
SCOTTISH STATUTORY INSTRUMENTS

2015 No. 446

The Public Contracts (Scotland) Regulations 2015

PART 3

REMEDIES

CHAPTER 6

APPLICATIONS TO THE COURT

Ineffectiveness orders

91.—(1) Without prejudice to all rights and obligations in respect of the period leading up to the date of the order, an ineffectiveness order made in relation to a contract renders unenforceable all rights and obligations directly arising from the contract in respect of the period commencing on the date of the order.

(2) Subject to any order made under [^{F1}regulation 92(1)(b) (powers of the court)], obligations rendered unenforceable by an ineffectiveness order made in relation to a contract must not be performed by the parties to the contract.

(3) Without prejudice to any power of the court to make an ineffectiveness order in relation to a contract based on a framework agreement in accordance with this Part, an ineffectiveness order made in relation to a framework agreement prohibits, with effect from the date of the order, the awarding of contracts based on the framework agreement.

(4) Subject to paragraph (5) and regulation 93 (general interest grounds for not making a declaration of ineffectiveness), the court must make an ineffectiveness order where—

- (a) the first ground for ineffectiveness referred to in paragraph (6) applies;
- (b) the second ground for ineffectiveness referred to in paragraph (8) applies; or
- (c) the third ground for ineffectiveness referred to in paragraph (9) applies.

(5) In proceedings under this Part to which regulation 88(4)(b) (enforcement of duties through the courts) applies, the court does not have power to make an ineffectiveness order if the proceedings would be incompetent if regulation 88(4)(a) applied to the proceedings.

First ground for ineffectiveness

(6) The first ground for ineffectiveness applies where the contracting authority has entered into a contract or has concluded a framework agreement without [^{F2}submitting] a contract notice to the [^{F3}UK e-notification service] in circumstances where the contract or framework agreement was not exempt from the requirement for prior publication of a contract notice.

(7) The first ground for ineffectiveness does not apply where—

- [^{F4}(a) the contracting authority submitted to the UK e-notification service for publication a voluntary ex ante transparency notice expressing its intention to enter into the contract or to conclude the framework agreement and containing—

Changes to legislation: The Public Contracts (Scotland) Regulations 2015, Section 91 is up to date with all changes known to be in force on or before 25 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes

- (i) the name and contact details of the contracting authority,
 - (ii) a description of the object of the contract or framework agreement,
 - (iii) a justification of the decision of the contracting authority to award the contract or conclude the framework agreement without prior publication of a contract notice,
 - (iv) the name and contact details of the economic operator to be awarded the contract or to become party to the framework agreement, and
 - (v) any other information which the contracting authority considered useful, and]
- (b) the contracting authority allowed a period of at least 10 days to elapse between the date of publication [F5 on the UK e-notification service] of the notice referred to in sub-paragraph (a) and the date on which the contracting authority entered into the contract or concluded the framework agreement.

Second ground for ineffectiveness

- (8) The second ground for ineffectiveness applies where all of the following apply—
- (a) the contracting authority has breached regulation 85(1) (notices of decisions to award a contract or conclude a framework agreement), 86(1) (standstill period) or 89 (automatic suspension of authority power to proceed with contract award);
 - (b) the contracting authority's breach referred to in sub-paragraph (a) prevented the economic operator from bringing proceedings or obtaining a remedy before the contract was entered into or the framework agreement was concluded;
 - (c) in awarding the contract or concluding the framework agreement there has been a breach of the duty owed to the economic operator under these Regulations, other than a breach of regulations 85(1) (notices of decisions to award a contract or conclude a framework agreement), 86(1) (standstill period) or this Part;
 - (d) the contracting authorities' breach referred to in sub-paragraph (c) has affected the chances of the economic operator bringing proceedings under this Part to obtain the contract or become a party to the framework agreement.

