
BRIEFING

PROCUREMENT - MANDATORY STANDSTILL PERIOD ON CONTRACT AWARD

Regulatory basis for standstill period

1. The process is set out in the Public Contract Regulations 2006 (“PCR”)¹ which in turn seek to implement the Alcatel judgements². This allows for unsuccessful bidders (termed “**economic operators**”) to be informed why they were unsuccessful before a contracting authority concludes a public sector contract with the successful bidder(s).
2. This Briefing Note focuses on the impact of this requirement on the Council as a contracting authority.

Contract Award Notice

3. A contract award notice has to be issued as soon as possible after the relevant award decision has been made by the Council³. This also has to be done by the most rapid means of communication practicable. The notice is to be issued to any economic operator which submitted an offer, applied to be included amongst the economic operators to be selected to tender for or negotiate the contract, or applied to be party to a framework agreement.
4. In practice the award decision will be:-

- the award of a contract; or
 - the conclusion of a framework agreement⁴.
5. The contract award notice has to include the following details⁵:-
 - The criteria for the award of the contract;
 - Where practicable, the score obtained by:-
 - ◇ the economic operator which is to receive the notice; and
 - ◇ the economic operator -
 - * to be awarded the contract; or
 - * to become a party to the framework agreement; and
 - the name of the economic operator -
 - ◇ to be awarded the contract; or
 - ◇ to become a party to the framework agreement.
 6. It is therefore evident that:-
 - the contract award notice is not an acceptance letter or a letter of intent.
 - each economic operator will receive a different letter.

¹ Reg 32 - PCR

² Alcatel Austria -v- Bundesministerium fur Wissenschaft und Verkehr Café 81/98 & Commission -v- Austria C/212/02.

³ Reg 32(1) PCR

⁴ Reg 32(11) PCR

⁵ Reg 32(2) PCR

7. There is nothing to preclude the Council from providing further information in the contract award notice particularly where:-

- clarification is necessary; or
- a request for a more detailed debrief is anticipated.

Call in of executive decision

8. An executive decision by the Council to enter into a contract may not be implemented prior to the expiry of the period allowed for the call in of such a decision. If the decision is called in it may not be implemented until such time as the Council determines that the call in does not proceed.

9. The issue of a contract award notice is likely to constitute implementation even though it does not commit the Council to an irrevocable step.

Standstill Period

10. The Council has to allow at least 10 days between the date of the despatch of a contract award notice and the date on which the Council proposes to enter into the contract or to conclude the framework agreement (“**the Standstill Period**”)⁶. (See Appendix A, Table 1 below.)

Accelerated Debrief

11. If a request for debrief is made by an economic operator that received the contract award notice by midnight at the end of the second working day after the issue of the notice (“an **Accelerated Debrief**”) then the Council has to provide the economic operator with:-

- the reasons why the economic operator was unsuccessful; and
- the characteristics and relative advantages of the successful tender⁷.

12. This Accelerated Debrief has to be given at least 3 working days before the end of the Standstill Period⁸ (“the **Accelerated Debrief Deadline**”).

Late Briefing

13. Where it is not possible for the Council to give the Accelerated Debrief by the Accelerated Debrief Deadline then the Standstill Period is extended. This extension has to allow at least 3 working days between the provision of the information required in Paragraph 11 and the date when the Council proposes to enter into the contract⁹. (See Appendix A, Table 2 below.)

Standard Debriefing

14. Where a request is made by an economic operator who was unsuccessful for a debrief after midnight at the end of the second working day of the period starting with the date of the issue of the contract award notice, (“a **Standard Debriefing**”) then the Council has to provide the following information within 15 days of the date on which it receives such a request namely¹⁰:-

- the reasons why the economic operator was unsuccessful;
- where the economic operator has submitted an admissible tender, the Council has to inform economic operator of

⁶ Reg 32(3) PCR

⁷ Reg 32(4) PCR

⁸ Reg 32(5) PCR

⁹ Reg 32(5) PCR

¹⁰ Reg 32(9) PCR

characteristics and relative advantages of the successful tender and:-

- * the name of the economic operator to be awarded the contract;
- * the names of the parties to the framework agreement, or
- * the names of the economic operators admitted to the dynamic purchasing system. (See Appendix A, Table 3 below.)

