

EXECUTIVE NOTE

THE PUBLIC CONTRACTS AND UTILITIES CONTRACTS (SCOTLAND) AMENDMENT REGULATIONS 2009 (S.S.I 2009/428)

The above instrument was made in exercise of the powers conferred by section 2(2) of the European Communities Act 1972. The instrument is subject to the negative resolution procedure.

Legislative context

The purpose of this instrument is to give effect in Scots law to Directive 2007/66/EC of the European Parliament and Council of 11th December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (the “Remedies Directive”). Amendments require to be made to the Public Contracts (Scotland) Regulations 2006 (S.S.I. 2006/1) and the Utilities Contracts (Scotland) Regulations 2006 (S.S.I. 2006/2, together, the “2006 Regulations”) in consequence of the Remedies Directive.

The 2006 Regulations have been amended on five occasions since they came into force in January 2006. The Subordinate Legislation Committee has indicated that, in its view, a Scottish Statutory Instrument (SSI) should not be amended substantively more than five times. Our intention had been to incorporate the changes required by the Remedies Directive in consolidated Regulations. However, due to the complexity of the Directive, we have had to focus on transposing the Directive rather than consolidating the Regulations on this occasion. We have identified that the 2006 Regulations could be improved in a number of respects. Making these improvements will require more time than a simple consolidation. We are also aware that the Regulations will require further amendment in 2010. We therefore propose to postpone consolidation of the 2006 Regulations until next year at the earliest.

The Remedies Directive requires the European Commission to amend Commission Regulation (EC) No. 1564/2005 of 7th September 2005 establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council to amend the model contract award notice and introduce a new “voluntary ex ante transparency notice”. Publication of the amended contract award notice will enable public bodies and utilities to shorten the period of time they are at risk from the new remedy of ineffectiveness penalty; publication of the new voluntary ex ante transparency notice will enable public bodies and utilities to remove the risk of the first ground for ineffectiveness applying. As at the date of making the Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2009 the amending Commission Regulation had not been published in the Official Journal of the European Union. In the light of this fact, it has been decided by the Scottish Ministers that it is expedient to make ambulatory references to Commission Regulation (EC) No. 1564/2005.

A copy of the Remedies Directive, is attached. Transposition tables for Directives 89/665/EEC and 92/13/EEC, as they have been amended by the Remedies Directive, are also attached.

Policy Objectives

The Remedies Directive introduces changes to the legal remedies available to aggrieved bidders for breaches of EU procurement law by public bodies or utilities. The aim of the Remedies Directive is to make procurement processes more transparent, to deter public bodies and utilities from awarding contracts in breach of EU procurement law and to address situations where such breaches occur.

The Remedies Directive provides for a harmonised standstill period (the time between the announcement of the winner of a competitive tendering exercise and the entering into of the contract) which allows aggrieved bidders the opportunity to challenge the decision before any contract is created. The Remedies Directive also provides for the automatic prohibition on entering into a contract when a court challenge is brought.

Under the 2006 Regulations, once a public body or utility has entered into a contract the only remedy available to an aggrieved bidder is damages. The Remedies Directive introduces a new concept of 'ineffectiveness' for contracts that have been entered into. The courts must render a contract ineffective where a public body or utility should have advertised a contract opportunity in the Official Journal of the European Union but did not, where the revised standstill obligations have not been observed, where the automatic prohibition on entering into a contract was not observed, and where the correct processes were not followed for the award of a contract under a framework agreement or a dynamic purchasing system.

Under the new Directive, when a court makes an ineffectiveness order it must impose a financial penalty upon the public body or utility concerned and also make such other order the court considers necessary to address the consequences of the ineffectiveness order on the rights and obligations of the parties to the contract. In certain other circumstances, the court will be required to impose a financial penalty on a public body or utility, or shorten the duration of the contract. The Remedies Directive prescribes minimum time limits for court challenges, which differ depending on a number of factors including whether the pursuer is or is not seeking an ineffectiveness order.

The Remedies Directive requires information about the contract award decision to be given only to tenderers and candidates which have not previously been informed about their elimination. The 2006 Regulations do not require contracting authorities to notify tenderers and candidates which are eliminated at an earlier stage. In order to provide clarity on this point, and allow the new remedies regime to function effectively, we have introduced a new obligation on contracting authorities to notify tenderers and candidates of their rejection when they are eliminated from a procurement procedure prior to the contract award decision. The new obligations are intended to clarify when information should be provided to tenderers and candidates in line with best practice, and do not constitute an additional burden on contracting authorities.

Consultation

We have worked closely with officials in the Office for Government Commerce, part of HM Treasury, which has responsibility for implementing the Remedies Directive for the rest of the UK. We have also worked closely with colleagues in the Scottish Court Service.

We have undertaken two public consultations. The first consultation sought feedback on the Scottish Government's approach to implementation of the Remedies Directive and took place from August to November 2008. The consultation was publicised via Scottish Procurement Policy Note 8/2008 which was distributed to public sector procurement organisations and to others with an interest in public procurement. We received a total of fifteen responses to the consultation. Where respondents gave permission for their response to be made public, these were published on the Scottish Government's website on 28 November 2008. An analysis of the responses was published on 13 February 2009:

<http://www.scotland.gov.uk/Publications/2009/02/remedies>.

The second consultation sought feedback on draft regulations and a number of outstanding questions relating to implementation of the Remedies Directive and took place from June to August 2009. The consultation was publicised via Scottish Procurement Policy Note 3/2009 which was distributed to public sector procurement organisations and to others with an interest in public procurement. We received a total of twenty-four responses to the second consultation and have taken full account of these in finalising this instrument. The responses, and an analysis of the responses will be published on the Scottish Government's website shortly.

We will issue a further Scottish Procurement Policy Note to stakeholders to alert them to the Regulations and to provide guidance on the changes introduced by the Remedies Directive. The Note will also be published on the Scottish Procurement Directorate's website. We have also arranged training for public bodies and utilities.

Financial Effects

This instrument may require public bodies and utilities to adopt processes which are not part of their current procurement regime, although the cost to them of making these changes is expected to be minimal. The instrument does not impose any obligations on businesses.

The instrument introduces new penalties for certain breaches of the procurement rules, including ineffectiveness, contract shortening and civil financial penalties. These are likely to have a financial effect on any public body or utility which has been found to have breached the procurement rules. The new penalties are unlikely to result in additional cost to suppliers bringing legal proceedings in the Sheriff Court or Court of Session. There could, however, be implications for the successful bidder if the court declares an awarded contract ineffective or shortens the duration of a contract. Further information on the potential financial effects is included in the attached Regulatory Impact Assessment.

Scottish Procurement Directorate
Scottish Government
November 2009

FINAL REGULATORY IMPACT ASSESSMENT

1. Title of proposal

Transposition of EU Directive 2007/66/EC¹ (the Remedies Directive) in Scots law.

