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THE PUBLIC CONTRACTS REGULATIONS 2015

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FOR UTILITIES, THE UTILITIES CONTRACTS REGULATIONS 2016

GUIDANCE ON THE STANDSTILL PERIOD

Updated in October 2016

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OVERVIEW

What is the standstill period?

The standstill period provides for a short (at least 10 calendar day) pause between the point when the contract award decision is notified to bidders, and the final contract conclusion, during which time suppliers can challenge the decision. It is a legal requirement imposed through the remedies directives.

Why is this helpful/necessary?

The purpose is that for contracts subject to the EU procurement directives, a contract award decision must 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. By properly applying the standstill period, authorities can protect themselves from potential ineffectiveness claims (a very serious post-contractual remedy).

What has changed?

The standstill rules are basically the same as they have been since December 2009 when the (then) new remedies directive was implemented. As the remedies directive has not changed, the essence of the standstill rules has not changed either. These rules are now captured in the new Public Contracts Regulations 2015 ('The Regulations'). (Utilities should refer to the Utilities Contracts Regulations 2016 (UCR2016), but those rules are very similar to the public sector rules, and this guidance is equally applicable except where noted otherwise).

There are two changes to be aware of, regarding the application of standstill to:

- **Contracts subject to the new Light Touch Regime for certain service contracts (LTR); and**
- **Procurements commenced by sub-central authorities using Prior Information Notices (PIN) as a call for competition (this does not affect central government authorities or Utilities)**

Both of these points are discussed in the main section below.

This note then goes on to provide a reminder of the other essential, longstanding requirements.

Which rules do I need to refer to

The standstill rules at Regulations 85 to 87, and rules on automatic suspension during standstill at Regulation 95. (Utilities should refer to Regulations 100-102 and 110 respectively of the UCR2016).

The Main Area of Change: CCS Recommends the Application of a Standstill Period to above-threshold LTR Contracts for Public Authorities.

Summary of the Change

Under the old rules, as "Part B" Service contracts did not need an OJEU contract notice, they did not need a standstill period, and so ineffectiveness could not have been given as a remedy for failure to publish an OJEU contract notice for a Part B Services contract.

The legal position for public authorities¹ is less clear under the new rules for the Light-Touch Regime (LTR). A standstill period may not strictly be required, particularly where a Prior Information Notice (PIN) instead of a contract notice has in fact been used to call for competition. But in the light of uncertainty, CCS suggests that contracting authorities will usually wish to send a standstill notice and observe the standstill period (in the same way as in procurements governed by the main rules), as this will avoid the risk that the contract (or framework agreement) might be subject to the draconian remedy of ineffectiveness if the case law does clarify that these requirements do apply to the LTR.

On the other hand, where particular circumstances make it important to award the contract urgently, contracting authorities may want to weigh the urgency against the risks of proceeding without a standstill.

These issues apply equally to those procurements by sub-central authorities which are permitted to be commenced by PIN as a call for competition.

It is also good practice to inform participants as soon as possible when they are excluded from a procurement exercise, and the reasons for that exclusion.

Contracts *below* the LTR threshold do not need a standstill period.

Key Points (these are longstanding requirements that have not changed)

¹ In the Utilities Directive, the relevant derogation from standstill makes clear that standstill can be avoided where it is permitted for the contract to be awarded "without a call for competition", unlike in the public sector directive which uses the phrase "without prior publication of a contract notice". The latter leaves some uncertainty for public authorities as to whether it is acceptable to avoid the standstill period when PINs have been used as a call for competition, though CCS believes this to be an unintended anomaly and has therefore recommended that public authorities apply the standstill period for above threshold LTR contracts, in the same way that Utilities have to do.

