



## **Amendments to the Public Contracts Regulations 2006 coming into force on 1<sup>st</sup> October 2011**

**Article by Colin Ricciardiello, Partner**

### Introduction

This note discusses the new Public Procurement (Miscellaneous Amendments) Regulations 2011 which come into force on 1<sup>st</sup> October 2011 and apply to the Public Contracts Regulations 2006 (“PCR 2006”), the Utilities Contracts Regulations 2006 and other Regulations concerned with public procurement. This note only deals with the amendments to the PCR 2006.

The amending Regulations makes some critical changes to PCR 2006 – the most important of which reduces the 3 month time limit for starting proceedings (relating to a breach of a duty owed under PR 2006) to only 30 days. Some changes are also introduced to: the “automatic suspension” provisions (PCR 2006 Reg 47G); mandatory reasons for the rejection of an economic operator (PCR 2006 Reg 23); miscellaneous minor updates, improvements and corrections to the PCR 2006.

Under 47D of PCR 2006 (unamended), the time limit for starting proceedings requires that they are started “promptly” and in any event 3 months after the date when the grounds for starting the proceedings first arose. Under the amendments the position is:-

- The time limit for issuing the claim starts on the date of knowledge when the economic operator first knew or ought to have known that grounds for bringing proceedings had arisen. The new time limit will apply to all claims (except where effectiveness is claimed) when the date of the knowledge occurs on or after 1<sup>st</sup> October 2011;
- The Court formerly had an unlimited discretion to extend time to start a claim. It still has a discretion to extend this 30 day time limit when there is good reason for doing so. However, now its “capped” so any extension cannot be more than 3 months after the date when the economic operator knew or ought to have known that the grounds for starting the claim had arisen;
- In its un-amended form, 47D imposed an additional requirement to bring proceedings “promptly” with an in any event long stop period of 3 months. What “prompt” meant

necessarily was uncertain (but was obviously something less than 3 months) and depended on its own facts. The promptness requirement has been in conflict with and since the ECJ's judgment in Uniplex.<sup>1</sup> That decision held that the "promptness" requirement was contrary to EU law as it imposed an uncertain time limit<sup>2</sup>.

### Service of a claim once proceedings are started

Under the amending regulations, a claim now has to be served on a contracting authority within 7 days. Under the un-amended Reg 47F, the claim had to be served on a contracting authority and service under 47F (5) was in accordance with the rules of the court. Proceedings were regarded as "started" (and thereby stopping the 3 month time limit from running) when they were also served and that service had to be effected within that 3 month time limit.<sup>3</sup> This change greatly simplifies the position and a claim is now regarded as started when it is issued (that is the conventional position and conforms with CPR 7.2(1)) – with a requirement to serve within 7 days of issue on a contracting authority.

### "Automatic Suspension"

Under the unamended 47G, the trigger for suspending the entering into a contract was issuing proceedings and serving them in accordance with the court rules. However, under the amendment the suspension will be triggered when a claim is issued and the contracting authority becomes aware of that claim being issued – so covering the situation between issue and service within 7 days.

### Ineffectiveness

Regulation 47E (time limits for seeking a declaration of an effectiveness) have also been slightly amended in that proceedings are deemed to have started when a Claim Form was issued rather than being regarded as started only when the claim was served in accordance with the rules of the court.

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<sup>1</sup> The formulation that time starts running from when an economic operator knew or ought to have known of the grounds for starting proceedings follows the ECJ's ruling in Uniplex (UK) Ltd v NHS Business Services Authority C-406/08. This ruling was applied in SITA UK Ltd v GMWDA [2011 EDWCA Civ 156]. The court there confirmed that "grounds" for bringing proceedings was consistent with "infringement". As such, it is only necessary to have knowledge of why a bid failed and which indicate (not prove) that an infringement had occurred.

<sup>2</sup> The "promptly" requirement replicated the Judicial Review court rule and was in jeopardy since the decision in Uniplex when it came to any Judicial Review involving, at least, EU law/directives. The Administrative Court has followed Uniplex in Judicial Review proceedings – Buglife v Medway Council 2011 EWHC 746 – and in other procurement challenge cases.

<sup>3</sup> There is no amendment to Reg 47(5)F. As such the methods of service will still be pursuant to the court rules. Technically those rules allow a claimant to serve within 4 months of issue – CPR 7.5(1) – and 6 months if serving out of the jurisdiction. It will be safe to assume that the requirement to serve within 7 days will prevail.

## Standstill Notices

Where a tenderer has been excluded prior to the award stage and 3 months have passed from the date of knowledge of that exclusion, a contracting authority now does not need to send a Standstill Notice under Regulation 32.

## Mandatory grounds for exclusion

The grounds upon which an economic operator must be excluded under Regulation 23 of the PCR has been updated and includes a new mandatory ground under the Bribery Act 2010.

## Discussion

Clearly, because of the new 30 day time limit, bidders will be under pressure to make quick decisions about whether to start claims – particularly as the threshold about knowledge of infringement under Uniplex is not a high one and does not require full particulars of the breach to be known. From a contracting authority's point of view shortening the time limit and imposing a short and certain service requirement can only assist it in establishing whether a claim is going to be made and speed up the resolution of that claim. What may happen is that economic operators will issue and serve protective claims but may put them on "hold" whilst they seek more information about the reasons for their failure in a tender.

The courts have shown themselves reluctant to extend the 3 month time limit for issuing claims<sup>4</sup> but it remains to be seen if that approach is relaxed when the 3 month limit is reduced to 30 days.

THIS NOTE IS INTENDED TO PROVIDE A BRIEF OVERVIEW OF THE LEGAL PRINCIPLES ARISING OUT OF THE CASES AND REGULATIONS UNDER DISCUSSION. IT IS NOT INTENDED TO BE A COMPREHENSIVE GUIDE OR TO CONSTITUTE LEGAL ADVICE. FOR FURTHER INFORMATION AND ADVICE PLEASE CONTACT COLIN RICCIARDIELLO on 020 7450 4600. E-mail: cricciardiello@sharpepritchard.co.uk. Sharpe Pritchard Solicitors, Elizabeth House, Fulwood Place, London, WC1V 6HG.

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<sup>4</sup> See for example *Jobsin v DoH* [2003 EWCA Civ 1241] and *Mermec v Network Rail* [2011 EWHC 1847 TCC].