2. Purpose and intended effect

Objectives

The Remedies Directive introduces changes to the legal remedies available to suppliers for breaches of EU procurement law. The Directive addresses two main problems: the difficulty of challenging a direct award on the basis that there has been no prior advertising and no competition; and the difficulty of ensuring that a contract award decision can be set aside before the contract comes into effect.

The Directive provides that contracts which are awarded in breach of significant procedural rules, such as the requirement to advertise a contract in the Official Journal of the European Union, should be deemed ineffective. It also provides for a harmonised standstill period between the contract award decision and the award of the contract, to allow for challenges to the contract award decision. In addition, where a contract award decision is challenged in court, the contracting authority or utility must not enter into the contract before the Court has taken a decision on the application.

The Remedies Directive seeks to improve the rules governing the remedies available to aggrieved bidders, to make the procurement process more transparent, to further deter contracting authorities and utilities from awarding contracts in breach of EU procurement law and to satisfactorily address situations where such awards are made.

EU Member States must implement the Remedies Directive in national legislation by 20 December 2009.

Background

Member States have a responsibility to ensure that effective and rapid remedies are available against decisions taken by public sector contracting authorities or utilities. The European Commission has examined the review mechanisms in place in Member States and has identified a number of weaknesses. The purpose of the Remedies Directive is to improve the effectiveness of Member States' procedures for reviewing the award of public contracts.

At present, the Scottish Regulations² allow suppliers to bring proceedings in the Sheriff Court or the Court of Session against contracting authorities or utilities which have infringed their obligations to comply with the Scottish Regulations, or any other enforceable Community obligation which may be relevant to awarding a public contract.

Under the existing Scottish Regulations, the Sheriff Court or the Court of Session: can make an interim order suspending the procedure leading to the award of the contract; can order a

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32007L0066:EN:NOT>

² Regulation 47 of the Public Contracts (Scotland) Regulations 2006 and regulation 45 of the Utilities Contracts (Scotland) Regulations 2006.

contracting authority or utility to amend any document forming part of the procurement process; can set aside any decision, including a contracting authority or utility's decision to award a contract; and can award damages. Where a contract has been awarded, the only remedy available to aggrieved bidders is damages.

Following implementation of the new Directive, the remedies will be as follows:

- All existing remedies are unchanged, therefore damages will still be available to aggrieved bidders.
- In certain circumstances, where there has been a serious breach of the procurement rules, the Sheriff Court or the Court of Session will be required to declare an awarded contract ineffective, impose a civil financial penalty on the contracting authority or utility, and make any order it considers appropriate to address the future position of the parties.
- The Sheriff Court or Court of Session will be required to impose a civil financial penalty on the contracting authority or utility or shorten the duration of the contract:
 - where a contracting authority or utility awards a contract in breach of the standstill period or the prohibition on entering into a contract applying on the commencement of court proceedings; or
 - as an alternative to ineffectiveness where the Court has found that there are good reasons for maintaining the contract.
- The new remedies will be available against framework agreements but will not always be available against call-off contracts.

Amendments to the existing Scottish Regulations are necessary to implement the provisions in the Remedies Directive. The Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2009 make the necessary amendments.

Rationale for Government intervention

Government intervention is necessary to transpose the Directive by the European Commission's deadline of 20 December 2009.

3. Consultation

Within government

The following government agencies and departments have been consulted in the preparation of this Regulatory Impact Assessment (RIA):

Better Regulation and Industry Engagement Branch, Scottish Government
Constitution, Law and Courts Directorate, Scottish Government
Office of Government Commerce
Scottish Court Service
Scottish Government Legal Directorate

Public consultation

Two public consultations have been undertaken:

- The first consultation sought feedback on our approach to implementation of the Remedies Directive in Scotland and an initial RIA and took place from August to November 2008. We received a total of fifteen responses to the first consultation. Where respondents gave permission for their response to be made public, these were published on the Scottish Government consultation web pages on 28 November 2008. We published an analysis of the responses we received on the Scottish Government's website on 13 February 2009: <http://www.scotland.gov.uk/Publications/2009/02/remedies>.
- This second consultation sought feedback on draft regulations and a number of outstanding questions relating to implementation of the Directive and took place from June to August 2009. The consultation was publicised via Scottish Procurement Policy Note 3/2009 which was distributed to public sector procurement organisations and to others with an interest in public procurement. We received a total of twenty-four responses to the second consultation and have taken full account of these in finalising the amending Regulations. The responses, and an analysis of the responses, will be published on the Scottish Government's website shortly.

4. Options

Option 1 – do nothing

Non-implementation of the Directive would trigger infraction proceedings and the UK could be liable for substantial penalties. The Scottish Ministers are obliged by the terms of the Scotland Act to fulfil their obligations under EU law.

Option 2 – implement the Directive into national law

It is necessary to amend the existing Scottish Regulations to implement the provisions in the Directive relating to review procedures, the standstill period, ineffectiveness and other sanctions.

The options for implementation are constrained by the requirements of the Directive, which has already been adopted at the European level. The majority of the provisions in the Directive are mandatory. However, Member States have a choice as to how certain provisions in the Directive are implemented. In implementing the Directive, the Scottish Government has throughout chosen options which maximise the benefits and minimise the potential costs for all suppliers.

5. Costs and benefits

The risk assessment undertaken by the European Commission in April 2006³ concluded that the Remedies Directive would, in the short term, lead to an increase in the number of EU remedies cases and the associated process costs (though no forecast figures were available),

³ http://ec.europa.eu/internal_market/publicprocurement/docs/remedies/sec_2006_557_en.pdf

but that over time the benefits would outweigh the costs. The Scottish Government endorses this assessment.

Sectors and groups affected

The following are likely to be affected by changes to the legal remedies available to suppliers for breaches of EU procurement law: public sector procurement organisations and utilities must ensure that they comply with the rules governing the standstill period and review procedures; and suppliers and service providers will have greater opportunity to challenge in court the procedures adopted by public sector procurement organisations and utilities and the decisions they make. We anticipate that there may be an increase in the number of legal challenges in the Sheriff Court and Court of Session.

Benefits

Implementation of the Directive in Scotland will ensure that effective legal remedies are available to suppliers and service providers for breaches of EU procurement law. It will further deter contracting authorities and utilities from awarding contracts in breach of EU procurement law. Greater compliance with EU procurement law will result in savings to the public purse.

Costs

The number of legal challenges in the Sheriff Court and Court of Session for breaches of EU procurement law has, in the past, been low. Although we anticipate that there may be an increase in the number of challenges, it is not possible to predict the number of court cases and therefore to quantify the costs to the parties.

Any increase in the number of legal challenges in the Sheriff Court and Court of Session is likely to increase the legal costs for public sector procurement organisations and utilities.

We foresee that costs to public sector procurement organisations and utilities resulting from a successful challenge will also increase. In cases where the court declares an awarded contract ineffective or shortens the duration of a contract, there may be significant cost implications for the contracting authority or utility. In addition, the contracting authority or utility may be ordered to: pay a civil financial penalty; pay damages to the claimant; and pay compensation to the successful bidder. However, if contracting authorities and utilities comply with the procurement rules and undertake simple due diligence, they can minimise the risk of successful challenge.

