

# Consultation document

Draft amendments to the UK procurement Regulations implementing the ECJ 'Alcatel' judgment

August 2005

**OFFICE OF GOVERNMENT COMMERCE**

**CONSULTATION DOCUMENT**

THE DRAFT AMENDMENTS TO REGULATIONS IMPLEMENTING THE ECJ JUDGMENT IN THE  
ALCATEL CASE.

ECJ Case reference: C-81/98 Alcatel Austria v Bundesministerium fuer Wissenschaft und Verkehr.

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## 1. Executive Summary

The current UK procurement Regulations<sup>1</sup>, which also implement the requirements of the Public Sector Remedies Directive 89/665/EEC and the Utilities Remedies Directive 92/13/EEC, will shortly be amended. This is in order to give effect to the European Court of Justice (ECJ) judgment against Austria in the *Alcatel* case<sup>2</sup>. The amendments will reflect recently completed detailed negotiations with the European Commission on how to implement *Alcatel* in the UK. The *Alcatel* ruling found that national courts in EU Member States must, in all cases, be able to review and set aside award decisions on procurement contracts subject to the EU procurement Directives. A subsequent ECJ ruling<sup>3</sup> clarified that there should be a period of time between the contract award decision and the start of the contract to ensure that complainants are able, in duly justified cases, to bring actions in the national court for suspension and set-aside of the contract award decision.

This consultation concerns the required legislative changes in the UK to implement *Alcatel* by introducing a 10-day mandatory standstill period between the notification of the award decision and the date of contract conclusion for all procurements subject to the full scope of the EU Procurement Directives. This measure should be implemented with immediate effect.

OGC would welcome views on the draft amendments to the existing UK Regulations, both in terms of their content and their structure and ease of use. However it should be noted that substantive changes will not be negotiable with the European Commission as meeting the ECJ ruling.

OGC would welcome views on the amendments to the draft Regulations **by Monday 10 October 2005** at the latest. This consultation is shortened to six weeks because of the limited scope for change and an urgent requirement to amend the UK procurement Regulations now that there is clarity on the detail of how to implement *Alcatel* in the UK. ECJ rulings have direct effect in the national laws of all EU Member States and therefore UK contracting authorities are already at risk of legal challenge where there is no mandatory standstill period for the procurements concerned. The UK procurement Regulations need to be amended urgently to provide contracting authorities and suppliers with legal certainty. Implementation is also required, as agreed with the European Commission in detailed negotiations, to allay the risk that the Commission will refer the UK to the ECJ for non-implementation of ECJ judgments.

Please note that the amendments are to the *current* UK procurement Regulations which apply in England, Scotland, Wales and Northern Ireland.

A separate consultation exercise is running on the draft new UK procurement Regulations implementing the revised EU procurement Directives, 2004/17/EC and 2004/18/EC, which will cover England, Wales and Northern Ireland. Scotland is implementing these revised Directives separately and is carrying out a separate consultation exercise on the new draft Scottish procurement Regulations. However, until these new Scottish Regulations are implemented, any amendments to the current UK procurement Regulations will also apply to Scotland.

Please send your comments to [stephane.reynolds@ogc.gsi.gov.uk](mailto:stephane.reynolds@ogc.gsi.gov.uk) copied to [charlotte.spencer@ogc.gsi.gov.uk](mailto:charlotte.spencer@ogc.gsi.gov.uk).

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<sup>1</sup> Public Works Contracts Regulations 1991; Public Services Contracts Regulations 1993; Public Supply Contracts Regulations 1995; Utilities Contracts Regulations 1996.

<sup>2</sup> Case C-81/98 *Alcatel Austria v Bundesministerium fuer Wissenschaft und Verkehr*.

<sup>3</sup> C212/02

## 2. Introduction

### 2.1 Background information

The ECJ Alcatel judgement (C-81/98) against Austria in 1998 found that EU national courts must, in all cases, be able to review and set aside award decisions on all public procurement contracts which are fully subject to the EU procurement Directives.

Currently, within the UK, acceptance of a bidder's offer can create a contractually binding agreement immediately. Once a contract is in place, damages are the only available remedy for an aggrieved bidder who has been prejudiced by a breach of public procurement procedures by a contracting authority. The ECJ considered that in such circumstances, the limitation of remedies to an award of damages meant the absence of an effective remedy.

In May 2004, the European Commission issued a Reasoned Opinion (RO) against the UK, the last stage of formal infractions proceedings before being referred to the ECJ, requiring the UK to comply with the Alcatel judgment by introducing a mandatory standstill period between communication of award decision and contract conclusion. The RO definitively rejected the government's alternative proposals. A second ECJ judgement (C212/02) delivered in June 2004 against Austria again, also confirmed and clarified the position that a mandatory standstill period is required.

Following intensive discussions with the European Commission, OGC has issued policy advice to contracting authorities on how to introduce a mandatory standstill period into all affected procurement procedures with immediate effect. That advice is incorporated into this consultation document.

This consultation document invites comments on the proposed amendments to existing UK procurement Regulations to give effect to the Alcatel judgments, which are attached at Annex B. Respondents are also invited to comment on any other aspect of these proposals.

### 2.2 Timetable for implementation

There has been consultation on the Alcatel judgment previously. The European Commission has rejected alternatives to mandatory standstill as failing to meet the ECJ rulings.

It is a requirement of Community law that EU legislation be implemented in an effective, timely and proportionate manner. ECJ judgments have direct effect in all EU Member States. The government has decided that, in order to provide legal certainty for providers and contracting authorities, the UK should proceed quickly to introduce a short mandatory standstill period in the current UK procurement Regulations.

### 2.3 Timetable and practicalities for this consultation

#### 2.3.1 Timetable and closing date

The consultation period lasts from Thursday 25 August until Monday 10 October 2005. This allows 6 weeks for consultation. Please ensure your response reaches us by the closing date.

