

10-day Mandatory Standstill Period

OGC revised guidance note for public sector contracts

January 2008 - Update



OGC revised guidance note on the 10-day mandatory standstill period for public sector contracts

1. Introduction

- 1.1 The OGC held a six-week public consultation in October 2005 to gather views on the implementation of a 10-day mandatory standstill period for public contracts. This followed European Court of Justice (ECJ) judgements in two cases: Alcatel (C-81/98) against Austria¹, and a subsequent ruling, also against Austria². In the first case, the ECJ ruled that for procurements caught by the EU procurement Directives, a contract award decision must, in all cases, be open to review before contract conclusion. This enables the award decision to be set aside by a court where an aggrieved bidder has been prejudiced by a breach of the rules, notwithstanding the possibility of damages being awarded after contract conclusion. In the second case, the Court confirmed that a mandatory standstill period was needed.
- 1.2 To comply with the ECJ judgments, and following detailed negotiations with the European Commission, the mandatory 10-day standstill requirement was incorporated into the procurement Regulations³ (implementing the revised EU procurement Directives), which came into force on 31 January 2006. In drafting these Regulations, we have taken account of comments made during the consultation process. Further clarification on issues raised in the consultation, including additional information requested on specific areas, can be found at Annex A.
- 1.3 Since the original guidance note was produced in January 2006, the European Commission has commented on the guidance, particularly in the context of a revised Remedies Directive, which has now been adopted. In due course, we will need to implement the new Directive, which will be done by changes to our Regulations following consultation. In the meantime, we have updated this guidance, to reflect discussions with the Commission.

2. Scope of guidance

- 2.1 This guidance is specifically aimed at contracts within the full scope of the public procurement Directives and is therefore not intended to cover below threshold procurement, nor other procurements not fully covered by the public procurement Directives. However, it should be noted that, in cases of below-threshold procurements and of service concession contracts, where the full scope of the EU Directives do not apply, aggrieved tenderers are of course entitled to effective judicial protection of the rights they derive from the community legal order. [Although not specifically covered by the Regulations as they stand, a 10-day standstill period should be applied to works concessions contracts as well].

¹ Case C81/98 Alcatel Austria and Others -v- Bundesministerium für Wissenschaft und Verkehr

² C212/02 Commission v Austria

³ Please see: <http://www.ogc.gov.uk/index.asp?id=1004558>

3. Requirements of the mandatory standstill provision

Public Contracts Regulations 2006, 32(1)-32(3); Utilities Contracts Regulations 33(1)-33(3)

3.1 Contracting authorities must inform any economic operator (i.e. supplier, contractor or service provider) that has submitted an offer, has applied to be amongst those selected to tender for or negotiate the contract, or any economic operator who has applied to be party to a framework agreement, of its decision in relation to:

- the award of the contract; or
- the conclusion of a framework agreement.

3.2 The contracting authority must do this in writing by the quickest means available, as soon as possible after the award decision has been made, and include details of:

- the award criteria;
- where practicable, the score obtained by the economic operator to receive the notice, and the score obtained by the tenderer to be awarded the contract or to be part of the framework agreement;
- the name of the winning tenderer to be awarded the contract, or to be part of the framework agreement.

The contracting authority must allow at least 10 days between the date of despatch of this information (referred to below as 'notice of award'), and the date on which it proposes to enter into the contract, or conclude the framework agreement.

4. Request for debrief

Public Contracts Regulations 2006, 32(4)-32(5) and 32(9); Utilities Contracts Regulations 2006 33(4)-33(5) and 33(9)

4.1 An economic operator that has been sent a notice of award may request an accelerated debrief, provided it is received by a contracting authority, *in writing*, by midnight of the second working day of the standstill period. The contracting authority must provide this information at least 3 full working days before the end of the standstill period.

4.2 Where this is not possible, the standstill period must be extended to allow at least 3 working days between the provision of the feedback, and the date at which the contracting authority proposes to enter into the contract.

4.3 If a request for feedback is received outside of the accelerated time limit, a contracting authority must provide a debrief within 15 days of receipt of the request. There is no need to extend the standstill period in these circumstances.

5. Exceptions to the requirement for the mandatory standstill period

Extreme urgency under the negotiated procedure: Public Contracts Regulations 2006, 32(6); Utilities Contracts Regulations 2006, 33(6)

- 5.1 The mandatory standstill period does not apply to below threshold procurements or to procurements otherwise outside the full scope of the EU Directives. This means it does not apply to procurements of Part B services, or to procurements where there is only one tenderer following the extreme urgency provision under the negotiated procedure.
- 5.2 The standstill period is not relevant to those Utilities' procurements that are exempt from the full scope of the EU rules.

6. Framework Agreements

- 6.1 It is worth highlighting that for framework agreements, the mandatory standstill period applies at the stage at which a framework agreement itself is awarded, but not during subsequent call-offs or mini-competitions within framework agreements.

7. Dynamic Purchasing Systems

- 7.1 For Dynamic Purchasing Systems (DPS), the standstill period will not apply when economic operators apply to join the system as nothing is being awarded - only indicative bids are provided. But it will apply at the call off stage, when contracts are being awarded within the DPS.

