

# Public Procurement & The New Remedies Directive - What You Need To Know Seminar

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## Public Procurement & The New Remedies Directive - What You Need To Know

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### Introduction

This handout has been produced for those attending MacRoberts seminar on Public Procurement & The New Remedies Directive - What You Need To Know, held on 24 February 2010 (**the Seminar**).

This is designed to complement the following presentations at the Seminar:

- The Good & The Bad News: What Information Should An Authority Give To Bidders? by Kimberley Russell, Solicitor, Public Sector & Government Group
- What To Do When You Get The Bad News? By Robin Fallas, Senior Solicitor, Public Sector & Government Group
- Managing The Litigation Process by Julie Hamilton, Partner, Commercial Dispute Resolution Group and
- Potential For Remedies: What Can Be Achieved? Duncan Osler, Partner, Public Sector & Government Group

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## Remedies Under The Public Procurement Regime

### The Regime

The Public Contracts (Scotland) Regulations 2006/1 (**the Regulations**) were amended by the Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2009/428 which came into force on 20<sup>th</sup> December 2009 (**the Amending Regulations**). These set out the detailed rules which awarding bodies are required to follow when carrying out public procurements in Scotland and they implement into Scots law the Public Sector Directive 2004/18/EC (**the Public Sector Directive**) and the Remedies Directive 2007/66/EC (**together the Procurement Rules**).

### The Fundamental Principles

It is worth remembering that the Procurement Rules are intended to further the founding economic principles of the European Union, including in particular the free movement of capital, goods and services throughout European member countries, in a free internal market. The Procurement Rules were introduced to co-ordinate the public procurement procedures throughout the EU so that all economic operators may bid and compete for public contracts on a level playing field and open up the market to an increased number of bidders.

To do so, there are a number of fundamental requirements which underpin the Procurement Rules and apply to all public authorities under the Regulations, including the following legally binding principles:

- **Transparency** - an awarding body must ensure that information on procurement policies, rules, practices and opportunities is made available to all interested parties (in particular, potential suppliers and service providers). Interested parties have a legal right of access to such information. This is intended to make the process of awarding contracts equal and competitive.
  - **Non-discrimination** - an awarding body must ensure that there is no discrimination against contractors or providers from other EU countries and no discrimination between domestic and imported products or services. Awarding bodies should not place conditions on non-domestic bidders that are different to and more demanding than conditions placed on domestic bidders.
  - **Equality** - an awarding body may not impose conditions on some bidders and not on others unless (exceptionally) there is reasonable justification for such treatment. All enquiries and requests for information or other assistance must be treated fairly and equally.
  - **Mutual Recognition** – under this principle awarding bodies must accept technical specifications, diplomas and qualifications if supplied by undertakings from other EU countries when they are generally recognised as being equivalent to those required or recognised in the
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UK.

- **Proportionality** - this principle requires that definitions of performance and technical specifications are necessary and appropriate in relation to the objectives to be reached by the awarding body e.g. that excessive and disproportionate technical, professional or financial conditions are not applied when selecting candidates for procurements.

### Scope of Application

The Procurement Rules apply to the procurement of all public contracts if certain pre-conditions are met. The most important of these pre-conditions are as follows:

- The body awarding the contract must be a contracting authority;
- The object of the contract must be public works, supplies or services as defined in the Regulations; and
- The value of the works, services or supplies must be in excess of the specified financial threshold, although in Scotland certain obligations may still apply in relation to below-threshold procurements (which require sufficient advertising and transparent and non-discriminatory procedures under the Regulations).

There are however a number of general exclusions to the application of the Regulations. For instance (and not exhaustively) the award of contracts in relation to the following are excluded:

- The acquisition of land, including buildings and any estate, interest, easement, servitude or rights in or over land.
- In relation to broadcasting.
- In relation to arbitration/conciliation.
- Financial services.
- Central banking services.
- Research and development services (unless certain conditions are fulfilled) or the contract is classified as secret.

### Information On Public Sector Opportunities

For bidders, the key to successful engagement in a public procurement - securing contracts - is to be aware of contract opportunities, to carefully consider a contracting authority's requirements and to respond accordingly with proposals which are as competitive as possible.

