

**2011 No. 2053**

**PUBLIC PROCUREMENT**

**The Public Procurement (Miscellaneous Amendments)  
Regulations 2011**

<i>Made</i> - - - -	<i>17th August 2011</i>
<i>Laid before Parliament</i>	<i>24th August 2011</i>
<i>Coming into force</i> - -	<i>1st October 2011</i>

The Minister for the Cabinet Office is designated(a) for the purposes of section 2(2) of the European Communities Act 1972(b) in relation to public procurement and makes these Regulations in exercise of the powers conferred by that section.

**PART 1**

**GENERAL AND TRANSITIONAL**

**Citation, commencement and interpretation**

1.—(1) These Regulations may be cited as the Public Procurement (Miscellaneous Amendments) Regulations 2011 and come into force on 1st October 2011.

(2) In these Regulations—

“the Public Contracts Regulations” means the Public Contracts Regulations 2006(c); and

“the Utilities Contracts Regulations” means the Utilities Contracts Regulations 2006(d).

**Amendment of Regulations**

2.—(1) The Public Contracts Regulations are amended in accordance with Part 2.

(2) The Utilities Contracts Regulations are amended in accordance with Part 3.

(3) The Defence and Security Public Contracts Regulations 2011(e) are amended in accordance with Part 4.

(4) The Public Contracts (Scotland) Regulations 2006(f) are amended in accordance with regulation 29.

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(a) S.I. 2010/2473.

(b) 1972 c.68.

(c) S.I. 2006/5; amended by S.I. 2007/2157, 2009/2992, 2011/1441; there are other amending instruments but none is relevant.

(d) S.I. 2006/6; amended by S.I. 2007/2157, 2009/3100, 2011/1441; there are other amending instruments but none is relevant.

(e) S.I. 2011/1848.

(f) S.I. 2006/1, to which there are amendments not relevant to these Regulations.

(5) The Utilities Contracts (Scotland) Regulations 2006(a) are amended in accordance with regulation 30.

### **Meaning of “date of knowledge” in regulations 4 to 8**

3. In regulations 4 to 8, “date of knowledge” means the date on which the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.

### **Time limits etc and the Public Contracts Regulations: saving with modification of the provisions as amended in 2009**

4.—(1) Regulation 12 does not affect any proceedings where the date of knowledge has occurred before 1st October 2011.

(2) In those circumstances, regulation 47D of the Public Contracts Regulations shall have effect as if paragraph (2) provided—

“(2) Subject to paragraphs (3) and (4), such proceedings must be started within 3 months beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.”.

### **Time limits and the Public Contracts Regulations: modification of the existing saving of the original provisions**

5.—(1) This regulation applies where, by virtue of regulation 11 of the 2009 Regulations, regulation 47(7)(b) of the Public Contracts Regulations is not affected by regulation 10 of the 2009 Regulations.

(2) In those circumstances, that regulation 47(7) shall have effect as modified by the following provisions of this regulation.

(3) Where the date of knowledge has occurred before 1st October 2011, regulation 47(7) shall have effect as if paragraph (b) provided—

“(b) those proceedings are brought within 3 months from the date when the economic operator first knew or ought to have known that grounds for the bringing of the proceedings had arisen unless the Court considers that there is good reason for extending the period within which proceedings may be brought.”.

(4) Where the date of knowledge occurs on or after 1st October 2011, regulation 47(7) shall have effect—

(a) as if paragraph (b) provided—

“(b) those proceedings are brought within 30 days from the date of knowledge unless the Court considers that there is good reason for extending the period within which proceedings may be brought, in which case the Court may extend that period up to a maximum of 3 months from the date of knowledge.”; and

(b) as if “date of knowledge” were defined for that purpose as the date when the economic operator first knew or ought to have known that grounds for the bringing of the proceedings had arisen.

(5) In this regulation, “the 2009 Regulations” means the Public Contracts (Amendment) Regulations 2009(c).

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(a) S.S.I. 2006/2, to which there are amendments not relevant to these Regulations.

(b) Regulation 47(7), paragraph (b) of which addressed time limits in Part 9 of the Public Contracts Regulations as originally made in 2006, was omitted when a new Part 9 was substituted by regulation 10 of the 2009 Regulations, but its effect was preserved in relation to certain transitional cases by regulation 11 of the 2009 Regulations.

(c) S.I. 2009/2992.

**Time Limits etc and the Utilities Contracts Regulations: saving with modification of the provisions as amended in 2009**

6.—(1) Regulation 19 does not affect any proceedings where the date of knowledge has occurred before 1st October 2011.

(2) In those circumstances, regulation 45D of the Utilities Contracts Regulations shall have effect as if paragraph (2) provided—

“(2) Subject to paragraphs (3) and (4), such proceedings must be started within 3 months beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.”.

**Time limits and the Utilities Contracts Regulations: modification of the existing saving of the original provisions**

7.—(1) This regulation applies where, by virtue of regulation 13 of the 2009 Regulations, regulation 45(5)(a) of the Utilities Contracts Regulations is not affected by regulation 12 of the 2009 Regulations.

