

ARE YOU AWARE OF THE CHANGES TO THE PROCUREMENT RULES?

1. The Public Contracts (Amendment) Regulations 2009 became effective on the **20th December 2009**. Public bodies need to comply with the new Regulations and be aware of the changes to the 2006 Regulations to ensure compliance and minimise potential threats when seeking tenders.
2. Changes in the regulations include:
 - .1 A new remedy of contract ineffectiveness;
 - .2 Civil Financial Penalties;
 - .3 Requirement of suspension from entering into a contract; and
 - .4 New debrief requirements.

Contractual Ineffectiveness

3. Under the new regulations, a dissatisfied contractor may apply to the High Court for a declaration of contractual ineffectiveness where a public body:
 - .1 Awards a contract without preceding publication of a Contract Notice in the Official Journal, unless permitted by a derogation; or
 - .2 Is in breach of the rules regarding call-offs under a dynamic purchasing systems or framework agreements and has not allowed for the 10-day standstill period before concluding the called-off contract; or
 - .3 enters into the contract after an action to suspend the award procedure has been lodged, or before expiry of the above-mentioned 10-day standstill period, in circumstances where the Authority has also committed a breach of the substantive rules which affected the complainant's chances of obtaining the contract.

Civil Financial Penalties

4. What are Civil Financial Penalties? In everyday language they are a fine. When a court issues a declaration of contractual ineffectiveness, they must also impose a financial penalty.

5. How much will the penalties be? In short, nobody knows at this stage. The court imposing the penalty will decide the amount of the fine, but the Regulations do not give any guidance on how these should be determined. As the Regulations have only just become effective, there is no case law available to indicate the view courts will take on how these should be determined.

Requirement of Suspension from Entering into a Contract

6. Another change under the amended Regulations is the introduction of a requirement that the Contracting Authority refrains from entering into a contract when proceedings have been commenced to challenge the award decision. The suspension must continue until a court either makes an interim order lifting the suspension, or the proceedings are determined or discontinued.

New Debriefing Requirements

7. Under the 2006 regulations, the Contracting Authority was obliged to debrief an unsuccessful bidder, but only if a debrief was requested.
8. Under the amended Regulations, the Contracting authority **must** debrief all unsuccessful bidders. As a consequence, the unsuccessful bidder is entitled to a debrief without a request being made.
9. Further the standstill period will not commence until the debrief has been given.