

Annex B to OGC's second consultation on the Remedies Directive

Draft replacement for the existing Part 9 of the Public Contracts Regulations 2006.

The endnotes are not part of the proposed amendments, and are included to assist readers in considering the consultation draft. Square brackets indicate material that is particularly provisional (see paragraph 39 of the Consultation Document).

PART 9

APPLICATIONS TO THE COURT

Interpretation of Part 9

47.--(1) In this Part, except where the context otherwise requires,-

“contract” means a public contract, a framework agreement or a dynamic purchasing system;¹

“contracting authority” has the extended meaning given to it by paragraph (2);

“declaration of ineffectiveness” means a declaration made under regulation 47J(a);

“economic operator” has the extended meaning given to it by paragraph (2) and by regulation 47B(4);

“grounds for ineffectiveness” has the meaning given to it by regulation 47K;

“proceedings” means court proceedings taken for the purposes of regulation 47C;

“standstill period”, and references to its end, have the same meaning as in regulation 32A; and

“started” is to be construed in accordance with regulation 47F(3).

(2) Where the duty owed in accordance with regulation 47A is the obligation on a concessionaire to comply with the provisions of regulation 37(3)-

- (a) references in this Part to a “contracting authority” include, despite regulation 3, the concessionaire; and
- (b) references in this Part to an “economic operator” include, despite regulation 4, any person-

- (i) who sought, who seeks or would have wished, to be the person to whom a contract to which regulation 37(3) applies is awarded; and
- (ii) who is a national of a relevant State and established in a relevant State.

Duty owed to economic operators²

- 47A--(1) This regulation applies to the obligation on-
 - (a) a contracting authority to comply with-
 - (i) the provisions of these Regulations, other than regulations 14(2), 30(9), 32(14), 40 and 41(1); and
 - (ii) any enforceable Community obligation in respect of a public contract, framework agreement or design contest (other than one excluded from the application of these Regulations by regulation 6, 8 or 33); and
 - (b) a concessionaire to comply with the provisions of regulation 37(3).
- (2) That obligation is a duty owed to an economic operator.

Duty owed to GPA economic operators³

47B--(1) Subject to paragraphs (2) and (3), the duty owed to an economic operator in accordance with regulation 47A, is a duty owed also to a GPA economic operator.

- (2) The duty is not owed in relation to-
 - (a) a Part B services contract;
 - (b) a contract for research and development services specified in category 8 of Part A of Schedule 3;
 - (c) regulation 34;
 - (d) regulation 36;
 - (e) regulation 37(1); or
 - (f) regulation 37(2).

(3) The duty owed to a GPA economic operator in accordance with this regulation is owed by the Secretary of State for Defence only in relation to public supply contracts for the purchase or hire of goods specified in Schedule 5.

(4) References to an "economic operator" in this Part, except in regulation 47A or in relation to the duty owed in accordance with that regulation, also include a GPA economic operator.

(5) In this regulation—

"GPA economic operator" means a person from a GPA State who sought, who seeks, or would have wished, to be the person to whom the contract is awarded;

"GPA State" means any country other than a relevant State which, at the relevant time is a signatory to the GPA and has agreed with the European Community that the GPA shall apply to a contract of the type to be awarded; and

"relevant time" means the date on which the contracting authority sent a contract notice in respect of the contract to the Official Journal or would have done so if it had been required by these Regulations to do so.

Enforcement of duties through the Court

47C--(1) A breach of the duty owed in accordance with regulation 47A or 47B is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage.

(2) Proceedings taken for that purpose must be started in the High Court, and regulations 47D to 47O apply to such proceedings.

General time limits for starting proceedings

47D--(1) This regulation limits the time within which proceedings may be started where the proceedings do not seek a declaration of ineffectiveness.

(2) Subject to paragraphs (3) and (4), such proceedings must be started promptly and in any event within 3 months from the date when grounds for starting the proceedings first arose.

(3) The requirement for proceedings to be started promptly never requires them to be started before the end of any of the following periods:-

- (a) where the proceedings relate to a decision which is sent to the economic operator by facsimile or electronic means, 10 days from the day following the date on which the decision is sent;

- (b) where the proceedings relate to a decision which is sent to the economic operator by other means-
 - (i) 15 days from the day following the date on which the decision is sent; or
 - (ii) 10 days from the day following the date on which the decision is received;
- (c) where the proceedings relate to a decision to which regulation 32(1) applies, the standstill period;
- (d) where sub-paragraphs (a) and (b) do not apply but the decision is published, 10 days from the day on which the decision is published.

(4) The Court may extend the time limits imposed by this regulation (but not the limits imposed by regulation 47E), where the Court considers that there is a good reason for doing so.

