

Procurement Policy Note – Amendments to the Procurement Regulations

Information Note 06/11 31 August 2011

Issue

1. A number of amendments to the public procurement regulations will come into effect from October 2011. These change the time limits for Court challenges to procurement decisions, following the ECJ's "Uniplex" ruling and make some related procedural changes; modify the criteria for the 'automatic suspension'; amend the definitions of certain offences and other causes for which economic operators may, or must, be rejected; reflect Machinery of Government changes affecting the Office of Government Commerce (OGC); and make a few miscellaneous minor updates, improvements and corrections. These changes are summarised in the attached annex.
2. These changes affect the Public Contracts Regulations 2006 (PCR), the Utilities Contracts Regulations 2006 (UCR), and with respect to time limits, related procedural changes, and the automatic suspension only, the Defence and Security Public Contract Regulations 2011. The changes are made by the Public Procurement (Miscellaneous Amendments) Regulations 2011 (SI 2011/2053).

Timing

3. These changes come into effect on 1 October 2011.

Dissemination

4. Please circulate this Procurement Policy Note (PPN) within your organisation, agencies, non-departmental public bodies (NDPBs), and any other bodies for which you are responsible, drawing it to the particular attention of those with a purchasing role.

Contact

5. Any enquiries should be addressed to the Service Desk: 0845 000 4999
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Background

6. The judgement of the ECJ in the “Uniplex” case requires changes to the general time limits for starting proceedings in the High Court by interested parties challenging decisions made by contracting authorities or utilities. In Uniplex the ECJ ruled that some features of the original wording of the Public Contracts Regulations 2006 were incompatible with EU law.
7. The Government undertook a public consultation process on possible options for achieving compliance with the ECJ’s decision. Following that consultation, by the present changes an economic operator is required to bring a challenge within 30 days of when it knew or ought to have known of the grounds for action. The Courts have the discretion to extend this period if there are good reasons to do so, to a maximum of three months. There are also some changes to how the ‘nuts and bolts’ of the general time limit and the ineffectiveness time limit will work (summarised in the annex, which also explains the important transitional position). There are also some related changes affecting service of the claim form and to whom standstill notices must be sent, and a change to the point at which “automatic suspension” of a contract award is triggered.
8. We have updated the grounds upon which an economic operator can be rejected under regulation 23 of the PCR and regulation 26 of the UCR. The changes include updating, where appropriate, the list of criminal offences which trigger mandatory exclusion to include relevant offences created or consolidated since the Regulations were made. Some improvements to the drafting have also been made to bring the provisions more closely in line with the Directives and to ensure greater certainty and transparency.
9. References to OGC and the Treasury have, where appropriate, been replaced by references to the Cabinet Office, OGC’s functions having been moved to the Cabinet Office. Treaty references have been updated to reflect the Treaty of Lisbon, plus a few other minor corrections and wording changes.
10. Although they do not fundamentally change the procedural rules for awarding contracts, these changes are various and quite detailed. An attached annex therefore gives more information.
11. Existing guidance on the mandatory exclusion of economic operators, issued in 2010, will also be amended in due course to take into account the above mentioned updates.
12. The amendments to regulation 23 of the PCR and regulation 26 of the UCR do not affect the extent or duration of any mandatory exclusion. The Cabinet Office intends to undertake a review later this year of the mandatory exclusion provisions, including whether and under what circumstances mandatory exclusion might be lifted, and if so, how that might be undertaken.