(2) In those circumstances, that regulation 45(5) shall have effect as modified by the following provisions of this regulation.

(3) Where the date of knowledge has occurred before 1st October 2011, regulation 45(5) shall have effect as if paragraph (b) provided—

“(b) those proceedings are brought within 3 months from the date when the economic operator first knew or ought to have known that grounds for the bringing of the proceedings had arisen unless the Court considers that there is good reason for extending the period within which proceedings may be brought.”.

(4) Where the date of knowledge occurs on or after 1st October 2011, regulation 45(5) shall have effect—

(a) as if paragraph (b) provided—

“(b) those proceedings are brought within 30 days from the date of knowledge unless the Court considers that there is good reason for extending the period within which proceedings may be brought, in which case the Court may extend that period up to a maximum of 3 months from the date of knowledge.”; and

(b) as if “date of knowledge” were defined for that purpose as the date when the economic operator first knew or ought to have known that grounds for the bringing of the proceedings had arisen.

(5) In this regulation, “the 2009 Regulations” means the Utilities Contracts (Amendment) Regulations 2009(b).

**Time limits and service of proceedings: saving of Defence and Security Public Contracts Regulations 2011**

8. Regulation 26 does not affect any proceedings where the date of knowledge has occurred before 1st October 2011.

**Standstill notices and the definition of ‘tenderer’: modification of new provisions where certain transitional time limits apply**

9.—(1) The new regulation 32(18) of the Public Contracts Regulations inserted by regulation 13 of these Regulations shall have effect as if sub-paragraph (b)(ii) were omitted where the time limit

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(a) Regulation 45(5), paragraph (b) of which addressed time limits in Part 9 of the Utilities Contracts Regulations as originally made in 2006, was omitted when a new Part 9 was substituted by regulation 12 of the 2009 Regulations, but its effect was preserved in relation to certain transitional cases by regulation 13 of the 2009 Regulations.

(b) S.I. 2009/3100.

for starting the proceedings mentioned in that paragraph is a time limit which applies by virtue of—

- (a) regulation 4; or
- (b) regulation 5, but only where the limit is as modified by paragraph (3) of that regulation.

(2) The new regulation 33(15) of the Utilities Contracts Regulations inserted by regulation 20 of these Regulations shall have effect as if sub-paragraph (b)(ii) were omitted where the time limit for starting the proceedings mentioned in that paragraph is a time limit which applies by virtue of—

- (a) regulation 6; or
- (b) regulation 7, but only where the limit is as modified by paragraph (3) of that regulation.

(3) The new regulation 33(16) of the Defence and Security Public Contracts Regulations 2011 inserted by regulation 27 of these Regulations shall have effect as if sub-paragraph (b)(ii) were omitted where the time limit for starting the proceedings mentioned in that paragraph is a time limit which continues to apply by virtue of regulation 8 of these Regulations.

### **Transfer of functions etc: transitional provision**

**10.**—(1) Anything done before 1st October 2011 by the Office of Government Commerce or the Treasury under, or which was otherwise material to, any provision amended by regulation 16 or 23 shall have effect as if done by the Cabinet Office or the Minister for the Cabinet Office respectively.

(2) Where the Court has made an order before 1st October 2011 in the terms then required by regulation 47N(7)(a) or (8)(a) of the Public Contracts Regulations, regulation 47N shall apply, in relation to anything done on or after that date, subject to the amendments made by regulation 16(3) of these Regulations.

(3) Where the Court has made an order before 1st October 2011 in the terms then required by regulation 45N(7)(a) or (8)(a) of the Utilities Contracts Regulations, regulation 45N shall apply, in relation to anything done on or after that date, subject to the amendments made by regulation 23(3) of these Regulations.

(4) This regulation is without prejudice to section 17(2) (read with section 23) of the Interpretation Act 1978(a)

### **Treaty references: saving**

**11.**—(1) Regulation 17 does not affect any provision of the Public Contracts Regulations in its application to things done before 1st December 2009.

(2) Regulation 24 does not affect any provision of the Utilities Contracts Regulations in its application to things done before 1st December 2009.

## **PART 2**

### **AMENDMENT OF THE PUBLIC CONTRACTS REGULATIONS 2006**

#### **Time limits and service of proceedings**

**12.**—(1) In regulation 47(2), omit “, except in regulation 47D(2),”(b).

(2) In regulation 47D(c)—

- (a) for paragraph (2) substitute—

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(a) 1978 c.30.

(b) These words were substituted by S.I. 2009/2992.

(c) Regulations 47D, 47E and 47F were inserted by S.I 2009/2992.

“(2) Subject to paragraphs (3) to (5), such proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.”; and

(b) for paragraphs (4) and (5) substitute—

“(4) Subject to paragraph (5), the Court may extend the time limit imposed by paragraph (2) (but not any of the limits imposed by regulation 47E) where the Court considers that there is a good reason for doing so.

(5) The Court must not exercise its power under paragraph (4) so as to permit proceedings to be started more than 3 months after the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.

(6) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is issued.”.

(3) In regulation 47E, for paragraph (8) substitute—

“(8) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is issued.”.

