

SCOTTISH STATUTORY INSTRUMENTS

2015 No. 446

The Public Contracts (Scotland) Regulations 2015

PART 3

REMEDIES

CHAPTER 6

APPLICATIONS TO THE COURT

Modifications etc. (not altering text)

- C1** Pt. 3 Ch. 6 modified by SSI 2010/390 reg. 6 (as amended) (18.4.2016) by [The Public Contracts \(Scotland\) Regulations 2015 \(S.S.I. 2015/446\)](#), reg. 1(2), [sch. 6 para. 5\(3\)](#) (with regs. 3-18, 99-101)

Duty owed to economic operators

87.—(1) The obligation on a contracting authority to comply with the provisions of these Regulations (except where otherwise specified), and with any [^{F1}retained EU obligation that is enforceable by virtue of section 4 of the European Union (Withdrawal) Act 2018] in respect of a contract, framework agreement, dynamic purchasing system or design contest falling within the scope of these Regulations, is a duty owed to an economic operator from [^{F2}the United Kingdom or Gibraltar].

[^{F3}(2) The duty owed in accordance with paragraph (1) is a duty owed also to an economic operator from a country other than the United Kingdom, but only where Condition 1, Condition 2 or Condition 3 applies to the procurement concerned.]

[^{F4}(3) Condition 1 is that—

- (a) at the relevant time the economic operator is from a GPA state,
- (b) the procurement may result in the award of a contract of any description, and
- (c) immediately before IP completion day that GPA state had agreed with the EU that the GPA shall apply to a contract of that description.

(3A) Condition 2 is that—

- (a) at the relevant time the economic operator is from a country which, immediately before IP completion day, was a member State other than the United Kingdom,
- (b) the procurement may result in the award of a contract of any description, and
- (c) immediately before IP completion day the EU had agreed with a GPA state that the GPA shall apply to a contract of that description.]

(4) [^{F5}Condition 3 is that] —

- (a) [^{F6}immediately before IP completion day there was] an international agreement, other than the GPA, by which the EU [^{F7}was bound]; and

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- (b) in accordance with that agreement, the economic operator is, in respect of the procurement concerned, to be accorded remedies no less favourable than those accorded to economic operators from the EU in respect of matters falling within the scope of the duty owed in accordance with paragraph (1).

[^{F8}(4A) Paragraph (4)(b) is to be applied as if the United Kingdom were a member State.]

(5) In this regulation—

except in paragraph (1), references to an “economic operator”, include a reference to a GPA economic operator;

“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 [^{F9}which immediately before IP completion day was] a signatory to the GPA;

“relevant time” means the date on which the contracting authority [^{F10}submitted] a call for competition in respect of the contract to the [^{F11}UK e-notification service] or would have done so had it been required by these Regulations to do so.

Textual Amendments

- F1** Words in reg. 87(1) substituted (31.12.2020) by The Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020 (S.S.I. 2020/468), regs. 1(2), 4(58)(a)(i) (with sch. paras. 1-5)
- F2** Words in reg. 87(1) substituted (31.12.2020) by The Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020 (S.S.I. 2020/468), regs. 1(2), 4(58)(a)(ii) (with sch. paras. 1-5)
- F3** Reg. 87(2) substituted (31.12.2020) by The Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020 (S.S.I. 2020/468), regs. 1(2), 4(58)(b) (with sch. paras. 1-5)
- F4** Reg. 87(3)(3A) substituted for reg. 87(3) (31.12.2020) by The Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020 (S.S.I. 2020/468), regs. 1(2), 4(58)(c) (with sch. paras. 1-5)
- F5** Words in reg. 87(4) substituted (31.12.2020) by The Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020 (S.S.I. 2020/468), regs. 1(2), 4(58)(d)(i) (with sch. paras. 1-5)
- F6** Words in reg. 87(4)(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(58)(d)(ii)(aa) (with sch. paras. 1-5)
- F7** Words in reg. 87(4)(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(58)(d)(ii)(bb) (with sch. paras. 1-5)
- F8** Reg. 87(4A) inserted (31.12.2020) by The Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020 (S.S.I. 2020/468), regs. 1(2), 4(58)(d)(iii) (with sch. paras. 1-5)
- F9** Words in reg. 87(5) substituted (31.12.2020) by The Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020 (S.S.I. 2020/468), regs. 1(2), 4(58)(e)(i) (with sch. paras. 1-5)
- F10** Word in reg. 87(5) substituted (31.12.2020) by The Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020 (S.S.I. 2020/468), regs. 1(2), 4(58)(e)(ii)(aa) (with sch. paras. 1-5)
- F11** Words in reg. 87(5) substituted (31.12.2020) by The Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020 (S.S.I. 2020/468), regs. 1(2), 4(58)(e)(ii)(bb) (with sch. paras. 1-5)

Enforcement of duties through the courts

88.—(1) A breach of the duty owed in accordance with regulation 87 (duty owed to economic operators) is actionable by any economic operator which, in consequence of the breach, suffers, or risks suffering, loss or damage.

(2) Any proceedings for the purposes of paragraph (1) must be brought in the Sheriff Court or the Court of Session.