Procurement Policy Note 6/11; annex summarising the changes

1. The amendments to the public procurement rules do the following:
 - change the time limits for starting procurement proceedings in the High Court
 - change procedural requirements about service of the claim form
 - modify the trigger for the ‘automatic suspension’
 - update the criteria for the rejection of economic operators
 - replace references to the OGC and Treasury with references to the Cabinet Office and Minister for the Cabinet office
 - update treaty references to reflect the Treaty of Lisbon
 - make a few miscellaneous minor corrections/improvements.
2. These changes are made by the Public Procurement (Miscellaneous Amendments) Regulations 2011 (S.I. 2011/2053) which can be accessed at <http://www.legislation.gov.uk/ukxi/2011/2053/contents/made>. The Regulations include an Explanatory Note at the end which indicates which provisions do what.
3. The Regulations amend the Public Contracts Regulations 2006 (“the PCR”), the Utilities Contracts Regulations 2006 (“the UCR”) and, in some respects, the new Defence and Security Public Contracts Regulations 2006 (“the DSPCR”) which came into force on 21st August 2011¹.
4. This Note summarises the changes. For more information on the reasons behind the changes to the time limits, the service requirements and the automatic suspension, see the Cabinet Office’s response to the public consultation, at <http://www.cabinetoffice.gov.uk/resource-library/%E2%80%98uniplex%E2%80%99-consultation-response>

Time Limits and related procedural changes

5. These changes arise from the Cabinet Office’s consultation on the best long term response to the ECJ’s judgment in the Uniplex case².

¹ The DSPCR are amended to address the first 3 bullet points in para 1 – the other changes are already incorporated into the DSPCR as originally made on 28th July 2011.

² The Uniplex judgement is at : <http://eur-lex.europa.eu/Notice.do?val=509501:cs&lang=en&list=523364:cs,522034:cs,523392:cs,516632:cs,509501:cs,507232:cs,503019:cs,503016:cs,&pos=5&page=1&nbl=8&pgs=10&hwords=uniplex-&checktexte=checkbox&visu=#texte>

6. The features of the new general time limit³ are-
- a limit of 30 days from the day on which the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen (called “the date of knowledge” in this Note)
 - discretion for the Court to extend this where there is a good reason for doing so, but only up to a maximum of 3 months from the date of knowledge.
7. In substance, these new limits will apply to all cases where the date of knowledge occurs on or after 1st October 2011. For cases where it occurred earlier, the limit will continue to be the old limit as interpreted in the way required by the ECJ, i.e. 3 months from the date of knowledge, with unlimited discretion for the Court to extend.
8. These changes do not affect the more specific 10/15 days guaranteed by reg 47D(3) PCR, 45D(3) UCR and 53(3) DSPCR⁴.
- The new 30 day limit will work in a slightly different way from the previous limit-
- if the period would otherwise have ended on a non-working day, it is extended to the next working day
 - claimants will merely have to issue the claim form within the limit, rather than issue and serve it
9. However, there is a new requirement to serve the claim form within 7 days of issue (as in judicial review). This will also apply to ineffectiveness proceedings.
10. Where a tenderer has been excluded prior to award stage, and 3 months have elapsed from the date of knowledge of the exclusion, the contracting authority or utility will not need to send a standstill notice to the tenderer. This change does not apply if the date of knowledge occurred before 1st October 2011.

The automatic suspension

11. The automatic suspension of a contracting authority's (or utility's) ability to enter into a contract will now be triggered when the contracting authority (or utility) becomes aware that a claim form has been issued and that it relates to that contract. This addresses problems with using the 'deemed service' rules as the trigger, as originally provided for when the automatic suspension was introduced in 2009. This change applies from 1st

The consultation is at:

http://webarchive.nationalarchives.gov.uk/20110405223722/http://www.ogc.gov.uk/whats_new_notification_of_consultation.asp

³ That is, the limit imposed by reg 47D PCR, 45D UCR and 53 DSPCR. The ineffectiveness time limits in reg 47E PCR, 45E UCR and 54 DSPCR are unaffected except that, as with the general time limit, it will now be only the issue of the claim form, rather than its service, that will need to be accomplished within the relevant limit.

⁴ In practice, the guarantee will seldom add anything to the new 30 day limit, but may do so in the unusual event that there is enough delay between the date of knowledge (which starts time running towards the 30 day limit) and the specific event (of the kind mentioned in 47D(3) etc) which starts time running for the purposes of the shorter 10/15 day limit.

October 2011.

