

Briefing Note

The Utilities Contracts (Amendment) Regulations 2009

Introduction

On the 20th December 2009, the Utilities Contracts (Amendment) Regulations 2009 (SI 2009/3100) came into force, implementing the Remedies Directive 2007/66/EC. The purpose of the 2009 Regulations is to provide more effective remedies for suppliers which suffer as a result of breaches of the rules laid down in The Utilities Contracts Regulations 2006. This note summarises the main changes to the legislation but is written essentially, to examine the practical implications to procurement operations, for those organisations subject to the Utilities Contracts Regulations 2006.

Overview of the Changes

The 2009 Regulations do not effect procurements which commenced before the 20th December 2009. On or after this date, the new rules mark a major departure from the current position. Three major changes are to be found in the 2009 Regulations:

1. The New Standstill Rules

The new provisions in the 2009 Regulations replace what was previously a 2-stage process with a single-stage process. Utilities are now required to provide, at the beginning of the Standstill Period,¹ all the relevant information to unsuccessful tenderers in the Standstill Notice. This notice must include:

- The award criteria
- The reasons for the decision, including the characteristics and relative advantages of the successful tender
- The scores achieved by the 'winning' tenderer and those obtained by the recipient of the Standstill Notice
- The reasons (if any) why the tenderer did not meet the technical specifications
- The successful tenderer's name
- A precise statement when the standstill is expected to end.

¹ See Regulation 33A of the 2009 Regulations for the rules regarding the Standstill Period.

A similar notice must be sent to de-selected candidates. This notice will not include the relative advantages of the successful tender, as the de-selected candidate will not have submitted a tender.

2. Automatic Suspension

A key provision of the 2009 Regulations is the automatic suspension of the procurement process once proceedings are started. Where a claim of a breach of the rules is served, during the mandatory standstill period, the Utility is prevented from entering into the contract until the challenge is resolved.

3. Remedies

Ineffectiveness

This is the most significant change brought about by the 2009 Regulations which gives the courts the power to ‘scrap’ a contract the Utility had entered into in serious breach of the procurement rules.²

Other remedies include:

- Civil financial penalties (Fines) and
- Contract shortening.

Note: the “old” remedies where the court has the power to:

- Grant a temporary injunction
- Set aside decisions taken unlawfully
- Order that documents be amended
- Award damages

remain available in addition to the “new” remedies under the 2009 Regulations.

² Where there is a declaration of Ineffectiveness there must also be a civil financial penalty.

Practical steps for dealing with the impact of the 2009 Regulations

The key first-actions to mitigate the increased risk brought about by the 2009 Regulations are:

- All staff involved in procurement should be:
 - aware of the provisions of the 2006 Regulations, in particular, the requirement for weighted evaluation criteria³
 - briefed and made aware of the importance of the key provisions of the 2009 Regulations; the changes to the standstill provisions; Automatic Suspension and the Remedies for breaches.
- Evaluation teams (often, of course, multi-discipline) should be given up-dated guidance so it is easier to compile the detailed information now required under the New Standstill Rules.
- Pre-agreeing with suppliers the ineffectiveness terms which would 'pin-down' clearly the effects of an ineffectiveness ruling.

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³ Regulation 30 (3) of the 2006 Regulations refers.