(4) In regulation 47F, for paragraph (1) substitute—

“(1) Where proceedings are started, the economic operator must serve the claim form on the contracting authority within 7 days after the date of issue.”.

#### **Standstill notices: definition of ‘tenderer’**

13. In regulation 32—

(a) in paragraph (17)(b)(a), for “offer” substitute “offer and has not been definitively excluded”; and

(b) after paragraph (17) insert—

“(18) For the purposes of paragraph (17)(b)—

- (a) a tenderer has been excluded if its offer has been excluded from consideration; and
- (b) an exclusion is definitive if, and only if, the tenderer has been notified of the exclusion and either—
  - (i) the exclusion has been held to be lawful in proceedings under Part 9; or
  - (ii) the time limit for starting such proceedings has expired even on the assumption that the Court would have granted the maximum extension permitted by regulation 47D(4) and (5).”.

#### **Criterion for suspension of contract-making**

14. In regulation 47G(b)—

(a) for paragraph (1) substitute—

“(1) Where—

- (a) a claim form is issued in respect of a contracting authority’s decision to award the contract;
- (b) the contracting authority has become aware that the claim form has been issued and that it relates to that decision; and
- (c) the contract has not been entered into,

the contracting authority is required to refrain from entering into the contract.”; and

(b) omit paragraph (3).

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(a) Paragraph (17) was inserted by S.I. 2009/2992.  
(b) Regulation 47G was inserted by S.I. 2009/2992.

## Criteria for the rejection of economic operators

### 15. In regulation 23—

#### (a) for paragraph (1) substitute—

“(1) Subject to paragraph (2), a contracting authority shall treat as ineligible and shall not select an economic operator in accordance with these Regulations if the contracting authority has actual knowledge that the economic operator or its directors or any other person who has powers of representation, decision or control of the economic operator has been convicted of any of the following offences—

- (a) conspiracy within the meaning of section 1 or 1A of the Criminal Law Act 1977(a) or article 9 or 9A of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983(b) where that conspiracy relates to participation in a criminal organisation as defined in Article 2 of Council Framework Decision 2008/841/JHA(c);
- (b) corruption within the meaning of section 1(2) of the Public Bodies Corrupt Practices Act 1889(d) or section 1 of the Prevention of Corruption Act 1906(e), where the offence relates to active corruption;
- (c) the offence of bribery, where the offence relates to active corruption;
- (ca) bribery within the meaning of section 1 or 6 of the Bribery Act 2010(f);
- (d) fraud, where the offence relates to fraud affecting the European Communities’ financial interests as defined by Article 1 of the Convention on the protection of the financial interests of the European Communities(g), within the meaning of—
  - (i) the offence of cheating the Revenue;
  - (ii) the offence of conspiracy to defraud;
  - (iii) fraud or theft within the meaning of the Theft Act 1968(h), the Theft Act (Northern Ireland) 1969(i), the Theft Act 1978(j) or the Theft (Northern Ireland) Order 1978(k);

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- (a) 1977 c.45; section 1 was amended by section 5(1) of the Criminal Attempts Act 1981 (c.47), Part 2 of Schedules 1 and 2 to the Criminal Justice (Terrorism and Conspiracy) Act 1998 (c.40) and Schedule 1 to the Trade Union and Labour Relations (Consolidation) Act 1992 (c.52). Section 1A was inserted by section 5(1) of the Criminal Justice (Terrorism and Conspiracy) Act 1998 (c.40) and was amended by section 72(1)(a) of the Coroners and Justice Act 2009 (c.25).
  - (b) S.I. 1983/1120 (N.I.13); article 9 was amended by Part 2 of Schedules 1 and 2 to, and article 9A was inserted by section 6(1) of, the Criminal Justice (Terrorism and Conspiracy) Act 1998 (c.40). There are other amendments but none is relevant.
  - (c) OJ No L 300, 11.11.2008, p.42.
  - (d) 1889 c.69; this Act was repealed by Schedule 2 to the Bribery Act 2010 (c.23).
  - (e) 1906 c.34; section 1 was amended by section 108(2) of the Anti-terrorism, Crime and Security Act 2001 (c.24) and repealed by Schedule 2 to the Bribery Act 2010 (c.23).
  - (f) 2010 c.23.
  - (g) OJ No C 316, 27.11.1995, p.49.
  - (h) 1968 c.60; section 14(3) was repealed by Schedule 2 to the Postal Services Act 2000 (Consequential Modifications) Order 2003 (S.I. 2003/2908). Sections 15A and 15B were inserted by section 1(1) of the Theft (Amendment) Act 1996 (c.62) and section 15B was amended by article 278 of the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001 (S.I. 2001/3649). Section 16 was amended by section 5(5) of the Theft Act 1978 (c.31). Sections 15, 15A, 15B and 16 were repealed, and section 20 was amended, by Schedules 1 and 3 to the Fraud Act 2006 (c.35).
  - (i) 1969 c.16 (N.I.); section 14(3) was repealed by Schedule 2 to the Postal Services Act 2000 (Consequential Modifications) Order 2003 (S.I. 2003/2908). Sections 15A and 15B were inserted by article 3(1) of the Theft (Amendment) (Northern Ireland) Order 1997 (S.I. 1997/277 (N.I.3)). Section 15B was amended by article 279 of the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001 (S.I. 2001/3649). Sections 15, 15A, 15B and 16 were repealed, and sections 19 and 23 were amended, by Schedules 1 and 3 to the Fraud Act 2006 (c.35).
  - (j) 1978 c.31; section 1 was amended by section 4(1) of the Theft (Amendment) Act 1996 (c.62). Sections 1 and 2 were repealed by Schedules 1 and 3 to the Fraud Act 2006 (c.35). Section 5 was amended by Schedule 2 to the Extradition Act 1989 (c.33) and Schedules 1 and 3 to the Fraud Act 2006.
  - (k) S.I. 1978/1407 (N.I.23); article 3 was amended by article 6(1) of the Theft (Amendment) (Northern Ireland) Order 1997 (S.I. 1997/277 (N.I.3)). Articles 3, 4 and 7(1) were repealed by Schedules 1 and 3 to the Fraud Act 2006 (c.35). There are other amendments but none is relevant.