We do not believe that the changes introduced by the Directive will increase the cost to an aggrieved bidder of making a claim. Claimants will normally add the cost of bringing legal proceedings to their claim. However, there may be implications for the successful bidder if the court declares an awarded contract ineffective or shortens the duration of a contract. Bidders can take a number of steps to minimise any such costs, for example by satisfying themselves that procurement rules have been complied with and by agreeing terms pre-award governing the rights and obligations of the parties in the event that a contract or framework agreement is declared ineffective. If the court does declare an awarded contract ineffective or shortens the duration of a contract, it will be open to the successful bidder to claim compensation from the public body or utility.

6. Small/Micro Firms Impact Test

Small and micro businesses will benefit from the new remedies available for breaches of EU procurement law. One of the key aims of the Remedies Directive is to make the procurement process more transparent, to the benefit of all suppliers and service providers regardless of size.

Under the new rules, a challenge to a contract awarded to a supplier or service provider could result in the contract being declared ineffective by the Court or shortened. If this happened, the impact on a small or micro business might be greater than the impact on a larger business. However, the new rules apply only to contracts above the EU threshold values (small and micro firms are likely to have greater interest in lower value contracts). In addition, all businesses will be able to take the steps described in Section 5 to minimise their risk and will also be able to claim compensation from the public body or utility.

7. Legal Aid Impact Test

The majority of those seeking remedies for breach of EU procurement law will not be individuals, in which case legal aid will not be available. There will therefore not be a significant impact on the legal aid fund.

8. “Test Run” of business forms

Implementation of the Directive will not introduce any statutory business forms.

9. Competition assessment

EU procurement legislation is intended to facilitate greater competition by opening up markets. The Remedies Directive binds only the public and utilities sectors but beneficial effects are shared with private sector suppliers and service providers.

10. Enforcement, sanctions and monitoring

The new remedies, which are detailed in Section 2, will be available to suppliers which bring proceedings in the Sheriff Court and Court of Session. The European Commission will review Member States’ implementation of the Remedies Directive and report to the European Parliament and the Council of Europe before 20 December 2012.

11. Implementation and Delivery Plan

We intend to issue a Scottish Procurement Policy Note to stakeholders to alert them to the implementing Regulations and to provide guidance on the changes introduced by the Remedies Directive. The Note and guidance will be published on the Scottish Government website. We have also arranged training for public bodies and utilities.

12. Post-implementation Review

We will review and update this assessment within three years of the introduction of the amending Regulations.

13. Summary and recommendation

We intend to implement the Directive in line with our EC Treaty obligations and the Scotland Act.

Declaration and publication

I have read the RIA and I am satisfied that the benefits justify the costs. Copies of the RIA will be placed in the Scottish Parliament Information Centre and will also be published on the Improving Regulation website: <http://www.scotland.gov.uk/Topics/Business-Industry/support/better-regulation/partial-assessments/full>.

Signed:

Dated:

JOHN SWINNEY
Cabinet Secretary for Finance and Sustainable Growth

Contact

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TRANSPOSITION NOTE

Directive 2007/66/EC of the European Parliament and Council of 11th December 2007 amending Directive 89/665/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (see <http://eur-lex.europa.eu/Notice.do?val=149767:cs&lang=en&list=461925:cs,149767:cs,&pos=2&page=1&nbl=2&pgs=10&hwords=89/665/eec~>).

This Directive is transposed into Scots law by the Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2009 which amend the Public Contracts (Scotland) Regulations 2006.

Provision of Directive 89/665/EEC as amended by Directive 2007/66/EC	Provision of Public Contracts (Scotland) Regulations 2006, as amended by the Public Contracts and Utilities Contracts (Scotland) Regulations 2009
<p><i>Article 1</i></p> <p>Scope and availability of review procedures</p> <p>1. This Directive applies to contracts referred to in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (1), unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.</p> <p>Contracts within the meaning of this Directive include public contracts, framework agreements, public works concessions and dynamic purchasing systems.</p> <p>Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.</p> <p>2. Member States shall ensure that there is no discrimination between undertakings claiming harm in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.</p> <p>3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.</p> <p>4. Member States may require that the person wishing to use a review procedure has notified the contracting authority of the alleged infringement and of his intention to seek review, provided that this does not affect the standstill period in accordance with Article 2a(2) or any other time limits for applying for review in accordance with Article 2c.</p>	<p>See exclusion in regulation 47(10)</p> <p>Regulation 47A(2)(a)</p> <p>Regulation 47(5)</p> <p>Regulation 47(6)(a)</p>

<p>Provision of Directive 89/665/EEC as amended by Directive 2007/66/EC</p> <p>5. Member States may require that the person concerned first seek review with the contracting authority. In that case, Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract.</p> <p>Member States shall decide on the appropriate means of communication, including fax or electronic means, to be used for the application for review provided for in the first subparagraph.</p> <p>The suspension referred to in the first subparagraph shall not end before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contracting authority has sent a reply if fax or electronic means are used, or, if other means of communication are used, before the expiry of either at least 15 calendar days with effect from the day following the date on which the contracting authority has sent a reply, or at least 10 calendar days with effect from the day following the date of the receipt of a reply.</p>	<p>Provision of Public Contracts (Scotland) Regulations 2006, as amended by the Public Contracts and Utilities Contracts (Scotland) Regulations 2009</p>
<p>Article 2</p> <p>Requirements for review procedures</p> <p>1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:</p> <ul style="list-style-type: none"> (a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority; (b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure; (c) award damages to persons harmed by an infringement. <p>2. The powers specified in paragraph 1 and Articles 2d and 2e may be conferred on separate bodies responsible for different aspects of the review procedure.</p> <p>3. When a body of first instance, which is independent of the contracting authority, reviews a contract award decision, Member States shall ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim</p>	<p>Regulation 47A(1)(a)</p> <p>Regulations 47A(1)(b)(i) and (ii)</p> <p>Regulation 47A(1)(b)(iii)</p> <p>Regulation 47(10)</p>

<p>Provision of Directive 89/665/EEC as amended by Directive 2007/66/EC</p> <p>measures or for review. The suspension shall end no earlier than the expiry of the standstill period referred to in Article 2a(2) and Article 2d(4) and (5).</p> <p>4. Except where provided for in paragraph 3 and Article 1(5), review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.</p> <p>5. Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits.</p> <p>A decision not to grant interim measures shall not prejudice any other claim of the person seeking such measures.</p> <p>6. Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.</p> <p>7. Except where provided for in Articles 2d to 2f, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law.</p> <p>Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 1(5), paragraph 3 of this Article or Articles 2a to 2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.</p> <p>8. Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.</p> <p>9. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 234 of the Treaty and independent of both the contracting authority and the review body.</p> <p>The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment,</p>	<p>Provision of Public Contracts (Scotland) Regulations 2006, as amended by the Public Contracts and Utilities Contracts (Scotland) Regulations 2009</p>
	<p>Regulation 47A(2)</p> <p>Regulation 47A(7)</p>

