

Keeping within the law - Public Procurement compliance

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Public Procurement Law

Unprecedented change:

- Directives
 - Remedies Directive
 - Services Directive
- Cases
 - Transparency
 - Development Agreements

Consequences

- Damages
- Fines
- Criticism
- Funding Problems
- Audit

Challenges

- State of the economy
- Threat of insolvency
- Case law has moved on
- Security for costs applications vs. After the Event Insurance

Challenges: Transparency

- Criteria
- Sub-criteria
- Weightings

Everything a bidder needs to know in order to formulate the best bid possible.

Challenges: Development Agreements

Public works contracts indicators:

- If rental payments received.
- Contracting authority has produced / had significant involvement with the specification.
- Grant of planning permission is conditional upon the contracting authority entering into a s.106 agreement.
- The risk in the work lies with the contracting authority.
- Contracting authority takes ownership of the works but a development agreement might be caught by the PCR 2006 even if the contracting authority does not own the development.

Challenges: Development Agreements

Public works contracts contra-indicators:

- Vague statements of intent or lack of involvement in making legally binding decisions.
- No obligation to construct the building.
- If the developer has exclusive rights to the land.
- Works are incidental to the main object of the award.

Remedies Directive

Enhanced notification provisions:

Contracting authority must notify applicants of their exclusion from the procurement process at both PQQ and tender stages (Reg. 29A).

The Award Decision Notice must contain (Reg 32(2)):

- The criteria award for the contract.
- The “characteristics and relative advantages of the successful tenderer”.
- The score of the recipient and that of the successful tenderer.
- Details of when the standstill period will end.

Remedies Directive

Enhanced standstill provisions:

- (Where an advertisement is placed in OJEU) cannot enter into contract without standstill period or risk challenge of “ineffectiveness” (Reg 32A1).
- Standstill period clarified - ends midnight on the 10th day notice sent (if electronic or can guarantee receipt) or otherwise the 15th day after sending (if falls on a non-working day then must extend accordingly).

Remedies Directive

Enhanced remedies:

- Pre-contract (Reg 47L)
 - Set aside the decision.
 - Document amendment.
 - Contract shortening
 - Damages.
 - Anything else “appropriate”.
- Post-contract
 - Damages.
 - “Ineffectiveness”...

Remedies Directive

“Ineffectiveness”:

- If the contract is ‘ineffective’ then it can be set aside.
- A contract is ineffective if:
 - Contract has been awarded without publishing a prior OJEU notice (and a VEAT transparency notice has been issued).
 - Failure to comply with rules on standstill and
 - There have been other breach(es) of the regulations;
 - Claimant has been deprived of the chance to bring proceedings before the contract was entered into; and
 - Breach affected Claimant’s chances of winning the contract.
 - (Re frameworks) mini-competition rules not been followed (to the extent that they apply).



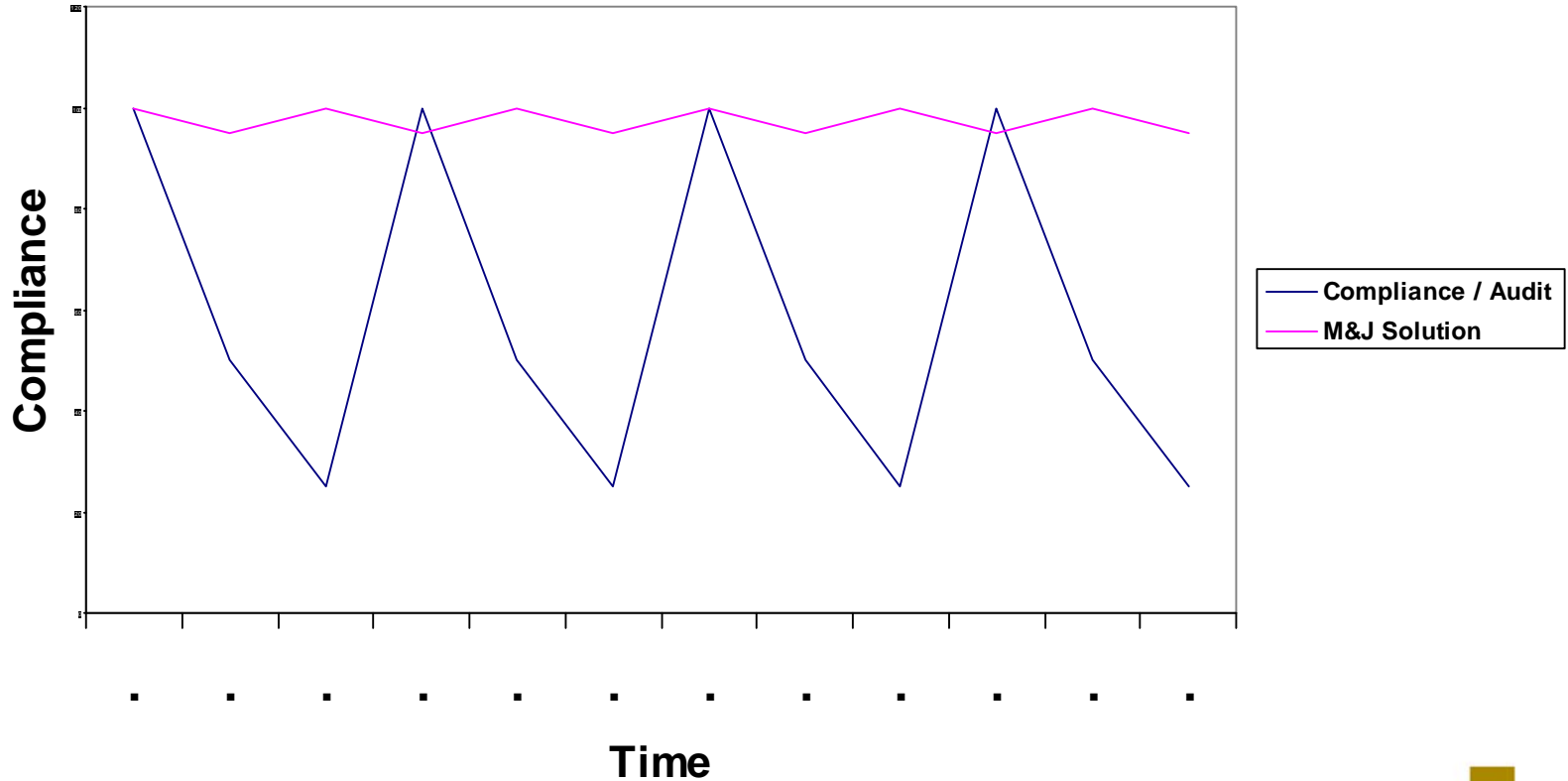
Risk Points

- Finding the activity !
- Recognising the need to comply
- Specifications
 - Confidentiality
 - Lock out spec
 - Non discrimination
- OJEU notice
- PQQ / ITT
 - Award v selection criteria
 - Interview!
 - Transparency
- Contract Award
 - Debrief

Risk Management

- Planning
- Strategy
- Frameworks and consortia
- Continuous improvement

Risk Management



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