EXPLANATORY MEMORANDUM TO

THE UTILITIES CONTRACTS (AMENDMENT) REGULATIONS 2009

2009 No. 3100

1. This explanatory memorandum has been prepared by the Office of Government Commerce, which is an office of Her Majesty's Treasury, and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument amends the Utilities Contracts Regulations 2006 (SI 2006 No 6) ("the 2006 Regulations") in order to implement the requirements of a European Union Directive on improving the effectiveness of review procedures concerning the award of contracts by public bodies and utilities (the "new Remedies Directive"). The amendments enhance the legal review procedures and remedies available for breaches of the public procurement rules.

2.2 An instrument has already been made which implements the requirements of the new Remedies Directive in relation to public contracts (The Public Contracts (Amendment) Regulations 2009 (SI 2009 No 2992)). This instrument completes the implementation of the new Remedies Directive by addressing those provisions relating to the utilities sector.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 Use of the power to make ambulatory references: In addition to the many obligations on Member States, the new Remedies Directive also requires the European Commission to amend an existing EU Regulation[1] before the transposition deadline of 20 December. This will make two special forms available to utilities in Member States: one is an existing form that will be modified; the other will be an entirely new form. The completion of these will enable utilities to shorten the period of time that they are at risk from the ineffectiveness penalty. However, while the Commission is now making the necessary changes, it has not completed the process yet. This poses practical problems for our implementation, as it is necessary for the UK Regulations to prescribe the European Regulation containing the forms, before it actually exists in its amended state.

3.2 In the light of these concerns, it has been decided by the Treasury that it is expedient to make use of the power to make ambulatory references in paragraph 1A of Schedule 2 to the European Communities Act 1972, which

[1] Commission Regulation (EC) No 1564/2005.

was inserted by section 28 of the Legislative and Regulatory Reform Act 2006. The use of this power will also provide additional certainty to the procurement community, who will not be dependent on further amending regulations being made at short notice.

3.3 The ambulatory references have been added only where they are expressly needed in relation to the particular forms to be amended, namely in regulations 32(1), (7) and (8) and 45K(4)(b) of the 2006 Regulations. Other references to this particular Regulation (No 1564/2005/EC) within the 2006 Regulations are not affected.

3.4 In making the amendments to regulation 32(7) and (8) the OGC has seen the Commission's draft proposed amending Regulation and confirmed that section II.1.4 remains the relevant reference on the form for the purpose of these amendments. The OGC will check that this is the position as soon as the European Regulation is adopted and published, and take appropriate steps if it is not.

3.5 An identical analysis and use of this power has been adopted in the Public Contracts (Amendment) Regulations 2009.

4. Legislative Context

4.1 Public procurement is regulated by the EU, primarily through two directives published in 2004, one applying to the public sector[2] and another applying to the utilities sector[3]. These directives contain detailed procedural rules for the award of contracts. Provisions on legal review procedures and the remedies that are available when the rules are breached are contained in two separate directives, collectively known as the remedies directives[4] (again one applying to the public sector and one to the utilities sector). The procedural procurement directives and the remedies directives are transposed into national law through one catch-all set of regulations for each of the two sectors: The Public Contracts Regulations 2006 (SI 2006 No 5) and the Utilities Contracts Regulations 2006 (SI 2006 No 6).

4.2 The new Remedies Directive[5] was published on 20 December 2007, with a deadline for transposition by all Member States within two years, i.e. by 20 December 2009. The new Remedies Directive was adopted following a successful proposal by the European Commission to amend the existing remedies directives. The proposal for the new Remedies Directive was considered and cleared by the House of Commons Select Committee on European Scrutiny in its Thirty-Second Report of 21 June 2006.

4.3 The new Remedies Directive contains two articles that need to be transposed in the United Kingdom. The obligations contained in these two articles are

[2] Directive 2004/18/EC
[3] Directive 2004/17/EC
[4] Directive 89/665/EC (public sector); and Directive 92/13/EEC (utilities sector)
[5] Directive 2007/66/EC

almost identical, the main difference being that Article 1 amends the rules for the public sector and Article 2 amends the rules for the utilities sector.

4.4 This instrument implements Article 2 of the new Remedies Directive and contains amendments to the Utilities Contracts Regulations 2006 ("the 2006 Regulations"). It is the second instrument to be made, the first being the Public Contracts (Amendment) Regulations 2009, which implements Article 1.

4.5 The gap between the making of the two instruments is intentional. In order to give the maximum possible foresight of the new Regulations, so that relevant parties could prepare accordingly, the Office of Government Commerce concluded that it should make and lay the first set of Regulations as soon as they were ready, which it did on 11 and 12 November 2009 respectively. The utilities sector, to which this second instrument applies, benefited from this advance making because the changes required to the public sector regulations are almost identical in technical content to those required for the utilities regulations.

4.6 This instrument meets the implementation deadline required in the new Remedies Directive of 20 December 2009, and completes the implementation of this Directive.

4.7 A transposition note is attached as an Annex to this Explanatory Memorandum.

5. Territorial Extent and Application

5.1 This instrument applies to England, Wales and Northern Ireland.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- ***What is being done and why***

7.1 The new Remedies Directive strengthens the legal review procedures that are available for breaches of the laws governing the award of procurement contracts (by both public bodies and utilities), and increases the range of remedies available, in all Member States. The amendments in this instrument are needed to implement the legal provisions contained in the new Remedies Directive as they relate to the utilities sector.

7.2 In the UK the utilities sector covers entities operating in the fields of water, energy[6], postal services[7] and transport. The 2006 Regulations (which this instrument amends) lay down rules applicable to certain types of procurement contract awarded by an entity for the purpose of performing specified activities in its particular sector.

7.3 Implementation of the new Remedies Directive is mandatory, though certain aspects of the provisions permit Member States some flexibility in deciding how, or in some cases whether, to implement them. There are also some policy issues to consider where the Directive is silent and so there is further flexibility in determining the method of implementation in this regard.

7.4 The amendments affect only a small number of the provisions in the 2006 Regulations overall, i.e. those that are related to review procedures and remedies. Therefore, the vast majority of the 2006 Regulations, which cover the procedural rules, remain unchanged. However, for those provisions that are amended, the changes in procurement policy and the extent of the textual amendments, are substantial. The most significant changes are:

7.4.1 The introduction of the new penalty of ineffectiveness, which will enable the Courts to strike down contracts that have been awarded in serious breach of the procurement rules. Ineffectiveness will only be prospective, not retrospective, meaning that it will only affect unperformed contractual obligations. Obligations that have been performed by any contractor will not therefore need to be undone (the choice between "prospective" and "retrospective" cancellation was offered by the Directive, and UK stakeholders strongly favoured the prospective method, even though that would need to be coupled with an additional civil financial penalty[8]);

7.4.2 The introduction of two other new penalties, one being civil financial penalties and the other contract shortening, which a Court can use as an alternative to ineffectiveness if it considers that there are important public interest reasons why the contract should continue. A civil financial penalty will also always be required to accompany an ineffectiveness ruling. The Court has discretion on the size of these penalties;

7.4.3 The automatic suspension of a contract award procedure whenever legal proceedings are started in respect of a contract award decision;

[6] Directive 2004/17/EC (the Utilities Directive) provides a mechanism (at article 30) to remove entities from the scope of the Directive, where it is demonstrated that the particular sector is open to effective competition in a member state. Two Art. 30 exemption Decisions have been made: Decision 2006/211/EC applying to electricity generation in England, Scotland and Wales and Decision 2006/211/EC applying to electricity and gas supply in England, Scotland and Wales. Article 30 is implemented in regulation 9 of the 2006 Regulations.

[7] The Public Contracts and Utilities (Postal Services Amendments) Regulations 2008 No 2848 brought postal services within the ambit of the utilities sector in the UK, as required by Directive 2004/17/EC.

[8] The new Remedies Directive uses the term "fines" but we use "civil financial penalties" to avoid any criminal connotations

7.4.4 Some minor procedural changes to the standstill period, which occurs between the contract award decision and the actual contract award, so that aggrieved bidders can seek remedies before the contract is awarded. The changes to the standstill period mainly involve: a new obligation to release the reasons for the award decision at the start of standstill, rather than upon request as is the case at present, and a new obligation to allow extra time for tenderers to receive the standstill notice in situations where the notice is sent using non-electronic means.

7.4.5 The abolition of the attestation system under which a utility could submit its contract award procedures to independent scrutiny and obtain confirmation of their conformity with UK and EU law. The new Remedies Directive no longer requires such a system to be operated at European or domestic level, due to lack of usage.