<p>Provision of Directive 89/665/EEC as amended by Directive 2007/66/EC</p> <p>their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.</p>	<p>Provision of Public Contracts (Scotland) Regulations 2006, as amended by the Public Contracts and Utilities Contracts (Scotland) Regulations 2009</p>
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<p>Provision of Directive 89/665/EEC as amended by Directive 2007/66/EC</p>	<p>Provision of Public Contracts (Scotland) Regulations 2006, as amended by the Public Contracts and Utilities Contracts (Scotland) Regulations 2009</p>
<p><i>Article 2a</i></p> <p>Standstill period</p> <p>1. The Member States shall ensure that the persons referred to in Article 1(3) have sufficient time for effective review of the contract award decisions taken by contracting authorities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 2c.</p> <p>2. A contract may not be concluded following the decision to award a contract falling within the scope of Directive 2004/18/EC before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.</p> <p>Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure.</p> <p>Candidates shall be deemed to be concerned if the contracting authority has not made available information about the rejection of their application before the notification of the contract award decision to the tenderers concerned.</p> <p>The communication of the award decision to each tenderer and candidate concerned shall be accompanied by the following:</p> <ul style="list-style-type: none"> — a summary of the relevant reasons as set out in Article 41(2) of Directive 2004/18/EC, subject to the provisions of Article 41(3) of that Directive, and, — a precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph. 	<p>Regulations 2(1) (“relevant standstill period”) and 32(3)</p> <p>Regulation 2(1) (“tenderer concerned”)</p> <p>Regulation 2(1) (“candidate concerned”)</p> <p>Regulation 32(2)</p> <p>Sub-paragraph (d), read with paragraph (7)</p> <p>Sub-paragraph (f)</p>
<p><i>Article 2b</i></p> <p>Derogations from the standstill period</p> <p>Member States may provide that the periods referred to in Article 2a(2) of this Directive do not apply</p>	

<p>Provision of Directive 89/665/EEC as amended by Directive 2007/66/EC</p> <p>in the following cases:</p> <p>(a) if Directive 2004/18/EC does not require prior publication of a contract notice in the <i>Official Journal of the European Union</i>;</p> <p>(b) if the only tenderer concerned within the meaning of Article 2a(2) of this Directive is the one who is awarded the contract and there are no candidates concerned;</p> <p>(c) in the case of a contract based on a framework agreement as provided for in Article 32 of Directive 2004/18/EC and in the case of a specific contract based on a dynamic purchasing system as provided for in Article 33 of that Directive.</p> <p>If this derogation is invoked, Member States shall ensure that the contract is ineffective in accordance with Articles 2d and 2f of this Directive where:</p> <ul style="list-style-type: none"> — there is an infringement of the second indent of the second subparagraph of Article 32(4) or of Article 33(5) or (6) of Directive 2004/18/EC, and, — the contract value is estimated to be equal to or to exceed the thresholds set out in Article 7 of Directive 2004/18/EC. 	<p>Provision of Public Contracts (Scotland) Regulations 2006, as amended by the Public Contracts and Utilities Contracts (Scotland) Regulations 2009</p> <p>Regulation 32(5)(a)</p> <p>Regulation 32(5)(b)</p> <p>Regulation 32(4)(b)</p> <p>Regulation 47B(8)</p> <p>Sub-paragraph (b)</p> <p>Sub-paragraph (c)</p>
<p>Article 2c</p> <p>Time limits for applying for review</p> <p>Where a Member State provides that any application for review of a contracting authority's decision taken in the context of, or in relation to, a contract award procedure falling within the scope of Directive 2004/18/EC must be made before the expiry of a specified period, this period shall be at least 10 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate if fax or electronic means are used or, if other means of communication are used, this period shall be either at least 15 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of the receipt of the contracting authority's decision. The communication of the contracting authority's decision to each tenderer or candidate shall be accompanied by a summary of the relevant reasons. In the case of an application for review concerning decisions referred to in Article 2(1)(b) of this Directive that are not subject to a specific notification, the time period shall be at least 10 calendar days from the date of the publication of the decision concerned.</p>	<p>Regulations 47(7)(b) and (8)</p>

Provision of Directive 89/665/EEC as amended by Directive 2007/66/EC	Provision of Public Contracts (Scotland) Regulations 2006, as amended by the Public Contracts and Utilities Contracts (Scotland) Regulations 2009
<p><i>Article 2d</i></p> <p>Ineffectiveness</p> <p>1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:</p> <p>(a) if the contracting authority has awarded a contract without prior publication of a contract notice in the <i>Official Journal of the European Union</i> without this being permissible in accordance with Directive 2004/18/EC;</p> <p>(b) in case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) of this Directive, if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of Directive 2004/18/EC, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract;</p> <p>(c) in the cases referred to in the second subparagraph of Article 2b(c) of this Directive, if Member States have invoked the derogation from the standstill period for contracts based on a framework agreement and a dynamic purchasing system.</p> <p>2. The consequences of a contract being considered ineffective shall be provided for by national law.</p> <p>National law may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed. In the latter case, Member States shall provide for the application of other penalties within the meaning of Article 2e(2).</p> <p>3. Member States may provide that the review body independent of the contracting authority may not consider a contract ineffective, even though it has been awarded illegally on the grounds mentioned in paragraph 1, if the review body finds, after having examined all relevant aspects, that overriding reasons relating to a general interest require that the effects of the contract should be maintained. In this case, Member States shall provide for alternative penalties within the meaning of Article 2e(2), which shall be applied instead.</p> <p>Economic interests in the effectiveness of the contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences.</p>	<p>Regulation 47B(5)</p> <p>Regulation 47B(7)</p> <p>Regulation 47B(8)</p> <p>Regulations 47B(1) to (3)</p> <p>Regulation 47B(10)(a)</p> <p>Regulation 47B(12)</p> <p>47B(13)(b)</p>

