

## Annex A to OGC's second consultation on the Remedies Directive

Draft amendments of the standstill provisions of the Public Contracts Regulations 2006, comprising an amended regulation 32 and a new regulation 32A.

For ease of comprehension, the proposed insertions and other amendments to the existing Regulations are shown by means of 'tracked' changes. The endnote is not part of the proposed amendments. Square brackets indicate material that is particularly provisional (see paragraph 39 of the Consultation Document).

### Information about contract award procedures

32.-(1) Subject to paragraph (13), a contracting authority shall as soon as possible after the decision has been made, inform any [economic operator which submitted an offer, applied to be included amongst the economic operators to be selected to tender for or to negotiate the contract, or applied to be party to a framework agreement], of its decision in relation to—

- (a) the award of the contract; or
- (b) the conclusion of the framework agreement;

and shall do so by notice in writing by the most rapid means of communication practicable.

(2) The notice referred to in paragraph (1) shall include—

- (a) the criteria for the award of the contract;
- (b) a summary of the reasons for the decision, including, [where applicable] [the characteristics and relative advantages of the successful tender and] the score obtained by—
  - (i) the economic operator which is to receive the notice; and
  - (ii) the economic operator—
    - (aa) to be awarded the contract; or
    - (bb) to become a party to the framework agreement;
- (c) the name of the economic operator—
  - (i) to be awarded the contract; or
  - (ii) to become a party to the framework agreement; and

(d) [a precise statement of the effect of those provisions of regulation 32A that are relevant, or potentially relevant, in the circumstances, together with any information known to the contracting authority that is relevant to the application, or likely application, of those provisions (for example, where it is intended that some of the notices being given under this paragraph are, or might be, given by different means or sent on different dates)].<sup>1</sup>

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**Deleted:** to conclude the framework agreement.

[(4) Subject to paragraph (13), if by midnight at the end of the second working day following the day on which a notice is sent to an economic operator under paragraph (1), a contracting authority receives a request in writing, from that economic operator for the reasons why that economic operator was unsuccessful, the contracting authority shall inform that economic operator of those reasons including, where applicable, the characteristics and relative advantages of the successful tender.

(5) A contracting authority shall give the information set out in paragraph (4) at least 3 working days before the presumptive end of the standstill period defined in regulation 32A(7), or, where that is not possible, as soon as is possible.]

(6) Where a contracting authority is using the negotiated procedure in accordance with regulation 14(1)(a)(iv) and there is only one tender for the contract, that contracting authority need not comply with paragraphs (1) to (5).

(7) Where a contracting authority awards a contract under a framework agreement, that contracting authority need not comply with paragraphs (1) to (5).

(8) Where a contracting authority is seeking to establish a dynamic purchasing system in accordance with regulation 20, that contracting authority need not comply with paragraphs (1) to (5) but, subject to paragraph (13), shall as soon as possible after a decision has been made, inform any economic operator which applied to be admitted to a dynamic purchasing system of its decision in relation to admittance to that system and shall do so in writing if requested by the economic operator.

(9) Except for a request made in accordance with paragraph (4), which shall be dealt with in accordance with paragraphs (4) and (5) and subject to paragraph (13), a contracting authority shall within 15 days of the date on which it receives a request in writing from any economic operator which was unsuccessful (whether in accordance with regulation 15(11), 16(7), 16(8), 17(9), 17(10), 18(10), 18(11), 20(8) or 30)—

(a) inform that economic operator of the reasons why it was unsuccessful; and

(b) if the economic operator submitted an admissible tender, the contracting authority shall inform that economic operator of the characteristics and relative advantages of the successful tender and—

- (i) the name of the economic operator to be awarded the contract;
- (ii) the names of the parties to the framework agreement; or
- (iii) the names of the economic operators admitted to the dynamic purchasing system.

(10) The reasons referred to in paragraph (9)(a) shall include any reason for the contracting authority's decision that the economic operator did not meet the technical specifications—

(a) as specified in regulation 9(6) by an equivalent means; or

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(b) in terms of the performance or functional requirements in regulation 9(7) by an equivalent means.

(11) Subject to paragraph (13), a contracting authority shall as soon as possible after the decision has been made, inform any economic operator which submitted an offer, which applied to be included amongst the economic operators to be selected to tender for, to negotiate the contract or to be admitted to a dynamic purchasing system, of its decision to abandon or to recommence a contract award procedure in respect of which a contract notice has been published, in relation to—

- (a) the award of a contract;
- (b) the conclusion of a framework agreement; or
- (c) admittance to a dynamic purchasing system.

(12) A contracting authority which informs an economic operator of its decision in accordance with paragraph (11) shall—

- (a) include the reasons for the decision; and
- (b) provide the decision and reasons in writing if requested by the economic operator.

(13) A contracting authority may withhold any information to be provided in accordance with paragraph (1), (4), (8), (9) or (11) where the disclosure of such information—

- (a) would impede law enforcement;
- (b) would otherwise be contrary to the public interest;
- (c) would prejudice the legitimate commercial interests of any economic operator; or
- (d) might prejudice fair competition between economic operators.