To assist, the Regulations require a contracting authority to advertise contract opportunities and to clearly set out how the procurement will operate at an early stage. Advertisement is by way of a **Contract Notice** which must contain certain information relating to the procurement. Information on contract opportunities is available from a number of sources but in the main, opportunities in Scotland

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can be found on:

- Tenders Electronic Daily: a web-portal on the European Commission's website which contains all published Contract Notices across the European Union;
- Public Contracts Scotland: a web-portal advertising contract opportunities in Scotland, both above and below-threshold; and/or
- The websites of individual contracting authorities (such as individual local authorities etc.).

It is important for the contracting authority accurately to describe its requirements at this stage so that the contract notice fully informs potential bidders, and constitutes the foundation of a legally compliant procurement.

### **The Types Of Procedures**

Four different procedures are currently available under the Procurement Rules namely, the Open, Restricted, Negotiated and Competitive Dialogue procedures. A Contracting Authority may choose between using the Open Procedure and the Restricted Procedure but there are restrictions on when the Negotiated and Competitive Dialogue procedures can be used. Furthermore an accelerated Restricted Procedure may be used in certain circumstances.

### **Pre-Qualification**

The restricted, negotiated and competitive dialogue procedures all involve a pre-qualification stage. A contracting authority is only permitted to base its decisions as to who to pre-qualify to be invited to tender, to negotiate or to participate in a competitive dialogue, on an applicant's economic and financial standing and/or its technical or professional ability.

There are also other certain grounds specified in the Regulations which automatically entitle a contracting authority to treat a bidder as ineligible to participate in the procurement. These grounds also entitle a contracting authority to exclude an interested party from taking part in an open procedure, and they include grounds such as insolvency or where the bidder has committed an act of grave misconduct in the course of their business.

### **Submitting A Tender & Tender Evaluation**

Contracting authorities are required to set out the evaluation criteria which they will use to assess offers received and make a contract award decision either within the Contract Notice or, at the time at which the contract documents are provided to bidders. Contracting authorities are required to comply with the fundamental principle of European law to act transparently and, for this reason they must apply the evaluation criteria that were indicated previously to bidders when assessing bids.

In other words, in a Public Procurement, a contracting authority must tell bidders in advance what it is

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going to do, then do what it said it would do.

### **Legitimate Evaluation Criteria**

The Regulations provide for two methods of tender evaluation only, namely 1) lowest price, or 2) most economically advantageous tender. If a contracting authority decides to use the latter, it may select qualitative criteria from a list in the Regulations, provided those other criteria are linked to the subject matter of the contract. Examples from the list are quality, delivery and aesthetic and functional characteristics, technical merit, after sales service and technical assistance but that list is not exhaustive and other criteria may be used. It is for the authority to determine the most appropriate evaluation criteria aimed at identifying the tender which is most economically advantageous to it.

Contracting authorities are required to inform bidders about the weightings it has decided to give to each of the evaluation criteria, and sub-criteria for bid evaluation. If it is not possible for the authority to do so, as an alternative they must list the criteria in the contract document in descending order of importance.

Prior to submitting tender bidders will generally examine the evaluation criteria (and their weightings) carefully so as to understand how the tender will be evaluated and to assist that bidder to tailor their response so as to demonstrate as fully as possible the economic advantageousness of its proposals.

### **Transparency and the Tender Process**

European case law has established that a body closely involved in the tendering procedure "must receive without any delay, precise information concerning the conduct of the entire procedure". Accordingly, if any aspect of the contracting authority's requirements, evaluation criteria and/or procedural requirements is unclear the Regulations allow bidders to seek clarification from an authority before they return their tender. The contract documents typically will inform bidders as to how clarifications may be sought e.g. whether a request for information is to be made in writing to a specified email or correspondence address.

Clarification to bidders during the tender process is in order to reduce or avoid misunderstandings but given the requirements of transparency, equal treatment and non-discrimination a contracting authority must provide additional information concerning the procurement process and evaluation to all bidders at the same time so that one bidder may not be given, or be seen to be given an unfair advantage.

### **Contract Award Process**

Following the submission of all tenders and tender evaluation, a contracting authority may only award a contract in accordance with the grounds (and no other grounds) specified in the Contract Notice and/or contract documents i.e. to the most economically advantageous tender in accordance with the pre-stated evaluation criteria, or to the tender submitting the lowest price.