<p>Provision of Directive 89/665/EEC as amended by Directive 2007/66/EC</p>	<p>Provision of Public Contracts (Scotland) Regulations 2006, as amended by the Public Contracts and Utilities Contracts (Scotland) Regulations 2009</p>
<p>However, economic interests directly linked to the contract concerned shall not constitute overriding reasons relating to a general interest. Economic interests directly linked to the contract include, inter alia, the costs resulting from the delay in the execution of the contract, the costs resulting from the launching of a new procurement procedure, the costs resulting from the change of the economic operator performing the contract and the costs of legal obligations resulting from the ineffectiveness.</p> <p>4. The Member States shall provide that paragraph 1(a) of this Article does not apply where:</p> <ul style="list-style-type: none"> — the contracting authority considers that the award of a contract without prior publication of a contract notice in the Official Journal of the European Union is permissible in accordance with Directive 2004/18/EC, — the contracting authority has published in the Official Journal of the European Union a notice as described in Article 3a of this Directive expressing its intention to conclude the contract, and, — the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice. <p>5. The Member States shall provide that paragraph 1(c) of this Article does not apply where:</p> <ul style="list-style-type: none"> — the contracting authority considers that the award of a contract is in accordance with the second indent of the second subparagraph of Article 32(4) or with Article 33(5) and (6) of Directive 2004/18/EC, — the contracting authority has sent a contract award decision, together with a summary of reasons as referred to in the first indent of the fourth subparagraph of Article 2a(2) of this Directive, to the tenderers concerned, and, — the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned if fax or electronic means are used or, if other means of communications are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision. 	<p>Regulation 47B(13)(a)</p> <p>Regulation 47B(6)</p> <p>Regulation 47B(9)</p>
<p>Article 2e</p> <p>Infringements of this Directive and alternative penalties</p>	

<p>Provision of Directive 89/665/EEC as amended by Directive 2007/66/EC</p> <p>1. In the case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) which is not covered by Article 2d(1)(b), Member States shall provide for ineffectiveness in accordance with Article 2d(1) to (3), or for alternative penalties. Member States may provide that the review body independent of the contracting authority shall decide, after having assessed all relevant aspects, whether the contract should be considered ineffective or whether alternative penalties should be imposed.</p> <p>2. Alternative penalties must be effective, proportionate and dissuasive. Alternative penalties shall be:</p> <ul style="list-style-type: none"> — the imposition of fines on the contracting authority; or, — the shortening of the duration of the contract. <p>Member States may confer on the review body broad discretion to take into account all the relevant factors, including the seriousness of the infringement, the behaviour of the contracting authority and, in the cases referred to in Article 2d(2), the extent to which the contract remains in force.</p> <p>The award of damages does not constitute an appropriate penalty for the purposes of this paragraph</p>	<p>Provision of Public Contracts (Scotland) Regulations 2006, as amended by the Public Contracts and Utilities Contracts (Scotland) Regulations 2009</p> <p>Regulation 47A(3)</p> <p>Regulations 47A(3) and (4)</p>
<p>Article 2f</p> <p>Time limits</p> <p>1. Member States may provide that the application for review in accordance with Article 2d(1) must be made:</p> <ul style="list-style-type: none"> (a) before the expiry of at least 30 calendar days with effect from the day following the date on which: <ul style="list-style-type: none"> — the contracting authority published a contract award notice in accordance with Articles 35(4), 36 and 37 of Directive 2004/18/EC, provided that this notice includes justification of the decision of the contracting authority to award the contract without prior publication of a contract notice in the <i>Official Journal of the European Union</i>, or — the contracting authority informed the tenderers and candidates concerned of the conclusion of the contract, provided that this information contains a summary of the relevant reasons as set out in Article 41(2) of Directive 2004/18/EC, subject to the provisions of Article 41(3) of that Directive. This option also applies to the cases referred to in Article 2b(c) of this Directive; 	<p>Regulation 47(7)(a)</p> <p>Regulation 44(7)(a)(i) and (9)(a)</p> <p>Regulation 44(7)(a)(i) and (9)(b)</p>

<p>Provision of Directive 89/665/EEC as amended by Directive 2007/66/EC</p>	<p>Provision of Public Contracts (Scotland) Regulations 2006, as amended by the Public Contracts and Utilities Contracts (Scotland) Regulations 2009</p>
<p>(b) and in any case before the expiry of a period of at least six months with effect from the day following the date of the conclusion of the contract.</p> <p>2. In all other cases, including applications for a review in accordance with Article 2e(1), the time limits for the application for a review shall be determined by national law, subject to the provisions of Article 2c.</p>	<p>Regulation 44(7)(a)(ii)</p> <p>Regulation 47(7)(b)</p>
<p>Article 3</p> <p>Corrective mechanism</p> <p>1. The Commission may invoke the procedure provided for in paragraphs 2 to 5 when, prior to a contract being concluded, it considers that a serious infringement of Community law in the field of public procurement has been committed during a contract award procedure falling within the scope of Directive 2004/18/EC.</p> <p>2. The Commission shall notify the Member State concerned of the reasons which have led it to conclude that a serious infringement has been committed and request its correction by appropriate means.</p> <p>3. Within 21 calendar days of receipt of the notification referred to in paragraph 2, the Member State concerned shall communicate to the Commission:</p> <ul style="list-style-type: none"> (a) its confirmation that the infringement has been corrected; (b) a reasoned submission as to why no correction has been made; or (c) a notice to the effect that the contract award procedure has been suspended either by the contracting authority on its own initiative or on the basis of the powers specified in Article 2(1)(a). <p>4. A reasoned submission communicated pursuant to paragraph 3(b) may rely among other matters on the fact that the alleged infringement is already the subject of judicial or other review proceedings or of a review as referred to in Article 2(9). In such a case, the Member State shall inform the Commission of the result of those proceedings as soon as it becomes known.</p> <p>5. Where notice has been given that a contract award procedure has been suspended in accordance with paragraph 3(c), the Member State shall notify the Commission when the suspension is lifted or another contract procedure relating in whole or in part to the same subject</p>	

<p>Provision of Directive 89/665/EEC as amended by Directive 2007/66/EC</p> <p>matter is begun. That notification shall confirm that the alleged infringement has been corrected or include a reasoned submission as to why no correction has been made.</p>	<p>Provision of Public Contracts (Scotland) Regulations 2006, as amended by the Public Contracts and Utilities Contracts (Scotland) Regulations 2009</p>
<p>Article 3a</p> <p>Content of a notice for voluntary ex ante transparency</p> <p>The notice referred to in the second indent of Article 2d(4), the format of which shall be adopted by the Commission in accordance with the advisory procedure referred to in Article 3b(2), shall contain the following information:</p> <ul style="list-style-type: none"> (a) the name and contact details of the contracting authority; (b) a description of the object of the contract; (c) a justification of the decision of the contracting authority to award the contract without prior publication of a contract notice in the <i>Official Journal of the European Union</i>; (d) the name and contact details of the economic operator in favour of whom a contract award decision has been taken; and (e) where appropriate, any other information deemed useful by the contracting authority. 	<p>Regulation 47B(6)(a)</p>
<p>Article 3b</p> <p>Committee procedure</p> <ol style="list-style-type: none"> 1. The Commission shall be assisted by the Advisory Committee for Public Contracts set up by Article 1 of Council Decision 71/306/EEC of 26 July 1971 (1) (hereinafter referred to as the Committee). 2. Where reference is made to this paragraph, Articles 3 and 7 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (2) shall apply, having regard to the provisions of Article 8 thereof. 	