#### 2.3.2 Devolved Administrations

Please note that the amendments are to the *current* UK procurement Regulations which apply in England, Scotland, Wales and Northern Ireland.

A separate consultation exercise is running on the draft UK Regulations implementing the revised EU procurement Directives, 2004/17/EC and 2004/18/EC, which will cover England, Wales and Northern Ireland. Scotland is implementing these revised Directives separately and is carrying out a separate consultation exercise on the new draft Scottish procurement Regulations. However, until these new Scottish Regulations are implemented, any amendments to the current UK procurement Regulations will also apply to Scotland.

### **2.3.3 Consultees**

This consultation particularly concerns contracting authorities, including government Departments, Local Authorities, contacting entities in affected utilities and the government Departments responsible for the sectors concerned, as well as providers and their representative bodies. Responses are also sought from all other interested parties and bodies including the Chartered Institute of Purchasing and Supply, the Confederation of British Industry and TUC, the legal community and the academic community.

OGC is sending this consultation to the consultees listed in Annex C.

### **2.3.4 How to respond**

OGC would prefer any comments on the draft Regulations to be sent electronically to Stephane Reynolds [stephane.reynolds@ogc.gsi.gov.uk](mailto:stephane.reynolds@ogc.gsi.gov.uk) and copied to Charlotte Spencer at [charlotte.spencer@ogc.gsi.gov.uk](mailto:charlotte.spencer@ogc.gsi.gov.uk).

Alternatively, written comments should be sent to:

Stephane Reynolds c/o Charlotte Spencer  
Procurement Policy Unit  
Office of Government Commerce  
Trevelyan House, 26 – 30 Great Peter Street  
London SW1 2BY  
Fax: 020 7271 1344

If you would like further copies of this consultation document, it can be found on the OGC's website at [www.ogc.gov.uk](http://www.ogc.gov.uk), or please contact Stephane Reynolds or Charlotte Spencer at the addresses given above.

When responding, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation please make clear who the organisation represents and, where applicable, how the views of the members were assembled.

This consultation is being conducted in line with the government's Code of Practice on Consultation. Please see section 4 of this document ("Consultation Criteria") for more information and how to contact OGC's designated consultation co-ordinator if you believe this consultation does not comply with the Code.

### **2.3.5 Outcome**

Responses to this document will help inform the final version of the amendments to UK Regulations implementing the ECJ judgment in the Alcatel case.

OGC aims to publish a summary of responses to this consultation with OGC's responses to queries raised during the consultation and, where appropriate, how the responses to the consultation have affected the amendments to the existing Regulations. This will be published as soon as possible after the closing date.

The final amendments to Regulations will be laid before Parliament as soon as possible after the consultation has ended.

### **2.3.6 Non-disclosure of responses**

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

All responses will be included in any statistical summary of numbers of comments received and views expressed.

## 2.4 Regulatory Impact Assessment

A partial Regulatory Impact Assessment is attached at Annex A.

## 3. Main body of Consultation

### 3.1 General comments

Introduction of the mandatory standstill period will require secondary legislation under section 2(2) of the European Communities Act 1972. This will be achieved by way of amendment to the Regulations<sup>4</sup> currently in force.

### 3.2 New provisions

The proposed amendments are as follows:

#### 3.2.1 A 10 day mandatory standstill period

For all public sector and utilities procurements covered by the full procedural requirements of the EU procurement Directives, **a minimum ten (10) calendar days** mandatory standstill period is required between communicating the award decision by email or fax and also by post to all tenderers and entering into a contractually binding agreement.

The notice of the contracting authority's award decision concerns only those contractors who submitted a tender (valid or invalid). The notice must contain:

- the award criteria;
- where appropriate<sup>5</sup>, the score the tenderer obtained against those award criteria;
- where appropriate, the score the winning tenderer obtained; and
- the name of the winning tenderer.

#### 3.2.2 New debriefing requirements within the standstill period

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<sup>4</sup> Public Works Contracts Regulations 1991; Public Services Contracts Regulations 1993; Public Supply Contracts Regulations 1995; Utilities Contracts Regulations 1996.

<sup>5</sup> i.e. where scores are being used. Scores are not necessarily relevant in the case of an award made on the basis of lowest price.

The contracting authority must provide additional debriefing<sup>6</sup> within the mandatory standstill period where an unsuccessful tenderer requests it by the end of the second working day of the standstill. Contracting authorities must allow for three full working days between the dispatch of this additional debriefing and the end of the standstill period. Contracting authorities may accordingly need to extend the standstill around public holiday periods. Where a request arrives within the standstill period but after the two working days deadline, contracting authorities are not bound to provide further debriefing within the standstill but still need to provide it within 15 days of receiving a written request, as per the normal rules. The existing contract award information rules remain unchanged in the event that tenderers do not take up the opportunity for an “accelerated” debrief within the standstill period.

### 3.3 Other points to note

The following points are also relevant:

#### 3.3.1 Procurements which are not covered

The mandatory standstill period does not apply to below threshold procurements or to procurements otherwise outside the full scope of the EU Directives. This means it does not apply to procurements of part B services. Nor does it need to apply to procurements where there is only one tenderer including those following, for example, the urgency provision under the negotiated procedure. Finally the standstill period does not apply to those Utilities procurements which are also exempt from the full scope of the EU rules.

#### 3.3.2 When to enter into contract

The standstill period cannot be a contract award with an operational start date. This was rejected by the European Commission. The communication of the award decision to the winning tenderer can however be a letter of intent to award which is not contractually binding. The amendments to give effect to the Alcatel judgment introduce a break between the communication of award decision to the tenderers and the point at which a contractually binding agreement is entered into.

