulation 45(8) of UCR prior to amendment).

[14] See Regulation 45(7) of PCR prior to the amendment, as well as Regulation 47(9) of UCR prior to the amendment.

[15] See Regulation 47J(2)(a) of PCR, as amended (also see Regulation 45J(2)(a) of UCR, as amended).

[16] See Regulation 47K(2) of PCR, as amended (also see Regulation 45K(2) of UCR, as amended).

[17] See Section 3.2.2 above.

[18] See Section 3.2.3 above.

[19] See Regulation 47K(5) of PCR, as amended (also see Regulation 45K(5) of UCR, as amended).

[20] See Regulations 19(7)(b), 19(8), and 19(9) of PCR, as amended. Note that UCR contains no provision which mirrors any of these, as Regulation 18(2) of UCR allows utilities to bypass the mini-competition stage where the underlying framework was properly awarded in compliance with the other provisions of UCR.

[21] See Regulation 47K(6) of PCR, as amended (also see Regulation 45K(6) of UCR, as amended). The applicable threshold here is the same as the threshold which determines whether or not a regulated procurement is required. Note that from 1 January 2010, a new set of lower threshold values prescribed by EC Regulation No. 1177/2009 of 30 November 2009 applies.

[22] See Regulations 47F(2) and (3) of PCR, as amended (also see Regulations 45F(2) and (3) of UCR, as amended).

[23] The decision of the European Court of Justice in the case of *pressetext Nachrichtenagentur Gmbh v Republik Österreich (Bund) and others* (Case C-454/06) provides an importance guidance on when a proposed contract "variation" triggers the requirement for a new procurement exercise. For further discussion on *pressetext*, see Sourcing Update, January 8, 2009.

[24] See Regulation 47L(1) of PCR, as amended (also see Regulation 45L(1) of UCR, as amended).

[25] See Regulation 47L(2) of PCR, as amended (also see Regulation 45L(2) of UCR, as amended).

[26] See Regulations 47L(3) and 47L(4) of PCR, as amended (also see Regulations 45L(3) and 45L(4) of UCR, as amended).

[27] See Regulation 47M(1) of PCR, as amended (also see Regulation 45M(1) of UCR, as amended).

[28] See Regulations 47M(3) and 47M(4) of PCR, as amended (also see Regulations 45M(3) and 45M(4) of UCR, as amended).

[29] Except where the arrangement in question is inconsistent with the fact that a contract cannot be retrospectively set aside, or the fact that the court is otherwise entitled to make any order that it sees fit; see Regulations 47M(5) and 47M(6) of PCR, as amended (also see Regulations 45M(5) and 45M(6) of UCR, as

amended).

[30] See Regulation 47O of PCR, as amended (also see Regulation 45O of UCR, as amended).

[31] See Regulation 47N(1) of PCR, as amended (also see Regulation 45N(1) of UCR, as amended).

[32] See Regulations 47N(2) and 47N(3) of PCR, as amended (also see Regulations 45N(2) and 45N(3) of UCR, as amended).

[33] See Regulations 47N(4) and 47N(5) of PCR, as amended (also see Regulations 45N(4) and 45N(5) of UCR, as amended).

[34] See Regulation 47N(10) of PCR, as amended (also see Regulation 45N(10) of UCR, as amended).

[35] See Regulation 47D(2) of PCR, as amended (also see Regulation 45D(2) of UCR, as amended). Note that the new regime makes it clear that "*promptly*" here does not mean that proceedings have to be brought during the standstill period (see Regulation 47D(3) of PCR and Regulation 45D(3) of UCR, as amended)

[36] See Regulation 47D(4) of PCR, as amended (also see Regulation 45D(4) of UCR, as amended).

[37] See Regulation 47E of PCR, as amended (also see Regulation 45E of UCR, as amended).

[38] See Regulation 47E(2)(a) of PCR, as amended (also see Regulation 45E(2)(a) of UCR, as amended).

[39] Here, one should bear in mind that if a contracting authority has properly complied with the enhanced award notification requirement under the new regime, most, if not all, of such reasons would have already been given when the contracting authority first announces the final outcome of the tender – see Section 3.2.2 above.

[40] See Regulation 47E(4) of PCR, as amended (also see Regulation 45E(4) of UCR, as amended).