<p>Provision of Directive 89/665/EEC as amended by Directive 2007/66/EC</p>	<p>Provision of Public Contracts (Scotland) Regulations 2006, as amended by the Public Contracts and Utilities Contracts (Scotland) Regulations 2009</p>
<p><i>Article 4</i></p> <p>Implementation</p> <ol style="list-style-type: none"> 1. The Commission may request the Member States, in consultation with the Committee, to provide it with information on the operation of national review procedures. 2. Member States shall communicate to the Commission on an annual basis the text of all decisions, together with the reasons therefor, taken by their review bodies in accordance with Article 2d(3). 	

TRANSPPOSITION NOTE

Directive 2007/66/EC of the European Parliament and Council of 11th December 2007 amending Directive 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (see <http://eur-lex.europa.eu/Notice.do?val=186065:cs&lang=en&list=461925:cs,&pos=2&page=1&nbI=2&pgs=10&hwords=92/13/eec~>).

This Directive is transposed into Scots law by the Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2009 which amend the Utilities Contracts (Scotland) Regulations 2006.

<p>Provision in Directive 92/13/EEC as amended by Directive 2007/66/EC</p>	<p>Provision in Utilities Contracts (Scotland) Regulations 2006, as amended by the Public Contracts and Utilities Contracts (Scotland) Regulations 2009</p>
<p><i>Article 1</i></p> <p>Scope and availability of review procedures</p> <ol style="list-style-type: none"> 1. This Directive applies to contracts referred to in Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating 	

<p>Provision in Directive 92/13/EEC as amended by Directive 2007/66/EC</p> <p>in the water, energy, transport and postal services sectors (1), unless such contracts are excluded in accordance with Article 5 (2), Articles 18 to 26, Articles 29 and 30 or Article 62 of that Directive.</p> <p>Contracts within the meaning of this Directive include supply, works and service contracts, framework agreements and dynamic purchasing systems.</p> <p>Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/17/EC, decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of procurement or national rules transposing that law.</p> <p>2. Member States shall ensure that there is no discrimination between undertakings likely to make a claim in respect of harm in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.</p> <p>3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.</p> <p>4. Member States may require that the person wishing to use a review procedure has notified the contracting entity of the alleged infringement and of his intention to seek review, provided that this does not affect the standstill period in accordance with Article 2a(2) or any other time limits for applying for review in accordance with Article 2c.</p> <p>5. Member States may require that the person concerned first seek review with the contracting entity. In that case, Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract.</p> <p>Member States shall decide on the appropriate means of communication, including fax or electronic means, to be used for the application for review provided for in the first subparagraph.</p> <p>The suspension referred to in the first subparagraph shall not end before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contracting entity has sent a reply if fax or electronic means are used, or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contracting entity has sent a reply or at least 10 calendar days with effect from the day following the date of the receipt of a reply.</p>	<p>Provision in Utilities Contracts (Scotland) Regulations 2006, as amended by the Public Contracts and Utilities Contracts (Scotland) Regulations 2009</p> <p>See regulation 45(9)</p> <p>Regulation 45A(2)(a)</p> <p>Regulation 45(4)</p> <p>Regulation 45(5)(a)</p>
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<p>Provision in Directive 92/13/EEC as amended by Directive 2007/66/EC</p> <p><i>Article 2</i></p> <p>Requirements for review procedures</p> <p>1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers:</p> <p>either</p> <p>(a) to take, at the earliest opportunity and by way of interlocutory procedure, interim measures with the aim of correcting the alleged infringement or preventing further injury to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a contract or the implementation of any decision taken by the contracting entity; and</p> <p>(b) to set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the notice of contract, the periodic indicative notice, the notice on the existence of a system of qualification, the invitation to tender, the contract documents or in any other document relating to the contract award procedure in question;</p> <p>or</p> <p>(c) to take, at the earliest opportunity, if possible by way of interlocutory procedures and if necessary by a final procedure on the substance, measures other than those provided for in points (a) and (b) with the aim of correcting any identified infringement and preventing injury to the interests concerned; in particular, making an order for the payment of a particular sum, in cases where the infringement has not been corrected or prevented.</p> <p>Member States may take this choice either for all contracting entities or for categories of entities defined on the basis of objective criteria, in any event preserving the effectiveness of the measures laid down in order to prevent injury being caused to the interests concerned;</p> <p>(d) and, in both the above cases, to award damages to persons injured by the infringement.</p> <p>Where damages are claimed on the grounds that a decision has been taken unlawfully, Member States may, where their system of internal law so requires and provides bodies having the necessary powers for that purpose, provide that the contested decision must first be set aside or declared illegal.</p> <p>2. The powers specified in paragraph 1 and Articles 2d and 2e may be conferred on separate bodies</p>	<p>Provision in Utilities Contracts (Scotland) Regulations 2006, as amended by the Public Contracts and Utilities Contracts (Scotland) Regulations 2009</p>
	<p>Regulation 45A(1)(a)</p> <p>Regulation 45A(1)(b)(i) and (ii)</p> <p>Regulation 45A(1)(b)(iii)</p>

<p>Provision in Utilities Contracts (Scotland) Regulations 2006, as amended by the Public Contracts and Utilities Contracts (Scotland) Regulations 2009</p>	<p>Provision in Directive 92/13/EEC as amended by Directive 2007/66/EC</p>
<p>Regulation 45(9)</p>	<p>responsible for different aspects of the review procedure.</p> <p>3. When a body of first instance, which is independent of the contracting entity, reviews a contract award decision, Member States shall ensure that the contracting entity cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period referred to in Article 2a(2) and Article 2c(4) and (5).</p> <p>3a. Except where provided for in paragraph 3 and Article 1(5), review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.</p>
<p>Regulation 45A(2)</p>	<p>4. Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits. A decision not to grant interim measures shall not prejudice any other claim of the person seeking such measures.</p> <p>5. The sum to be paid in accordance with paragraph 1(c) must be set at a level high enough to dissuade the contracting entity from committing or persisting in an infringement. The payment of that sum may be made to depend upon a final decision that the infringement has in fact taken place.</p> <p>6. Except where provided for in Articles 2d to 2f, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law.</p>
<p>Regulation 45A(7).</p>	<p>Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 1(5), paragraph 3 of this Article or Articles 2a to 2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.</p> <p>7. Where a claim is made for damages representing the costs of preparing a bid or of participating in an award procedure, the person making the claim shall be required only to prove an infringement of Community law in the field of procurement or national rules implementing that law and that he would have had a real chance of winning the contract and that, as a consequence of that infringement, that chance was adversely affected.</p> <p>8. The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.</p>

