



**IRISH DEVELOPMENTS**

**New Remedies Regulations**

The Remedies Regulations 2010 transpose into Irish Law the European Remedies Directive 2007. The key features include:-

- A stricter obligation on a contracting authority to provide in the standstill notice sufficient information to enable an unsuccessful tenderer to determine if there are grounds for seeking a review. The required information is specified in the Regulations. If the notice is not complete the standstill period will not commence.
- A standstill period of 14 days or 16 days (depending on the mode of communication) applies before a contract can be entered with the successful tenderer. This period begins on the day following the issuing of the standstill notice.
- The period for bringing a challenge is reduced to 30 calendar days after the applicant 'knew or ought to have known' of an alleged infringement of the rules. In certain instances, such as an illegal award of a contract without notice, a 6 months limit applies.
- A new remedy of 'ineffectiveness' is available, which allows the court to set aside the contract, where there is an illegal direct award; a failure to comply with the standstill period or breaches in relation to call off contracts. The court can impose an

alternative penalty of a fine or the shortening of the contract period if there are overriding reasons relating to the general interest.

- The commencement of court proceedings automatically suspends the right of the contracting authority to enter into the contract until the court deals with the matter.

**For more details see:** Remedies Regulations 2010 (S.I. 130 & 131 of 2010)

**SME Participation Circular 10/10**

This provides guidance to contracting authorities at national level in relation to procurement and SMEs. It requires the contracting authority, among other things, to:-

- advertise contracts for supplies and services with an estimated value of above €25,000 on [etenders.gov.ie](http://etenders.gov.ie). For works and related services (such as the appointment of a PSDP or designer) the advertising threshold is €50,000.
- use the open tendering procedure for advertised contracts for supply and services up to €25,000 in value, and for advertised contracts for works and related services up to €250,000.
- ensure that any minimum requirements set for tenders are relevant and proportionate to the circumstances of the particular contract.

**For more details see:**  
[www.etenders.gov.ie](http://www.etenders.gov.ie)

## RECENT CASES

### **Equal Treatment principle not breached in applying award criteria**

On the 17 February 2011, the European Court of Justice held that Cyprus had not breached public procurement rules when applying the award criteria to tenders for the design, supply and construction of a power station. The Commission alleged that Cyprus had not sufficiently disclosed a requirement relating to guaranteed returns in certain market conditions and that by applying this requirement had altered the award criteria in breach of the principle of transparency and equal treatment. The court held that there was reference to this requirement in the tender specification and that there was no subsequent altering of award criteria. It stated that although there may have been some lack of clarity as regards this requirement this lack of clarity was the same for all bidders.

**For more details see:** Case C-251/09 *European Commission v Republic of Cyprus*

### **Altering weightings of award criteria**

On the 18 November 2010, Ireland was found in breach of its obligations in relation to the procurement of translation services. Although this was regarded as a 'part B' services (and so not subject to the full rigour of the procurement rules), the court said that the principle of equal treatment and transparency was still applicable. It considered that the altering of the award criteria after the initial review of tenders received was in breach of the principles of equal treatment and transparency.

**For more details see:** Case C-226/09 *Commission v. Ireland*

### **Application of Public Procurement Rules to the supply of services by a public/private joint venture**

In a Finnish case, a contracting authority, Oulu City Council, established a joint venture with a private company for the purposes of providing occupational health care and welfare services. The JV then provided these occupational services to Oulu City Council. There was no invitation to tender for the provision of these services. The Finnish court asked the European Court of Justice whether the establishment of a joint venture between Oulu City Council and a private entity and the provision of the services by the JV was subject to the public procurement rules. On the 22 December 2010, the European Court of Justice found that the awarding of a contract to provide such services must be in accordance with public procurement rules.

**For more details see:** Case C-215/09 *Mehilainen Oy and Terveystalo Healthcare Oy v Oulun kaupunki*

### **Application of procurement rules to Development Agreements**

On the 25 March 2010, the European Court held that public procurement rules apply to development agreements. In this case, a public body sold land on which the purchaser intended to carry out works. This was considered to amount to a public works contract under the procurement rules. The court held that the concept of 'public works contracts' does not require that the subject development works to be physically or materially carried out by the contracting authority, once the works are carried out for the contracting authority's 'immediate economic benefit.'

**For more details see:** Case C-451/08 *Helmut Muller GmbH v. Bundesanstalt für Immobilienaufgaben*

### **Change in Subcontractor**

On the 13 April 2010, the European Court of Justice held that a change of subcontractor may in exceptional cases be a material amendment to the contract where the subcontractor is key to awarding the contract. Such circumstances could necessitate the re-advertisement of the

contract. It reaffirms the proposition that although service concession contracts are not subject to public procurement rules, they are subject nonetheless to the principles of transparency, equal treatment and non-discrimination.

**For more details see:** Case C-91/08 *Walls v. Stadt Frankfurt am Main*

## **RDJ PROCUREMENT SERVICES**

RDJ offer specialist advice to private, public sector and utilities clients on all aspects of public procurement (supplies, services and works contracts) including:

- Preparing and advising on procurement documents such as contract notices, instructions to tenders, prequalification questionnaires
- Advising on the procurement process, the appropriate procedures, conduct of the evaluation of tenders and contract award issues
- Managing compliance through the structuring of procurement transactions
- Interpretation of EU and Irish procurement law
- Advising on EU developments such as communications from the Commission and European Court of Justice (ECJ) decisions
- Pursuing remedies for breach of procurement rules

### **FINOLA MCCARTHY** **Partner**



Finola McCarthy specialises in construction, public procurement and environmental law. She advises on all types of construction and engineering projects both public and private sector, from tendering procedures, through to contract documents and dispute resolution.

### **AOIFE SHIELDS** **Solicitor**



Aoife Shields practises in the areas of Construction and Environmental and Public Procurement. She advises businesses across a range of industry sectors; statutory bodies and private clients on all aspects of environmental, construction and public procurement law.

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