7.4.6 The abolition of the conciliation procedure operated by the European Commission under which economic operators could apply for conciliation of a dispute with a utility. The new Remedies Directive has repealed the provisions requiring the European Commission to provide this service, again, due to lack of usage.

7.5 The Office of Government Commerce has also developed an additional regulation that is necessary for the new remedies regime to function effectively. This is explained in more detail below.

7.5.1 Previously, there had been ambiguity about whether the EU Directives and the 2006 Regulations, required utilities to notify participants when they are eliminated from a procurement exercise before the point at which the contract award decision is made. In particular, the obligation hitherto imposed by the Regulations on utilities to provide information to economic operators of a decision "in relation to" the award of the contract, has created uncertainty about whether this obligation should or could be interpreted as extending to an obligation to debrief those excluded at a stage prior to the ultimate award decision, particularly as there seems to be a good argument that the Directives themselves give rise to an *implied* obligation of that kind.

7.5.2 The new Directive does not introduce any new explicit notification obligations in this respect, but the Office of Government Commerce believes there are strong reasons, which emerged through the public consultation process, for creating certainty as to the stages at which information should be given to economic operators.

7.5.3 In particular, the need to re-draft the substantive provisions on notification in relation to the decision at award stage (to comply with explicit requirements of the Directive), necessitated a decision on whether to remain silent or codify obligations of transparency at early stages in the process. OGC's approach has been to introduce a clear provision on this point, for the following reasons.

7.5.4 First, there are obligations in the EU public procurement directives to notify candidates or tenderers of the reasons for their elimination *upon request*, and so it is implicit that the EU legislator intended that candidates and tenderers would need to be notified in order for them to be able to make the request for reasons. The implementation of an explicit notification obligation in this respect would be clearer.

7.5.5 Secondly, there are also obligations on candidates and tenderers to bring legal proceedings within certain timeframes, and those time periods start when the grounds for bringing a claim first arise, which in terms of operators alleging inappropriate exclusion, is likely to occur at the point when the utility notifies a particular operator of its decision to exclude them. Now that the range and the severity of penalties has increased, the importance of timely notification of the elimination of any candidates or tenderers has also increased, as it is in the interests of utilities not to inadvertently offer more than the minimum time period by an administrative failure to notify the candidate or tenderer of their elimination. An explicit obligation would reduce the risks to utilities of falling foul of the new and more severe remedies rules.

7.5.6 In any event, the Office of Government Commerce would regard the notification of those excluded at a preliminary stage of the fact of their exclusion to be undoubted good practice and the sort of obligation that could hardly be criticised as matter of basic fairness and transparency.

7.5.7 In summary therefore, the new UK-specific obligation for utilities to notify participants of their elimination from a procurement exercise is expedient to make the previously ambiguous and arguably implied notification obligations in the Regulations clearer and explicit, reduce the risks of utilities falling foul of the now more severe penalties, and increase the clarity of the standstill provisions for stakeholders. It should not be regarded as "gold-plating" as it does not add burdens to any parties, rather it improves the clarity of the regime overall, in line with best practice and the good argument that it implements an implied obligation in the Directive.

7.6 In addition, we have taken the opportunity to correct two errors in the 2006 Regulations. First, the definition of "working day" in regulation 2(1) of the 2006 Regulations inadvertently failed to exclude Christmas Day and Good Friday. This correction is relevant to the implementation of the new Remedies Directive, but will apply also to existing provisions of the Regulations which implement the main 2004 Utilities Procurement Directive. Secondly, regulation 16(3)(d) of the 2006 Regulations concerning the making of a call for competition via a periodic indicative notice (PIN) contains a mistaken cross-reference. In requiring that the PIN be published no more than 12 months prior to a selection invitation being sent to economic operators, regulation 16(3)(d) refers to an invitation sent out in accordance with sub-paragraph (b) of that regulation, whereas the correct cross-reference is to an invitation sent out in accordance with sub-paragraph (c). As other amendments

in this instrument require cross-reference to regulation 16(3), OGC took the decision to correct this error.

7.7 The policy is not expected to attract major interest from the general public, although the policy is of significant interest to those people working in the field of public procurement by utilities. The consultation exercises evoked useful feedback from around 40 organisations, comprising contracting authorities and utilities, legal and advisory firms, and a small number of industry representative organisations.

7.8 The policy is legally important, as it increases the remedies and review procedures available for breaches of the procurement rules. However, the policy is not expected to be politically important.

- ***Consolidation***

7.9 There are currently no plans to consolidate the 2006 Regulations, but the Office of Government Commerce will keep this under review.

8. Consultation outcome

8.1 OGC has used two full public consultations to involve stakeholders in the decision making process: the first elicited stakeholders' views on the choices made available by the new Remedies Directive; and the second exposed draft Regulations for comment, and sought additional feedback on several policy options that were not covered by the Directive.

8.2 A decision was taken to run a combined consultation process for utilities and contracting authorities, since the issues addressed were largely identical for both sectors, and the consultation documents highlighted this approach expressly. Where there were differences between the sectors, these were made explicit.

8.3 The first consultation ran for 12 weeks between July and October 2008. Over 40 organisations responded, some in substantial detail. Around half of the respondents were contracting authorities (two of whom were utilities), just over a quarter were in the legal or advisory professions, and the rest were industry representatives. The main outcomes from the first consultation were decisions that:

8.3.1 The UK would not introduce mandatory internal reviews by utilities for alleged procurement rule breaches, rather the High Court would continue to be the formal review body.

8.3.2 Serious procurement rule breaches could lead to a contract being declared ineffective, but that ineffectiveness would only affect contractual obligations that had yet to be performed and would not be applied retrospectively.

8.4 The second consultation ran for 12 weeks from May to July 2009, eliciting responses from a similar number and range of stakeholders as the first one. The draft Regulations exposed to consultation at this stage made amendments in relation to public contracts (let by contracting authorities). A decision was taken not to include in the second consultation separate draft Regulations making amendments for the utilities sector. This was for reasons of efficiency and convenience. OGC took the view that none of the substantive changes or policy questions differed as between the two sectors, and that engagement with the utilities sector could be properly and clearly carried out, without a draft of this instrument. No complaints or comments were received as a result of OGC adopting this stance.

8.5 So far as the consultees are concerned, responses were received from three utilities, two Government departments with responsibilities relating to the utilities sectors (BIS and DFT responded to both consultation rounds), and legal and advisory firms and the CBI, who represent organisations in the utilities sector. In relation to the specific amendments being made to attestation and conciliation in the utilities sector, namely the abolition of both systems at the European level, no objections or comments were received in relation to this proposal. In OGC's view this confirms the position that both systems were rarely used by utilities in the UK, if at all.

8.6 There were many detailed changes to the draft Regulations following consideration of the responses, and some things did not change as the consultation confirmed the proposed policy option. The main highlights are:

8.6.1 The decision to include a new obligation for utilities to notify participants of their rejection from a procurement process (as explained in paragraph 7.5 of this memorandum)

8.6.2 That the full reasons for the contract award decision would be released when the decision is announced (the draft Regulations offered two possibilities, the other being a summary of reasons being given upfront and detailed reasons upon request).

8.6.3 That the reasons above need only be given to parties that have not already been notified of their elimination (this narrows the current policy where all participants, including those that have already been eliminated, are notified of the contract award decision).

8.6.4 That the proposed policy of not specifying a maximum level for the new civil financial penalties should stand, and the court should be empowered to impose penalties that are "effective, proportionate and dissuasive", which is consistent with the new Remedies Directive.

8.6.5 Endorsement of the proposed transitional policy, whereby the new rules will only affect new procurement processes that start on or after 20 December 2009.

8.6.6 That explicit provisions would be made covering how contracts made from a pre-tendered catalogue of suppliers would be affected when the procurement for the catalogue itself was found ineffective (these situations are not addressed by the new Remedies Directive but are nevertheless an important policy issue where the many stakeholders need certainty).

8.7 The full analysis of consultation responses has been undertaken and has informed the drafting of this instrument as described above. As we have concentrated our efforts on laying the two necessary instruments to enable stakeholders to prepare accordingly, the consultation analysis is not yet ready for publication. It will however be published as soon as possible after the laying of this instrument and before the Regulations take effect on OGC's website at:
http://www.ogc.gov.uk/procurement_policy_and_application_of_eu_rules_european_procurement_directives.asp

9. Guidance

9.1 Detailed guidance on the practical implications of the new regulations will be published on OGC's website, alongside other existing guidance on the procurement rules, see:

http://www.ogc.gov.uk/procurement_policy_and_application_of_eu_rules_guidance_on_the_2006_regulations_.asp

9.2 The above guidance is currently being finalised and will be published shortly after the Regulations are made. It will be relevant to both contracting authorities and utilities. In addition, a powerpoint training package will also be provided so that the more experienced practitioners can brief their own colleagues.