- (iv) fraudulent trading within the meaning of section 458 of the Companies Act 1985(a), article 451 of the Companies (Northern Ireland) Order 1986(b) or section 993 of the Companies Act 2006(c);
  - (v) fraudulent evasion within the meaning of section 170 of the Customs and Excise Management Act 1979(d) or section 72 of the Value Added Tax Act 1994(e);
  - (vi) an offence in connection with taxation in the European Union within the meaning of section 71 of the Criminal Justice Act 1993(f);
  - (vii) destroying, defacing or concealing of documents or procuring the execution of a valuable security within the meaning of section 20 of the Theft Act 1968(g) or section 19 of the Theft Act (Northern Ireland) 1969(h);
  - (viii) fraud within the meaning of section 2, 3 or 4 of the Fraud Act 2006(i); or
  - (ix) making, adapting, supplying or offering to supply articles for use in frauds within the meaning of section 7 of the Fraud Act 2006;
- (e) money laundering within the meaning of section 340(11) of the Proceeds of Crime Act 2002(j);
- (ea) an offence in connection with the proceeds of criminal conduct within the meaning of section 93A, 93B or 93C of the Criminal Justice Act 1988(k) or article 45, 46 or 47 of the Proceeds of Crime (Northern Ireland) Order 1996(l);
- (eb) an offence in connection with the proceeds of drug trafficking within the meaning of section 49, 50 or 51 of the Drug Trafficking Act 1994(m); or
- (f) any other offence within the meaning of Article 45(1) of the Public Sector Directive as defined by the national law of any relevant State.
- (1A) In paragraph (1), “active corruption” means corruption as defined in Article 3 of the Council Act of 26 May 1997(n) or Article 3(1) of Council Joint Action 98/742/JHA.” (o);
- (b) in paragraph (4)(a)—
- (i) after “individual” insert “is a person in respect of whom a debt relief order has been made or”; and
  - (ii) after “bankruptcy restrictions order” insert “or a debt relief restrictions order”; and
- (c) for paragraph (4)(h) substitute—
- “(h) is guilty of serious misrepresentation in providing any information referred to within this regulation or regulation 24, 25, 26 or 27, or has not provided such information in response to a request by the contracting authority;”.

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- (a) 1985 c.6; section 458 was modified by regulation 4 of, and Part 1 of Schedule 2 to, the Limited Liability Partnerships Regulations 2001 (S.I. 2001/1090) and repealed by Schedule 16 to the Companies Act 2006 (c.46).
  - (b) S.I. 1986/1032 (N.I.6); article 451 was modified by regulation 4 of, and Part 1 of Schedule 2 to, the Limited Liability Partnerships Regulations (Northern Ireland) 2004 (S.R. (NI) 2004 No 307) and repealed by Schedule 16 to the Companies Act 2006 (c.46). There are other amendments but none is relevant.
  - (c) 2006 c.46; section 993 is applied (with modifications) by regulation 47 of the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009 (S.I. 2009/1804) and by regulation 3 of, and Schedule 1 to, the Unregistered Companies Regulations 2009 (S.I. 2009/2436).
  - (d) 1979 c.2.
  - (e) 1994 c.23; section 72 was amended by section 17 of the Finance Act 2003 (c.40).
  - (f) 1993 c.36.
  - (g) 1968 c.60; section 20 was amended by Schedules 1 and 3 to the Fraud Act 2006 (c.35).
  - (h) 1969 c.16 (N.I.); section 19 was amended by Schedules 1 and 3 to the Fraud Act 2006 (c.35).
  - (i) 2006 c.35.
  - (j) 2002 c.29.
  - (k) 1988 c.33; sections 93A, 93B and 93C were respectively inserted by sections 29(1), 30 and 31 of the Criminal Justice Act 1993 (c.36) and repealed by Schedules 11 and 12 to the Proceeds of Crime Act 2002 (c.29).
  - (l) S.I. 1996/1299 (N.I.9); articles 45, 46 and 47 were repealed by Schedules 11 and 12 to the Proceeds of Crime Act 2002 (c.29). There are other amendments but none is relevant.
  - (m) 1994 c.37; sections 49, 50 and 51 were repealed by Schedules 11 and 12 to the Proceeds of Crime Act 2002 (c.29).
  - (n) OJ No C 195, 25.6.1997, p.2.
  - (o) OJ No L 358, 31.12.1998, p.2; repealed by Council Framework Decision 2003/568/JHA (OJ No L 192, 31.7.2003, p.54).