Third ground for ineffectiveness

- (9) The third ground for ineffectiveness applies where—
- (a) the contract is a contract based on a framework agreement or a contract awarded under a dynamic purchasing system;
 - (b) the contract was awarded in breach of—
 - (i) regulations 34(7)(b) or (c) or 34(10) (framework agreement), in the case of a contract based on a framework agreement (rules governing the award of contracts based on a framework agreement); or
 - (ii) regulation 35(19) to (23) (dynamic purchasing systems), in the case of a contract awarded under a dynamic purchasing system (rules governing the award of contracts under a dynamic purchasing system); and
 - (c) the estimated value of the contract at the relevant time is equal to or greater than the relevant threshold.
- (10) The third ground for ineffectiveness does not apply where the contracting authority—
- (a) considered the award of the contract to be in accordance with the provisions mentioned in paragraph (9)(b);
 - (b) has, despite regulation 85(4)(b) (notices of decisions to award a contract or conclude a framework agreement), by notice in writing informed the economic operators that

submitted tenders of its decision in relation to the award of the contract and the notice included the information referred to in regulation 85(1) to (3) (notices of decisions to award a contract or conclude a framework agreement); and

- (c) has allowed a period of at least the relevant standstill period to elapse between the date of sending of the notice of its decision to award the contract and the date on which the contracting authority entered into the contract.

Textual Amendments

- F1** Words in [reg. 91\(2\)](#) substituted (18.4.2016) by [The Public Contracts \(Scotland\) Amendment Regulations 2016 \(S.S.I. 2016/47\)](#), regs. 1, [2\(8\)](#)
- F2** Word in [reg. 91\(6\)](#) substituted (31.12.2020) by [The Public Procurement etc. \(EU Exit\) \(Scotland\) \(Amendment\) Regulations 2020 \(S.S.I. 2020/468\)](#), regs. 1(2), [4\(60\)\(a\)\(i\)](#) (with sch. paras. 1-5)
- F3** Words in [reg. 91\(6\)](#) substituted (31.12.2020) by [The Public Procurement etc. \(EU Exit\) \(Scotland\) \(Amendment\) Regulations 2020 \(S.S.I. 2020/468\)](#), regs. 1(2), [4\(60\)\(a\)\(ii\)](#) (with sch. paras. 1-5)
- F4** [Reg. 91\(7\)\(a\)](#) substituted (31.12.2020) by [The Public Procurement etc. \(EU Exit\) \(Scotland\) \(Amendment\) Regulations 2020 \(S.S.I. 2020/468\)](#), regs. 1(2), [4\(60\)\(b\)](#) (with sch. paras. 1-5, 9)
- F5** Words in [reg. 91\(7\)\(b\)](#) substituted (31.12.2020) by [The Public Procurement etc. \(EU Exit\) \(Scotland\) \(Amendment\) Regulations 2020 \(S.S.I. 2020/468\)](#), regs. 1(2), [4\(60\)\(c\)](#) (with sch. paras. 1-5, 9)

Changes to legislation:

The Public Contracts (Scotland) Regulations 2015, Section 91 is up to date with all changes known to be in force on or before 25 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.

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Changes and effects yet to be applied to :

- Regulations applied by [2023 c. 54 s. 119\(2\)\(a\)](#)
- reg. 91(6) word substituted by [S.S.I. 2019/112 reg. 3\(59\)\(a\)\(i\)](#) (This amendment not applied to legislation.gov.uk. S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))
- reg. 91(6) words substituted by [S.S.I. 2019/112 reg. 3\(59\)\(a\)\(ii\)](#) (This amendment not applied to legislation.gov.uk. S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))
- reg. 91(7)(a) substituted by [S.S.I. 2019/112 reg. 3\(59\)\(b\)](#) (This amendment not applied to legislation.gov.uk. S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))
- reg. 91(7)(b) words substituted by [S.S.I. 2019/112 reg. 3\(59\)\(c\)](#) (This amendment not applied to legislation.gov.uk. S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))

Changes and effects yet to be applied to the whole Instrument associated Parts and Chapters:

Whole provisions yet to be inserted into this Instrument (including any effects on those provisions):

- reg. 11(1)(e)(i)(aa) words substituted by [S.S.I. 2019/112 reg. 3\(11\)\(a\)\(i\)](#) (This amendment not applied to legislation.gov.uk. S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))
- reg. 11(1)(e)(i)(bb) words substituted by [S.S.I. 2019/112 reg. 3\(11\)\(a\)\(ii\)](#) (This amendment not applied to legislation.gov.uk. S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))
- reg. 78(1)(i)(ii) and words inserted by [S.S.I. 2019/112 reg. 3\(52\)\(a\)](#) (This amendment not applied to legislation.gov.uk. S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))