

White Paper

Meeting the challenge of the EU Remedies Directive

Richard Canning, Principal Consultant
Commerce Decisions Limited

Executive summary

The EU Remedies Directive has potentially significant implications for procuring authorities, as well as introducing more time for unsuccessful tenderers to challenge contract award decisions.

Procurement authorities will need to ensure they have an open and transparent strategy to decision-making, and must be able to respond effectively to any challenges to their decisions.

This White Paper describes how QinetiQ Commerce Decisions' web-based tool can help procurement authorities meet the challenge of the Directive.

Contents

What is the new Directive?	2
Part B 'standstill' period	2
Why has it been put in place?	3
The challenge of conforming to the new directive	3
Achieving an effective and open decision strategy	4
Providing a compliant debrief report	4
QinetiQ Commerce Decisions and the EU Remedies Directive	5
Strategy	5
Assessment scheme	6
Assessment logistics – AWARD®	7
Summary	7
About Richard Canning	8
About Commerce Decisions	8
About QinetiQ	9

What is the new Directive?

In December 2009, the EU Remedies Directive 2007 was implemented into English law. This has substantially amended the existing remedies regime contained in the Public Contracts Regulations 2006 (the Regulations) which governs the remedies available to bidders in the event of a breach of the EU procurement regulations by a contracting authority.

The Regulations apply when a contracting authority lets a contract for works, services or supplies that exceeds a certain financial threshold (approximately £139,000 for supplies and services contracts and £3.5 million for works contracts).

These amendments require Public Authorities:

- to send a written debrief automatically to all bidders when issuing the contract award notice containing detailed comparison information
- to place a contract decision in suspension if a challenge is raised by an unsuccessful tenderer
- to respond to any challenge submitted up to six months after contract award

The implications of a successful challenge have also been extended whereby a court can ultimately decide to make an awarded contract ineffective from the date of the order.

Essentially, this amendment places any new contract at risk of challenge for up to six months from the date of award.

Part B 'standstill' period

Procurement rules provide that the majority of public contracts can be awarded only after an obligatory ten-day 'standstill' period. Before the new directive, the services listed in Part B of the UK's Regulations (e.g. Education, Health, Hotel and Legal) were not subject to this requirement.

The new Remedies Directive makes it obligatory for Part B service contracts also to be subject to the requirements of the standstill period. This represents a major change in the way that Part B service contracts are awarded and practitioners must be aware of the changes in order to update their procedures.

Why has it been put in place?

Previously, unsuccessful tenderers were allowed to submit challenges within ten days of the contract announcement. This was clearly a very short time for tenderers to process the feedback from the procuring authority and has now been deemed inappropriate. In addition, the only damages that an unsuccessful tenderer could receive previously were some form of payment from the procuring authority.

The previous regulations provided vague guidance to authorities on what should be published to unsuccessful tenderers (the 'reasons for the decision'). This created uncertainty as to what should be published and caused frustration for tenderers in terms of what they received. This level of ambiguity also increased the likelihood of a challenge.

The new directive enables the damages to include a suspension of the contract awarded, if appropriate. The consequences could be far-reaching: competitions may need to be re-run, the delivery of works etc. will be delayed, the purchaser will have to pay a fine, may have to pay damages, and, depending on the terms of their arrangements, may also need to indemnify the formerly successful tenderer.

The new directive places even greater emphasis on public procuring authorities to ensure they comply with all procurement rules during a competition.

The challenge of conforming to the new directive

Much has been written about the new directive and many commentators recommend adopting a 'defensive' approach to conducting competitions. This may simply be terminology, but the fundamental principles of public contracting are that the decision being made should be done so in an open and transparent way.

So, the Authority must adopt a principle of openness in its dealings with all suppliers. It must ensure that a decision-making strategy is designed and then operated consistently by all agencies such that, at the conclusion of the process, the Authority is readily able to demonstrate that the process was operated in accordance with the stated (published) strategy and be in a position to provide detailed debrief material that complies with the specifications set out in the new directive.

If a procuring authority can adopt a principle of full exposure, within the constraints of normal commercial confidences, it is far less likely to be challenged. This approach will be the best form of defence.

Achieving an effective and open decision strategy

One of the key blocks to establishing an open approach is where the Authority has been unable to clarify its genuine decision drivers before advertising the opportunity. This often happens as a result of the need to maintain project momentum, but immediately places risk on the Authority.

This was highlighted in the case of *Harmon CFEM Facades (UK) Limited v The Corporate Officer of the House of Commons (Oct 1999)*, where the Authority did not disclose any formal criteria. The court determined that The House was liable for Harmon's tendering costs and damages (loss of profit).