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## The Mandatory Standstill Period

Before a contract may be entered into between a contracting authority and a successful bidder, the Regulations provide that the authority must already have notified all bidders and candidates concerned of its award decision and allow a period of at least 10 or 15 days (depending on the circumstances) to elapse, between the authority communicating the award decision to all parties, and the date it actually concludes the contract (**the Mandatory Standstill Period**).

An authority must provide each unsuccessful bidder with specified information. That includes the criteria for award of the contract, (where practicable) the score obtained by the bidder receiving the notice and the bidder to be awarded the contract, the name of the successful bidder and for unsuccessful bidders, a summary of the reasons why it was unsuccessful, the characteristics and relative advantages of the successful tenderer and a precise statement of the effect of the standstill requirements on the economic operator receiving the notice.

In addition, if asked in writing by an unsuccessful bidder the contracting authority, it must inform that bidder within 15 days of receipt of the reasons why it was unsuccessful and disclose the name of the successful tenderer and characteristics and the relative advantages of the successful tender, if not already provided.

The purpose of these disclosure obligations is primarily to achieve transparency of information about the procurement process. The purpose of that transparency is to generate fairness in that process. Indirectly, information so provided may be of assistance to a bidder which considers it needs to raise legal proceedings to protect its interests in a procurement. A contracting authority should meet those disclosure requirements, even though it may be exposing itself to greater risk of legal challenge by releasing information required under the Regulations.

A second purpose of disclosure is to provide information to bidders to allow them to understand where their proposals were less attractive to the contracting authority than those of the successful bidder, and so to review and improve their approach to future tendering exercises.

## Remedies Under The Regulations

Contracting authorities owe an obligation to all economic operators to comply with the Procurement Rules. As a result, the Regulations provide for certain remedies to be made available to contractors and other suppliers in actions against contracting authorities based either on a breach, or suspected breach of the Procurement Rules or any other provision of EC law governing the procurement process.

Under the Regulations, a Court may award the following remedies:

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- interim suspension of a procedure for contract award or suspend the implementation of any decision or action taken in the course of the procedure;
- and if satisfied that a breach of the contracting authority's duty has occurred;
- an order to set aside any unlawful decision including amending a document; and
- an order for the award of damages to the economic operator who has suffered loss or damage as a consequence of the breach.

Aside from orders of ineffectiveness described below, the remedies available to aggrieved bidders are limited to damages if the contract has been legitimately entered into i.e. after the Mandatory Standstill Period has expired in accordance with the Regulations.

In order successfully to pursue a Court action for one of the above remedies a bidder must first have informed the contracting authority of the breach (or alleged breach) of the duty owed to it under the Procurement Rules, and of its intention to bring proceedings in respect of that breach (commonly referred to as a **Letter Before Action** or a **Letter of Formal Complaint**) and must bring proceedings for that breach promptly and in any event within three months of when the grounds for the bringing the proceedings first arise (although a Court may extend those grounds for "good reason").

### **Orders for Ineffectiveness**

For procurements to which the amended remedies provisions apply (commenced after 20 December 2009), proceedings may be brought before a Court within (a) 30 days of a valid contract award notice being sent to the Official Journal or of all tenderers having been duly informed in writing of a contract award decision, or (b) otherwise, within 6 months.

Those proceedings for ineffectiveness would seek that the Court render unenforceable all rights and obligations directly arising from the contract for the period starting on the date of the order.

The first, second and third grounds for ineffectiveness are where:

1. a contract is entered into, or a framework is concluded, by a contracting authority without a contract notice having been sent to the Official Journal, when one should have been so sent;
2. a contracting authority has breached the rules on notice to bidders and on mandatory standstill periods, the breach prevented the bidder from bringing proceedings prior to the contract being entered into, and there has been another qualifying breach of the Regulations (duly affecting the chances of that economic operator bringing proceedings); and
3. a contract is awarded following a qualifying breach of the Regulations in relation to awards under framework agreements (or dynamic purchasing systems).

Where an ineffectiveness order is made a Court must order the contracting authority to pay a financial penalty and also make such orders as are appropriate to address the consequences of the order on the parties to the contract made ineffective. In addition it may order a financial penalty in certain other

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circumstances, notably where it decides (balancing negative consequences and the benefits) not to grant an interim order.