Rejection of Economic Operators

12. The grounds upon which an economic operator must be rejected under regulation 23 (1) of the PCR and regulation 26(1) of the UCR have been updated, the main changes include: -

- updating the list of offences to include offences created or consolidated since the Regulations came into force (original references have been retained where necessary in order to capture historical offences);
- insertion of the relevant Northern Ireland offences to provide greater transparency;
- conspiracy has been extended to capture conspiracy offences committed outside England and Wales (or outside the UK in the case of Northern Ireland);
- the corruption provisions have been brought into line with the Directives by limiting mandatory exclusion to convictions for active corruption (in effect giving, rather than receiving, a bribe);
- the statutory definition of money laundering has been improved by directly referencing the Proceeds of Crime Act 2002, rather than the cumbersome cross-reference to the Money Laundering Regulations 2007; and
- the principal money laundering offences have been inserted in order to capture historical convictions and those still pursued under transitional arrangements.

13. The grounds upon which an economic operator may be rejected under regulation 23 (4) of the PCR and regulation 26 (5) of the UCR have also been updated;-

- references to debt relief orders and debt relief restrictions orders⁵ have been inserted; and
- the provisions relating to misrepresentation have been strengthened and brought more closely into line with the wording of the Directives.

Bribery Act 2010

14. A new mandatory ground of exclusion was inserted into regulation 23(1) of the PCR (and is mirrored in regulation 26(1) of UCR) on 1 July 2011 pursuant to the Bribery Act (Consequential Amendments) Order 2011 (SI 2011/1441), as follows: -

(ca) bribery within the meaning of section 1 or 6 of the Bribery Act 2010;

15. The offences relating to being bribed (section 2) and the offence of 'failure of commercial organisations to prevent bribery' (section 7) will not trigger mandatory exclusion under the procurement regulations, but may give rise to grounds in support of a discretionary exclusion in accordance with regulation 23(4) PCR or 26(5) UCR.

16. The core Pre-Qualification Questionnaire, first issued in December 2010⁶, will shortly be revised and reissued to reflect all of the changes to regulation 23 of the PCR.

⁵ Introduced on 6 April 2009 pursuant to the Tribunals, Courts and Enforcement Act 2007.

References to the OGC and Treasury

17. References in the PCR and UCR to the OGC and the Treasury are, where appropriate, replaced with references to the Cabinet Office and its Minister. This reflects the transfer of responsibility for OGC from the Treasury to the Minister for the Cabinet Office last year, and the subsequent administrative integration of the OGC into the Cabinet Office.
18. In practice, this mainly affects-
- obligations on contracting authorities and utilities to report information to Government (for onward transmission to the EU Commission). Such reports are to be sent to the Cabinet Office
 - the logistics of the payment and enforcement of civil financial penalties
 - the mechanism for obtaining from the EU Commission 'article 30' exemptions for particular utilities sectors that are sufficiently exposed to competition.
19. For practical purposes, things that have already been done by or through the OGC will remain valid (such as existing utilities exemptions granted following an application by OGC).

Treaty references

20. To reflect the Treaty of Lisbon, references in the PCR and UCR to the Treaty establishing the European Community are replaced with references to the Treaty on the Functioning of the European Union, and the specific reference to article 296 of the former (the derogation relating to defence and security) is replaced by a reference to the corresponding article 346 of the latter. This is technical updating and does not change the effect.

Miscellaneous minor corrections/improvements

21. A few words are added to regulation 47K(6)(c) of the PCR and regulation 45K(6)(c) of the UCR to ensure, as required by the relevant Directives, that the third ground of ineffectiveness can apply to a contract where the estimated value of the contract is *equal* to the relevant threshold as well as when it *exceeds* that threshold. This corrects a simple slip by which the previous wording, read literally, achieved the wrong result where the estimated value of the contract was exactly equal to the threshold.
22. A phrase in regulation 47E(2)(b) of the PCR and regulation 45E(2)(b) of the PCR is modified slightly for greater clarity about the relationship between the 30 day ineffectiveness time limit and the 6 month ineffectiveness time limit.
23. The drafting of regulation 47D(3)(b)(i) of the PCR (45D(3)(i) of the UCR) is simplified to remove a superfluous category. This does not change the effect of the provision.

⁶ http://webarchive.nationalarchives.gov.uk/20110601212617/http://www.ogc.gov.uk/documents/PPN_PQQ_20_10.pdf