

EU & Competition

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Remedies Directive: Devil in the Detail

The Office of Government Commerce has just closed its consultation on the detailed amendments to the Public Contracts Regulations 2006 and the Utilities Contracts Regulations 2006 required to implement in England, Wales and Northern Ireland the EU's Remedies Directive (Directive 2007/66/EC). The policy approach to implementation is generally welcomed. However, there is devil in the detail, particularly as regards the standstill period where the proposed amendments to the existing set of regulations appear to "gold plate" the requirements of the Directive.

D&W has responded to the OGC consultation highlighting a number of areas of concern - view the consultation response [here](#). In particular;

- The Remedies Directive only requires summary information to be provided within the mandatory standstill period, but the OGC proposes maintaining the additional "accelerated debrief" requirements in the existing set of regulations (with potentially complicated knock-on effects in the event that an unsuccessful bidder later challenges the validity of the concluded contract);
- The Remedies Directive does not require that Alcatel letters be sent to all economic operators who expressed an interest in the contract, but the OGC is considering maintaining this requirement in the existing set of regulations (again with potentially complicated knock-on effects in the event that an unsuccessful bidder later challenges the validity of the concluded contract);

- Neither the Remedies Directive nor the proposed amended regulations clarify the question as to the "trigger" for the sending of the Alcatel letters and the standstill period, whether it is following appointment of the preferred bidder or prior to conclusion of the contract (again with potentially complicated knock-on effects in the event that an unsuccessful bidder later challenges the validity of the concluded contract);
- The Remedies Directive requires that contract award be automatically suspended if an unsuccessful bidder initiates court proceedings (the unsuccessful bidder no longer being required to make application for interim measures / injunction), but there still seems to be uncertainty as to how contracting authorities and the courts will be able to deal with unfounded challenges to contract award decisions and otherwise expedite proceedings.

The Scottish Government is consulting separately on implementation of the Remedies Directive in Scotland. Whilst the draft amendments to the Scottish set of regulations are structured differently the same devil is in the detail. That consultation remains open until 21 August 2009. D&W will be responding separately to the Scottish Government's consultation.

This Alert! is correct to the best of our knowledge and belief at the time of going to press. It is however written as a general guide, so it is recommended that specific professional advice is sought before any action is taken. We are required by law to protect personal data.

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If you would like to discuss the implications of the proposed amendments to the existing set of regulations or would be interested in training on the EU public procurement rules please contact the person at D&W with whom you normally liaise, or one of the following specialists:

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