Special time limits for seeking a declaration of ineffectiveness

47E--(1) This regulation limits the time within which proceedings may be started where the proceedings seek a declaration of ineffectiveness.

- (2) Such proceedings must be started-
 - (a) where paragraph (3) or (5) applies, within 30 days from the relevant date mentioned in that paragraph;
 - (b) in any other case, within 6 months from the day following the date on which the contract was entered into.

(3) This paragraph applies where the a relevant contract award notice has been published in the Official Journal, in which case the relevant date is the day following the date on which the notice was published.

- (4) For that purpose, a contract award notice is relevant if, and only if,-
 - (a) the contract was awarded without prior publication of a contract notice; and
 - (b) the contract award notice includes justification of the decision of the contracting authority to award the contract without prior publication of a contract notice.

(5) This paragraph applies where the contracting authority has informed the tenderers and candidates concerned of the conclusion of the contract, in which

case the relevant date is the day following the date on which those tenderers and candidates were informed (or, if they were not all informed on the same date, the date on which the last of them was informed).

(6) In paragraph (5), “the tenderers and candidates concerned” means all economic operators who-

- (a) submitted an offer; or
- (b) applied -
 - (i) to be included amongst the economic operators to be selected to tender or to negotiate the contract; or
 - (ii) to be a party to a framework agreement;

except any economic operators who were informed of the rejection of their application, and the reasons for it, before the contracting authority gave notice of the award of the contract under regulation 32(1).⁴

(7) In this regulation, “contract award notice” means a notice in accordance with regulation 31(1).

Starting proceedings

47F—[(1) A claim form may be filed only if the economic operator has informed the contracting authority of the breach or apprehended breach of the duty owed to it in accordance with regulation 47A or 47B by that contracting authority and of its intention to start proceedings in respect of it.]

(2) Where proceedings are to be started, the economic operator must, after filing the claim form, serve it on the contracting authority.

(3) For the purposes of regulations 47D, 47E and 47G(1), proceedings are to be regarded as started only when the claim form is served in compliance with paragraph (2).

(4) Paragraph (5) applies where proceedings are started-

- (a) seeking a declaration of ineffectiveness; or
- (b) alleging a breach of regulation 32A, 47G or 47H(1)(b) where the contract has not been fully performed⁵.

(5) In those circumstances, the economic operator must, as soon as practicable, send a copy of the claim form to each person, other than the contracting authority, who is a party to the contract in question.

(6) The contracting authority must, as soon as practicable, comply with any request from the economic operator for any information that the economic operator may reasonably require for the purpose of complying with paragraph (5).

(7) In this regulation-

“claim form” includes, in Northern Ireland, the originating process by which the proceedings are commenced; and

“serve” means serve in accordance with rules of court, and for the purposes of this regulation a claim form is deemed to be served on the day on which it is deemed by rules of court to be served.

Contract-making suspended by challenge to award

47G--(1) Where-

- (a) proceedings are started in respect of a contracting authority’s decision in relation to the award of the contract; and
- (b) the contract has not been entered into;

the starting of the proceedings [automatically] requires the contracting authority to refrain from entering into the contract.

(2) The requirement continues until any of the following occurs:-

- (a) the Court brings the requirement to an end by interim order under regulation 47H(1)(a);
- (b) the proceedings are determined, discontinued or otherwise disposed of.

(3) This regulation does not affect the obligations imposed by regulation 32A.

Interim orders

47H--(1) In proceedings, the Court may, where relevant, make an interim order-

- (a) bringing to an end the requirement imposed by regulation 47G;
- (b) restoring or modifying that requirement;
- (c) suspending the procedure leading to-
 - (i) the award of the contract; or
 - (ii) the determination of the design contest;

in relation to which the breach of the duty owed in accordance with regulation 47A or 47B is alleged;

- (d) suspending the implementation of any decision or action taken by the contracting authority in the course of following such a procedure.

- (2) This regulation does not prejudice any other powers of the Court.

Remedies where the contract has not been entered into

47I--(1) Paragraph (2) applies if-

- (a) the Court is satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with regulation 47A or 47B; and
- (b) the contract has not yet been entered into.

(2) In those circumstances, the Court may do one or more of the following:-

- (a) order the setting aside of the decision or action concerned;
- (b) order the contracting authority to amend any document;
- (c) award damages to an economic operator which has suffered loss or damage as a consequence of the breach.

- (3) This regulation does not prejudice any other powers of the Court.