For the avoidance of doubt, the communication of the award decision at the beginning of the mandatory standstill period is not the same type of letter of comfort or guarantee or indemnity referred to, with caution, in the Government Accounting rules, because it is issued only after the contracting authority has made a final award decision, and after all the appropriate consents (e.g. from the Treasury) for incurring expenditure and accepting liabilities have already been obtained.

#### 3.3.3 Legal challenge within the standstill period

A legal challenge means the issue of a claim or application in a UK Court. It does not include communications from either a disgruntled tenderer to the contracting authority threatening legal proceedings or communications from legal advisers to the disgruntled tenderer, all of which may be litigious in nature.

During the mandatory standstill period a legal challenge can be brought in Court by a contractor seeking the suspension or setting aside of the contract award decision. Where such a challenge is brought, the contracting authority concerned should wait to see whether interim measures are granted before proceeding to contract conclusion, and where interim measures are granted, should wait until the outcome of legal proceedings before entering into a contractually binding agreement.

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<sup>6</sup> The contracting authority shall inform the tenderer of the reasons why he was unsuccessful and, if the tenderer submitted an admissible tender, shall inform him of the characteristics and relative advantages of the successful tender. This additional debriefing can be given in such manner and form as the contracting authority considers appropriate.

The mandatory standstill period will not change the fact that once a contract has been entered into, damages are the only available remedy if a breach of the procurement rules is established in Court. An existing contract can therefore not normally be rescinded.

### **3.3.4 What delays to expect**

When a Court challenge is brought by an aggrieved tenderer during the mandatory standstill period, both the tenderer and the contracting authority can apply for the Court to expedite the hearings. The Court may do so under its general case management powers under the Civil Procedure Rules or there is a specific provision dealing with expedited hearings in the Commercial Court. A claim in respect of a procurement award procedure should fall into the jurisdiction of the Commercial Court. However, it will be up to the parties to demonstrate to the Court that the case is of "sufficient urgency and importance" before the Court would grant such a hearing and where such an application is granted, it is unlikely that the proceedings would be dealt with within the standstill period.

### **3.3.5 How to count the standstill period**

The mandatory standstill period begins the day after the award decision is issued by fax or email and also by post to all tenderers. If the standstill period ends on a non-working day (such as a weekend or a UK public holiday), it must be extended to the end of the next working day.

### **3.3.6 'Alcatel' and forthcoming Regulations**

These new rules will also be included in the Regulations implementing the new consolidated Public Sector (2004/18/EC) and Utilities (2004/17/EC) Directives. The draft Public Sector Regulations, which are currently under separate consultation<sup>7</sup>, will be updated to reflect these new rules. The Utilities provisions will be amended in a similar way.

Finally, there may be subsequent modifications to these standstill rules depending on the outcome of forthcoming negotiations between the European Commission and all EU Member States on revisions to the Remedies Directives.

### **3.3.7 Application of the mandatory standstill period to PFI procurement**

In the case of PFI procurement the application of the mandatory standstill period is to take place at a time when all matters material to the contract award decision to the winning tenderer have been resolved. This may be interpreted as being prior to commercial close but should be as close to this date as the procuring authority believes practicable.

### **3.3.8 Application of the mandatory standstill period to framework agreements**

The mandatory standstill period applies to the award of the framework agreement itself, not to contracts, or call-offs, awarded within the framework. This derives from the fact that the establishment of a framework agreement by a procurement under the Directive, which is sufficiently clear and certain as to the terms on which individual contracts may be awarded under it, removes the need for further advertised procurements in order to award a contract under the framework.

The existing EU public sector procurement Directives, and the existing UK Regulations which implement them, do not cover framework agreements. For this reason, the amendments to the existing UK procurement Regulations to give effect to the Alcatel ruling do not refer to framework agreements.

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<sup>7</sup> OGC's public consultation on the draft Regulations implementing Directives 2004/18/EC and 2004/17/EC runs until 12 September 2005. The documents are available at: <http://www.ogc.gov.uk/index.asp?docid=1003745>



This will be altered in the UK Regulations implementing the new EU consolidated public sector Directive which does, for the first time, include provisions on framework agreements.

In the interim, because the new Directive's provisions on framework agreements are simply making explicit what is already considered to be permissible under the EU rules, OGC has advised that contracting authorities should apply those provisions now: they should also apply the standstill period now.

Provisions on framework agreements are already included in the procurement rules covering utilities.

A separate OGC consultation is underway on the draft Regulations implementing the new EU Procurement Directives.

### 3.4 Guidance

OGC has issued advice to contracting authorities and further guidance will be reviewed in the light of comments received. Existing guidance can be found at [http://www.ogc.gov.uk/embedded\\_object.asp?docid=1003894](http://www.ogc.gov.uk/embedded_object.asp?docid=1003894)

## 4. Consultation Criteria

The six main criteria of the government's Code of Practice on Consultation are listed below. The full code can be accessed at <http://www.cabinet-office.gov.uk/regulation/Consultation/Code.htm>

The Six Consultation Criteria:

- Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
- Be clear about who may be affected, what questions are being asked, and the timescale for responses.
- Ensure that your consultation is clear, concise and widely accessible.
- Give feedback regarding the responses received and how the consultation process influenced the policy.
- Monitor your Department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
- Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

Please note that the government has, exceptionally, decided that this consultation will run for six weeks. This is because the UK procurement Regulations need amending urgently to allay the risk of the European Commission referring the UK to the ECJ. Given the extent of earlier consultation of interested parties over a number of years, the government believes that a six-week consultation will allow effective consultation. OGC will be emailing this consultation document to interested parties in addition to posting it on the website (<http://www.ogc.gov.uk/>).