A Court may decline to make an ineffectiveness order in certain circumstances relating to the public interest, as described in more detail in the Seminar and if it does, it must order payment of a financial penalty or shorten the duration of the contract.



## **Managing The Litigation Process**

**By Julie Hamilton**

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### **Introduction**

No one really wants to go to court nor do you want to have an action raised against you. However, sometimes it is your only option to have a matter decided. In this paper I will consider what issues might arise before and during a procurement challenge litigation and give you some practical tips to deal with them as effectively as possible. Almost all of the points apply equally to the new Remedies Directive as they did under the existing regime.

#### **1. Early, specialist advice**

We say this to all of our clients who may have a dispute in any commercial field. However, my experience in advising in two recent procurement challenge court cases is that it makes a huge difference to how a matter is approached, managed and, of course, how it may turn out, if legal advice is sought at an early stage.

The old regime had a fairly tight time frame within which you had to operate, and relatively quick decisions had to be taken, quite early on. You could not sit back and wait for several years before deciding, for example, whether or not to pursue a claim. In view of the extremely tight timescales introduced by some aspects of the new Remedies Directive, and I have in mind the inability to extend standstill and ineffectiveness orders, it will be even more important to decide very early on, if you are the unsuccessful bidder, what remedy you want, and how you might try to achieve that. If you are the contracting authority, you will need to get very early advice on how robust your procurement process was. I cannot emphasise enough how vitally important it will be for you, as time is definitely not on your side.

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In the DR Plumbing case in which we acted, the time line was as follows:

26 November 2008:	Notification letter. Standstill extended by correspondence.
15 December 2008:	Debrief meeting.
16 January 2009:	Contracting authority advised contract had been awarded by letter on 27 November 2008.
20 January 2009:	Court action raised.
29 January – 3 February 2009	Interim orders hearing and decision.

So, cases move very quickly and you have to be fully prepared.

## **2. The right team/the right court**

So, not only do you have to take early advice, you need to have both the procurement advice and litigation strategy in mind. There is, in my view, no point giving procurement law advice in a vacuum when you have reached the stage of getting the bad news. Obviously, I would recommend that you contact MacRoberts, as we have unique experience in this area, but even if you do not contact us, then please bear this in mind.

Whilst the new regime provides as with the old regime that the court can be either the sheriff court or the Court of Session, my recommendation is that this is such a specialist and new area, which usually needs to be handled with some urgency in court due to the nature of the underlying works, you should only really contemplate raising proceedings in the Court of Session, which for those of you that do not know, is in Edinburgh. To conduct a case in the Court of Session you need to instruct either a Solicitor Advocate or an Advocate, and there are several Counsel in the main commercial chambers (or stables as they are known) with relevant expertise and experience. This is not an area to "dabble" in, in my opinion, so you want to instruct someone who knows what they are doing from the off.

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In the Court of Session you have the choice of the ordinary court or the commercial court. In the commercial court the rules provide a procedure which is designed to be swifter, more flexible and with less emphasis on written pleadings than ordinary procedure. The case should be dealt with as quickly as possible, closely supervised by the court and all appearances should be before the same judge.

Certainly, in our most recent case, which was raised in the commercial court, the procedure moved quickly: we sought and were granted a shortened, 14 day notice period (normally, there is a 21 day notice period following service of a summons, which is the originating document in a court case), after the summons was returned to court, defences were lodged within 7 days, and there was a preliminary hearing to decide on further procedure within a few days of defences being lodged, a short period of adjustment of the written pleadings was allowed and a legal debate fixed to start within 2 weeks of that initial hearing. In the event, the debate took 5 days, not 2 days as anticipated, but the commercial judge made sure that he cleared his diary to finish the hearing off by the end of the following week. He then issued a written decision within less than 4 weeks of the debate concluding. I should say that in this case, the unsuccessful defender has lodged an appeal, which is set down for what is called "early disposal" at the request of the parties, due to the nature of the dispute and the public interest angle. Appeal dates are awaited.