10. Impact

10.1 A joint impact assessment was prepared for the two sets of regulations implementing the new Remedies Directive, and is attached to this memorandum.

10.2 The impact assessment provides a full narrative assessment, considering the impacts of each article in the new Remedies Directive in turn. It concludes that there is no option but to implement the Directive, as non-implementation would breach our EU obligations and trigger legal proceedings by the European Commission to rectify the breach.

10.3 In most circumstances, it is expected that the costs of implementation to the public sector should be minimal, as the changes to the public procurement process are mainly small procedural changes. There should be no need for more civil servants to make the new policy work, as the new procedures should be easily absorbed within existing resources. It is possible that some suppliers may increase their tender prices to some extent to factor in the

potential added risks posed by the new remedies, which could lead to an increase in the prices paid by some contracting authorities and utilities, though consultation feedback from industry has not indicated that this is likely to be a major issue.

10.4 There is no direct impact on businesses, charities or the voluntary sectors as the new rules do not impose any obligations on these sectors. Some suppliers may wish to take certain steps to protect themselves from the perceived threat of the new remedies, but the main known protections are relatively straightforward and inexpensive to achieve, and OGC guidance will explain these protections for all parties.

10.5 However, where there are legal challenges for breaches of the procurement rules, there may be additional costs in specific legal proceedings for both the public sector organisation that is procuring the contract, and the private or voluntary sector organisations that participate in the procurement exercise because the new rules provide new and more substantial remedies than were available previously. The impact assessment explains in detail why it is not possible to forecast these costs, but in essence it is because the details of future court cases can not be feasibly predicted.

11. Regulating small business

11.1 The legislation imposes procedural obligations on utilities, which are organisations (whether public or private sector) operating in the fields of water, energy, postal services and transport. In general, utilities are of a size which means they are not classified as small businesses, and so the impact of these procedural obligations on small businesses and SMEs is expected to be minimal.

11.2 However, businesses of any size (including those that are small) should benefit, as the new rules should help to deter future breaches of the procurement rules, incentivise fair treatment and therefore be positive for competition, as well as providing better remedies when the rules are breached.

11.3 Small businesses that wish to bring legal proceedings against utilities are required under the existing rules to bring those proceedings in a particular way, and these new rules modify those procedures to facilitate access to the new remedies.

11.4 Furthermore, a small business that wins a contract but then finds out that one of the losing bidders wants to bring legal proceedings to nullify the contract, may decide voluntarily to become a party to the legal proceedings. However, this is not obligatory and is not considered to be regulating small business, rather it is explained for completeness.

12. Monitoring & review

12.1 The intended outcomes of this instrument are:

12.1.1 To implement the new Remedies Directive in national law, by the EU deadline of 20 December 2009, thereby achieving compliance with our legal obligations as members of the European Union;

12.1.2 To implement the new Remedies Directive in the way that works best for UK stakeholders, having regard to the views expressed in the public consultations;

12.1.3 To improve the sanctions available for breaches of the public procurement rules, which should act as both a deterrent to breaches and provide suitable remedies where such breaches occur.

12.2 The European Commission is required to review the implementation of the new Remedies Directive by 20 December 2012. The UK plans to participate actively in this review at European level.

13. Contact

Matthew Wynne at the Office of Government Commerce (Tel 0845 000 4999 or email matthew.wynne@ogc.gsi.gov.uk) can answer any queries regarding the instrument.

TRANSPOSITION NOTE

Transposition note for: Directive 2007/66/EC amending Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts ("the new Directive").

As described in paragraph 4.7 of the Explanatory Memorandum, the Regulations that this transposition note accompanies implement Article 2 of the new Directive, which amends Directive 92/13/EEC in relation to review procedures concerning the award of contracts in the utilities sector (referred to in this Note as the "original remedies directive"). Separate regulations (the Public Contracts (Amendment) Regulations 2009 – SI 2009/2992) have been made to implement the remaining obligations contained in Article 1 of the Directive concerning contracts in the public sector.

These Regulations do what is necessary to implement Article 2 of the Directive, including making consequential changes to domestic legislation to ensure its coherence in the area where they apply.

The main elements of the Directive implemented in these Regulations are as follows:

Article[9]	**Objective**	**Implementation**[10]
1(3)	A requirement under the original remedies directive for Member States to ensure that review procedures are available to those who have or had an interest in obtaining a particular contract or who have been or risk being harmed by an alleged infringement.	Already implemented – **regulation 45C** recasts this obligation
1(4)	A discretion given to Member States under the original remedies directive to require the person alleging infringement to notify the utility.	Already implemented – **regulation 45F** recasts this obligation
2(1)	A requirement under the original remedies directive for Members States to ensure that, in relation to review procedures, provision is made for powers to take interim and interlocutory measures, to set aside unlawful decisions and to award damages.	Already implemented **– regulation 45I** recasts the obligation.
2(3)	Requires Member States to ensure	Implemented in **regulation 45G**

[9] References are to Articles of the original remedies directive, Directive 92/13/EEC, concerning utilities contracts, as amended by Directive 2007/66/EC

[10] References are to the Utilities Contracts Regulations 2006 as amended by these Regulations

Article[9]	Objective	Implementation[10]
	the automatic suspension of the contract-making process, whenever a legal review of a contract award decision has been applied for but not yet concluded.	
2a	Requires Member States to impose a "standstill period" obligation under which contracts are not to be entered into until after the expiry of at least 10 or 15 calendar days (depending on the means of communication used) after the award decision is notified to the participants, so that aggrieved parties can pursue an effective range of pre-contractual remedies.	Implemented in **regulation 33A**
2b	Gives Member States the discretion to disapply the above "standstill period" in three specific circumstances.	Implemented in **regulation 33(6A), 33(6B) and 33(7).**
2c	Requires Member States to always allow would-be challengers at least 10 or 15 calendar days (depending on the means of communication used) to apply for a review of a utility's decision, starting from the time when the decision was notified or published.	Implemented in **regulation 45D(3)**
2d(1)	Requires Member States to introduce a new remedy of ineffectiveness, under which contracts can be cancelled after they have been awarded, for certain serious rule breaches.	Implemented in **regulation 45K**
2d(2)	Gives Member State discretion to provide for one of two alternative methods of ineffectiveness, one being retrospective cancellation (where all contractual obligations have to be cancelled, including those that have already been delivered) or prospective cancellation, where only the undelivered obligations need be cancelled, but which must be coupled with additional penalties (i.e. a fine).	Implemented in **regulation 45M(1) (**prospective cancellation and additional penalties) and regulation **45N(1) to (5)** (additional penalties)
2d(3)	Gives Member States the discretion to provide for national review bodies not	Implemented in **regulation 45L**

Article[9]	Objective	Implementation[10]
	to make a declaration of ineffectiveness even if the contract has been illegally awarded, if there are public interest reasons for maintaining the contract.	
2d(4) and (5)	Requires Member States to allow utilities to remove the availability of ineffectiveness as a remedy in certain circumstances by voluntarily publishing a voluntary notice/award decision notice and following the standstill period.	Implemented in **regulation 45K (3) and (7)**
2e	Requires Member State to provide for new penalties of fines and contract shortening to be made available in certain circumstances, either as an alternative to ineffectiveness or as an addition to prospective ineffectiveness.	Implemented in **regulation 45N**
2f	Requires Member States to allow at least 6 months from when the contract was made to bring an ineffectiveness claim, and to allow for this time to be reduced to at least 30 days if the utility publicises the award/notifies unsuccessful tenderers.	Implemented in **regulation 45E**
3a	Requires Member States to use the requirements adopted by the Commission for the contents of the voluntary notice required under Article 2d(4).	Implemented in **regulation 45K(3)(b)**
3 to 7	A requirement under the original remedies directive for Member States to give utilities the option of using an attestation system has been abolished. Attestation involved independent scrutiny of contract award procedures and practices to confirm conformity with UK and EU law.	**Regulation 44** revoked (by regulation 11 of these Regulations)
(repeal of) 9 to 11	A requirement under the original remedies directive for the Commission to operate a conciliation procedure has been abolished. The procedure allowed aggrieved suppliers to apply to the Commission for conciliation of a dispute with a utility.	**Regulation 46** revoked (by recast Part 9 in regulation 12 of these Regulations)

Summary: Intervention & Options

Department /Agency:	Title:	
Office of Government Commerce	**Impact Assessment of the transposition of the EU Remedies Directive into UK Regulations (excluding Scotland)**	
Stage: Implementation	**Version:** final version 1.0	**Date:** 28 October 2009
Related Publications: Remedies 1st Consultation Document; the Remedies Directive		

Available to view or download at:

http://www.ogc.gov.uk

Contact for enquiries: Matthew Wynne **Telephone:** 0845 000 4999

What is the problem under consideration? Why is government intervention necessary?