<p>Provision in Directive 92/13/EEC as amended by Directive 2007/66/EC</p> <p>9. Whereas bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measures taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 234 of the Treaty and independent of both the contracting entity and the review body.</p> <p>The members of the independent body referred to in the first paragraph shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.</p> <p><i>Article 2a</i></p> <p>Standstill period</p> <p>1. The Member States shall ensure that the persons referred to in Article 1(3) have sufficient time for effective review of the contract award decisions taken by contracting entities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 2c.</p> <p>2. A contract may not be concluded following the decision to award a contract falling within the scope of Directive 2004/17/EC before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.</p> <p>Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure.</p> <p>Candidates shall be deemed to be concerned if the contracting entity has not made available information about the rejection of their application before the notification of the contract award decision to the tenderers concerned.</p>	<p>Provision in Utilities Contracts (Scotland) Regulations 2006, as amended by the Public Contracts and Utilities Contracts (Scotland) Regulations 2009</p>
<p>Regulations 2(1) (“relevant standstill period”) and 33(3)</p> <p>Regulation 2(1) (“tenderer concerned”)</p> <p>Regulation 2(1) (“candidate concerned”)</p>	

Provision in Directive 92/13/EEC as amended by Directive 2007/66/EC	Provision in Utilities Contracts (Scotland) Regulations 2006, as amended by the Public Contracts and Utilities Contracts (Scotland) Regulations 2009
<p>The communication of the award decision to each tenderer and candidate concerned shall be accompanied by the following:</p> <ul style="list-style-type: none"> — a summary of the relevant reasons as set out in Article 49(2) of Directive 2004/17/EC, and, — a precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph. 	<p>Regulation 33(2)</p> <p>Sub-paragraph (d), read with paragraph (7)</p> <p>Sub-paragraph (f)</p>
<p>Article 2b</p> <p>Derogations from the standstill period</p> <p>Member States may provide that the periods referred to in Article 2a(2) of this Directive do not apply in the following cases:</p> <p>(a) if Directive 2004/17/EC does not require prior publication of a notice in the <i>Official Journal of the European Union</i>;</p> <p>(b) if the only tenderer concerned within the meaning of Article 2a(2) of this Directive is the one who is awarded the contract and there are no candidates concerned;</p> <p>(c) in the case of specific contracts based on a dynamic purchasing system as provided for in Article 15 of Directive 2004/17/EC.</p> <p>If this derogation is invoked, Member States shall ensure that the contract is ineffective in accordance with Articles 2d and 2f of this Directive where:</p> <ul style="list-style-type: none"> — there is an infringement of Article 15(5) or (6) of Directive 2004/17/EC, and, — the contract value is estimated to be equal to or to exceed the thresholds set out in Article 16 of Directive 2004/17/EC. 	<p>Regulation 33(5)(a)</p> <p>Regulation 33(5)(b)</p> <p>Regulation 33(4)(b)</p> <p>Regulation 45B(8)</p> <p>Sub-paragraph (b)</p> <p>Sub-paragraph (c)</p>

<p>Provision in Directive 92/13/EEC as amended by Directive 2007/66/EC</p>	<p>Provision in Utilities Contracts (Scotland) Regulations 2006, as amended by the Public Contracts and Utilities Contracts (Scotland) Regulations 2009</p>
<p><i>Article 2c</i></p> <p>Time limits for applying for review</p> <p>Where a Member State provides that any application for review of a contracting entity's decision taken in the context of, or in relation to, a contract award procedure falling within the scope of Directive 2004/17/EC must be made before the expiry of a specified period, this period shall be at least 10 calendar days with effect from the day following the date on which the contracting entity's decision is sent to the tenderer or candidate if fax or electronic means are used or, if other means of communication are used, this period shall be either at least 15 calendar days with effect from the day following the date on which the contracting entity's decision is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of receipt of the contracting entity's decision. The communication of the contracting entity's decision to each tenderer or candidate shall be accompanied by a summary of the relevant reasons. In the case of an application for a review concerning decisions referred to in Article 2(1) (b) of this Directive that are not subject to a specific notification, the time period shall be at least 10 calendar days from the date of the publication of the decision concerned.</p>	<p>Regulations 45(6)(b) and (7)</p>
<p><i>Article 2d</i></p> <p>Ineffectiveness</p> <p>1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting entity or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:</p>	<p>Regulation 45B(5)</p>
<p>(a) if the contracting entity has awarded a contract without prior publication of a notice in the <i>Official Journal of the European Union</i> without this being permissible in accordance with Directive 2004/17/EC;</p>	<p>Regulation 45B(7)</p>
<p>(b) in case of an infringement of Article 1(5), Article 2(3) or Article 2a (2) of this Directive, if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of Directive 2004/17/EC, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract;</p>	<p>Regulation 45B(8)</p>
<p>(c) in cases referred to in the second subparagraph of Article 2b(c) of this Directive, if Member States have invoked the derogation from the standstill period for contracts based on a dynamic purchasing system.</p>	<p>Regulation 45B(8)</p>

Provision in Directive 92/13/EEC as amended by Directive 2007/66/EC	Provision in Utilities Contracts (Scotland) Regulations 2006, as amended by the Public Contracts and Utilities Contracts (Scotland) Regulations 2009
<p>2. The consequences of a contract being considered ineffective shall be provided for by national law.</p> <p>National law may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed. In the latter case, Member States shall provide for the application of other penalties within the meaning of Article 2e(2).</p> <p>3. Member States may provide that the review body independent of the contracting entity may not consider a contract ineffective, even though it has been awarded illegally on the grounds mentioned in paragraph 1, if the review body finds, after having examined all relevant aspects, that overriding reasons relating to a general interest require that the effects of the contract should be maintained. In this case, Member States shall provide for alternative penalties within the meaning of Article 2e(2), which shall be applied instead.</p> <p>Economic interests in the effectiveness of the contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences.</p> <p>However, economic interests directly linked to the contract concerned shall not constitute overriding reasons relating to a general interest. Economic interests directly linked to the contract include, inter alia, the costs resulting from the delay in the execution of the contract, the costs resulting from the launching of a new procurement procedure, the costs resulting from the change of the economic operator performing the contract and the costs of legal obligations resulting from the ineffectiveness.</p> <p>4. The Member States shall provide that paragraph 1(a) of this Article does not apply where:</p> <ul style="list-style-type: none"> — the contracting entity considers that the award of a contract without prior publication of a notice in the Official Journal of the European Union is permissible in accordance with Directive 2004/17/EC, — the contracting entity has published in the Official Journal of the European Union a notice as described in Article 3a of this Directive expressing its intention to conclude the contract, and, — the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice. <p>5. The Member States shall provide that paragraph 1(c) of this Article does not apply where:</p> <ul style="list-style-type: none"> — the contracting entity considers that the award of a contract is in accordance with Article 	<p>Regulations 45B(1) to (3)</p> <p>Regulation 45B(10)(a)</p> <p>Regulation 45B(12)</p> <p>Regulation 45B(15)</p> <p>45B(13)(b)</p> <p>Regulation 45B(13)(a)</p> <p>Regulation 45B(6)</p> <p>Regulation 45B(9)</p>