Remedies where the contract has been entered into

47J If, the Court is satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with regulation 47A or 47B, the Court-

- (a) must, if it is satisfied that any of the grounds for ineffectiveness apply, make a declaration of ineffectiveness in relation to the contract unless regulation 47L requires the Court not to do so;
- (b) must, where required by regulation 47N, impose penalties in accordance with that regulation;
- (c) may award damages to an economic operator which has suffered loss or damage as a consequence of the breach, regardless of whether the Court also acts as described in sub-paragraphs (a) and (b);

- (d) must not order any other remedies.

Grounds for ineffectiveness

47K--(1) There are three grounds for ineffectiveness.

(2) Subject to paragraph (3), the first ground applies where the contract has been awarded without prior publication of a contract notice in any case in which these Regulations required the prior publication of a contract notice.

(3) The first ground does not apply if all the following apply:-

- (a) the contracting authority [considers] that the award of a contract without prior publication of a contract notice [is] permitted by these Regulations;
- (b) the contracting authority has published a voluntary transparency notice [in accordance with....⁶] expressing its intention to enter into the contract; and
- (c) the contract has not been entered into before the end of a period of at least 10 days from the day following the date of the publication of the notice.

(4) The second ground applies where the two elements described in paragraphs (5) and (6) are both present.

(5) The first element is present where the contract has been entered into in breach of any requirement imposed by regulation 32A, 47G or 47H(1)(b).

(6) The second element is present where all the following apply:-

- (a) the breach mentioned in paragraph (5) has deprived the economic operator of the possibility of pursuing pre-contractual remedies;
- (b) there has been a breach of the duty owed to the economic operator in accordance with regulation 47A or 47B in respect of obligations other than those imposed by regulation 32A and this Part; and
- (c) the breach mentioned in sub-paragraph (b) has affected the chances of the economic operator obtaining the contract.

(7) Subject to paragraph (8), the third ground applies where all the following apply:-

- (a) the contract is based on a framework agreement or was awarded under a dynamic purchasing system;

- (b) the contract was awarded in breach of-
 - (i) regulation 19(7)(b), (8) and (9) (award of particular contracts under framework agreements); or
 - (ii) regulation 20(11) to (14) (award of contracts under dynamic purchasing systems); and
 - (c) the estimated value of the contract exceeds the relevant threshold for the purposes of regulation 8.
- (8) The third ground does not apply if all the following apply:-
- (a) the contracting authority [considers] that the award of the contract [is] in accordance with-
 - (i) regulation 19(7)(b), (8) and (9) (award of particular contracts under framework agreements); or
 - (ii) regulation 20(11) to (14) (award of contracts under dynamic purchasing systems);
 - (b) the contracting authority has, despite regulation 32(7), voluntarily complied with the requirements set out in regulation 32(1) and (2); and
 - (c) the contract has not been entered into before the date on which the standstill period would have ended if regulation 32A(2) to (5), but not regulation 32A(6), had applied.

General interest grounds for not making a declaration of ineffectiveness

47L--(1) Where the Court is satisfied that any of the grounds for ineffectiveness apply, the Court must not make a declaration of ineffectiveness if-

- (a) the contracting authority or another party to the proceedings raises an issue under this regulation; and
- (b) the Court is satisfied that overriding reasons relating to a general interest require that the effects of the contract should be maintained.

(2) For that purpose, economic interests in the effectiveness of the contract may be considered as overriding reasons only if in exceptional circumstances ineffectiveness would lead to disproportionate consequences.

(3) However, economic interests directly linked to the contract cannot constitute overriding reasons relating to a general interest.

- (4) For that purpose, economic interests directly linked to the contract include-
- (a) the costs resulting from the delay in the execution of the contract;
 - (b) the costs resulting from the commencement of a new procurement procedure;
 - (c) the costs resulting from change of the economic operator performing the contract; and
 - (d) the costs of legal obligations resulting from the ineffectiveness.

The consequences of ineffectiveness

47M--(1) Where a declaration of ineffectiveness is made, the contract is to be considered to be prospectively, but not retrospectively, ineffective as from the time when the declaration is made.

(2) Paragraph (1) does not prevent the exercise of any power under which orders or decisions of the Court may be stayed, but at the end of any period during which a declaration of ineffectiveness is stayed, the contract is then to be considered to have been ineffective as from the time when the declaration had been made.

(3) When making a declaration of ineffectiveness, or at any time after doing so, the Court may make any order that it thinks appropriate for addressing-

- (a) the implications of paragraph (1) or (2) for the particular circumstances of the case;
- (b) any consequential matters arising from the ineffectiveness.

(4) Such an order may, for example, address issues of restitution and compensation as between those parties to the contract who are parties to the proceedings.

(5) Paragraph (6) applies where the parties to the contract have, at any time before the declaration of ineffectiveness is made, agreed by contract any provisions for the purpose of regulating their mutual rights and obligations in the event of a declaration of ineffectiveness being made.