## Transfer of functions etc

- 16.—(1) In regulation 2(1), omit the definition of “Office of Government Commerce”.
- (2) In each of the following provisions, for “Office of Government Commerce” substitute “Cabinet Office”:
- (a) regulation 14(2);
  - (b) regulation 30(9);
  - (c) regulation 32(16);
  - (d) regulation 40(1);
  - (e) regulation 40(2) (in both places);
  - (f) regulation 41(1) (in both places);
  - (g) regulation 41(3).
- (3) In regulation 47N(a)—
- (a) for paragraph (7) substitute—
    - “(7) Subject to paragraph (7A), where a contracting authority is ordered by the High Court of England and Wales to pay a civil financial penalty under this regulation—
    - (a) the Court’s order must state that the penalty is payable to the Minister for the Cabinet Office;
    - (b) the Court must send a copy of the order to the Minister;
    - (c) the contracting authority must pay the penalty to the Minister; and
    - (d) the Minister must, on receipt of the penalty, pay it into the Consolidated Fund.
  - (7A) Where the Minister for the Cabinet Office, or the Cabinet Office, is ordered to pay a civil financial penalty under this Part—
    - (a) paragraph (7) does not apply; and
    - (b) the Minister for the Cabinet Office must pay the penalty into the Consolidated Fund.”;
  - (b) in paragraph (8), for “Where” substitute “Subject to paragraph (8A), where”;
  - (c) after paragraph (8), insert—
    - “(8A) Where the Department of Finance and Personnel is ordered to pay a civil financial penalty under this Part—
    - (a) Paragraph (8) does not apply; and
    - (b) the Department must pay the penalty into the Consolidated Fund of Northern Ireland.”; and
  - (d) in paragraph (9)(a)—
    - (i) for “Treasury” substitute “Minister for the Cabinet Office”; and
    - (ii) for “them” substitute “the Minister”.
- (4) In Schedule 1, under the entry for “HM Treasury”, omit “Office of Government Commerce”.

## Treaty references

- 17.—(1) In regulation 2(1)—
- (a) omit the definition of “EC Treaty”; and
  - (b) after the definition of “telecommunications services”, insert—
    - “TFEU” means the Treaty on the Functioning of the European Union”(b).

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(a) Regulation 47N was inserted by S.I 2009/2992.  
(b) OJ No C 115, 9.5.2008, p.47.



(2) In regulations 6(2)(c) and 36(6)(d), for “Article 296 of the EC Treaty” substitute “Article 346 of the TFEU”.

(3) In each of the following provisions, for “EC Treaty” substitute “TFEU”:

- (a) regulation 6(2)(d)(i);
- (b) regulation 6(2)(l);
- (c) regulation 30(8)(b);
- (d) regulation 36(6)(e)(i).

#### **Miscellaneous minor amendments**

**18.**—(1) In regulation 47D(3)(b)(a), for paragraph (i) substitute the following—

“(i) 15 days beginning with the day after the day on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;”.

(2) In regulation 47E(2)(b), for “in any other case” substitute “in any event”.

(3) In regulation 47K(6)(c), for “exceeds” substitute “is equal to or exceeds”.

## **PART 3**

### **AMENDMENT OF THE UTILITIES CONTRACTS REGULATIONS 2006**

#### **Time limits and service of proceedings**

**19.**—(1) In regulation 45(2), omit “, except in regulation 45D(2),”(b).

(2) In regulation 45D(c)—

(a) for paragraph (2) substitute—

“(2) Subject to paragraphs (3) to (5), such proceedings must be started within 30 days beginning with the date when the utility first knew or ought to have known that grounds for starting the proceedings had arisen.”; and

(b) for paragraphs (4) and (5) substitute—

“(4) Subject to paragraph (5), the Court may extend the time limit imposed by paragraph (2) (but not any of the limits imposed by regulation 45E) where the Court considers that there is a good reason for doing so.

(5) The Court must not exercise its power under paragraph (4) so as to permit proceedings to be started more than 3 months after the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.

(6) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is issued.”.

(3) In regulation 45E, for paragraph (8) substitute—

“(8) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is issued.”.

(4) In regulation 45F, for paragraph (1) substitute—

“(1) Where proceedings are started, the economic operator must serve the claim form on the utility within 7 days after the date of issue.”.

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(a) Regulations 47D, 47E and 47K were inserted by S.I. 2009/2992.

(b) These words were substituted by S.I. 2009/3100.

(c) Regulations 45D, 45E and 45F were inserted by S.I. 2009/3100.