- A “standstill notice” (also referred to as an “award decision notice” or a “Regulation 86 notice”) needs to be sent to all tenderers (which is any tenderer that has not been definitively excluded) and any candidates (candidates being any applicants that have not already been notified of their rejection and the reasons for it).
- The reasons for the award decision must be included with the notice, released at the start of standstill, not given later upon request. This is essentially a written debrief.
- Information about the ending of the standstill period should be included within the standstill notice
- The minimum standstill period is calculated depending on the means of communication used to transmit the standstill notice:
 - i. At least 10 calendar days, when the notice is communicated using electronic means (e.g. fax², email); or
 - ii. When using non-electronic means, there is a choice between either: 15 days from date of sending; or 10 days from date of receipt
- In certain circumstances the standstill period need not be observed. These are:
 - i. Where there is no obligation to advertise the contract in OJEU (eg below-threshold procurements, or negotiated procedures without a call for competition)
 - ii. Where there is only one tenderer remaining and there are no candidates
 - iii. In above-threshold call-off contracts from a framework agreement or Dynamic Purchasing System (DPS), the standstill period is voluntary not mandatory (but we still strongly recommend applying it to protect against possible post-contractual ineffectiveness claims).
- Any legal challenge of the contract award decision prior to entry into the contract (which will most likely be during the standstill period) triggers the automatic suspension of the contract award.
- See the flow-chart overleaf for a quick and easy reminder of the main steps to take

Main Requirements of the Standstill Notice

² In the Regulations generally, reference is made to facsimile as something different from electronic means, but for convenience this Guidance uses the term ‘electronic means’ to include fax as well as e-mail.

- Contracting authorities must as soon as possible after the decision has been made, inform all of the tenderers (ie tenderers that have not already been definitively excluded) and any candidates (i.e. any rejected applicants that have not been informed of the reasons for the rejection of their application) of the decision to:
 - award the contract; or
 - conclude the framework agreement;
 by sending a standstill notice .

- Where it is to be sent to a tenderer, the standstill notice must include:
 - the criteria for the award of the contract;
 - the reasons for the decision, including: the characteristics and relative advantages of the successful tender; the score (if any) obtained by the economic operator which is to receive the notice and the tenderer to be awarded the contract / become party to the framework agreement;
 - the reasons (if any) why the economic operator did not meet the technical specifications;
 - the name of the tenderer(s) to be awarded the contract / become party to a framework agreement;
 - a precise statement of either:
 - (i) when the standstill period is expected to end and, if relevant, how its ending might be affected by any, and if so what, contingencies; or
 - (ii) the date before which the contracting authority will not, in conformity with regulation 87, enter into the contract or conclude the framework agreement.

- Where it is to be sent to a candidate, the standstill notice must include:
 - the reasons why the candidate was unsuccessful; and
 - all the same information that would be sent to tenderers, except for “relative advantages of the successful tenderer”³.

Frequently asked questions

³ A candidate will, of course, have been given no ‘score’ and so the obligation to include “the score (if any)” of the recipient of the notice will not bite.

Q. How do I comply with the obligation to reveal the “characteristics and relative advantages of the successful tender?”

- To comply with the obligation to reveal the “characteristics and relative advantages of the successful tender”, contracting authorities should release the full breakdown of scores against each criterion and sub-criterion, and support this with narrative explanation of why the winner scored more heavily in the relevant areas
- To reveal the “relative advantages of the successful tender” is to give unsuccessful tenderers a helpful indication of the ways in which the winning tender was better than their offering, but in a sufficiently generic way that does not compromise the confidentiality or intellectual property of the successful tenderer and which may be useful so that unsuccessful tenderers can improve their offerings next time. So the explanation given to each unsuccessful tenderer will need to be bespoke and differ in some ways to the explanations given to other unsuccessful tenderers, as each tender is likely to have different characteristics and therefore the relative advantages of the winning tender to each of the losing tenders will differ.
- Clearly, divulging key innovative features or other confidential aspects offered by the successful tenderer is unlikely to be acceptable. At the other extreme, making comparisons against the published award criteria seems to be clearly acceptable, as the scores of the winner and the tenderer receiving the notice have to be given in any event. Therefore, a relatively safe approach would be to provide a narrative description of the characteristics and relative advantages of the successful tender, in a generic and confidentiality-respecting way, using the award criteria as the basis for comparisons, in the way envisaged in the above examples.