### **3. What type of orders can or should be sought**

The first and most obvious order to consider is usually damages. In the most recent case I have referred to, damages are sought, but, interestingly, very much as a subsidiary remedy, insofar as the unsuccessful contractor is concerned. An unsuccessful contractor would have to show that it had suffered loss and damage as a result of the authority's breaches, and that, had the pursuer fulfilled the contract, it would have generated profit. However, one has to weigh up the economics. A pursuer ought to think very carefully about the potential gain as against the time, expense, effort, publicity and potential reputational damage a procurement challenge case can create. For a contracting authority, it is essential to challenge the relevancy and specification of a damages claim.

However, it is the other orders sought or to be sought that are often crucial, usually interim orders. These are the most pressing and urgent. Under the new regime, if you are a pursuer, you may not have much time at all to think about them in detail, and may need to take action to preserve your position. If you are on the receiving end, or likely to be, of an application for interim orders, then make sure that your caveats are in place and up-to-date (these are an early warning trigger, which can be prepared and lodged in the appropriate courts quickly and cheaply, and are something we recommend all of our commercial clients have in place).

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The first interim order to consider is interim interdict. Interdict is a preventative remedy, which prohibits action which is threatened or continuing, and it looks to the future, not to the past. Its function is a negative one, and it would not be appropriate to compel the performance of an obligation by means of interdict. So, in the DR Plumbing case, interim interdict was sought and granted to prevent the Council from entering into a contract with the purportedly successful contractor. Prior to that being determined in court, a written undertaking was agreed with the Council that pending the determination of the application for interim orders by the court the Council would not take any further steps to implement its decision to award the contract, on a without prejudice basis.

Another order usually sought in tandem with interim interdict is interim suspension which is self-explanatory.

The two main questions for the court in an interim orders application are, first, has the pursuer made out a prima facie case i.e. a good, arguable case and second, does the balance of convenience favour the making of such an order? That usually means the effect on the pursuer of not getting the order compared with the effect on the defender of the order being granted. These applications are granted without any definitive hearing on the merits of the case, and are designed to preserve matters pending the final outcome of litigation. The issue often arises as to whether the orders are truly "interim". Often, obtaining interim orders means that the action will not be contested further or the order may go further, and determine the issue for all practical purposes.

Thereafter, orders to set aside and seek suspension and reduction are usually sought. In the Sidey case, no interim orders were ultimately sought due to the helpful position adopted early on by the Council, and the arguments in the case in the context of orders sought for set aside and suspension and reduction of the purported contract were about the competency of the pursuer's claim, the applicability of the Regulations and whether any remedy other than damages was open to the pursuer.

I should say that a question for any unsuccessful bidder to consider is whether an order could be sought seeking an award of the contract.

The new remedy afforded by the Remedies Directive, ineffectiveness orders, is commented on in the Potential for Remedies paper.

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## Conclusion

This is a very complex area of law, and it is developing constantly. Any argument in court requires a review of European case law. The appeal in the Sidey case is awaited. Let's see what the reaction is to the 2009 Directive. One thing is for sure, it will not be a quiet year!

## Disclaimer

The material contained in this handout is of the nature of general comment only and does not give advice on any particular matter. Readers should not act on the basis of the information in this handout without taking appropriate professional advice upon their own particular circumstances.

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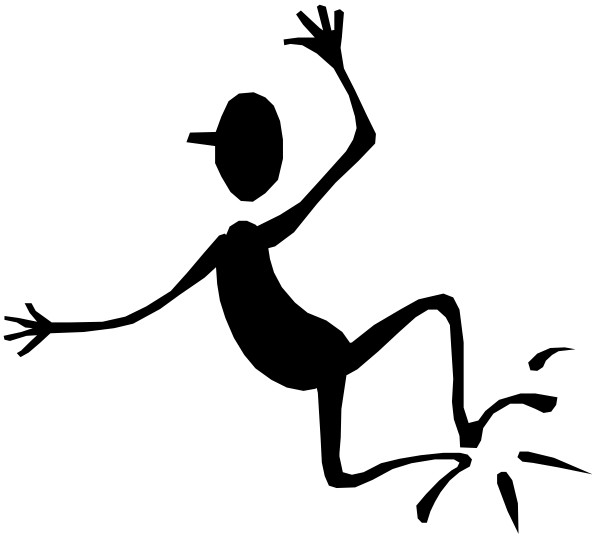
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# The Good & The Bad News: What Information Should An Authority Give To Bidders?