The claim amounted to £5 million, which was 15% of the contract value. This significant unbudgeted cost arose because the procurer was unable to show an audit trail indicating a fair and open process.

Clearly, a much more significant risk to the programme is the chance of challenge downstream, which would introduce months of delay and new costs to the programme.

This occurred in the case of *D.R. Plumbing & Heating Services Limited v Aberdeen City Council (Feb 2009)* where the Council used undisclosed criteria to make a decision, which was then successfully challenged by a tenderer. The court ruled that the subsequent contract should be set aside. It is imperative, therefore, that a clear and durable decision-making strategy has been established before advertising the opportunity.

The decision strategy needs to enable the Authority to select the solution that best meets its needs and to be logical and clear to all stakeholders, including tenderers. Once this strategy is decided, it must be delivered coherently throughout the life of the competition and consistently by all the stakeholders.

Providing a compliant debrief report

The new directive is very clear in the debrief requirement.

- A written debrief to all tenderers has to be provided automatically when issuing the contract award notice.
- This debrief must contain:
 - the criteria for the award of the contract
 - the reasons for the decision, including the characteristics and relative advantages of the successful tender
 - that tenderer's own scores
 - the scores of the winning tenderer(s)
 - the name of the winning tenderer(s)

For Pre-Qualification Questionnaire (PQQ) applicants, all of the above applies with the exception of relative advantages of the successful tender.

The key differences are the provision of 'characteristics and relative advantages of the successful tender' and the winning tenderer's scores. Most procurement teams should have no difficulty in providing the latter (the winning score must be known in order to have made the selection decision). However, the ability to present the characteristics and relative advantages may not be so straightforward.

Many teams have traditionally compared bids based on a large set of scores and then created 'post-evaluation' reports to articulate the reasons for their decision. This clearly creates significant effort for the team after the event and, more importantly, attracts significant risk of error and misrepresentation of the real decision issues.

The new requirement to articulate not only the reasons but also the relative advantages introduces another level of consideration that creates even more effort and challenge if this requirement has not been built into the fundamental assessment methodology.

QinetiQ Commerce Decisions and the EU Remedies Directive

Through its extensive experience in working with procurement authorities and tenderers, and through the development of its internationally renowned web-based decision application AWARD, QinetiQ Commerce Decisions is well placed to provide informed and practical support to procuring authorities.

Strategy

QinetiQ Commerce Decisions' Professional Services team supports its customers in establishing decision-making strategies that are clearly focused on delivering the project objectives, and are designed in such a way to enable clear understanding from all stakeholders on how it will operate and be used to achieve the end decision.

Major projects are complex in many respects, and teams are often reluctant to expose their decision-making approaches to mitigate the risk of being 'boxed in' by a process that may not suit their needs once formal tenders have been evaluated. The Office of Government Commerce has always sought to move away from closed approaches in order to maximise open competition and, most importantly, comply with legislation.

We have often found that it is not that a procuring authority cannot determine an effective process, but simply that it has not been able to gather the opinions of the key decision-makers to identify a coherent strategy, or made the time to do so.

By making use of an external agency, a procuring authority is more likely to produce an effective decision strategy that carries low risk, as the external agency will bring all the issues together and enable a balanced solution to be delivered.

Assessment scheme

There are many case studies that demonstrate that open and fair assessment schemes are often not applied. This presents a golden opportunity for challenge – and has done so on numerous occasions.

QinetiQ Commerce Decisions' Structured Criteria Development (SCD) method enables teams to establish an assessment scheme that can be shared with all stakeholders, is fundamentally resource-efficient, and is wholly focused on ensuring project success. Schemes created in this way will also readily support the debrief requirement.

This is achieved by working with key stakeholders and project documentation, including the project's requirement. SCD enables a truly focused and optimal criteria set to be identified. One clear issue is that teams often regard the technical evaluation to be concerned solely with 'compliance' with the requirement.

It is clear, however, that the focus should be on the supplier's ability to deliver the requirement. This may involve more criteria about the supplier's proposed approach to maintain resources throughout the programme and evidence of where the proposed solution has been successfully implemented elsewhere. Interestingly, by adopting this approach, the number of scored criteria can be less than 100, compared with a requirements document containing thousands of compliancy points.

Examples of this include a major IT system for use by the emergency services where 63 criteria were used (the requirement had more than 4,500 items); and a project providing an array of specialist military equipment where the buyer was able to use 13 criteria to select a supplier for a range of technically specified equipment.