15. What is clear from this Standard Debriefing process is that this debrief may be given after the contract award date.

Content of Debrief

16. The content of the debrief whilst not overly prescriptive, does not negate the obligation of the Council in accordance with EU law to adopt the principle of transparency in its communication. Essentially what the Council is required to explain is why the aggrieved economic operator was unsuccessful, whereas the winning economic operator was successful.

17. The Council may withhold any information to be provided in a debrief where the disclosure of such information¹¹:-

- would impede law enforcement;
- would otherwise be contrary to the public interest;
- would prejudice the legitimate commercial interests of any economic operator; or
- might prejudice fair competition between economic operators.

18. Therefore the debrief cannot be used by an aggrieved bidder to secure the disclosure of information which is commercially confidential to another bidder.

Implications for Council

19. The procurement timetable for a public sector contract needs to allow sufficient time for:-

- the issue of a timely contract award notice;
- the possibility of an executive decision being called in;
- the provision of an effective debrief.

20. In framing the content of an evaluation report to secure an executive decision to award a contract, consideration will need to be given as to the scope of the debrief that will be provided.

21. A debrief is an opportunity to commend an economic operator for the strengths of their bid, and to guide them as to where they might have improved. An unsuccessful bidder will be more likely to participate in and provide effective competition if given a further tendering opportunity on another contract if they consider that:-

- their participation in the process has been genuinely appreciated;
- they have learnt from the outcome and therefore are able to improve their performance next time;
- they have been treated fairly; and
- the Council has been open and transparent.

The conduct of a debrief therefore requires careful management.

¹¹ Reg 32(13) PCR

22. There is no requirement for a debrief to take the form of a meeting. However, a meeting will reduce the need for further clarification of statements made by the Council. A debrief meeting will need to focus on the discussion on a document prepared by the Council prior to the meeting which explains why the economic operator was unsuccessful. Any issues which the Council is unable to answer fully at the meeting can be covered in a further statement issued promptly after the meeting.

Rapiscan case

23. A practical example of the operation of a request for a debrief prior to contract award is illustrated in the Rapiscan case. Although the mandatory standstill period did not apply in this instance, it is a warning about how to conduct such a process. (See Appendix B below.)