If you feel that the consultation does not otherwise satisfy these criteria please contact OGC's designated consultation co-ordinator:

Catherine Moody  
Enterprise Team, Regulation and Business Finance branch  
HM Treasury  
1 Horse Guards Road  
London  
SW1A 2HQ  
Tel: 020 7270 4358

Email: [Catherine.Moody@hm-treasury.x.gsi.gov.uk](mailto:Catherine.Moody@hm-treasury.x.gsi.gov.uk)

## **Annex A – Partial Regulatory Impact Assessment**

### **1. Purpose and Intended Effect of the Measure**

#### **1.1 Objective**

The EU public procurement rules seek to ensure that public sector bodies and utilities award contracts in an efficient and non-discriminatory manner. They aim to ensure that public money is spent appropriately. They are based on the principles of competitive procurement, transparency and non-discrimination, and facilitate value for money for the taxpayer as well as promoting European trade.

The European Court of Justice (ECJ) judgments<sup>8</sup> seek to ensure this by introducing the opportunity to obtain a remedy at the contract award stage but prior to contract conclusion. This allows aggrieved providers to challenge an award decision in Court and seek to have it overturned when this can make a real difference to the outcome.

#### **1.2 Background**

In 1998 the ECJ ruled<sup>9</sup> that, for procurements caught by the EU procurement Directives, a contract award decision must, in all cases, be open to review before contract conclusion to enable the award decision to be set aside by a court where an aggrieved bidder has been prejudiced by a breach of the rules, notwithstanding the possibility of damages being awarded after contract conclusion.

Without a mandatory standstill period between communication of award decision to all tenderers and contract conclusion, it is legally possible in the UK for the award of a contract to coincide with its conclusion, and the only remedy then available is damages. Pursuing a claim for damages may be of limited comfort to aggrieved bidders.

In order to comply with the ECJ judgment, the government has decided that a short mandatory standstill period will be introduced in the UK between communication of award decision and contract conclusion for procurements subject to the EU procurement Directives.

#### **1.3 Devolution**

The amendments which are the subject of this consultation are to the existing UK procurement Regulations which cover England, Scotland, Northern Ireland and Wales.

Similar amendments will be included in the Regulations implementing the revised procurement Directives, which will cover England, Wales and Northern Ireland. Scotland is implementing these new Directives separately and will be responsible for including standstill provisions in the Scottish implementing Regulations.

#### **1.4 Risk assessment**

Should an aggrieved bidder decide to mount a challenge to a contract award decision there is a risk that award of the contract will be delayed pending the outcome of Court proceedings. Also, if the challenge is successful, there is a risk that the award decision could be set aside making it null and void. Contracting authorities could be forced to re-run the competition incurring further delays in delivery of the procurement's objective and resource costs on the contracting authority in conducting a re-tender.

However, unless the UK procurement Regulations are amended to include a mandatory standstill period the UK will remain in breach of an EU obligation with the result that the

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<sup>8</sup> C-81/98 and C212/02

<sup>9</sup> C-81/98

infraction proceedings already in progress against the UK will be referred to the ECJ, a case we would almost certainly lose.

## 2. Options

Options are constrained by the requirements of the effect of the original ECJ ruling and have been further limited by a further ECJ ruling on Alcatel (C212/02).

Alternatives were debated extensively with the European Commission with a view to reaching the least burdensome means of meeting the Alcatel judgment. The Commission took a firm line that there was no alternative to introducing a mandatory standstill period to meet the ECJ rulings.

Non-implementation, or further delay to the implementation of a mandatory standstill period, would trigger a referral of the UK by the Commission to the ECJ. We would be very likely to lose this case, resulting in daily fines against the UK until the introduction of a mandatory standstill period.

In addition, non-implementation would mean suppliers missing out on the greater transparency and fairness at the award stage of procurements that the ECJ Alcatel ruling aims to provide.

## 3. Costs and Benefits

### 3.1 Business sectors affected

In the main, it is the public sector that must comply with these amendments to the rules. There will be an effect on those utilities which are covered by the procurement Regulations and who will also have to apply the standstill provisions to their procurements.

The standstill period will be most noticeable in procurements where it has hitherto been possible to start work immediately the award decision has been communicated to the winning tenderer. Contractors involved in procurements where there is *already* a delay between the award decision and the conclusion of the contract should be unaffected (because any aggrieved tenderers already have the time to bring an action to suspend and set-aside the award decision). A winning tenderer will only face substantial additional delay and cost if a complainant is able to bring a well-founded case before a court in the short period following the award decision, and that case is not resolved quickly. However overall these rules ensure greater transparency and fairness at the award stage of procurements covered by the full scope of the EU Directives.

### 3.2 Regulatory burden

These proposed amendments will implement Alcatel by introducing a 10-day mandatory standstill period between award decision and contract conclusion for all procurements caught by the full scope of the EU procurement Directives. This constitutes the absolute minimum requirement to comply with the ECJ judgment in the Alcatel case effectively while meeting the European Commission's concerns.

### 3.3 Compliance Costs

There will be no compliance costs for suppliers; indeed, the measure allows them increased redress in the event that the procurement rules have not been properly followed.

It is public sector contracting authorities and some utilities that must comply with the rules. The onus is on contracting authorities and the relevant utilities to ensure the rules are followed properly to limit the possibility of challenges.

### **3.4 Impact on public sector bodies**

The mandatory standstill period will only apply to those procurements which are subject to the full scope of the EU procurement Directives and which are above the relevant monetary thresholds (which start at around £100,000). The standstill is unlikely to affect large complex projects and Private Finance Initiative (PFI) projects where the process is already lengthy, so affording ample opportunity for objections to be raised. This is of course without prejudice to the formal standstill period which will apply to those PFI contracts which are subject to the full rules.

The adjustment of award practice has been encouraged in OGC guidance advice of 3 June 2005 to contracting authorities advising them to implement a 10 day standstill period for all affected contracts with immediate effect.

### **3.5 Equity and Fairness**

There should be no disproportionate effect on particular business sectors. Public sector bodies in other EU Member States are already subject to, or are expected soon to comply with, the mandatory standstill period rule.