On 20 December 2007, the EU published an amending directive (Council Directive 2007/66/EC - the 'Remedies Directive') that revises the rules on legal review procedures and remedies available for breaches of the EU public procurement rules. The main problem being addressed by the EU in formulating the Directive was to improve the review procedures and remedies available for breaches of the public procurement rules. In particular it aims to provide an effective remedy for, and a deterrent to, illegal direct awards of public contracts. Government intervention is necessary to transpose the Directive by the EU's deadline of 20 December 2009.

What are the policy objectives and the intended effects?

-To transpose the above Directive and thereby adhere to the UK's EU Treaty obligations.

-To maximise potential benefits and minimise potential negative impacts on UK stakeholders.

-The main effect will be to increase the sanctions available for breaches of the public procurement rules, acting as both a deterrent to breaches and a remedy where breaches occur.

What policy options have been considered? Please justify any preferred option.

The policy options are:

i) implement

ii) not implement

The latter would breach the UK's obligations as a member of the European Union, and would trigger infraction proceedings by the European Commission. The UK must therefore implement. Consideration of the possible impacts of each of the policy choices on each article in the Directive are given in more detail in the attached evidence base.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

The European Commission will review the implementation by 20 December 2012. This will inform the UK and other Member States of the success of the Directive.

Ministerial Sign-off For SELECT STAGE Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

....Date: 3 November 2009

Summary: Analysis & Evidence

Policy Option:	Description:

COSTS

ANNUAL COSTS		Description and scale of **key monetised costs** by 'main affected groups'
One-off (Transition)	**Yrs**	(Not monetisable, for the reasons explained in the evidence base)
£		
Average Annual Cost (excluding one-off)		
£		**Total Cost** (PV) £

Other **key non-monetised costs** by 'main affected groups' : i) Contracting Authorities: new rules could add costs for authorities that award contracts illegally. ii) Winning bidders, if their contract is overturned: could lose revenue in short-term, but counter-claim damages to restore lost revenues. iii) Aggrieved bidders: legal costs of making a claim, but recoupable if successful.

BENEFITS

ANNUAL BENEFITS		Description and scale of **key monetised benefits** by 'main affected groups'
One-off	**Yrs**	(Not monetisable, for the reasons explained in the evidence base)
£		
Average Annual Benefit (excluding one-off)		
£		**Total Benefit** (PV) £

Other **key non-monetised benefits** by 'main affected groups' i) Contracting Authorities: the new rules should deter future breaches in the long-term, so further improving compliance. ii) All bidders: the presence of enhanced review procedures and remedies incentivise fair treatment and competition, which should help optimise value for money, as well as providing better recourse when the rules are breached.

Key Assumptions/Sensitivities/Risks The European Commission's impact assessment (April 2006) concluded the new 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 in the EU assessment), but that over time the benefits will outweigh the costs. The UK assumes the same.

Price Base Year	Time Period Years	**Net Benefit Range** (NPV) £	**NET BENEFIT** (NPV Best estimate) £

What is the geographic coverage of the policy/option?				England, Wales & NI
On what date will the policy be implemented?				20 December 2009
Which organisation(s) will enforce the policy?				The High Court
What is the total annual cost of enforcement for these organisations?				£ Not known
Does enforcement comply with Hampton principles?				Yes
Will implementation go beyond minimum EU requirements?				No
What is the value of the proposed offsetting measure per year?				£ N/A
What is the value of changes in greenhouse gas emissions?				£ N/A
Will the proposal have a significant impact on competition?				No
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	N/A	N/A	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices) (Increase - Decrease)

Increase of £ Decrease of £ **Net Impact** £

Key: **Annual costs and benefits: Constant Prices** **(Net) Present Value**

Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

RIA PART 2 – Key Background Information

Purpose

1. This impact assessment supports the proposed draft regulations that will implement Council Directive 2007/66/EC (the Remedies Directive) in England, Wales and Northern Ireland.

Background

2. The EU public procurement rules seek to ensure that public sector bodies award contracts in an efficient and non-discriminatory manner; these rules were implemented by the Public Contracts Regulations 2006 and the Utilities Contracts Regulations 2006. These rules include enforcement obligations and remedies that are available through the courts for breaches of the rules, such as the suspension of procurements and the award of damages.

3. Directive 2007/66/EC, which was adopted by the EU and published in December 2007, enhances the previous remedies rules by requiring or allowing Member States to implement specific changes. The intended effects are that: the rules governing remedies on the award of public contracts are improved and harmonised across the EU, the procurement process is more transparent, contracting authorities are further deterred from awarding contracts illegally, and situations where awards are made illegally can be addressed satisfactorily.

4. Within the Directive, there are a number of different types of rules:
    i) Mandatory new provisions for all Member States, where there is no choice over implementation;
    ii) Mandatory new provisions but with optional elements on how the provision is implemented; and
    iii) Permissive provisions, where Member States can choose whether to implement or not.

5. OGC's approach to implementation involved two consultation exercises. The first consultation, which ran during autumn 2008, sought feedback from stakeholders on the approach to implementation. This involved describing to stakeholders the options available to the UK and seeking their views on the preferred options. Comments were also sought on a draft Regulatory Impact Assessment (RIA). The consultation evoked a substantial response, with over 40 organisations responding in some detail. The analysis that followed during winter 2008/9 informed decisions on OGC's implementation policy.

6. The second consultation, which this more detailed RIA accompanies, summarised the outcomes of the first consultation, confirmed the implementation policy, and sought comments on draft implementing Regulations.

Impact Assessment Requirements

7. RIAs are generally required for transposition of EU Directives. The Department for Business, Innovation and Skills (BIS) [Enterprise and Regulatory Reform (BERR)] guidance on impact assessment clarifies that an assessment should be carried out for any government proposal that:

   i) Imposes or reduces costs on businesses or the third sector;

   ii) Similarly affects costs in the public sector, unless those costs fall below a threshold of £5M, in which case only a developmental/option stage assessment is required.

OGC's Approach to Impact Assessment

Overview

7. OGC acknowledges the helpful impact assessment guidance provided by the Department for Business, Innovation and Skills (BIS). This impact assessment adheres to the key principles within BIS' on-line toolkit, although it does not strictly follow every aspect of the reporting templates offered by BIS, for specific reasons as explained in more detail below.

8. Generally, the consultative approach taken by OGC is harmonious with the recommended approach to impact assessment. Specifically, OGC has:

   - consulted stakeholders twice about the various options available to them, which included two draft impact assessments, the second building on the comments on the first;
   - considered and documented the possible impacts of those options in its analysis of the responses;
   - used the impact assessment to aid decision-making in formulating the implementation policy;
   - published the final impact assessment.

Analysis of comments on the first draft impact assessment

9. OGC's view in the first consultation document was that the new Remedies Directive was unlikely to have a significant cost impact on either businesses, the third sector or the public sector. Any changes would affect public sector processes to some extent, but these were anticipated to be under the £5M threshold. OGC used the first consultation to test this thinking, and issued a draft developmental/option stage impact assessment for comments.

10. However, the responses to the impact assessment were mixed.12 respondents agreed with OGC's initial view that costs should not be substantial, as most of the provisions were clarifications of the existing rules. The only exception to this general rule related to one of the mandatory provisions within the Directive (article 2d – ineffectiveness), which was perceived to have potential for significant impact in some cases. However, most stakeholders expected the likelihood of claims arising to be a rare occurrence..

11. 8 respondents called for a more detailed Regulatory Impact Assessment. Generally, these respondents also acknowledged that ineffectiveness claims would be rare. There

was also a general acknowledgement that it would be impossible to forecast the number of possible claims arising under the new rules, or the potential value of those claims, which rendered financial forecasting impossible also. Nevertheless, respondents explained clearly that the potential value of a single ineffectiveness claim could feasibly exceed, in complex high-value contracts, the £5M threshold that triggers the need for a full RIA.

12. The other respondents either did not comment or did not express a clear opinion either way.

13. The policy team found the differing views of respondents helpful in informing the decision-making process as implementation progressed. Furthermore, the consultation exercise overall, i.e. not just the impact assessment but the feedback and analysis in its entirety, has provided a substantial evidence base on which to make better-informed policy decisions. In formulating its analysis, OGC has considered carefully the possible impacts arising from taking one or another course of action. Consequently, OGC has documented this more detailed, narrative RIA, discussing briefly the impact of each of the proposed Regulations but focussing on article 2d ineffectiveness as the main topic of concern, and how consultation has confirmed that the right choices have been taken in the respect of this.

