

New Arrangements for Awarding Part B and Sub-threshold Contracts

Increasingly at the end of a tender process Commissioning Officers are:

- Delaying signing the contract because of the “standstill period”;
- Saying they need to publish details of the winning contractor in the Official Journal of the European Union (OJEU);
- Issuing “letters of intent” to successful contractors.

**Why is this happening?
What has changed?**

New arrangements are now in place which applies to all tender procedures where the original notice **WAS NOT** published in the OJEU.

These arrangements apply to all Part B contracts, sub threshold services (total contract value below £173,934 for public purchasing generally (or £113,057 for contracts directly with Government Departments, and negotiated contracts).

The reasons for the changes lie in the Remedies Directive which was implemented on 20th December 2009. This has had a dramatic effect on public sector contracting, the effects of which are only now coming to the fore. Under British law for hundreds of years, a contract, once awarded could not be declared ineffective and thus annulled by the Courts. The legal remedy which was available to the courts under contract law in the event of a failure was to award damages **NOT** to cancel and re-award the contract to the dis-satisfied party. **The Remedies Directive changed this dramatically.**

Since 20.12.2009 UK courts have been able to declare a contract to be “ineffective” and thus cancelled in the event of a successful challenge regarding a failure to comply with procurement legislation. There is a time limit for challenging a tender outcome which is six months from the contract award. This can be reduced to 30 days in some circumstances. If a contract is found to be ineffective the purchaser must undertake a new tendering exercise.

However – a purchaser can eliminate the risk of legal challenge, and thus the declaration of contractual ineffectiveness by publishing a “Voluntary Ex-Ante Transparency” or VEAT notice in the OJEU. This implements a “standstill period” to enable dis-satisfied tenderers to start a legal challenge. The standstill period is 10 days from the publication of the decision to award the contract, if the notification is sent electronically or by fax; 15 days if not sent electronically.

The purchaser must provide:

- An “award decision notice” at the start of the standstill period; and
- A “summary of reasons” for not awarding the contract.

If a VEAT notice is published, dis-satisfied tenderers MUST commence any challenge during the stated standstill period. No challenge is possible after the standstill period has been completed.



Although voluntary, the VEAT notice is becoming increasingly significant as purchasers seek to limit the possibility of legal challenge.

There is an added benefit for both provider and purchaser in that the publication of VEAT notice removes the opportunity for any dis-satisfied tenderers to obtain a judgement of contract ineffectiveness. Publication of a VEAT notice demonstrates compliance with the transparency requirement of the EU Treaties by notifying the market place that a supplier has been appointed for a contract which may not have been previously advertised in the OJEU.

The content of the VEAT notice should be as follows:

- Date of publication
- details of the purchaser;
- type and title of contract;
- short description of contract and CPV codes
- type of procedures;
- award criteria and weightings;
- name and address of selected supplier
- estimated value of contract;
- final value of contract;
- whether or not there will be sub-contractors
- procedures for appeal;
- arrangements for mediation;
- precise information on deadlines for lodging appeals:
- service where information about the lodging of appeals may be obtained;
- justification for not advertising the tender in the OJEU.

Contrast this much more detailed notice with that which must be sent to suppliers at the award stage:

- the criteria for the decision;
- reason for the decision including the characteristics and relative advantages of the successful tenderer;
- scores of both the recipient and the winner;
- name of the winner;
- precise statement of the standstill date.

VEAT notices offer you the opportunity to contact the awarding authority and challenge the Contract award should you believe that your organisation has been excluded from the process or otherwise disadvantaged in some way. They also provide suppliers with key market intelligence which can be used to identify possible sub-contracting opportunities.

Access to VEAT Notices is becoming an important tool for all organisations who tender for Part B or sub-threshold contracts