<p>Provision in Utilities Contracts (Scotland) Regulations 2006, as amended by the Public Contracts and Utilities Contracts (Scotland) Regulations 2009</p>	<p>Provision in Directive 92/13/EEC as amended by Directive 2007/66/EC</p> <p>15(5) and (6) of Directive 2004/17/EC,</p> <p>— the contracting entity has sent a contract award decision, together with a summary of reasons as referred to in the first indent of the fourth subparagraph of Article 2a(2) of this Directive, to the tenderers concerned, and,</p> <p>— the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned if fax or electronic means are used or, if other means of communications are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.</p>
<p>Regulation 45A(3)</p> <p>Regulations 45A(3) and (4)</p>	<p>Article 2e</p> <p>Infringements of this Directive and alternative penalties</p> <p>1. In case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) not covered by Article 2d(1)(b), Member States shall provide for ineffectiveness in accordance with Article 2d(1) to (3), or for alternative penalties. Member States may provide that the review body independent of the contracting entity shall decide, after having assessed all relevant aspects, whether the contract should be considered ineffective or whether alternative penalties should be imposed.</p> <p>2. Alternative penalties must be effective, proportionate and dissuasive. Alternative penalties shall be:</p> <ul style="list-style-type: none"> — the imposition of fines on the contracting entity; or, — the shortening of the duration of the contract. <p>Member States may confer on the review body broad discretion to take into account all the relevant factors, including the seriousness of the infringement, the behaviour of the contracting entity and, in the cases referred to in Article 2d(2), the extent to which the contract remains in force.</p> <p>The award of damages does not constitute an appropriate penalty for the purposes of this paragraph.</p>

Provision in Directive 92/13/EEC as amended by Directive 2007/66/EC	Provision in Utilities Contracts (Scotland) Regulations 2006, as amended by the Public Contracts and Utilities Contracts (Scotland) Regulations 2009
<p><i>Article 2f</i></p> <p>Time limits</p> <p>1. Member States may provide that the application for review in accordance with Article 2d(1) must be made:</p> <p>(a) before the expiry of at least 30 calendar days with effect from the day following the date on which:</p> <ul style="list-style-type: none"> — the contracting entity published a contract award notice in accordance with Articles 43 and 44 of Directive 2004/17/EC, provided that this notice includes the justification of the decision of the contracting entity to award the contract without prior publication of a notice in the Official Journal of the European Union, or — the contracting entity informed the tenderers and candidates concerned of the conclusion of the contract, provided that this information contains a summary of the relevant reasons as set out in Article 49(2) of Directive 2004/17/EC. This option also applies to the cases referred to in Article 2b(c) of this Directive; <p>(b) and in any case before the expiry of a period of at least six months with effect from the day following the date of the conclusion of the contract.</p> <p>2. In all other cases, including applications for a review in accordance with Article 2e(1), the time limits for the application for a review shall be determined by national law, subject to the provisions of Article 2c.</p>	<p>Regulation 45(6)(a)</p> <p>Regulations 45(6)(a)(i) and (8)(a)</p> <p>Regulations 45(6)(a)(i) and (8)(b)</p> <p>Regulation 45(6)(a)(ii)</p> <p>Regulation 45(6)(b)</p>
<p><i>Article 3a</i></p> <p>Content of a notice for voluntary ex ante transparency</p> <p>The notice referred to in the second indent of Article 2d(4), the format of which shall be adopted by the Commission in accordance with the advisory procedure referred to in Article 3b(2), shall contain the following information:</p> <ul style="list-style-type: none"> (a) the name and contact details of the contracting entity; (b) a description of the object of the contract; (c) a justification of the decision of the contracting entity to award the contract without prior 	<p>Regulation 45B(6)(a)</p>

<p>Provision in Directive 92/13/EEC as amended by Directive 2007/66/EC</p>	<p>Provision in Utilities Contracts (Scotland) Regulations 2006, as amended by the Public Contracts and Utilities Contracts (Scotland) Regulations 2009</p>
<p>publication of a notice in the Official Journal of the European Union;</p> <p>(d) the name and contact details of the economic operator in favour of whom a contract award decision has been taken; and</p> <p>(e) where appropriate, any other information deemed useful by the contracting entity.</p>	
<p>Article 3b</p> <p>Committee procedure</p> <p>1. The Commission shall be assisted by the Advisory Committee for Public Contracts set up by Article 1 of Council Decision 71/306/EEC of 26 July 1971 (1) (hereinafter referred to as the Committee).</p> <p>2. Where reference is made to this paragraph, Articles 3 and 7 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (2) shall apply, having regard to the provisions of Article 8 thereof.</p>	
<p><i>Articles 4 to 7 relating to an attestation system are repealed by article 2(4) of Directive 2007/66/EC.</i></p>	<p>Regulation 44 (attestation) has been omitted accordingly.</p>
<p>Article 8</p> <p>Corrective mechanism</p> <p>1. The Commission may invoke the procedure provided for in paragraphs 2 to 5 when, prior to a contract being concluded, it considers that a serious infringement of Community law in the field of procurement has been committed during a contract award procedure falling within the scope of Directive 2004/17/EC, or in relation to Article 27(a) of that Directive in the case of contracting entities to which that provision applies.</p> <p>2. The Commission shall notify the Member State concerned of the reasons which have led it to conclude that a serious infringement has been committed and request its correction by appropriate means.</p> <p>3. Within 21 calendar days of receipt of the notification referred to in paragraph 2, the Member State concerned shall communicate to the Commission:</p> <p>(a) its confirmation that the infringement has been corrected;</p>	

<p>Provision in Directive 92/13/EEC as amended by Directive 2007/66/EC</p>	<p>Provision in Utilities Contracts (Scotland) Regulations 2006, as amended by the Public Contracts and Utilities Contracts (Scotland) Regulations 2009</p>
<p>(b) a reasoned submission as to why no correction has been made; or</p> <p>(c) a notice to the effect that the contract award procedure has been suspended either by the contracting entity on its own initiative or on the basis of the powers specified in Article 2(1)(a).</p> <p>4. A reasoned submission communicated pursuant to paragraph 3(b) may rely among other matters on the fact that the alleged infringement is already the subject of judicial review proceedings or of a review as referred to in Article 2(9). In such a case, the Member State shall inform the Commission of the result of those proceedings as soon as it becomes known.</p> <p>5. Where notice has been given that a contract award procedure has been suspended in accordance with paragraph 3(c), the Member State concerned shall notify the Commission when the suspension is lifted or another contract procedure relating in whole or in part to the same subject matter is begun. That new notification shall confirm that the alleged infringement has been corrected or include a reasoned submission as to why no correction has been made.</p>	
<p><i>Articles 9 to 11 relating to conciliation are repealed by article 2(6) of Directive 2007/66/EC.</i></p>	<p>Regulation 46 (conciliation) has been omitted accordingly.</p>
<p>Article 12</p> <p>Implementation</p> <ol style="list-style-type: none"> 1. The Commission may request the Member States, in consultation with the Committee, to provide it with information on the operation of national review procedures. 2. Member States shall communicate to the Commission on an annual basis the text of all decisions, together with the reasons therefor, taken by their review bodies in accordance with Article 2d(3). 	