Analysis of comments on the second draft impact assessment

14. The second consultation document provided a much more detailed draft impact assessment, which examined the potential effect of each of the articles in the Directive in a similar way to this final version.

15. Only 9 of the 34 respondents (ie 26%) commented on the impact assessment. This is similar to the low level of response that occurred in the first consultation. It seems therefore reasonable to assume that those that chose not to comment further were either satisfied with the assessment or not concerned by it, as most stakeholders did comment, some extensively so, on other questions where they were not satisfied with a proposal or did have concerns.

16. Of the respondents that did comment, the main views emerging were as follows:

    i. Two respondents urged for a review of the impact of the Regulations. One thought this should occur 1 year after implementation, although the respondents may have been unaware of the Commission's obligations to impact assess the Directive before December 2012 i.e. 3 years after implementation.

    ii. Two respondents explicitly agreed that it was either difficult or impossible to make a financial forecast of the impact of implementation.

    iii. Several respondents suggested alternative or additional views on the possible impacts, whilst still acknowledging that financial forecasts were not possible. These were:

        a. A potentially higher caseload for the courts. Four respondents thought that the new rules could lead to a significant increase in claims, though none suggested any way to forecast this. Two thought interlocutory applications could rise significantly. One view was that the new mandatory provision that requires contract-making to be suspended automatically when the contract award decision is challenged, would make it easier/cheaper for claimants to cause disruption for contracting authorities and their chosen contractors, and would therefore be potentially more disruptive to public projects. One

thought now every challenge, regardless of its foundations, would require the contracting authority to apply to the court. However, the counter-argument is that caseload for injunctions may actually decrease, as there should no longer be a need for challengers to have to apply for an injunction.

b. Longer contract start-times (i.e. "chilling") to avoid the threat of ineffectiveness.

c. Ineffectiveness could potentially add costs in respect of: a) bidders pricing-in the risk and b) the additional time/costs of agreeing the bespoke consequences of ineffectiveness in advance.

d. Agreement, by several respondents, with the potential impact-reducing potential of the proposal for pre-agreed ineffectiveness terms. They welcomed a suggested draft and/or relevant guidance.

e. The view, by two law firms, that the impact assessment was unnecessary. One qualified this by saying that the impact should be assessed when the Directive is made (which it was by the Commission), as now the UK has no choice but to implement.

17. OGC acknowledges the range and relevance of the comments made in response to the draft impact assessment. Whilst the majority of stakeholders seemed to be content (signified by their decision not to comment), those that did comment did not in the main appear to have significant objections to the impact assessment. The one key difference of opinion was that some stakeholders felt that the new rules could increase the legal caseload substantially, particularly in terms of interim injunctions.

18. However, while OGC acknowledges these comments, there is no evidence from which to either validate or counter the arguments made by these respondents, and it seems from respondents' feedback that they support OGC in the view that no-one can feasibly predict the volume by which the courts' caseload may increase. This would, at the very least, require some baseline data on the current number of injunction applications for procurement cases, which is presently not available.

19. OGC agrees with the broad range of potential concerns that respondents had over the practical knock-on effects on public projects (possible "chilling" effect, costs of risk/negotiations etc). However, we reiterate that these effects are not avoidable through making alternative policy choices – the policy options chosen from those laid down in the Directive are on balance the most pragmatic and least potentially inconvenient ones. A key priority will be the production and timely release of guidance on managing the potential problems and risks resulting from the new remedies rules, including further guidance on the essential elements of pre-agreed ineffectiveness terms that practitioners can draw on when setting up new contracts under the new rules.

Constraints

20. OGC points out one significant constraint in relation to this assessment: predictive data is not available on the potential frequency of cases arising purely because of the new rules, or the value of the remedies sought in those cases, or how the courts might rule when the facts of future cases are as yet unknown. Therefore, this impact assessment can only

provide a narrative analysis rather than a financial forecast. The European Commission's impact assessment similarly could not estimate these figures.

21. Whilst there are mixed views about the future effect that the new rules will have on the the (historically low) number of known court rulings on procurement cases, it is possible that a single ineffectiveness claim on a sizeable contract could breach the Better Regulation Executive (BRE) threshold of £5million, which was a contributing factor in OGC's decision to produce this more detailed impact assessment. However, contract values for ineffectiveness could, in theory, range from anywhere between £100K and £1BN or more, so it is impossible to estimate the likely cost of one or more claims at this point in time.

22. Since implementing the ineffectiveness provision is mandatory, this impact assessment concerns itself primarily with implementing in such a way that minimises the possible negative aspects, rather than the do-nothing option, which would trigger infraction proceedings by the EU.

Options

22. Strategically, there are only two options available:

22.1 Option 1 – Do nothing

22.1.1 Non-implementation of the Directive would breach EU Treaty obligations and trigger infractions proceedings, resulting in the UK being liable for substantial penalties. This option is therefore not feasible. The UK must, therefore, implement the Directive. Consequently, the do-nothing option is not considered within the detailed assessment of each article in Part 3 of this document, unless the Directive specifically permits an option for not implementing the article.

22.2. Option 2 – Implement Directive into UK Law

22.2.1 The options for implementation are constrained by the requirements of the Directive, which has already been adopted by the European Parliament and Council. Within these constraints there are a number of articles in the Directive where Member States have choices as to how, and in some cases whether (or not), to implement particular provisions. Following responses to our 2008 consultation, we have drafted implementing regulations for all of the articles below.

Article 1	Scope and Applicability of Review Procedures
Article 2	Requirements for Review Procedures
Article 2a	Standstill Period
Article 2b	Derogations from the standstill period
Article 2c	Time limits for applying for review
Article 2d	Ineffectiveness
Article 2e	Infringements of this Directive and alternative penalties
Article 2f	Time limits (for ineffectiveness)
Article 3a	Content of a notice for voluntary ex ante transparency

22.2.2 Against each article, we believe we have selected the best policy option to limit the possible negative consequences including, where it is permitted by the Directive, not implementing provisions that are entirely optional for Member States. Our approach has been influenced and shaped by the public consultations undertaken in 2008 and 2009, and the following assessment considers the potential impact of each article, and OGC's chosen approach, in turn.

RIA PART 3 – POTENTIAL IMPACT OF ARTICLES

23. This section of the RIA considers the potential impact of each of the articles within the Directive. It does not attempt to repeat the detailed justification for OGC's policy decisions contained within the consultation document and which have been endorsed by the Exchequer Secretary to the Treasury. Where helpful it recaps on the policy decision, whilst majoring on the possible impacts of each option.

Article 1 – Scope and Applicability of Review Procedures

24. Article 1(5) is entirely permissive: it allows Member States to introduce a mandatory first review by the contracting authority as a pre-cursor to court proceedings. The options available are either to implement or not. OGC's analysis led to the policy decision not to implement article 1(5), so there is no impact. There were also some other choices contained in Article 1, but these only apply to Member States that opt to implement article 1(5) which the UK has chosen not to do, so again there is no impact.

Article 2 – Requirements for Review Procedures

25. The substantive new provision at article 2 is that contract procedures must be automatically suspended following an application for legal review of the award decision (i.e. which would normally be brought during the standstill period). The article is mandatory; there are no optional elements, and the matter has already been impact-assessed at EU level. The main impact is that the UK Regulations and procurement procedures will need to be adapted to ensure that contract-making is suspended when the award decision is challenged. The suspension itself means that the procurement will not move forwards until the challenge is resolved, which could for example involve some costs depending on the complexity of the legal proceedings and the parties' respective involvement in them, though comparable costs may have still occurred in the absence of an automatic suspension, so there may not be a predictable increase in legal costs as a result of the new suspension rule (and this impact assessment explores in more detail later why legal costs can not be feasibly predicted). Furthermore, the parties involved can still pursue other commercial activities during the suspension. Therefore, the new suspension requirement is not expected to increase or decrease costs significantly; it is mainly expected to be a fairly straight-forward process-change for the public sector to accommodate.

Article 2a – Standstill Period

26. The standstill period is already provided for in the UK Regulations; there is no major change resulting from article 2a. The only minor amendments that will be needed are:

    i) Adjustments to allow the normal standstill period of 10 days to be extended (up to 15 days) where the commencement of the period is notified by non-electronic means, so that tenderers have time to receive the information through the postal or courier systems used. Feedback confirmed that electronic means of communication would be the normal method, so the normal standstill period will

therefore remain as 10 days. This small amendment to the rules is not expected to trigger any substantial impact on any stakeholders. It merely allows a few extra days notice to compensate for the added time taken for the delivery of non-electronic communications.

ii) For contracting authorities to make a clear statement of the exact standstill period. This is a minor administrative requirement on contracting authorities and should be absorbed easily into procedures without cost impacts.