Q. Do I need to do a face-to-face debrief as well as the written debrief in the standstill notice?

- Contracting authorities may still use debriefing sessions where appropriate to explain the outcomes of procurement processes to the participants. However, contracting authorities should be aware that the risks arising from any discrepancy between written and oral debriefing information are high, and so it is important that there is consistency between the legally required information that is provided in written form and any other information that is provided orally. Consequently, where oral debriefing is to be used, a cautious approach is recommended. Such an approach may necessitate carefully planned oral briefings, and clear records being kept of exactly what is said and by whom.

Q. What information is needed in providing information about the ending of the standstill period?

- The key thing that is always needed is to make clear when the standstill period ends. If relevant, the notice must also flag up how the ending might be affected by any contingencies and, if so, what those contingencies are. For instance where the contracting authority is sending at least one of the notices by post, and elects to factor this into the calculation of the standstill period by using the '10 days from receipt' option rather than the '15 days from sending' option. The "precise statement" should be as precise as reasonably can be expected..

Q. Do I have to use electronic communications to send the standstill notice?

- Contracting authorities are obliged to inform economic operators of the award decision in writing by the fastest means practicable, which will in most circumstances be achievable through electronic transmission. In these circumstances, the minimum standstill period is 10 calendar days from the date of sending. This means that the period ends at midnight at the end of the 10th day after the sending date (i.e. counting the day after the sending date as the first day after, etc). We strongly recommend use of electronic means, both for compliance and convenience reasons.

Q. What about procurements using the negotiated procedure without prior publication?

- Where the authority is using this procedure to negotiate with just one bidder from the outset, there is clearly no requirement or useful purpose in applying a standstill period, as no-one other than the single bidder would receive it and who could make a challenge in light of it. However, it is possible that, after the award of the contract, another supplier may feel aggrieved at the absence of a transparent competitive procurement, and challenge the contracting authority's decision that it had legitimate grounds for using this special procedure, and seek a declaration of ineffectiveness. Contracting Authorities can publish a *Voluntary Transparency Notice* instead of a standstill period, to protect against this kind of ineffectiveness claim.

Q. Do I need a standstill period for call-off contracts?

- In above-threshold call-offs from framework agreements and dynamic purchasing systems, to give protection from ineffectiveness claims, a cautious approach would be to send the standstill notice to everyone on the framework/DPS, so as to ensure that parties that were not invited to the mini-competition (who may be aggrieved by their non-invitation) have the chance to seek pre-contractual remedies. Alternatively, if the contracting authority has identified a clear subset of parties on the framework/DPS that have the necessary capability to perform the contract (for example, all the suppliers on the relevant lot), then the authority may prefer to limit the dissemination of the standstill notices to that subset, on the basis that no grievance could be raised by any other framework suppliers. See Regulation 99(7).

Q. What happens when a bidder challenges the award decision?

- Contracting authorities are automatically obliged to refrain from entering into the contract when proceedings are brought in respect of the award decision and the contract has not already been entered into (or the framework concluded). An injunction is not necessary to prevent the contract being made. Failure to comply with this requirement can be part of the grounds for an ineffectiveness claim, so it is extremely important that contracting authorities adhere to this requirement. The automatic suspension remains in force until either the court terminates the suspension or the proceedings come to an end. The contracting authority can apply to the Court for the suspension to be terminated, and a contracting authority should take specific legal advice where it would like to evaluate the chances of obtaining such an order.

Q. Do sub-central authorities commencing a procurement using a Prior Information Notice as a call for competition need to apply the standstill period?

- Yes, CCS recommends that standstill is applied in these circumstances, despite the absence of a certain legal position on the matter. The issues discussed at the start of this guidance in relation to LTR contracts apply equally to contracts procured by sub-central authorities using a PIN as call for competition.

Annex A - Standstill Flow Chart

Standstill Flow Chart