Kimberley Russell

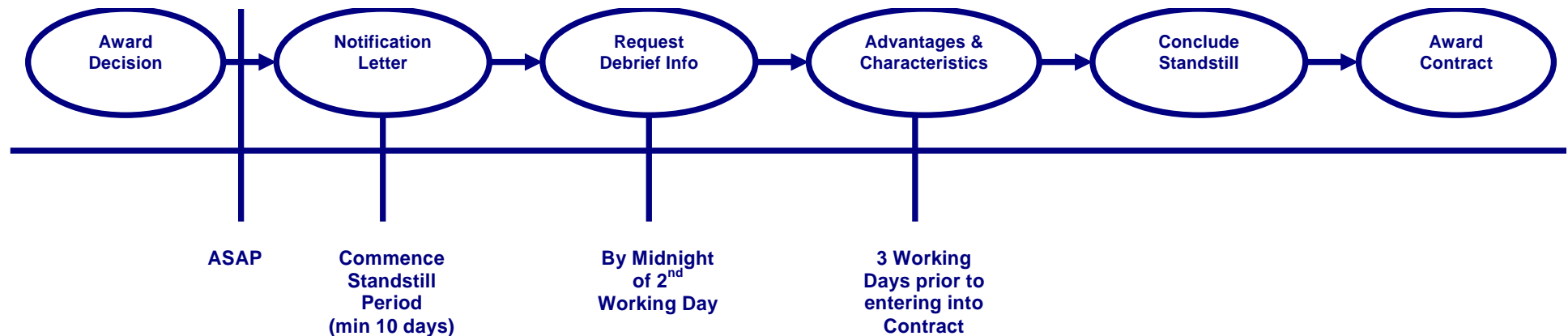


# Catch 22



# Notification Requirements

## Pre 20 December 09



- ▣ Notification Letter to include:
  - ▶ Criteria for award of the contract
  - ▶ Name of successful bidder; and
  - ▶ Scores of (a) unsuccessful bidder and (b) successful bidder
- ▣ Bidder may request relative advantages and characteristics of successful tender to be provided



# Notification Requirements

## Post 20 December 09

- ▣ Content of Notification Letter also to include:
  - ▶ Information included previously AND
  - ▶ Summary of reasons why unsuccessful;
  - ▶ The characteristics and relative advantages of successful tender; and
  - ▶ Precise statement of Standstill Period - may not be 10 calendar days



# Notification Requirements Post 20 December 09

- ▣ Consequences:
  - ▶ Now front Loaded
  - ▶ Shift of Burden – Onus now on Contracting Authority
    - MUST inform bidders of relative advantages and characteristics of successful tender at the outset (as opposed to on request)
  - ▶ NO explicit requirement for a Debrief



# Relative Advantages & Characteristics

- ▣ Vital to provide all required information:
  - ▶ Potential Ground for Ineffectiveness - Breach of requirement to send Award Decision to all Bidders
  - ▶ May include a failure to provide relative advantages and characteristics (invalid Notice)
- ▣ BUT what does relative advantages and characteristics actually mean? and
- ▣ Can an Authority ever provide satisfactory reasons for its decision (including the characteristics and relative advantages of the successful tender) sufficient to satisfy an aggrieved bidder?



# Relative Advantages & Characteristics Cont.

- ▣ Lack of detailed guidance available
- ▣ BUT more than just a summary
- ▣ Best practice? Arguably:
  - ▶ Keep an accurate record of evaluation process and outcome;
  - ▶ Provide a detailed objective justification of the award decision;



# Relative Advantages & Characteristics Cont.

- ▶ Provide full details on evaluation scores and evaluation process; and
  - ▶ Provide a comprehensive comparison of the successful tender against the relevant bidder's proposals
- ▣ Remember Transitional Arrangements!