Article 2b – Derogations from the standstill period

27. The derogations are optional for Member States. If transposed into UK Regulations they would give additional flexibility so that the full remedies rules would not apply in certain circumstances. Conversely, a decision not to transpose the derogations would increase the scope of the remedies rules and make the regime more onerous. The consultation confirmed that stakeholders preferred the derogations to be transposed, and this is in line with the Government's general aim to identify proposals that best achieve its objective whilst minimising cost burdens. The derogations should help to limit any additional costs of the new rules, rather than significantly impose any costs in themselves.

Article 2c: Time limits for applying for a review

28. Under article 2c, Member States must ensure that a certain period of time is available for reviews to be brought (the absolute minimum being 10 days where electronic means are used and 15 days otherwise). UK Regulations currently require reviews to be brought 'promptly, and in any event within 3 months', which is in line with judicial review timescales. The consultation confirmed that stakeholders were content with OGC's minimalist approach of maintaining the principle of the existing Regulations but ensuring that the Remedies Directive is complied with by clarifying that 'promptly' can never mean less than 10 or 15 days (depending on the method of communication used). There are no direct costs expected from this minor clarification.

Article 2d: Ineffectiveness

<u>The need for further impact assessment on ineffectiveness</u>

29. The ineffectiveness provisions were intended, by the EU and the Member States that designed them, both as a deterrent to, and a sanction for, significant breaches of the rules, especially illegal direct contract awards. Previously, the only remedy that was available post-award was damages. The principle of ineffectiveness is straightforward: contract awards that are found to be illegally awarded can be overturned. Implementation, however, is a more complex matter.

30. In the first consultation, stakeholders perceived ineffectiveness had the greatest potential of all the new provisions to impact on procurement procedures, and some respondents sought further analysis of the possible effects of it. OGC considered the potential impacts from the limited data available in determining the optimum policy model, and these considerations are described below.

31. A view amongst some stakeholders was that the new rules might not substantially increase the historically low number of cases[1] that reach a stage where they are ruled on by a court (and so become publicly known). However, this is quite speculative, and there is also a counter-view that the availability of additional and potentially more attractive penalties might lead to an increase in remedies sought.

32. Speculation aside, it is possible that a single ineffectiveness claim on a sizeable contract could breach the Better Regulation Executive's recommended threshold of £5million, triggering the need for further impact assessment. Since that remains a possibility, OGC concluded the need for this more detailed impact assessment.

Constraints

33. BIS guidance[2] on impact assessment urges for impacts to be monetised wherever possible. However, OGC highlights to stakeholders a clear and unavoidable constraint in relation to the assessment: predictive data is not possible on the potential frequency of cases arising purely because of the new rules, or the value of the remedies sought in those cases, or how the courts might rule when the future facts are impossible to predict. Furthermore, contract values for ineffectiveness could, in theory, range from anywhere between £100K and upwards of £1BN. So it is impossible to estimate the likely cost of one or more claims at this point in time. Consequently, this impact assessment can only be a narrative analysis of the pros and cons of the options available for implementation, rather than a financial forecast.

Risk Assessment

34. In terms of risk, the impacts of a successful ineffectiveness claim are clearly very high, irrespective of which method of ineffectiveness is chosen: either the prospective cancellation of contractual obligations coupled with the added threat of a civil financial penalty[3], or the retrospective unravelling of all contractual obligations including those that had already been delivered. Both outcomes have potentially serious consequences for an upheld ineffectiveness claim. A key concern is, therefore, the assessment of which of these methods is likely to have the least problematic impact on stakeholders.

35. Generally, many stakeholders supported OGC in anticipating that the likelihood and frequency of successful ineffectiveness claims will be rare. Partly, this view is attributable to the historically low number of known UK court rulings on procurement rules breaches. Partly it is attributable to the dissuasively high consequences of the threat of ineffectiveness itself. It may also be attributable to the fairly simple best-practice steps that can be taken by both procurers and bidders to avoid ineffectiveness arising.

36. In other words, the threat of ineffectiveness is substantial, but also easily avoidable, so parties to a contract should, in all but exceptional circumstances, be able to protect themselves in such a way that the sanction cannot be invoked. Low use of

[1] Conclusive data is not available on the definitive number of UK court judgements on procurement cases (or on how many cases that start are resolved out of court), as cases are not classified as such. Only tentative conclusions can be drawn from the known number of published cases, which have always been in single figures each year (eg in 2008 we know of 5 published UK judgements, a similar number in 2007 and even fewer in previous years).

[2] http://www.berr.gov.uk/whatwedo/bre/policy/scrutinising-new-regulations/preparing-impact-assessments/toolkit/page44199.html

[3] The directive refers to these as fines, but in the UK we are using the term civil financial penalty to avoid any inference or misapprehension that these are criminal penalties.

ineffectiveness could also be indicative of its success as a deterrent to rule breaches, in the same way that utilisation could indicate its failure as a deterrent.

37. This consideration of possibly-high-impact against very-low-likelihood is important in considering whether there is really a substantial concern here: on the one hand, stakeholders are anxious about the possibility of expensive court proceedings and their outcomes, but on the other hand the presence of the possibility of ineffectiveness could actually help to reduce substantial breaches of the procurement rules, which in turn marginalises the chance of ending up in court. In other words, the more people that worry about ineffectiveness, the less likely they are of falling foul of it. The alternative view, as raised by respondents, means that it could only take one successful ineffectiveness claim on a substantial contract to trigger major additional costs to the public and private sectors; a single ineffectiveness claim on a sizeable contract could breach the £5M threshold for detailed impact assessment.

The impact of implementing / not implementing

38. Article 2d on ineffectiveness is mandatory. Despite there being optional elements within the mandatory requirement, a decision to do-nothing would breach the UK's obligations under the EU Treaty, triggering infraction proceedings by the European Commission, and lead ultimately to an ECJ court case and a substantial civil financial penalty as well as political embarrassment with our EU neighbours. Consequently the do-nothing option has been discarded. Furthermore, it should be borne in mind that, even if the consequences of implementing the article are felt to be of significant impact, there is still no option of not implementing. The law has been agreed at European level and the UK must now comply. Rather, OGC has concerned itself primarily with selecting the best policy option from the alternatives available, which will maximise the positive effects and minimise the negative ones.

The impact of the 3 different options (prospective, retrospective, or court discretion)

39. Stakeholders were asked for opinions based upon 3 possible alternatives permitted by the Directive:

    i) Prospective cancellation. This would mean that all future (i.e. as yet unperformed) obligations were rendered ineffective, and would also require the courts to impose a civil financial penalty on the contracting authority, so that the overall penalty would be comparable with the alternative of retrospective cancellation. Most stakeholders preferred this option: the penalty was still felt to be dissuasively high, but it eliminated some of the additional uncertainties and the corresponding risks and costs of the other alternatives.

    ii) Retrospective cancellation. This would involve cancellation of all contractual obligations, including those that had already been performed. Stakeholders were unanimously opposed to this option, mainly because of the practical difficulties in undoing delivered obligations (e.g. 'unbuilding' a building) and the substantial uncertainties that would come alongside it. Uncertainty was a major risk factor for all parties, along with the potential for generating further costs in the procurement process.

    iii) Court discretion between prospective and retrospective cancellation. The benefits of additional flexibility were outweighed by the same concerns regarding uncertainty as highlighted in the previous option.

40. OGC concluded from the consultation exercise that prospective cancellation represented the option with the least negative impacts, which OGC equated with the ‘do-minimum’ option suggested in the impact assessment guidance.

Possible costs/benefits of pre-agreeing ineffectiveness terms

41. Stakeholder feedback identified that in many cases, parties to a contract would be keen to pre-agree specific contract terms before signing the contract, which would pin-down clearly the effects of an ineffectiveness ruling and the various obligations of the parties in unwinding the contract. OGC perceives that such a practice will not only be helpful in clarifying what would happen in the event of an ineffectiveness claim, but will also be significant in further reducing the possibility of claims ever arising. In other words, the process of agreeing ineffectiveness terms will place the possibility of ineffectiveness clearly in the minds of parties to the contract, thereby encouraging them to apply the necessary and straightforward remedies rules before awarding the contract and in doing so avoid the highly problematic possibility of ineffectiveness.

42. OGC’s guidance on the new remedies rules will include some suggested content on how these terms can be formulated. However, there is no evidence to suggest that the formulation of such terms should involve significant additional costs; the action is purely a precautionary measure and akin to one which happens in many contracts already (e.g. exit clauses).