(14) A contracting authority shall prepare a record in relation to each public contract awarded by it, framework agreement concluded by it or dynamic purchasing system established by it, specifying—

- (a) the name and address of the contracting authority;
- (b) the value of the consideration to be given under the contract, framework agreement or dynamic purchasing system and—
  - (i) the type of goods purchased or hired;
  - (ii) the work or works to be carried out; or
  - (iii) the services to be provided;
- (c) where offers were evaluated in accordance with regulation 30, the names of the economic operators which submitted those offers and where the contracting authority has used the restricted procedure or negotiated procedure, the reasons why those economic operators were selected;
- (d) the name of any economic operator—

- (i) to which the contract was awarded;
  - (ii) with which the framework agreement was concluded; or
  - (iii) which was admitted to the dynamic purchasing system;
- and the reasons for having—

(aa) awarded the contract to, or concluded the framework agreement with, that economic operator; or

(bb) admitted that economic operator to the dynamic purchasing system;

- (e) the names of the economic operators which were unsuccessful in the circumstances referred to in regulation 15(11), 16(7), 16(8), 17(9), 17(10), 18(10), 18(11), 20(8) or 30 and the reasons why they were unsuccessful;
- (f) if known to the contracting authority, the parts of the contract or framework agreement that the economic operator to which the contract has been awarded, or with which the framework agreement has been concluded, intends to sub-contract to another economic operator;
- (g) in the case of a contracting authority which used the negotiated procedure, which of the circumstances specified in regulation 13 or 14 constituted grounds for using that procedure;
- (h) in the case of a contracting authority which used the competitive dialogue procedure, details of the circumstances which constituted grounds for using that procedure in accordance with regulation 18(2); and
- (i) where a contracting authority has abandoned a contract award procedure, the conclusion of a framework agreement or the establishment of a dynamic purchasing system, the reasons why the contracting authority has decided not to award the contract, to conclude the framework agreement or to establish the dynamic purchasing system as the case may be.

(15) A contracting authority shall keep appropriate information to document the progress of contract award procedures conducted by electronic means.

(16) If the Commission requests a report containing the information specified in paragraph (14), the contracting authority shall send a written report containing that information, or the main features of it, to the Office of Government Commerce for onward transmission to the Commission.

### **Standstill period**

**32A-(1)** Where regulation 32(1) applies, the contracting authority must not enter into the contract or conclude the framework agreement until the end of the standstill period.

(2) Where the contracting authority sends a regulation 32(1) notice to all the relevant economic operators by facsimile or electronic means, the

standstill period ends at midnight at the end of the 11<sup>th</sup> day following the relevant sending date, unless paragraph (6) applies.

(3) Where the contracting authority sends a regulation 32(1) notice to all the relevant economic operators only by other means, the standstill period ends at whichever of the following occurs first:-

(a) midnight at the end of the 16<sup>th</sup> day following the relevant sending date;

(b) midnight at the end of the 11<sup>th</sup> day following the date on which the last of the economic operators to receive such a notice receives it;

unless paragraph (6) applies.

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(4) In paragraphs (2) and (3), "the relevant sending date" means the date on which the regulation 32(1) notices are sent to the relevant economic operators, and if the notices are sent to different relevant economic operators on different dates, the relevant sending date is the date on which the last of the notices is sent.

(5) Where the contracting authority sends a regulation 32(1) notice to one or more of the relevant economic operators by facsimile or electronic means and to the others by other means, the standstill period ends at whichever of the following two times occurs latest:-

(a) midnight at the end of the 11th day following the day on which the last notice is sent by facsimile or electronic means;

(b) the time at which whichever of the following occurs first-

(i) midnight at the end of the 16th day following the day on which the last notice is sent by other means;

(ii) midnight at the end of the 11<sup>th</sup> day following the date on which the last of the economic operators to receive a notice sent by such means receives it;

unless paragraph (6) applies

(6) Where a request is made under regulation 32(4), but the information is not given in accordance with regulation 32(5) before the presumptive end of the standstill period, the standstill period does not end until midnight at the end of the third working day after the day on which the information is [provided].

(7) In paragraph (6) and in regulation 32(5), "the presumptive end of the standstill period" means the time at which the standstill period would end in accordance with paragraph (2), (3) or (5), as the case may be, if that paragraph were not subject to paragraph (6).

(8) In this regulation-

"regulation 32(1) notice" means a notice given in accordance with regulation 32(1); and

“relevant economic operators” means economic operators to which regulation 32(1) requires information to be given.

ENDNOTE

<sup>1</sup> The final paragraph of article 2a(2) of the new Directive refers to “a precise statement of the exact standstill period” applicable under national law. This does not seem to be free from ambiguity, and the draft new regulation 32(2)(d) illustrates how the Regulations might formulate the requirement in a way that takes account of the fact that the exact period may depend on variables which cannot with certainty be known at the time the notice needs to be given. Comments on the best approach to take would be particularly welcome

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