(6) In those circumstances, the Court must not exercise its power to make an order under paragraph (3) in any way which is inconsistent with those provisions, unless and to the extent that the Court considers that those provisions are incompatible with the requirement in paragraph (1) or (2).

Penalties in addition to, or instead of, ineffectiveness

47N--(1) Where the Court makes a declaration of ineffectiveness, it must also order that the contracting authority pay a civil financial penalty of the amount specified in the order.

(2) Paragraph (3) applies where-

- (a) in proceedings for a declaration of ineffectiveness the Court is satisfied that any of the grounds for ineffectiveness apply but does not make a declaration of ineffectiveness because regulation 47L requires it not to do so; or
- (b) in any proceedings, the Court is satisfied that the contract has been entered into in breach of any requirement imposed by regulation 32A, 47G or 47H(1)(b), and does not make a declaration of ineffectiveness (whether because none was sought or because the Court is not satisfied that any of the grounds for ineffectiveness applies).

(3) In those circumstances, the Court must order at least one, and may order both, of the following penalties:-

- (a) that the duration of the contract be shortened to the extent specified in the order;
- (b) that the contracting authority pay a civil financial penalty of the amount specified in the order.

(4) When the Court is deciding what order to make under paragraph (1) or (3), the overriding consideration is that the penalties must be effective, proportionate and dissuasive.

(5) In determining the appropriate order, the Court must take account of all the relevant factors, including-

- (a) the seriousness of the relevant breach of the duty owed in accordance with regulation 47A or 47B;
- (b) the behaviour of the contracting authority; and
- (c) where the order is to be made under paragraph (3), the extent to which the contract remains in force.

(6) Where more than one economic operator starts proceedings in relation to the same contract, paragraph (4) applies to the totality of penalties imposed in respect of the contract.

(7) Where a contracting authority is ordered to pay a civil financial penalty under this regulation,-

- (a) the Court’s order must state that the penalty is payable to the Treasury;⁷
- (b) the Court must send a copy of the order to the Office of Government Commerce;
- (c) the contracting authority must pay the penalty to the Treasury [through the Office of Government Commerce]; and
- (d) the Treasury must, when they receive the penalty, pay it into the Consolidated Fund.

(8) Where a contracting authority is a non-Crown body, any payment due under paragraph (7) may be enforced by the Treasury as a judgment debt due to them.

(9) In paragraph (3)(a), “duration of the contract” refers only to its prospective duration as from the time when the Court makes the order.

Injunctions against the Crown

47O In proceedings against the Crown, the Court has power to grant an injunction despite section 21 of the Crown Proceedings Act 1947.

Related amendment of regulation 2(4)

In regulation 2(4)(c), for “32(3)” substitute “32A and Part 9”.

An amendment to regulation 31(2) will also be needed to take account of the Commission regulation that will be made later this year to revise the forms (details of which will be known before the UK Regulations are finalised and made).

ENDNOTES

¹ These three terms all attract the definitions in regulation 2(1). Article 1(1) (2nd paragraph) of the Directive refers also to public works concessions, but these are not mentioned explicitly here because the definitions of ‘public works concession contract’ and ‘public works contract’ in regulation 2(1) make it clear that the former is just one particular type of the latter, and hence within the definition of ‘public contract’ for the purposes of the Regulations.

² This regulation is based on existing regulation 47(1).

³ This regulation is based on existing regulation 47(2), (3), (4) and (11).

⁴ This definition proceeds on the basis that article 2f(1)(a), second sub-paragraph, of the new Directive attracts the definitions of tenderers and candidates concerned in article 2a(2). We think it unnecessary to qualify draft regulation 47E(6)(a) for two reasons. First, because the Court’s discretion to extend time under regulation 47D(4) will never make it possible to be sure that the rejection of the tenderer’s

bid prior to the contract award decision (for example, for being non-compliant) “can no longer be subject to a review procedure” within the meaning of the 2nd sub-paragraph of article 2a(2). Secondly, because where such a tenderer had brought such a challenge which resulted in the legality of the rejection being upheld, no further question of that tenderer subsequently challenging the award decision itself would seem to arise.

⁵ That is to say, circumstances in which the Court would, if the allegations are upheld, be required to consider shortening the duration of the contract (by virtue of regulation 47N(2)(b)).

⁶ The wording will be finalised once the European Commission has made its regulation about these notices, prescribing the form to be used.

⁷ Modification of the references to the Treasury, the Office of Government Commerce and the Consolidated Fund in paragraphs (7) and (8) in relation to penalties imposed by the High Court of Northern Ireland are under consideration.