The possible costs/benefits of best practice

43. Although the range of procurement-rules breaches that can contribute to an ineffectiveness claim being brought are quite broad, there are only a small number of quite specific remedies-rule conditions that must also always be present in order to make ineffectiveness possible, and so it should be possible to marginalise the likelihood of claims occurring by issuing clear guidance on how to prevent them.

44. Cleary, for contracting authorities, the overarching message is that compliance with the rules will ensure that they are protected from ineffectiveness claims. However, OGC guidance will also spell out the specific rules which can trigger ineffectiveness, which can be summarised as:

    i) Illegal direct contract awards (i.e. failure to publish an OJEU contract notice, where one is required);

    ii) Breach of the procedural rules for awarding above-threshold call-off contracts (from framework agreements and dynamic purchasing systems) where the contracting authority has not applied a standstill period;

    iii) Where coupled with a substantive breach of the main procurement rules:

        a. When the contract is awarded pending a court review of the award decision (in breach of the automatic suspension requirement); or
        b. When the contract is awarded in breach of the standstill period.

45. Successful tenderers also have a key interest in ensuring that their fairly-won contract is not at risk from ineffectiveness. By making some simple checks before signing the contract, the winner can protect itself at virtually no cost.

46. OGC guidance was always intended to complement the remedies implementation, so there is no anticipated cost to these best practice measures, though it could be very beneficial in terms of marginalising the number of possible ineffectiveness claims.

Consideration of scenario-based assessments

47. The range of possible scenarios to which the ineffectiveness penalty could apply is virtually unlimited: there are literally thousands of possible combinations of different but relevant aspects, such as contract value, duration, type, scope, risk etc. Of these, contract value seems likely to be the most relative factor to the potential value of any ineffectiveness claim which could feasibly equate to or exceed the entire contract value.

48. However, the contract in question could be virtually any size imaginable, and therefore the ineffectiveness claim could be any size too. The contract could be amongst the biggest let by the public sector e.g. above £1 billion spanning a 25-year period, or it could be a mid-range multi-million pound deal, or it could be at the lower end of the range where ineffectiveness can be applied i.e. above the relevant OJEU threshold, which in many cases is around £90,000.

49. Consequently there seems little to be gained in pondering specific scenarios, as a conclusion based on one scenario may have no practical relevance to the factors at play in a real ineffectiveness claim should it arise. For example, a model based on a hypothetical example involving a £15 million contract might generate an ineffectiveness claim that caused the defending contracting authority to lose the full contract value of £15 million, but how is that hypothetical knowledge helpful if, following implementation, an actual ineffectiveness claim relates to a contract with a value of £100,000, or £1 billion?

50. What is perhaps more helpful is to consider the general bands of contract value and consider the risk to each of these. For example, feedback from stakeholders in the PPP/PFI markets has confirmed that there are substantial concerns about how ineffectiveness could effect these arrangements. The stakeholders explained clearly how the ineffectiveness, or at least the threat of it, could destabilise those markets, for example, by inadvertently discouraging funders from being involved because of the perceived high risks. Clearly, the stakeholders in those markets are concerned that the impact could be very high indeed. Furthermore, the very presence of the bidders' concerns suggests there is an even greater likelihood that they will make the relevant checks during legal due diligence to ensure that the contracting authority has not breached an ineffectiveness-inducing rule before signing the contract. Whilst it is therefore understandable that there is much concern about the possible impact in these markets, the likelihood of ineffectiveness actually arising seems to be even further mitigated by the managed approach to risk-taking required by those markets and the capability of the contracting authority's commercial assurance and governance regime.

51. On the other hand, in procurements with a lower value or profile, there might be less general concern on both the buyer and seller sides about the possible impact of ineffectiveness. This could be the case for contracts which are only just above threshold, or for above-threshold call-offs from a framework agreement. So, whilst the impact of ineffectiveness is clearly lower on lower-value contracts, it may be possible that the likelihood of an ineffectiveness rule breach is higher than in higher-value contracts, whilst still being low likelihood overall.

52. However, the above considerations are still extremely speculative, whilst drawing where possible on stakeholders' views. The only relevant conclusions that can be drawn from the above considerations are:
   - The impact on any procurement could be as much as the entire contract value.

- The greater risk of ineffectiveness claims occurring could be within the larger number of lower-value contracts as opposed to the smaller number of higher-value contracts.

Possible impacts on the contracting authority

53. The onus is on contracting authorities to understand and apply the rules. The possible impacts of ineffectiveness on contracting authorities could be substantial for a single ineffectiveness claim, as has been discussed above. However, the ineffectiveness rule was developed by the EU precisely for this reason – the intention in creating the rule was to dissuade authorities from acting illegally. Contracting authorities have a simple choice: adhere to the procurement rules, in which case there is no impact; or act illegally, in which case the impact is potentially significant.

54. OGC expects that contracting authorities, as has generally been the case in the past, will respect the procurement rules and therefore the impact will be minimal, though OGC can not rule out the possibility that isolated rule breaches might trigger one or more future ineffectiveness claims with an unpredictable cost impact. That risk lies entirely within the control of contracting authorities and is not removable by the method of ineffectiveness that the UK implements.

55. The choice of prospective cancellation is required to be coupled with a civil financial penalty – this is the trade-off for not having performed obligations 'undone' as would be the case with retrospective cancellation. Clearly this impacts on contracting authorities only, which might have led to an expectation that contracting authorities would argue against prospective cancellation – but instead they preferred it, largely for the additional benefits of certainty and practicability. Since it would be for the court to determine the level of the civil financial penalty, there is no way of estimating the possible cost of a single civil financial penalty as the matter is for case-by-case consideration. Civil financial penalties should be effective, proportionate and dissuasive.

56. There may also be some risk of contracting authorities being pursued vigorously by claimants without real grounds for a complaint. Although these circumstances are likely to be rare (within the already rare context of ineffectiveness claims), it could still be possible that there might be costs to some contracting authorities in defending a legitimate course of action from a resolute review applicant.

Possible impacts on the successful tenderer

57. The possible impact on successful tenderers is also substantial – they could see themselves stripped of a contract that they believed they had won legitimately. Ineffectiveness seems odd when viewed from this perspective, as it would appear to penalise an apparently innocent party.

58. However, OGC has no choice over implementing ineffectiveness, and can only influence the method of ineffectiveness. OGC considers that the chosen method, prospective cancellation, limits the negative impacts on successful tenderers insofar as is possible within the mandate laid down by the Directive. The evidence for this conclusion is that the alternative, retrospective cancellation, would require the undoing of delivered obligations in addition to the winning tenderer being stripped of the contract. For example, a retrospectively ineffective construction contract might require the disassembly of a part-constructed building, which would presumably result in additional costs for personnel, demolition, waste management and transit of materials. Or a retrospectively

cancelled consultancy services contract could involve the difficult undoing of advice, influence and intellectual property.

59. On the other hand, the UK's chosen method of ineffectiveness, prospective cancellation, limits the cancellation to those obligations that have yet to be performed. Whilst this still might mean the loss of a valuable income stream, there would be no requirement to undo anything that had already been done, which we expect would be preferable to tenderers in most foreseeable circumstances. The contractor would also normally have the right to seek damages for any incurred loss, had such eventualities not been pre-defined before the contract was awarded. In the construction example above, prospective cancellation would simply mean that work stops, and payment is made for all work up until that point. The same would apply to the consultancy example. Clearly more complex projects such as PFIs would involve more complex arrangements than simply stopping work, but those arrangements would be considered during the pre-agreement of the ineffectiveness terms as discussed above.

60. In conclusion, the impact of prospective cancellation on the originally successful tenderer could, if not considered beforehand, initially trigger some unforeseeable costs. However, those costs should be largely or wholly avoidable by the agreement of relevant terms pre-award, and may even be recoupable after contract award through the legal system where, for example, the contractor whose contract is deemed ineffective can prove consequential loss arising from the contract being taken from him. (This could mean a further potential cost impact for the public sector). Feedback has also confirmed that stakeholders on the supply-side prefer prospective cancellation.

Possible impacts on the unsuccessful tenderer (ie the claimant)

61. The impact on the unsuccessful tenderer(s) is expected to be mainly beneficial, as the ineffectiveness remedy adds to the previous suite of remedies available and enables the aggrieved bidder to bid again, if successful in pursuing the claim. Whilst there is undoubtedly a cost element is using the UK legal system, this cost is not new or specific to the ineffectiveness remedy – it has always been there and as such is not considered to be a new impact resulting from the new Directive. Furthermore, claimants would normally claim the costs of legal proceedings in addition to their other claim, which mitigates any cost impacts to the claimant further.

