EU Remedies Directive 2007/66/EC

1) The notes below are for the information of members, they are not meant to be an exhaustive or legal review of the new rules. Full details of the new regulations can be accessed on the OGC website (www.ogc.gov.uk) together with guidance on the application of the rules.

2) The above directive came into force in the UK on the 20th December 2009. The UK Government has implemented the new rules by the introduction of “The Public Contracts (Amendment) Regulations 2009.

3) UK Transitional Policy

3.1) The new rules will apply only to new procurements beginning on or after the 20th December 2009. This policy also applies to framework agreements and dynamic purchasing systems (DPS). This means that where the start of the procurement process for framework agreements or DPS occurred before the new rules took effect than both the framework agreements and DPS and any subsequent call offs from them are also subject to the older rules.

For the purposes of the rules the start of the procurement is deemed to be when a contract notice or other contractual notice was issued. For contracts that are not formally advertised the regulations address in detail when a procurement is deemed to have started but the main features are that when no OJEU notice is issued it will be when the purchasing authority first made contact with potential suppliers either by the seeking of offers or expressions of interest or responding to an unsolicited offer or expression of interest.

3.2) The transition has been managed by amending the existing UK Public Procurement Regulations. The detailed requirements of the Public and Utility Sectors are similar and have two main components.

a) The standstill changes are achieved by; an amended regulation 32 and a new regulation 32A of the Public Contract Regulations 2006 and an amended regulation 33 and a new regulation 33A of the Utilities Regulations 2006.

b) The new rules concerning remedies are contained in a redrafted part 9 of both sets of Regulations. These greatly expand the rules previously contained in Regulation 47 of the Public Contracts Regulations 2006 and Regulation 45 of the Utilities Contracts Regulations 2006.
4) Summary of the main changes.

The remedies available under the old rules will continue to apply but in addition the new rules introduce new remedies for illegal contracts and failure to correctly apply the mandatory standstill period. The main changes introduced in the new rules include:

a) a greater level of commonality and consistency between member states in the application of the mandatory standstill period which occurs between the purchasers decision to award a contract and then actual contract award so that aggrieved purchasers may seek remedies before the contract is entered into.

b) ineffectiveness (contract cancellation) as a remedy for certain serious breaches of the rules, such as illegal direct awards

c) two other new penalties, one being civil financial fines and the other contract shortening, which the courts may use as an alternative to ineffectiveness if the courts consider that there are important public interest reasons why the contract should continue. A civil financial penalty will also be required to accompany an ineffectiveness ruling.

d) an automatic suspension procedure whenever legal proceedings are started in respect of a contract award decision.

e) a time period of six months when a declaration of ineffectiveness is sought where a contract award notice has not been published.

5) Remedies.

Under the previous rules bidder’s remedies in the UK consisted of damages including costs and in certain circumstances lost profits. Under the old rules a contract could not be set aside once it had been entered into. Under the new rules courts will no longer be restricted to awarding compensation as a remedy to an improperly awarded contract or framework agreement and, with certain exceptions, contracts may be set aside even once entered into.

5.1) Remedies where the contract has not been entered into:

When the court is satisfied that there has been a breach of the rules by the contracting authority the court may:

- Order the setting aside of the decision concerned
- Order the purchaser to amend any documentation
- Make an award of damages.

The position for contracts not entered into is therefore in effect similar to the previous rules.

5.2) Remedies where the contract has been entered into.
Unless there are overriding reasons of general interest the courts must make a declaration of ineffectiveness if:

a) The contract has been awarded without prior publication of a contract notice in breach of the rules

b) The contract has been awarded in breach of the rules relating to the mandatory standstill period or has been awarded following the start of proceedings in respect of a contracting authority’s decision and all of the following apply:

- The breach has deprived the bidder of the possibility of pursuing pre contractual remedies
- A breach of one of the substantive duties owed by the contracting authorities has occurred
- The breach has affected the chances of the contractor obtaining the contract

c) A contract for a value in excess of the threshold was awarded in breach of the rule’s applicable Framework Agreements or Dynamic Purchasing Systems

d) In addition to making a declaration of ineffectiveness the court must also order the contracting authority to pay a fine. The court may also award damages to an economic operator that has suffered loss or damage as a result of the breach

e) Where the court does not make a declaration of ineffectiveness for reasons of overriding reasons of general interest, the court must order that the period of the contract is shortened and/or that the purchasing authority pays a fine.

When determining the shortening of the contract and/or fine the overriding consideration is that the penalty must be effective, proportionate and dissuasive.

6) Mandatory Standstill Period (main changes)

a) The reasons for the award decision must now be released at the start of the standstill rather than on request

b) Because of the above, there is no longer the need for an accelerated debrief upon request as the debrief should be automatic upon release of the standstill notice
c) The standstill notice only needs to be sent to tenderers and any candidates that have not already been notified of their rejection and the reasons for it

d) Information on the ending of the standstill period should be included within the standstill notice

e) The minimum standstill period is now calculated differently, depending upon the means of communication used to transmit the notice

6.1) Mandatory standstill period. Information to be sent to tenderers;

a) The criteria for the award of contract

b) The reasons for the decision, including the characteristics and relevant advantages of the successful tender; the score obtained by the bidder which is to receive the notice and the scores of the bidder to be awarded the contract/framework agreement

c) The reasons (if applicable) why the bidder did not meet the technical specification

d) The name of the successful bidder(s)

e) A precise statement of either
   - When the standstill period is expected to end and, if relevant, how its ending may be affected by any, and if so what, contingencies or
   - The date before which the contracting authority will not enter into the contract or framework agreement

6.2) The information to be sent to a candidate must include:

a) The reasons why the candidate was unsuccessful and

b) All the same information sent to tenderers except for “relative advantages” of the successful tenderer

6.3) Timescales for sending the Mandatory Standstill Period Notice.

a) At least 10 days when the notice was sent by electronic means (including fax or email) or

b) When using non-electronic means, there is a choice of either 15 days from date of sending or 10 days from date of receipt (when receipt can be clearly established)

c) When a mixture of procedures is used for communicating the notices, the longer standstill period will apply.
7) Application of the Mandatory Standstill Period to contracts placed under framework agreements and dynamic purchasing systems.

The new rules make optional the application of the mandatory standstill period to above threshold contracts placed under framework agreements or dynamic purchasing systems. If purchasing authorities apply correctly the standstill period to the award of these contracts, even if found to be in breach of the rules, the remedy of ineffectiveness will not apply but if they do not apply the standstill period then the awards could be subject to the remedy of ineffectiveness.