### **Standstill notices: definition of ‘tenderer’**

**20.** In regulation 33—

- (a) in paragraph (14)(b)(a), for “offer” substitute “offer and has not been definitively excluded”; and
- (b) after paragraph (14) insert—
  - “(15) For the purposes of paragraph (14)(b)—
  - (a) a tenderer has been excluded if its offer has been excluded from consideration; and
  - (b) an exclusion is definitive if, and only if, the tenderer has been notified of the exclusion and either—
    - (i) the exclusion has been held to be lawful in proceedings under Part 9; or
    - (ii) the time limit for starting such proceedings has expired even on the assumption that the Court would have granted the maximum extension permitted by regulation 45D(4) and (5).”.

### **Criterion for suspension of contract-making**

**21.** In regulation 45G(b)—

- (a) for paragraph (1) substitute—
  - “(1) Where—
  - (a) a claim form is issued in respect of a utility’s decision to award the contract;
  - (b) the utility has become aware that the claim form has been issued and that it relates to that decision; and
  - (c) the contract has not been entered into,the utility is required to refrain from entering into the contract.”; and
- (b) omit paragraph (3).

### **Criteria for the rejection of economic operators**

**22.** In Regulation 26—

- (a) for paragraph (1) substitute—
  - “(1) Subject to paragraph (2), where a utility is a contracting authority, it shall treat as ineligible and shall not select an economic operator in accordance with these Regulations if the utility has actual knowledge that the economic operator or its directors or any other person who has powers of representation, decision or control of the economic operator has been convicted of any of the following offences—
  - (a) conspiracy within the meaning of section 1 or 1A of the Criminal Law Act 1977 or article 9 or 9A of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 where that conspiracy relates to participation in a criminal organisation as defined in Article 2 of Council Framework Decision 2008/841/JHA;
  - (b) corruption within the meaning of section 1(2) of the Public Bodies Corrupt Practices Act 1889 or section 1 of the Prevention of Corruption Act 1906, where the offence relates to active corruption;
  - (c) the offence of bribery, where the offence relates to active corruption;
  - (ca) bribery within the meaning of section 1 or 6 of the Bribery Act 2010;

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(a) Paragraph (14) was inserted by S.I.2009/3100.  
(b) Regulation 45G was inserted by S.I. 2009/3100.

- (d) fraud, where the offence relates to fraud affecting the European Communities' financial interests as defined by Article 1 of the Convention on the protection of the financial interests of the European Communities, within the meaning of—
  - (i) the offence of cheating the Revenue;
  - (ii) the offence of conspiracy to defraud;
  - (iii) fraud or theft within the meaning of the Theft Act 1968, the Theft Act (Northern Ireland) 1969, the Theft Act 1978 or the Theft (Northern Ireland) Order 1978;
  - (iv) fraudulent trading within the meaning of section 458 of the Companies Act 1985, article 451 of the Companies (Northern Ireland) Order 1986 or section 993 of the Companies Act 2006;
  - (v) fraudulent evasion within the meaning of section 170 of the Customs and Excise Management Act 1979 or section 72 of the Value Added Tax Act 1994;
  - (vi) an offence in connection with taxation in the European Union within the meaning of section 71 of the Criminal Justice Act 1993;
  - (vii) destroying, defacing or concealing of documents or procuring the execution of a valuable security within the meaning of section 20 of the Theft Act 1968 or section 19 of the Theft Act (Northern Ireland) 1969;
  - (viii) fraud within the meaning of section 2, 3 or 4 of the Fraud Act 2006; or
  - (ix) making, adapting, supplying or offering to supply articles for use in frauds within the meaning of section 7 of the Fraud Act 2006;
- (e) money laundering within the meaning of section 340(11) of the Proceeds of Crime Act 2002;
- (ea) an offence in connection with the proceeds of criminal conduct within the meaning of section 93A, 93B or 93C of the Criminal Justice Act 1988 or article 45, 46 or 47 of the Proceeds of Crime (Northern Ireland) Order 1996;
- (eb) an offence in connection with the proceeds of drug trafficking within the meaning of section 49, 50 or 51 of the Drug Trafficking Act 1994; or
- (f) any other offence within the meaning of Article 45(1) of the Public Sector Directive as defined by the national law of any relevant State.

(1A) In paragraph (1), “active corruption” means corruption as defined in Article 3 of the Council Act of 26 May 1997 or Article 3(1) of Council Joint Action 98/742/JHA.”(a);

- (b) in paragraph (5)(a)—
  - (i) after “individual” insert “is a person in respect of whom a debt relief order has been made or”; and
  - (ii) after “bankruptcy restrictions order” insert “or a debt relief restrictions order”; and
- (c) for paragraph (5)(h) substitute—
  - “(h) is guilty of serious misrepresentation in providing any information referred to within this regulation or regulation 24 or 27, or has not provided such information in response to a request by the contracting authority.”.