These effective and efficient schemes readily support the debrief requirement. Specifically, the directive requires the 'characteristics' of the bids to be articulated. SCD produces criteria that reflect the project goals. So, the evaluation against SCD criteria will deliver an accurate assessment of the bid's characteristics (e.g. strong project management evidence, poor supply chain evidence).

Bids can be compared efficiently because of the optimal criteria set used. Project teams are able to provide comparisons at the scored criteria level and at higher levels (where weighted combinations may be used) as required.

With an SCD criteria set there will be no reason to paraphrase the assessment, because the level of detail recorded 'at source' will be appropriate. This approach requires a level of professionalism from the assessment team supported by some clear guidance on the style and format of assessments.

This assessment information could also be the subject of Freedom of Information requests, so this level of rigour will achieve compliance on a number of fronts.

Assessment logistics – AWARD®

Even if a coherent and open strategy, supported by an effective assessment scheme, has been established, it must be delivered coherently throughout the procurement process.

QinetiQ Commerce Decisions' AWARD software solution enables this by presenting the scheme to assessors via a web-enabled interface, facilitating and controlling access to documentation and maintaining live reporting underpinned by an ongoing audit trail.

AWARD has been used throughout the public and private procurement community over many years to deliver more than £60 billion of contract decisions, and continues to be enhanced and maintained to ensure that all the latest procurement implications and customer needs are supported.

AWARD enables customers to have immediate access to assessments and documentation in order to generate live reports on progress and, most importantly, results. One of AWARD's key strengths is its ability to generate instantaneous debrief reports. AWARD has a suite of pre-established reporting formats that will enable comparison reports to be generated readily.

This will remove the need for any further administrative effort. This functionality will ensure an effective debrief product that meets the revised requirements. The AWARD software has been specifically designed to support the procurement process and so comes with many other features, including clarification management, offline assessment solutions and comprehensive document management capabilities.

Summary

The Remedies Directive introduces greater implications and more time for unsuccessful tenderers to challenge contract award decisions.

Procurement authorities must ensure they have developed an open and transparent strategy and be in a position to demonstrate coherence with it to prevent challenges occurring and to respond rapidly to any that are raised.

QinetiQ Commerce Decisions has both the experienced resources and a well-established web-based tool to enable procurement authorities to meet the challenge.

About Richard Canning

An experienced project manager and team leader with more than 25 years' public sector experience, Richard joined Commerce Decisions in 2004 having worked previously for the Ministry of Defence. With Commerce Decisions, Richard has had extensive experience in the deployment of AWARD and the delivery of decision-making schemes.

He has enabled the delivery of all types of procurement processes within numerous projects and has delivered Competitive Dialogue process advice and support. Richard is a practitioner of the QinetiQ Commerce Decisions' proprietary Structured Criteria Development decision-making methodology that engages with stakeholders to develop clear evaluation criteria.

Richard also has extensive experience of developing and implementing processes to ensure that dialogues are effective and efficient; including managing the interchange of information between the Authority and dialogue participants in AWARD, and of monitoring and reporting on the progress of the dialogue.

About Commerce Decisions

Commerce Decisions has been supporting strategic, high-risk procurements globally since 2001, and is at the forefront of best practice procurement. With a unique focus on complex evaluation, we have unrivalled experience in supplier evaluation and are a trusted provider of procurement services to the public and private sectors.

We deliver a robust and defensible procurement process to our clients, proven time and time again across many sectors including construction, transport, education, health, defence and facilities management procurements – to date, we have supported over 13,000 strategic projects, collectively worth over \$400billion. This enviable experience and in-depth knowledge has enabled us to develop proven methodologies, supporting clients to deliver the best possible outcome on strategic and complex procurement projects.

Headquartered in Oxfordshire, UK, and with offices in Canberra, Australia, and Ottawa, Canada, Commerce Decisions provides software and services to support the procurement and post contract review processes for both buyers and suppliers. For buyers we improve the efficiency and effectiveness of the evaluation process to make the best buying decision based on all the relevant criteria, underpinned by our AWARD® software. For bidders we improve the quality and timeliness of proposals to best meet the needs of the potential buyer and thereby give them the best chance of securing the contract, underpinned by our ADVANCE™ software.

About QinetiQ

QinetiQ is a leading international provider of technology-based services and solutions to the defence, security and related markets.

We develop and deliver services and solutions for government organisations, predominantly in the UK and US, including defence departments, intelligence services and security agencies.

In addition, we provide technology insertion and consultancy services to commercial and industrial customers around the world.

