

EU Remedies Directive – Impact on administration and processes!

Since the introduction of the New Remedies Directive on 20 December 2009 many industry commentators have been focussed on the impact on new procurements started after this date. In particular, the focus has been on the latter stages of procurement at award stage and the new requirements around de-briefing and the statutory standstill period. But what about the earlier stages of procurement? What is the impact, from a practical perspective at pre-qualification stage?

We have now concluded the first stage of procurement under the Restricted Procedure under the new Directive with completion of the pre-qualification stage and shortlisting for tender. Like most people involved in procurement, we have read the Directive and the guidance from OGC and tried to understand how this will affect all new procurement activity. But alas, research as we may, there is very little guidance on what to do at pre-qualification stage. Under the old rules, for example, there was no requirement to provide feedback to bidders that failed at PQQ stage, but at contract award stage, all bidders had to be notified of the results. Under the new rules, only economic operators need to be notified of the tender results and importantly, provided a full debrief. Economic operators are only those who have been invited to tender and do not include those who failed at PQQ stage. Therefore, whilst Economic Operators (tenderers) are afforded comprehensive feedback via a written de-brief at contract award stage, what happens to all of those who failed at PQQ stage?

At Cameron Consulting, we have always provided notification to bidders who failed at PQQ stage, even under the old rules, quite often providing them with their score and that of the lowest qualifying bidder. When asked for further feedback from a bidder, we would give structured telephone feedback which whilst never good news for a bidder, was always gratefully received.

When considering the new rules and the apparent silence on the matter of feedback at PQQ stage, it is perhaps appropriate to apply some logic to what should be done. Given that the new rules require that a de-brief should outline the relative advantages of the winning bid over that of the economic operator, then it follows that this should also be the case at PQQ stage. Therefore, at PQQ stage, we now provide a full written de-brief to all unsuccessful bidders, outlining why their bid was unsuccessful against each section of the PQQ. This is helpful to the bidder and will give them useful feedback on how to approach future procurement, but most importantly, reduces the potential risk to the client of a challenge from an unsuccessful bidder. Of course, adopting this approach takes time and will increase the administration and cost of procurement. However, this type of best practice is surely a price worth paying if it helps to avoid costly challenges and disputes.

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By the time our next newsletter (Summer) is published, we would have concluded our first procurement under the new Directive and hope to report on our practical experiences at the latter stages of the procurement process.

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