### **Transfer of functions etc**

**23.—**(1) In regulation 2(1), omit the definition of “Office of Government Commerce”.

(2) In each of the following provisions, for “Office of Government Commerce” substitute “Cabinet Office”:

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(a) For information about the legislation and other texts mentioned in the paragraphs substituted by this paragraph, see the footnotes to the corresponding substitution made by regulation 15(a).

- (a) regulation 9(1)(a);
  - (b) regulation 9(1)(c)(ii);
  - (c) regulation 34(5)(e)(i);
  - (d) regulation 34(5)(e)(iii)(aa);
  - (e) regulation 39(3);
  - (f) regulation 39(6).
- (3) In regulation 45N(a)—
- (a) for paragraph (7) substitute—
    - “(7) Where a contracting authority is ordered by the High Court of England and Wales to pay a civil financial penalty under this regulation—
    - (a) the Court’s order must state that the penalty is payable to the Minister for the Cabinet Office;
    - (b) the Court must send a copy of the order to the Minister;
    - (c) the utility must pay the penalty to the Minister; and
    - (d) the Minister must, on receipt of the penalty, pay it into the Consolidated Fund.”;
    - and
  - (b) in paragraph (9)(a)—
    - (i) for “Treasury” substitute “Minister for the Cabinet Office”; and
    - (ii) for “them” substitute “the Minister”.

#### **Treaty references**

- 24.**—(1) In regulation 2(1)—
- (a) omit the definition of “EC Treaty”; and
  - (b) after the definition of “supply contract”, insert—
    - “TFEU” means the Treaty on the Functioning of the European Union”(b).
- (2) in each of the following provisions, for “EC Treaty” substitute “TFEU”:
- (a) regulation 6(e)(i);
  - (b) regulation 6(i);
  - (c) regulation 30(8)(b).

#### **Miscellaneous minor amendments**

- 25.**—(1) In regulation 45D(3)(b)(c), for paragraph (i) substitute the following—
- “(i) 15 days beginning with the day after the day on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;”.
- (2) In regulation 45E(2)(b), for “in any other case” substitute “in any event”.
- (3) In regulation 45K(6)(c) for “exceeds” substitute “is equal to or exceeds”.

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(a) Regulation 45N was inserted by S.I. 2009/3100.  
 (b) OJ No C 115, 9.5.2008, p.47.  
 (c) Regulations 45D, 45E and 45K were inserted by S.I. 2009/3100.

## PART 4

### AMENDMENT OF THE DEFENCE AND SECURITY PUBLIC CONTRACTS REGULATIONS 2011

#### **Time Limits and service of proceedings**

- 26.—(1) In regulation 50(2), omit “, except in regulation 53(2),”.
- (2) In regulation 53—
- (a) for paragraph (2) substitute—
- “(2) Subject to paragraphs (3) to (5), such proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.”; and
- (b) for paragraphs (4) and (5) substitute—
- “(4) Subject to paragraph (5), the Court may extend the time limit imposed by paragraph (2) (but not any of the limits imposed by regulation 54) where the Court considers that there is a good reason for doing so.
- (5) The Court must not exercise its power under paragraph (4) so as to permit proceedings to be started more than 3 months after the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.
- (6) For the purposes of this regulation, in England and Wales and in Northern Ireland, proceedings are to be regarded as started when the claim form is issued.”.
- (3) In regulation 54, for paragraph (8) substitute—
- “(8) For the purposes of this regulation, in England and Wales and in Northern Ireland, proceedings are to be regarded as started when the claim form is issued.”.
- (4) In regulation 55, for paragraph (1) substitute—
- “(1) Where proceedings are started, the economic operator must serve the claim form, or in Scotland the proceedings, on the contracting authority within 7 days after the date of issue.”.

#### **Standstill notices: definition of ‘tenderer’**

27. In regulation 33—
- (a) in paragraph (15)(b), for “offer” substitute “offer and has not been definitively excluded”; and
- (b) after paragraph (15) insert—
- “(16) For the purposes of paragraph (15)(b)—
- (a) a tenderer has been excluded if its offer has been excluded from consideration; and
- (b) an exclusion is definitive if, and only if, the tenderer has been notified of the exclusion and either—
- (i) the exclusion has been held to be lawful in proceedings under Part 9; or
- (ii) the time limit for starting such proceedings has expired even on the assumption that the Court would have granted the maximum extension permitted by regulation 53(4) and (5).”.

#### **Criterion for suspension of contract-making**

28. In regulation 56—
- (a) for paragraph (1) substitute—
- “(1) Where—

- (a) a claim form is issued, or in Scotland proceedings are brought, in respect of a contracting authority's decision to award the contract;
  - (b) the contracting authority has become aware that the claim form has been issued, or in Scotland the proceedings have been brought, and that the claim form relates, or the proceedings relate, to that decision; and
  - (c) the contract has not been entered into,
- the contracting authority is required to refrain from entering into the contract.”; and
- (b) omit paragraph (3).

## PART 5

### AMENDMENT OF SCOTTISH REGULATIONS

#### **Transfer of functions: the Public Contracts (Scotland) Regulations 2006**

- 29.**—(1) In regulation 2(1), omit the definition of “Office of Government Commerce”.
- (2) In regulation 41(1) and (3), for “Office of Government Commerce” substitute “Cabinet Office”.
- (3) In Schedule 1, under the entry for “HM Treasury”, omit “Office of Government Commerce”.