### **3.6 Environmental/Social costs**

There will be no costs imposed of an environmental or social nature.

## **4. Consultation with small business: the Small Firm's Impact Test**

Not relevant.

## **5. Competition assessment**

The UK procurement Regulations bind contracting authorities in the public sector and utilities in particular sectors. They set out coordinated procedures which must be followed for public procurements above certain thresholds. The amendments to give effect to the Alcatel judgments will not affect particular providers more than others.

The effect of the amendments is to allow aggrieved bidders an opportunity to challenge the award decision, complementing existing rights available to mount a challenge against a procurement carried out by a contracting authority (public body or utility). This measure increases transparency in public procurement and thereby facilitates greater competition by further opening up public markets.

## **6. Enforcement and sanctions**

A tenderer who considers that a procurement has been conducted in breach of the rules for non-application of a mandatory standstill period between award decision and contract conclusion, can bring proceedings in the High Court (Court of Session in Scotland).

In monitoring and reviewing the application of the mandatory standstill period, the European Commission will consider any complaints received direct from tenderers aggrieved by non-implementation or mis-application of the standstill period. The Commission may encourage complainants to take up the case in the national Courts, but it may also pursue infraction proceedings against the UK, which could ultimately lead to the UK being referred to the ECJ.

## **7. Consultation**

In shaping its proposals for implementing the Alcatel judgments OGC consulted widely - including the Confederation of British Industry and other business groups, academics and specialist legal advisers, the devolved administrations, Heads of Procurement in other government Departments including in the Office of the Deputy Prime Minister, and the Small Business Service in DTI.

## **8. Monitoring and review**

The next opportunity to review these rules on the mandatory standstill period will be the revision of the EU Remedies Directives. The European Commission is not expected to make its initial proposals to EU Member States before Spring 2006. The negotiations on the Remedies Directives are expected to last for at least two years. There may be subsequent modifications to the mandatory standstill period rules thereafter.

## **9. Summary and Recommendation**

In order to comply with ECJ rulings, we are required to introduce a standstill period between contract award and contract conclusion in procurements covered by the EU procurement rules.

The proposed standstill period, and scope of application is the result of detailed consultation and negotiations and it is recommended that it be introduced as soon as possible.

## Annex B – Draft amendments to the procurement Regulations

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### STATUTORY INSTRUMENTS

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2005 No.

## PUBLIC PROCUREMENT

### The Public Contracts (Works, Services and Supply) and Utilities Contracts (Amendment) Regulations 2005

<i>Made</i> - - - -	2005
<i>Laid before Parliament</i>	2005
<i>Coming into force</i> - -	2005

The Treasury, being designated<sup>(10)</sup> for the purposes of section 2(2) of the European Communities Act 1972<sup>(11)</sup> in relation to public procurement, in exercise of the powers conferred upon them by the said section 2(2)<sup>(12)</sup> make the following Regulations:

#### Citation and commencement

1. These Regulations may be cited as the Public Contracts (Works, Services and Supply) and Utilities Contracts (Amendment) Regulations 2005 and shall come into force on [xxx].

#### Interpretation

2. In these Regulations—

“Public Works Regulations” means the Public Works Contracts Regulations 1991<sup>(13)</sup>;

“Public Services Regulations” means the Public Services Contracts Regulations 1993<sup>(14)</sup>;

“Public Supply Regulations” means the Public Supply Contracts Regulations 1995<sup>(15)</sup>; and

“Utilities Regulations” means the Utilities Contracts Regulations 1996<sup>(16)</sup>.

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<sup>(10)</sup> S.I. 1991/755.

<sup>(11)</sup> 1972 c.68.

<sup>(12)</sup> The powers remain exercisable by the Treasury as regards Scotland by virtue of section 57(1) of the Scotland Act 1998 c.46.

<sup>(13)</sup> S.I. 1991/2680 which is amended by section 2(4) and paragraph 6(1) of and Schedule 2 to the Police (Northern Ireland) Act 2000 c.32 and S.I. 1992/3279, S.I. 1995/201, S.I. 1996/2911, S.I. 1999/1042, S.I. 1999/1820, S.I. 2000/2009 and S.I. 2003/46.

<sup>(14)</sup> S.I. 1993/3228 which is amended by section 1 of the Employment Rights (Dispute Resolution) Act 1998 c.8, section 2(4) and paragraph 6(1) of and Schedule 2 to the Police (Northern Ireland) Act 2000 c.32 and S.I. 1995/201, S.I. 1996/2911, S.I. 1999/1042, S.I. 1999/1820, S.I. 2000/2009, S.I. 2001/1149 and S.I. 2003/46.

<sup>(15)</sup> S.I. 1995/201 which is amended by section 1 of the Employment Rights (Dispute Resolution) Act 1998 c.8, section 2(4) and paragraph 6(1) of and Schedule 2 to the Police (Northern Ireland) Act 2000 c.32, S.I. 1996/2911, S.I. 1999/1042, S.I. 1999/1820, S.I. 2000/2009, S.I. 2001/1149, S.I. 2003/46 and S.I. 2003/242.

<sup>(16)</sup> S.I. 1996/2911 which is amended by S.I. 2001/2418, S.I. 2003/46, 2003/1615 and S.I. 2003/331.

### Public Works Regulations

3.—(1) The Public Works Regulations shall be amended as follows.

(2) After regulation 20 there shall be inserted—

**“20A Information to be given to contractors before awarding contract**

(1) A contracting authority shall inform by notice, any contractor who submitted an offer or who applied successfully to be included amongst the persons to be selected to tender for or to negotiate the contract, of its decision in relation to the award of the contract and shall do so by facsimile or electronic mail and also by post.