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APPENDIX A

Table 1 - Accelerated Debriefing

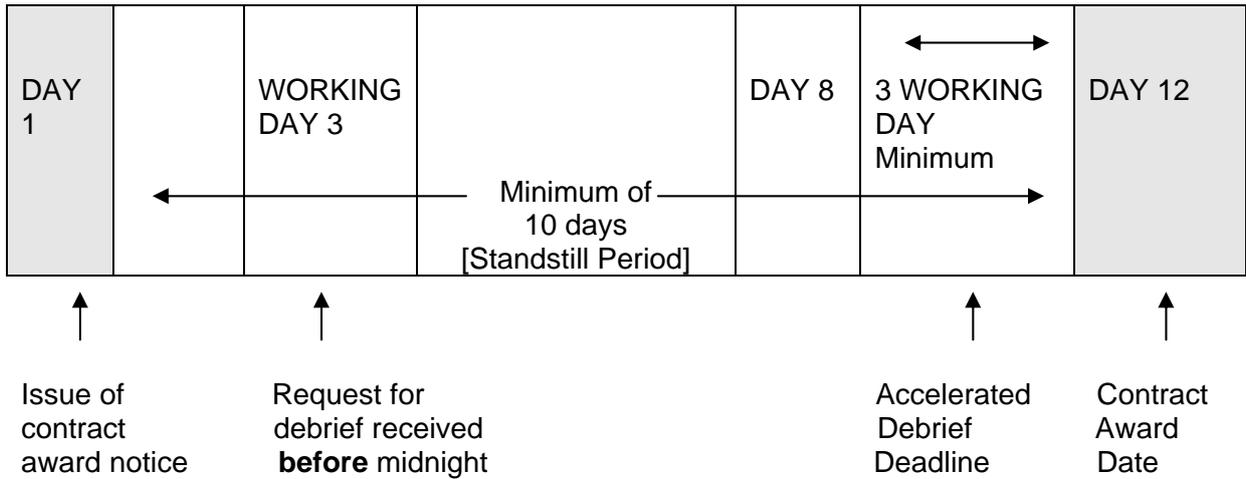


Table 2 - Late Debriefing

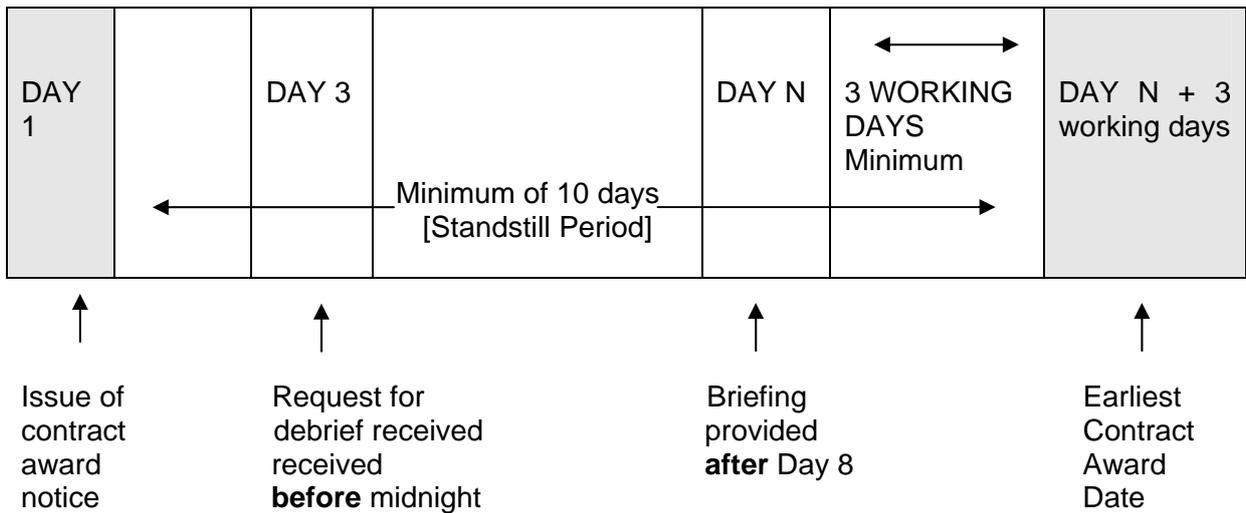
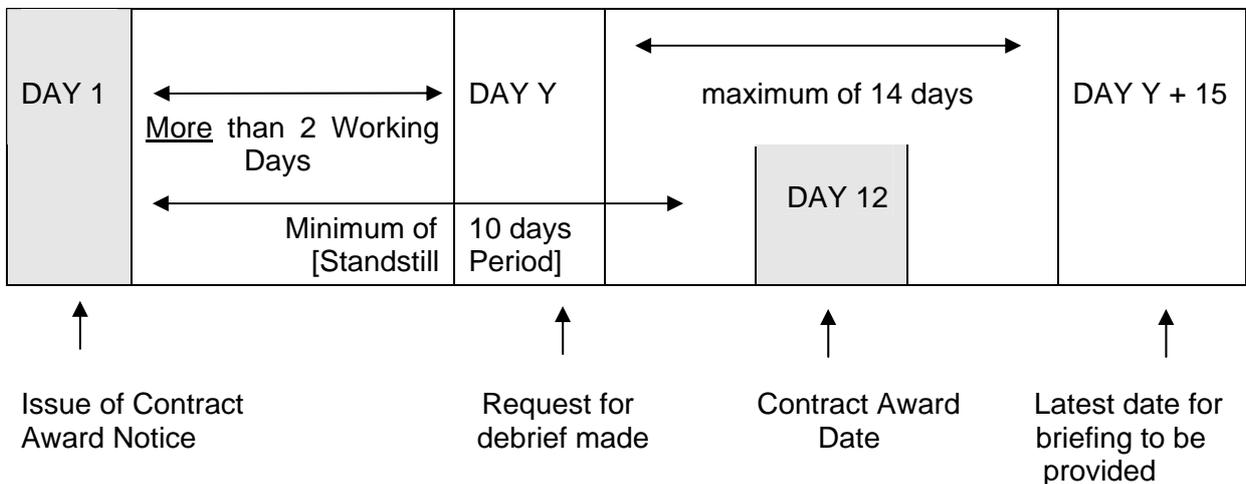