#### **Transfer of functions: the Utilities Contracts (Scotland) Regulations 2006**

- 30.**—(1) In regulation 2(1), omit the definition of “Office of Government Commerce”.
- (2) in each of the following provisions, for “Office of Government Commerce” substitute “Cabinet Office”:—
- (a) regulation 9(1)(a);
  - (b) regulation 9(1)(c)(ii);
  - (c) regulation 34(5)(e)(i);
  - (d) regulation 34(5)(e)(iii)(aa);
  - (e) regulation 39(3);
  - (f) regulation 39(5).

*Mark Harper*  
Parliamentary Secretary, Cabinet Office

17th August 2011

#### **EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

These Regulations amend various statutory instruments relating to public procurement, namely the Public Contracts Regulations 2006 (“the PCR”), the Utilities Contracts Regulations 2006 (“the UCR”), the Defence and Security Public Contracts Regulations 2011 (“the DSPCR”), the Public Contracts (Scotland) Regulations 2006 (“the Scottish PCR”) and the Utilities Contracts (Scotland) Regulations 2006 (“the Scottish UCR”).

The PCR (as previously amended) implemented, for England, Wales and Northern Ireland, and the Scottish PCR (as previously amended) implemented for Scotland, Directive 2004/18/EC of the European Parliament and Council on the co-ordination of procedures for the award of public works contracts, public supply contracts and public services contracts (OJ L 134, 30.4.2004, p114)

and Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ No L 395, 30.12.1989, p33) as amended(a).

The UCR (as previously amended) implemented, for England, Wales and Northern Ireland, and the Scottish UCR implemented for Scotland, Directive 2004/17/EC of the European Parliament and Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p1) and Council Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ No L 76, 23.3.1992, p14) as amended(b).

The DSPCR implemented Directive 2009/81/EC of the European Parliament and Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts in the field of defence and security (OJ No L 216, 20.8.2009, p.76).

Regulations 12, 19 and 26 change the general time limit within which economic operators must start any Court proceedings which they wish to take under the PCR, UCR or DSPCR respectively. The new limit is 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen, but the Court may extend this to up to 3 months where it considers that there is a good reason for doing so. For these purposes (and also for the purposes of the special time limits applicable to proceedings for a declaration of ineffectiveness), proceedings are to be regarded as started when they are issued, and the economic operator must serve the claim form within 7 days after the date of issue. These changes result from the judgment of the Court of Justice of the European Union in Case C-406/08 (Uniplex) which held certain features of the limits formerly applicable under the PCR and UCR to be incompatible with EU Law.

Transitionally (by virtue of regulations 3 to 8), former time limits will continue to apply (subject to modification) where, before the commencement of these amendments, the economic operator already knew, or ought to have known, of the grounds for starting proceedings.

Regulations 13, 20 and 27 modify the requirement in the PCR, UCR and DSPCR respectively to send a standstill notice to tenderers, by excepting tenderers who have been excluded from the procurement process where the exclusion has been held to be lawful in proceedings under the Regulations or where the time limit for starting such proceedings has expired. Regulation 9 makes a transitional modification.

Regulations 14, 21 and 28 modify the requirement (imposed by the PCR, UCR and DSPCR respectively) on contracting authorities and utilities to refrain from entering into a contract the award of which is challenged by proceedings under the Regulations. The requirement will now arise when the authority or utility has become aware that a claim form has been issued.

Regulations 15 and 22 amend the list of criminal offences relevant to the rejection of economic operators under regulation 23(1) of the PCR or regulation 26(1) of the UCR respectively. These amendments include updating the list to include relevant offences created or consolidated since those Regulations were made, and inserting references to offences relevant to Northern Ireland. Also, regulation 23(4) of the PCR and regulation 26(5) of the UCR are amended to take account of debt relief orders and debt relief restriction orders, and to bring the provisions relating to misrepresentation closer into line with the wording of the applicable Directive.

Regulations 16, 23, 29 and 30 amend the PCR, UCR, Scottish PCR and Scottish UCR respectively, primarily to reflect machinery of Government changes. These amendments include

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- (a) By Council Directive 92/50/EEC relating to the coordination of procedures for the award of public services contracts (OJ No L 209, 24.7.1992, p1) and by Directive 2007/66/EC of the European Parliament and Council amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ No L 335, 20.12.2007, p31).
  - (b) By Directive 2007/66/EC of the European Parliament and Council amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ No L 335, 20.12.2007, p31).

replacing references to the Office of Government Commerce with references to the Cabinet Office, and references to the Treasury with references to the Minister for the Cabinet Office.

Regulations 17 and 24 update certain treaty references to reflect changes made by the Treaty of Lisbon, subject to the saving made by regulation 11.

Regulations 18 and 25 make miscellaneous minor amendments to the PCR and UCR respectively.

An impact assessment has not been produced for this instrument as no significant impact on the private or voluntary sectors is foreseen.

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