(2) The notice referred to in paragraph (1) shall include—

- (a) the criteria for the award of the contract,
- (b) where appropriate, the score the contractor obtained against the criteria for the award of the contract,
- (c) where appropriate, the score the winning contractor obtained; and
- (d) subject to paragraph (8), the name of the person awarded the contract.

(3) The contracting authority shall allow a period of not less than 10 calendar days to elapse between the date of despatch of the notice referred to in paragraph (1) and the date on which it proposes to enter the contract.

(4) Subject to paragraph (8), if by the end of the second working day of the period in paragraph (3) a contractor who was sent a notice under paragraph (1) requests reasons as to why he was unsuccessful, the contracting authority shall, within the period set out in paragraph (5) inform that contractor, in such manner and form as that contracting authority considers appropriate, of the characteristics and relative advantages of the successful tender.

(5) The time within which reasons must be given are 3 working days before the end of the period referred to in paragraph (3), or where it is not possible to provide the reasons within that period, the time allowed under paragraph (3) shall be extended to allow not less than 3 working days before the end of the period after the reasons are given.

(6) Where there is only one tender for a contract, including where a contracting authority is using the negotiated procedure pursuant to regulation 10(2)(f), that contracting authority need not comply with paragraphs (1) to (5) above.

(7) Where no request is made pursuant to paragraph (4), and subject to paragraph (8), a contracting authority shall, within 15 days of the date on which it receives a request in writing from any contractor who was unsuccessful (whether pursuant to regulation 11(7), 12(4), 12(5) 13(7) 13(8) or (20)), inform that contractor of the reasons why he was unsuccessful and, if the contractor submitted an admissible tender, the contracting authority shall inform him of the characteristics and relative advantages of the successful tender.

(8) A contracting authority may withhold any information to be provided in accordance with paragraphs (1), (4) and (7) above where the disclosure of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of any person or might prejudice fair competition between contractors.”.

(3) In regulation 22<sup>(17)</sup> (information about contract award procedures) paragraphs (2), (3) and (3A)<sup>(18)</sup> shall be omitted.

### Public Services Regulations

4.—(1) The Public Services Regulations shall be amended as follows.

(2) After regulation 21 there shall be inserted—

**“21A Information to be given to services providers before awarding contract**

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<sup>(17)</sup> Regulation 22 was substituted by 2000/2009, regulation 3(10).

<sup>(18)</sup> Inserted by S.I. 2003/46, regulation 3(11).

(1) A contracting authority shall inform by notice, any services provider who submitted an offer or who applied successfully to be included amongst the persons to be selected to tender for or to negotiate the contract of its decision in relation to the award of the contract and shall do so by facsimile or electronic mail and also by post.

(2) The notice referred to in paragraph (1) shall include—

- (a) the criteria for the award of the contract,
- (b) where appropriate, the score the services provider obtained against the criteria for the award of the contract,
- (c) where appropriate, the score the winning services provider obtained; and
- (d) subject to paragraph (8), the name of the person awarded the contract.

(3) The contracting authority shall allow a period of not less than 10 calendar days to elapse between the date of despatch of the notice referred to in paragraph (1) and the date on which it proposes to enter the contract.

(4) Subject to paragraph (8), if by the end of the second working day of the period in paragraph (3) a services provider who was sent a notice under paragraph (1) requests reasons as to why he was unsuccessful, the contracting authority shall, within the period set out in paragraph (5) inform that services provider, in such manner and form as that contracting authority considers appropriate, of the characteristics and relative advantages of the successful tender.

(5) The time within which reasons must be given are 3 working days before the end of the period referred to in paragraph (3), or where it is not possible to provide the reasons within that period, the time allowed under paragraph (3) shall be extended to allow not less than 3 working days before the end of the period after the reasons are given.

(6) Where there is only one tender for a contract, including where a contracting authority is using the negotiated procedure pursuant to regulation 10(2)(g), that contracting authority need not comply with paragraphs (1) to (5) above.

(7) Where no request is made pursuant to paragraph (4), and subject to paragraph (8), a contracting authority shall, within 15 days of the date on which it receives a request in writing from any services provider who was unsuccessful (whether pursuant to regulation 11(8), 12(4), 12(5) 13(7) 13(8) or (21)), inform that services provider of the reasons why he was unsuccessful and, if the services provider submitted an admissible tender, the contracting authority shall inform him of the characteristics and relative advantages of the successful tender.

(8) A contracting authority may withhold any information to be provided in accordance with paragraphs (1), (4) and (7) where the disclosure of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of any person or might prejudice fair competition between services providers.”.

(3) In regulation 23<sup>(19)</sup> (information about contract award procedures) paragraphs (2), (3) and (3A)<sup>(20)</sup> shall be omitted.

## Public Supply Regulations

5.—(1) The Public Supply Regulations shall be amended as follows.

(1) After regulation 21 there shall be inserted—

### “21A Information to be given to suppliers before awarding contract

(1) A contracting authority shall inform by notice, any supplier who submitted an offer or who applied successfully to be included amongst the persons to be selected to tender for or

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<sup>(19)</sup> Regulation 23 was substituted by S.I. 2000/2009, regulation 4(10).

<sup>(20)</sup> Inserted by S.I. 2003/46.



to negotiate the contract of its decision in relation to the award of the contract and shall do so by facsimile or electronic mail and also by post.

(2) The notice referred to in paragraph (1) shall include—

- (a) the criteria for the award of the contract,
- (b) where appropriate, the score the supplier obtained against the criteria for the award of the contract,
- (c) where appropriate, the score the winning supplier obtained; and
- (d) subject to paragraph (8), the name of the person awarded the contract.

(2) The contracting authority shall allow a period of not less than 10 calendar days to elapse between the date of despatch of the notice referred to in paragraph (1) and the date on which it proposes to enter the contract.