Table 3 - Standard Debriefing



APPENDIX B

Rapiscan Systems Ltd – v – Commissioners of Her Majesty's Revenue & Customs (2006) HC

The Claimant applied for a declaration that the defendant's purported award of a contract for the supply of scanners was unlawful and an order restraining the defendant from entering into a contract for a supplies procurement until further order.

The claimant submitted its bid in September 2005, and was informed on 14 July 2006 that it had been unsuccessful. The defendant intended to conclude the contract award on 26 July 2006 and invited the claimant to a debrief day on 1 August 2006.

The claimant contended that the defendant:-

- Failed to have regard to and apply the requirements of the Public Supply Regulations 1995;
- Purported to award the contract on the basis of only some of the contract award criteria originally set out in the tendering documentation;
- Failed to ensure that a level playing field existed between the tenderers;
- Awarded the contract on the basis of the application of criteria which were unfair and lacking in transparency.

The claimant gave notice of its intention to bring proceedings on 20 July 2006 and sought an extension of the standstill date and by implication deferral of the date on which the contract was to be concluded, pending the provision of information to which the claimant asserted it was entitled. The defendant refused to provide an undertaking that it would not enter into a concluded agreement with the party to which it had purported to award the contract until such time as the matter was considered by the courts.

The claimant further contended that the defendant was in breach of its procedural obligations to provide information at a time and in a manner which ensured that the claimant could, if necessary bring proceedings to vindicate its claim.

The defendant contended that the claimant had not made out a sufficiently arguable case that the 1995 Regulations had been breached; and that the claimant's application for interim relief must stand or fall on the basis of the information then available.

The court had initially to determine whether there was a serious issue to be tried – whether the claimant's case as presented had a real prospect of success. The court determined that there was first sufficient material on which it could be found that there was a serious issue to be tried.

The court was troubled by the defendant's immediate and continuing refusal to extend the standstill period and defer the contract date to a date after that fixed for the debrief, particularly in the light of the fact that the defendant conceded that there was no pressing urgency in relation to entering into the contract and the knowledge that could have some impact on the claimant's ability properly to enjoy a right of access to a full remedy from the courts. The court stated that even if the rules have been complied with strictly, the parties should seek to ensure that they do not frustrate the legal rights of others deliberately or otherwise.

The court directed on 27 July 2006 for the case to be adjourned and the debrief would take place as scheduled on 1 August 2006. The defendant undertook not to enter into the contract until this was concluded.

The lessons to be learned from this case are that:-

1. Decisions on proposed contract award need to be carefully drafted to demonstrate so that they are transparent, complete and soundly based and so that the evaluation complies with the published award criteria.
2. Contract award timescales inevitably are “urgent” and require immediate attention – but courts may question the process and timescale and ascertain the likely impact of delay upon the parties.
3. Using a tactical advantage or simply the mechanical application of an unequal procurement process on an apparently unsuccessful tenderer may weigh against a contracting authority when a court is carefully balancing whether to intervene.