Conclusions on Ineffectiveness

62. Prospective cancellation represents the preferred position regarding the three alternatives to the majority of stakeholders. It offers the most benefits and the least potential negative impacts on the stakeholder network.

Article 2e – Infringements of this Directive and Alternative Penalties

63. Article 2e is mandatory but with an optional element, requiring a choice to be made by Member States.

64. Where there has been a remedies rule breach (ie breach of standstill period or contract award whilst a court is reviewing an award decision), but no substantive breach of the main procurement rules, Member States are required to provide for either ineffectiveness, alternative penalties (contract shortening or fines), or court discretion between ineffectiveness and alternative penalties.

65. As the article is mandatory, there is no choice other than to implement it. The main considerations are therefore how best to minimise the potential negative consequences. Stakeholder feedback was mixed: a larger number of stakeholders preferred court discretion, but the arguments complementing that feedback were generally limited to the general benefits of flexibility that is associated with court discretion. On the other hand, a smaller number of stakeholders made more convincing arguments for limiting the effects of article 2e to alternative penalties, not ineffectiveness. OGC concurs with the latter, as ineffectiveness appears to be too severe a penalty for inconsequential breaches that have not affected the chances of any party in winning the contract. This also represents the minimum action, in terms of the possible impact on stakeholders, which is permissible under the Directive, although as with previous discussion on ineffectiveness, it is impossible to quantify the number or cost of successful claims.

Article 2f – Time Limits (for ineffectiveness claims)

66. Article 2f is mandatory. The effect is that, where Member States require reviews to be brought within a specific period of time, that period is at least 30 days where tenderers have been notified of the award, or at least 6 months where tenderers have not been notified.

67. The main choice for the UK is whether to implement the minimum limits given by the Directive, or to allow for longer periods. Stakeholders understood the choice and were clear in their responses that the minimum periods were satisfactory and UK Regulations should not attempt to extend them (extension would also be tantamount to 'gold-plating' without any clear justification).

68. The special time limits for ineffectiveness claims (30 days or 6 months depending on the circumstances) are entirely new, and has been added into the existing regime without changing the existing time limits for other types of claims (i.e. 3 months in most circumstances). The limiting of the ineffectiveness period is also helpful, given the uniquely sweeping and profound impact that a successful ineffectiveness claim could have on the parties to a contract. Consequently the UK has opted to make the time limits absolute – i.e. there will be no court powers to extend the availability of ineffectiveness beyond the time limits, as is the case with other types of claim. This should further minimise any negative impact and facilitate greater contractual certainty.

Article 3a – Contents of a notice for voluntary ex ante transparency

69. Article 3a is mandatory with no optional elements. It requires Member States wishing to use the voluntary transparency mechanism to do so in a prescribed format.

70. OGC does not expect that contracting authorities will often need to use the voluntary transparency mechanism, but even in the event that they do, the details required are relatively straightforward and should not add substantially to costs for contracting authorities.

Conclusion

71. The mandatory nature of the new Directive requires some significant additions and amendments to be made to the UK Regulations. In some cases, there are choices in implementing, and OGC's role has been to identify, consult and then decide on the choices which represent the best policy options for the UK.

72. BRE guidance encourages systematic assessment of impacts over a suggested £5M threshold, avoidance of ‘gold-plating’ and taking a minimalist approach to implementation. OGC has adhered to BRE guidance insofar as is possible within the context of this implementation. This impact assessment has examined, article by article, the choices available for the UK and identified a range of options. The options that represent the least cost and greatest benefit within the confines of the mandate laid down in the Directive have invariably been selected by OGC. However, specific monetising of the possible impacts has not been possible given the unavailability of relevant predictive data, and the unpredictability of the facts surrounding future potential court cases.

73. It seems that the greatest potential area of concern regarding the impact of the new rules is with the ineffectiveness provisions. However, the impact may be substantially reduced by adherence to the rules and best practice. So on the one hand it is possible that there may be no impact whatsoever if no ineffectiveness claims arise, but on the other hand it is also possible that the triggering of a single ineffectiveness claim could result in substantial costs and inconvenience to the contracting authority and supplier(s) concerned. What is clear is that all parties to a contract have a major interest in avoiding ineffectiveness, and since there are simple things that can be done to ensure that it is avoided, then it is to their commercial advantage to do those things and always to ensure that they are done before signing the contract.

RIA PART 4 – Checklist of Specific Impact Tests

ECONOMIC TESTS

1. Competition Assessment

This Directive, as with other procurement Directives, is intended to facilitate greater competition by opening markets and specifically by providing deterrents and sanctions to anti-competitive behaviours.

2. Small Firms Impact Test

The new Remedies rules will affect the way in which public contracts can be challenged, but it will not affect the normal day-to-day business environment of small firms or anyone else.

In some ways, the new rules are to the benefit of businesses, including small firms, as they will have additional remedies available should they wish to challenge a public procurement made in breach of the procurement rules. Furthermore, the new rules will further encourage contracting authorities to respect the public procurement rules, which means that contracts are more likely to be competed fairly, to the benefit of all firms regardless of size.

There is also a possibility that a contract won by a small business could later be deemed ineffective, or shortened. This could potentially affect small businesses to a greater extent than the same set of circumstances might affect a larger firm. In such cases, the small firm would have both opportunities to reduce or eliminate its risk before being awarded the contract, if it wished to do so, and may also be able to claim damages for incurred losses having been awarded the contract, and the legal fees for making the claim. These impacts were discussed in Part 3 as part of the discussion on ineffectiveness.

However, these instances are expected to be very rare, as has generally been the case with procurement cases in the UK, and there are significant disincentives as discussed in Part 3 which further limit the likelihood of claims occurring. Furthermore these situations are largely avoidable by making some basic checks before the contract is signed.

In any event, the ineffectiveness provision is mandated by the Remedies Directive, so there is no choice other than to implement it. OGC has selected the option permitted in the Directive, which has the least negative consequences for all firms, including those that are small.

OGC has reviewed BIS' guidance on the Small Firms Impact Test (SFIT). The guidance recommends that particular studies are done with small firms so that various policy alternatives can be identified if the cost implications for small firms are high. As is discussed in Part 3 of this RIA, the possible cost implications cannot be monetised, and there are no alternative policy options as this aspect of the Directive is mandatory. Consequently, OGC concludes that there is no further helpful value to be added by the SFIT in this context.

3. Legal Aid Impact Test

The Remedies Directive affects commercial matters between the public sector and economic operators that bid for public sector contracts - there is no anticipated impact on Legal Aid.

OGC has worked closely with the Ministry of Justice to consider and minimise the impact on the workload of the courts. No significant changes to court procedures are thought to be necessary. Any impact on the courts' workload would therefore mainly depend on the volume and

complexity of future cases, which as this impact assessment has concluded can not be feasibly predicted. At this early stage, as there are presently no baseline figures with which to work.

4. Other Economic Issues

There is a possibility that the new rules could generate receipts for Government, as a result of civil financial penalties on contracting authorities. In one sense, this is not new money, but rather public money changing hands from one public body to another. However, the number of civil financial penalties and the corresponding number of receipts is expected to be very low (ie isolated instances and possibly few or none). The value of receipts is entirely unpredictable.

SUSTAINABILITY TESTS

5. Sustainable Development

The impacts of this Directive cannot be monetised, as discussed in the RIA, due to the unpredictability of facts and data on potential future court cases. The impacts, if any, are more likely to be economic than social or environmental. However, the policy complies with the 5 Sustainable Development principles:

- -Living within environmental limits;
- -Ensuring a strong, healthy and just society;
- -Achieving a sustainable economy;
- -Promoting good governance; and
- -Using sound science responsibly

6. Carbon Assessment / Other Environment

There are no environmental characteristics to this policy proposal and therefore these tests are not relevant.

SOCIAL TESTS

7. Health Impact Assessment

The proposal should have no impact on health, well-being or health inequalities.

8. Race Equality, Disability Equality, Gender Equality, Human Rights

The policy is derived from EU law, via the European Commission, and so is compliant with other EU laws on race, disability, equality and human rights. An extensive public consultation has not produced any evidence that suggests the proposed policy has any bearing on race equality, disability equality, gender equality or human rights. The policy improves the rights of *all* businesses in tendering for public contracts, and is not skewed in favour of or against any particular group.

9. Rural Proofing

The proposal should have no impact in different rural areas.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	***Results in Evidence Base?***	***Results annexed?***
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	Yes	No
Carbon Assessment	Yes	No
Other Environment	Yes	No
Health Impact Assessment	Yes	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	Yes	No

Annexes

none