(3) Subject to paragraph (8), if by the end of the second working day of the period in paragraph (3) a supplier who was sent a notice under paragraph (1) requests reasons as to why he was unsuccessful, the contracting authority shall, within the period set out in paragraph (5) inform that supplier, in such manner and form as that contracting authority considers appropriate, of the characteristics and relative advantages of the successful tender.

(4) The time within which reasons must be given are 3 working days before the end of the period referred to in paragraph (3), or where it is not possible to provide the reasons within that period, the time allowed under paragraph (3) shall be extended to allow not less than 3 working days before the end of the period after the reasons are given.

(5) Where there is only one tender for the contract, including where a contracting authority is using the negotiated procedure pursuant to regulation 10(2)(e), that contracting authority need not comply with paragraphs (1) to (5).

(6) Where no request is made pursuant to paragraph (4), and subject to paragraph (8), a contracting authority shall, within 15 days of the date on which it receives a request in writing from any supplier who was unsuccessful (whether pursuant to regulation 11(7), 12(4), 12(5) 13(7) 13(8) or (21)), inform that supplier of the reasons why he was unsuccessful and, if the supplier submitted an admissible tender, the contracting authority shall inform him of the characteristics and relative advantages of the successful tender.

(7) A contracting authority may withhold any information to be provided in accordance with paragraphs (1), (4) and (7) where the disclosure of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of any person or might prejudice fair competition between suppliers.”

(8) In regulation 23<sup>(21)</sup> (information about contract award procedures) paragraphs (2), (3) and (3A)<sup>(22)</sup> shall be omitted.

### Utilities Regulations

6.—(1) Regulation 23A<sup>(23)</sup> (information about contract awards) of the Utilities Regulations shall be amended as follows.

(2) For paragraph (1) there shall be substituted—

“(1) A utility shall inform by notice, any provider who submitted an offer or who applied successfully to be included amongst the persons to be selected to tender for or to negotiate the contract of its decision in relation to the award of the contract and shall do so by facsimile or electronic mail and also by post.

(1A) The notice referred to in paragraph (1) shall include—

- (a) the criteria for the award of the contract,
- (b) where appropriate, the score the provider obtained against the criteria for the award of the contract,

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<sup>(21)</sup> Regulation 23 was substituted by S.I. 2000/2009, regulation 4(10).

<sup>(22)</sup> Inserted by S.I.2003/46.

<sup>(23)</sup> Regulation 23A was inserted by S.I. 2001/2418, regulation 3(8).

- (c) where appropriate, the score the winning provider obtained; and
- (d) subject to paragraph (3) , the name of the person awarded the contract.

(1B)The utility shall allow a period of not less than 10 calendar days to elapse between the date of despatch of the notice under paragraph (1) and the date on which it proposes to enter the contract.

(1C) If by the end of the second working day of the period in paragraph (1B) a provider who was unsuccessful requests reasons as to why he was unsuccessful, the utility shall, within the period set out in paragraph (1D) inform that provider of the characteristics and relative advantages of the successful tender.

(1D) The time within which reasons must be given are 3 working days before the end of the period in paragraph (1B), or where it is not possible to provide the reasons within that period, the time allowed under paragraph (1B) shall be extended to allow not less than 3 working days before the end of the period after the reasons are given.

(1E) Where there is only one tender for the contract, including where a utility has sought offers without a call for competition pursuant to regulation 16(d), that utility need not comply with paragraphs (1) to (1D) .”

(2) In paragraph (2), the words “Where no request is made pursuant to paragraph (1C) and” shall be inserted at the beginning.

(3) In paragraph (3) the words “paragraphs (1), (1A), (1C) and (2)” shall be substituted for the words “paragraph (2)”.

[xxx] 2005

*Name*  
*Name*  
Two of the Lords Commissioners of  
Her Majesty’s Treasury

## EXPLANATORY NOTE

*(This note is not part of the Regulations)*

Council Directives 93/37/EC (O.J. No. L199,9.8.93, p.54), 92/50/EC (OJ No.L209, 24.7.92 p.1) and 93/36/EC (O.J. L199, 9.8.93, p.1) concern the co-ordination of procedures for the award of public works contracts, public services contracts and public supply contracts respectively. Council Directive 93/38/EC (OJ No. L199, 9.8.93, p.84) concerns the co-ordination of procedures for the award of supply, works and services contracts by certain entities operating in the water, energy, transport and telecommunications sectors.

Those Directives have been implemented for the United Kingdom by the Public Works Contracts Regulations 1991 (S.I. 1991/2680) (“the Works Regulations”), the Public Services Contracts Regulations 1993 (S.I. 1993/3228) (“the Services Regulations”), the Public Supply Contracts Regulations 1995 (S.I. 1995/201) (“the Public Supply Regulations”) and the Utilities Contracts Regulations 1996 (S.I. 1996/2911) (“the Utilities Regulations”) respectively.

The Works Regulations, the Services Regulations and the Supply Regulations specify the procedures to be followed by public bodies, called “contracting authorities”, and the Utilities Regulations specify the procedures to be followed by public bodies and bodies with special or exclusive rights carrying on an activity in the water, energy, transport and telecommunications sectors, called “utilities”, when they seek offers for certain contracts for the provision of works, services or supplies.

In the case of Alcatel Austria AG and Others -v- Bundesministerium fur Wissenschaft und Verkehr C-81/98 (“Alcatel”), the European Court of Justice held that

*“The combined provisions of Article 2(1)(a) and (b) and the second subparagraph of Article 2(6) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts must be interpreted as meaning that the Member States are required to ensure that the contracting authority’s decision prior to the conclusion of the contract as to the bidder in a tender procedure with which it will conclude the contract is in all cases open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once the contract has been concluded, of obtaining an award of damages.”*

Therefore EU member states must ensure that an unsuccessful tenderer for a public contract has an effective opportunity to challenge the award decision of a contracting authority or a utility before the contracting authority enters into a contractually binding agreement with the winning tenderer.