8. E-auctions

- 8.1 It is necessary to have a 10-day standstill period before entering a contract after a stand-alone e-auction is closed (i.e. an e-auction which is run outside of a framework agreement) or at the end of an e-auction run within a Dynamic Purchasing System. E-auctions held within framework agreements are for specific call offs and so they do not need a standstill period. For e-auctions undertaken outside the auspices of a framework agreement, the standard terms and conditions may need to be altered to ensure that the contract is not formed at the same time as the final bid is accepted to ensure compliance with the Regulations.

ANNEX A - General points arising from the consultation

(For ease of reference, the term provider has been used throughout this response to refer to contractors, service providers, and suppliers).

OGC received some 40 responses on the content and structure of the planned amendments to the Regulations from a range of organisations (including public sector and utilities), business groups, specialist legal advisers and other specialists. A number of issues raised by consultees, essentially to provide more logic and clarity on the functioning of these “standstill” rules, have been reflected in the new Regulations. This section provides further guidance on specific areas as requested by consultees.

Method of communication of award decision

Public Contracts Regulations 2006, 32(1); Utilities Contracts Regulations 2006, 33(1)

Several respondents queried why it was necessary to communicate the award decision (which must be sent to any providers involved at any stage of the procurement) by post if it had already been sent by fax or email. This point has now been clarified in the new Regulations. Information must be given to contractors in writing before awarding the contract, and must be by the quickest communication method practicable, which may include fax or email. This means that where notice of award has been given by fax or email, there is no additional requirement to give notification by post. However, where it is not practicable to give notice by fax or email, then the quickest alternative means should be used. What is practicable will depend on the circumstances but could include first class post, hand delivery or courier delivery.

Request for debrief

Public Contracts Regulations 2006, 32(4)-32(5) and 32(9); Utilities Contracts Regulations 2006, 33(4)-33(5) and 33(9)

Several respondents expressed concerns regarding the new debriefing requirements within the standstill period. A supplier can receive an accelerated debrief (a debrief within the standstill period) if they request it by midnight of the second day of the standstill. A contracting authority has to provide this, allowing three full working days between dispatch of the debrief and the end of the standstill period. If a request is received outside this time limit, normal rules apply and a contracting authority must provide debriefing within 15 days of receipt of a request.

Respondents to the consultation were concerned that there needed to be evidence that a contractor had requested an accelerated debrief in writing, to ensure that it was clear that a request had been submitted within the time limit. As detailed in the guidance above, the new Regulations now provide that the request must be made in writing (which includes fax and email) and that the contracting authority must receive it by midnight of the second day of the standstill period.

Timing

Public Contracts Regulations 2006, 32(5); Utilities Contracts Regulations 2006, 33(5)

The responses indicated some concerns about how the time period should be calculated when a rapid debrief was requested under the Regulations. The new Regulations provide clear detail of the requirements of the standstill period, and the accelerated debrief provision.

Scoring

Public Contracts Regulations 2006, 32(2b); Utilities Contracts Regulations 2006, 33(2b)

Some respondents expressed concerns about the requirement to provide unsuccessful tenderers with their scores and the scores of the successful provider “where appropriate.” They pointed out that a contracting authority’s/utility’s judgement about the successful tender is made against the relevant award criteria as a whole and that the use of this term might be taken to imply that contracting authorities should always score tenders even where it might not be the best method of evaluation.

The wording in the new Regulations has been changed to “where practicable” to show that scores should be provided where scoring was used as part of the evaluation method and where it is possible for the scoring system to be simply explained. If a scoring system used in an evaluation has been so complex that the information could not meaningfully be given, it would qualify as not being “practicable” to provide scoring details. Where scores have not been used, we would recommend, as best practice, the provision of a comparative evaluation of the successful and unsuccessful bids to unsuccessful providers instead of scores.

PFI procurement and other complex projects

The original guidance indicated the difficulties of deciding when the award decision took place in these complex procurements. To fully comply with the Alcatel ruling, the standstill period should occur at a time when all matters material to the decision to conclude the contract have been resolved.

Procurement in the electricity and gas markets, including where e-auctions are used

As part of an earlier consultation prior to reaching agreement with the European Commission on how to implement the mandatory standstill period into UK law, concerns were expressed over procuring energy, such as electricity or gas, for the public sector. These concerns were repeated in the October consultation. Electricity and gas are commodities where the market price fluctuations are arguably such that contracts often need to be entered into at the fall of the hammer i.e. concluded, in most cases, on the lowest price offered by the winning bidder at the end of an electronic reverse auction.

A significant amount of the public sector's purchases are already being conducted through framework agreements, since these can achieve greater value for money in this field. Expectations are that, in time, an increasing number of the public sector's energy requirements will also be made using such agreements.

The mandatory standstill period only applies at the stage at which framework agreements are set up and not for subsequent call-offs or mini-competitions. Where

required, call-offs and mini-competitions can also be e-auctions. E-auctions can take place within framework agreements without individual standstill periods. For contracting authorities, which already source energy through e-auctions organised within framework agreements, there is therefore no issue with the standstill provision. *Regulation 21 of the new Public Contracts Regulations 2006, sets out the rules for e-auctions.*

OGC advice to contracting authorities is to consider procuring energy requirements through setting up their own framework agreements, or by using a relevant framework managed by another organisation. Alternatively contracting authorities could seek to aggregate their energy requirements with those of others and set-up common framework agreements.

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⁴ Case C81/98 Alcatel Austria and Others -v- Bundesministerium für Wissenschaft und Verkehr

⁵ C212/02 Commission v Austria

⁶ Please see: <http://www.ogc.gov.uk/index.asp?id=1004558>