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# What To Do When You Get The Bad News

Robin Fallas



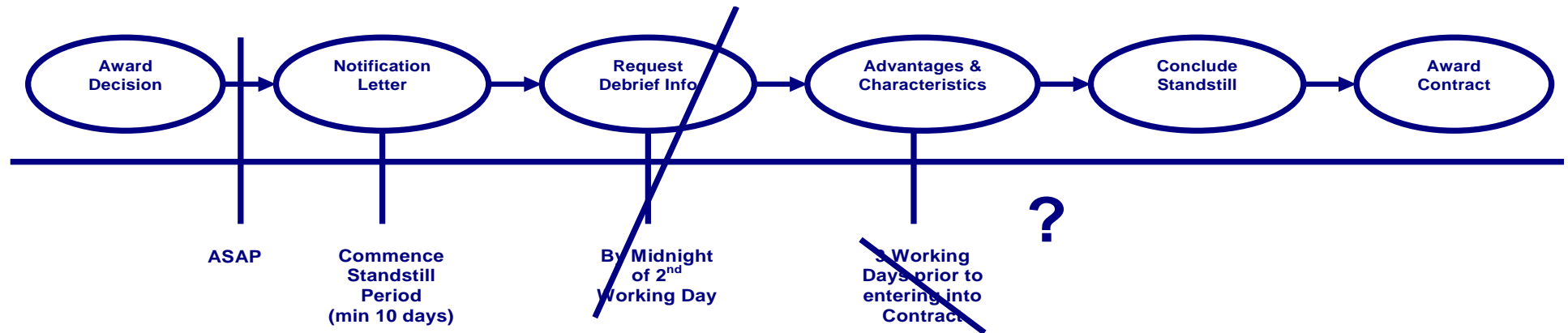
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# Overview In Brief

- ▣ New regime only applies to procurements **commenced** on or after 20/12/09
- ▣ New regime - Bidder's perspective - changes and implications
- ▣ Some other observations
- ▣ Key considerations - what to do on receiving the bad news
- ▣ Taking matters forward - remedies



# Bidders – Changes & Implications



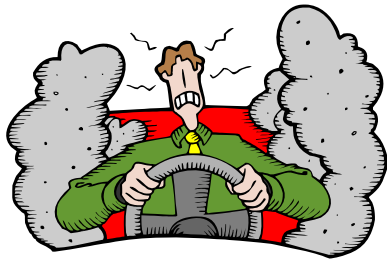
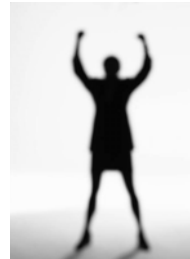
- ❑ Reg 32(2) - “characteristics/advantages” at outset
- ❑ No “3 working day” window following further info
- ❑ Reg 32(6) - Unclear what further info
- ❑ Difficult to extend standstill?



# Some Other Brief Observations

- ▣ Reg 32(5) - Below threshold standstill?
- ▣ Reg 32(10) - Provision of information
- ▣ Reg 32 (8) – Recommencement





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# What to do when you get the bad news

## - Information is (still) key

- On receipt of Notification Letter:
  - ▶ Early and careful consideration
    - Compliance with Reg 32(2) and 32(3)
    - Disclosure of breach?
    - Cause for concern?
    - Does info provide characteristics and advantages?
  - ▶ Use of Reg 32(6) / Request for debrief?

.....Decision time!



# Summary Of Post 20<sup>th</sup> December Remedies

- ▣ **(Reg 47A(1)) Damages** – *but can you show “loss”?*
- ▣ **(Reg 47A(1) & (2)) Set-aside pursuant to interim-order** – *be aware of court discretion and quick action within standstill important.*
- ▣ **(Reg 47(B)) Ineffectiveness of contract** – *limited circumstances + court discretion not to order*
- ▣ **Financial penalty on CA** – *will this remedy be of interest to you as unsuccessful bidder?*
- ▣ **Contract shortening** – *will this remedy be of interest to you as unsuccessful bidder?*
- ▣ **Standstill (still) key to keeping options open**

.....**Decision time!**



# If Going To Court

- ▣ Time limits:
  - ▶ **30 days** for “ineffectiveness” order where “notification” carried out by CA
  - ▶ **6 months** for ineffectiveness in all other circumstances
  - ▶ **3 months** “+ promptly” in all other circumstances
- ▣ Reg 47(6): Letter of complaint / Letter before action
- ▣ Reg 47(10): Once proceedings served, CA shall not enter into contract



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