Regulations 3, 4, 5 and 6 of these Regulations give effect to this judgment in UK law by amending the Works Regulations, the Services Regulations, the Supply Regulations and the Utilities Regulations to provide that the contracting authority or utility must allow a period of not less than 10 calendar days to elapse between the date of despatch of its notification informing the contractors, service providers or suppliers (“providers”) who applied successfully to be included amongst the persons to be selected to tender for or to negotiate the contract or who submitted an offer of its decision in relation to the award of the contract and the date on which the contracting authority or utility proposes to enter into the contract. The Regulations also make provision for a contracting authority or a utility to give reasons to an unsuccessful provider if they are requested to do so within two working days of giving notification of their decision. The contracting authority or utility must then give its reasons within 3 working days of the day in which it proposes to enter the contract, or if that is not possible, it must extend the time before entering the contract by at least three working days of giving reasons to the unsuccessful provider. The purpose of this period is to allow, at the point at which the award decision is notified to those who tendered, an unsuccessful provider who believes that the contracting authority or utility has breached its duty to comply with the provisions of the Works Regulations, the Services Regulations, the Supply Regulations or the Utilities Regulations or with any enforceable Community obligation, to bring proceedings before the contract is entered into seeking an interim order suspending the implementation of a decision taken by the contracting authority or utility to award the contract or an order setting aside the decision to award the contract. The Regulations do not apply where there is only one tender for a contract, including where a contracting authority is using the negotiated procedure for reasons of extreme urgency, or a utility has sought offers without a call for competition for reasons of extreme urgency.

## **Annex C – List of Those Consulted**

BIP  
1 King's Bench Walk  
Accenture  
Achilles  
Allen & Overy  
Amec plc  
Association of Consulting Engineers  
Association of Electricity Suppliers  
Atkins  
Atos Origin  
BAA  
Baker & McKenzie  
Balfour Beatty plc  
Bar Council  
Best Practice Group plc  
Bevan Ashford  
Bevan Brittan  
Beachcroft Wansbroughs  
Bird & Bird  
BLWA, The Association of the Laboratory Supply Industry  
Bovis Lend Lease  
Brent Council  
Brick Court Chambers  
Bristol City  
British Broadcasting Corporation  
British Chambers of Commerce  
BT  
Cabinet Office  
Cabinet Office Legal Advisors  
Cable & Wireless  
Cap Gemini  
Capita Group plc  
Carillion plc  
Catholic Agency for Overseas Development  
Centre for Management and Policy Studies (CMPS)  
CENTREX  
Charity Commission  
Chartered Institute of Purchasing and Supply  
Clifford Chance  
Clyde&Co  
Coal Authority  
COI Communications  
Commission for Racial Equality  
Computer Sciences Corporation  
Confederation of British Industry

Construction Confederation  
Costain Group plc  
Court Service  
Criminal Justice Information Technology  
Criminal Records Bureau  
Crown Estate  
Crown Office & Procurator Fiscal Service  
Crown Prosecution Service  
Deloitte LLP  
Denton Wilde Sapte  
Department for Constitutional Affairs  
Department for Culture Media & Sport  
Department for Education & Skills  
Department for Environment Food & Rural Affairs  
Department for International Development  
Department for Trade and Industry  
Department for Transport  
Department for Work & Pensions  
Department of Finance & Personnel, Northern Ireland  
Department of Health  
Department of Trade and Industry  
Departmental Solicitor's Office, Northern Ireland  
Disability Rights Commission  
DLA  
Dorset County Council  
EEF, the Manufacturers' Organisation  
Energis  
English Heritage  
Environment Agency  
EPR Architects Limited  
Export Credits Guarantee Department  
Federation of Small Businesses  
Food Standards Agency  
Foreign & Commonwealth Office  
Forestry Commission  
Forum of Private Business  
Freshfields  
Fujitsu Services  
Global Crossing  
Global to Local  
GMB  
Government Actuary's Department  
Government Communications Headquarters  
Government of Gibraltar  
Hammonds  
Health & Safety Executive  
Hedra plc  
HM Prison Service

Herbert Smith  
Hewlett Packard  
Highways Agency  
HM Land Registry  
HM Prison Service  
HM Revenue & Excise  
HM Treasury  
Home Office  
Home Office Legal Advisors  
House Of Commons  
IBM  
IdeA  
Inland Revenue  
Institute of Directors  
Institute of Management Consultancy  
Jarvis plc  
Job Centre Plus  
KPMG LLP  
Law Society  
Lestranger and Brett Solicitors  
Local Government Association  
LogicaCMG  
Management Consultancies Association  
MCC Ltd  
Ministry of Defence  
Monckton Chambers  
Nabarro Nathanson  
National Assembly for Wales  
National Audit Office  
National Savings & Investments  
NHS Purchasing & Supply Agency  
Nottingham University  
Office For National Statistics  
Office of Government Commerce  
Office Of The Deputy Prime Minister  
Office Of Water Services  
OFGEM  
OGCbuying.solutions  
Ordnance Survey  
PA Consulting Group  
Parliamentary Estates Directorate  
Partnerships UK  
Pinsent Masons  
Police Information Technology Organisation  
Post Office  
Postal Services Commission  
PPP Forum  
PwC

Remploy  
Royal Mail  
Royal National Institute for the Blind  
Rural Payments Agency  
Schofield Sweeney Solicitors  
Scottish Executive  
SEC Specialist Engineering Contractors Group  
Serco Group plc  
Serious Fraud Office  
Sheppard & Wedderburn  
Siemens Business Services  
Singletons Solicitors  
Small Business Service  
Stanford Consulting  
Tenders Direct  
Treasury Solicitor's Department  
TUC  
Unicorn  
Waste & Resources Action Programme  
Welsh Procurement Initiative  
Women and Work Commission