

## EU & Competition

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### The shared burden of procurement compliance on major projects

PPP projects advertised through the Official Journal of the European Union (OJEU) after 20 December 2009 are subject to important new rules on the debriefing of unsuccessful bidders.

If a procuring authority fails to comply with the new rules on the debriefing of unsuccessful bidders, or seeks to vary the contract materially post-award, the contract will be vulnerable to being declared ineffective by the courts - according to **Graeme Young**, senior associate at **Dundas & Wilson**.

In this article we highlight the key risks for PPP projects presented by the new *Remedies Directive*, which was implemented in the UK with effect from 20 December 2009, and the implications for both procuring authorities and for the successful bidders awarded the contracts.

Importantly, one of the implications of the new rules is that the potential risk of a challenge to the procurement process or the contract award is now shared much more heavily with the successful bidder and any banks or other organisations providing funding to the project.

### Concluded contracts - now risk is ineffective

Under the old rules, the courts did not have the power to set aside a contract once it had been concluded with the successful bidder (unless the procuring authority had acted ultra vires by entering into the contract or had acted in bad faith when awarding it).

Under the new rules, an unsuccessful bidder can now apply to the court for what is termed a "declaration of ineffectiveness" provided that the challenge is made within certain time-scales.

The court is required to make a declaration of ineffectiveness if it is satisfied:

- that the procuring authority failed to comply with the new standstill requirements before entering into the contract
- that the procuring authority had breached EU procurement rules when conducting the tender process in a way that affected the bidder's chances of winning the contract

Where a declaration of ineffectiveness is made, the contract is to be considered to be prospectively - but not retrospectively - ineffective as from the time when the declaration is made and, accordingly, those obligations under the contract which at that time have yet to be performed are not to be performed.

With procurement cases often taking more than 12 months to reach a final decision, and the judgment potentially being appealed, an action for a declaration of ineffectiveness would leave both the procuring authority and the successful contractor in an extremely awkward position.

### Legal proceedings - automatically suspend award

In addition to the potential risk to concluded contracts, the new rules also provide that the issuing of legal proceedings against the procuring authority prior to the contract being entered into automatically suspends the contract award process.

Under the old rules a claimant had to obtain an interim injunction if it wished to prevent the procuring authority from entering into the contract.

In practice this was often difficult as the potential claimant had very little time to establish whether it had good grounds for bringing a claim and had to satisfy the court not only that there was a

serious issue to be tried but the damages would not be an adequate remedy and, further, that the balance of convenience favoured the interim injunction.

In order to secure the interim injunction the potential claimant would also have to give a cross-undertaking as to damages. This meant that the claimant could be liable for the additional costs incurred by the procuring authority in delaying its tender process in circumstances where the procuring authority ultimately won.

Under the new rules the procuring authority is automatically suspended from awarding the contract once proceedings are issued and served on the authority, and it is for the procuring authority to apply to the court to end the suspension if it wishes to award the contract.

### Implications for procuring authorities

With the case-law rapidly developing the detail of transparency obligations in relation to award criteria and tender evaluation, compliance with EU procurement rules is already a major concern for procuring authorities when approaching PPP projects.

If this was not already enough, the new rules now significantly strengthen the remedies available to unsuccessful bidders both prior to contract award (automatic suspension) and post-award (declaration of ineffectiveness).

This requires procuring authorities to ensure that they fully comply with their debriefing obligations and observe the standstill period before entering into the contract with the successful bidder.

The Office of Government Commerce (OGC) has issued guidance recommending that authorities release the full breakdown of scores against each criterion and sub-criterion, and support this with narrative explanation of why the winner scored more in the relevant areas.

Procuring authorities therefore need to plan the debriefing and standstill period carefully to ensure the relevant information is provided and that it is consistent with the award criteria and evaluation process as stated in the tender documentation issued to bidders during the process.

Procuring authorities may also want to consider seeking professional indemnities or other contractual protections from any external advisers engaged to run the procurement for the authority.

Some procuring authorities are looking at insurance cover policies in respect of their procurement process for major projects, which would include compliance with the EU procurement rules.

### Implications for successful bidders

While the grounds for a declaration of ineffectiveness and the time-limits for bringing such an action are limited, the new rules now ensure that the successful bidder shares the risk of a potential challenge and has an acute interest in ensuring that the standstill rules have been complied with.

Under the old rules the successful bidder could generally take the position that the risks of any procurement challenge post-award were negligible.

Under the new rules, successful bidders and the banks or other organisations providing funding to the project are much more likely to seek assurances from the procuring authority that it has fully complied with the new the standstill rules.

Furthermore, both the procuring authority and the successful bidder are likely to want to consider inserting provisions in the contract documents to cover what would happen in the event of any declaration of ineffectiveness (and the courts have an obligation to consider any such provision or agreement between the parties when making a declaration).

For example, the parties might agree that property or other resources may transfer back to the authority, that any payments for services not received or works not commenced be repaid or agree a mutually acceptable cessation plan for the orderly running down of the contract.

### Risks in variations post contract award

Beyond potential issues in relation to the OJEU procurement process conducted to award the contract for a PPP project, the new rules also have implications for future variations to the contract - PPP contracts generally being agreed for a term of between 25 to 30 years.

Any variation that is sufficiently material such as to require a renegotiation of the financial model or other core contract provisions relating to the pricing or charging arrangements or the scope of works or services provided may trigger a fresh requirement to put the contract (or at least the proposed variation) out to competitive OJEU tender process.

Any contract variations agreed in breach of an obligation to conduct a fresh OJEU process would be regarded as "illegal direct awards" under the new rules, leaving them vulnerable to be challenged and declared ineffective by the courts.

Therefore, both procuring authorities and the private sector partners parties to PPP arrangement would be advised to ensure that the change provisions in the contract are sufficiently detailed to allow for any foreseeable variations and to identify what may or may not be material changes to the contract.

Where a potentially material variation is considered there should be some appropriate contractual protocol for managing the potential risk of challenge.

**This article first appeared in Infrastructure Journal online on 6 Jan 10**

This Article 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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