(3) Proceedings under this regulation may not be brought unless—

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- (a) the economic operator bringing the proceedings has informed the contracting authority of—
 - (i) the breach or apprehended breach of the duty owed to it in accordance with regulation 87 (duty owed to economic operators); and
 - (ii) of its intention to bring proceedings under this Part in respect of that breach or apprehended breach; and
- (b) the proceedings are brought in accordance with paragraph (4).
- (4) For the purpose of paragraph (3)(b), proceedings must be brought—
 - (a) in the case of proceedings seeking an ineffectiveness order (as defined in regulation 91 (ineffectiveness orders))—
 - (i) where paragraph (5) applies, within 30 days from the relevant date referred to in that paragraph; and
 - (ii) in any other case, within 6 months from the date of the contract being entered into or the date of conclusion of the framework agreement; and
 - (b) in any other case, 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 unless the court considers that there is a 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 that date.
- (5) For the purpose of paragraph (4)(a)(i), this paragraph applies where—
 - (a) the contracting authority has [^{F12}submitted] a contract award notice to the [^{F13}UK e-notification service] in accordance with regulation 52 ([^{F14}publication on the UK e-notification service]), including reasons for its decision to enter into the contract or conclude the framework agreement without prior publication of a contract notice, in which case the relevant date is the date of [^{F15}submission to the UK e-notification service]; or
 - (b) the contracting authority has by notice in writing informed all tenderers concerned and all candidates concerned (if any) of its decision in relation to the award of the contract or the conclusion of the framework agreement, and the notice includes the information referred to in regulation 85(2)(d)(i), or as the case may be, (e)(notices of decisions to award a contract or conclude a framework agreement), in which case the relevant date is the date of sending of the notice.

Textual Amendments

- F12** Word in reg. 88(5)(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\(59\)\(a\)](#) (with sch. paras. 1-5)
- F13** Words in reg. 88(5)(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\(59\)\(b\)](#) (with sch. paras. 1-5)
- F14** Words in reg. 88(5)(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\(59\)\(c\)](#) (with sch. paras. 1-5)
- F15** Words in reg. 88(5)(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\(59\)\(d\)](#) (with sch. paras. 1-5)

Automatic Suspension of authority power to proceed with contract award

89.—(1) Without prejudice to the application of any relevant standstill period, where proceedings under this Part are served on a contracting authority in relation to a contract that has not been entered into, a framework agreement that has not been concluded or a dynamic purchasing system that has not

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been established, the contracting authority must not enter into the contract, conclude the framework agreement or establish the dynamic purchasing system unless—

- (a) the proceedings are determined, discontinued or disposed of; or
- (b) the court, by interim order, brings to an end the prohibition.

Powers and duties of the court

90.—(1) Subject to paragraphs (3) and (7), but otherwise without prejudice to any other powers of the court, in proceedings brought under this Part the court—

- (a) may by interim order suspend one or more of the following—
 - (i) the procedure leading to the award of a contract, the conclusion of a framework agreement, the establishment of a dynamic purchasing system or the determination of a design contest;
 - (ii) the implementation of any decision or action taken by the contracting authority in the course of following a procedure referred to in paragraph (i);
- (b) if satisfied that a decision or action taken by a contracting authority was in breach of the duty owed under regulation 87 (duty owed to economic operators), may do one or more of the following—
 - (i) order the setting aside of that decision or action;
 - (ii) order the contracting authority to amend any document;
 - (iii) award damages to an economic operator which has suffered loss or damage as a consequence of the breach.

(2) In any interim proceedings under this Part the court may decide not to grant an interim order when the negative consequences of such an order are likely to outweigh the benefits, having regard to the following considerations—

- (a) that decisions taken by a contracting authority must be reviewed effectively and, in particular, as rapidly as possible;
- (b) the probable consequences of an interim order for all interests likely to be harmed; and
- (c) the public interest.

(3) Where the court is satisfied that regulation 91(8)(a) (ineffectiveness orders) applies but the second ground for ineffectiveness is not otherwise met, the court must, without prejudice to the other powers of the court, order—

- (a) the payment by the contracting authority of a financial penalty; or
- (b) the shortening of the duration of the contract or framework agreement awarded following the procurement in relation to which the breach occurred.

(4) In determining what order to make under paragraph (3) the court must—

- (a) ensure that the order is effective, proportionate and dissuasive; and
- (b) have regard to all relevant factors including—
 - (i) the seriousness of the breach; and
 - (ii) the behaviour of the contracting authority.

(5) Where the court makes an order under paragraph (3)(b) the court must, without prejudice to the other powers of the court, make such other order as the court considers appropriate to address the consequences of the shortening of the duration of the contract or framework agreement on the rights and obligations of the parties to the contract or framework agreement.

(6) Before making an order under paragraph (5), the court must have regard to any terms of the contract or framework agreement relating to the rights and obligations of the parties should the duration of the contract or framework agreement be shortened.

(7) Subject to paragraph (3) and regulation 91 (ineffectiveness orders), in proceedings under this Part the court does not have power to order any remedy other than an award of damages in respect of a breach of the duty owed under regulation 87 (duty owed to economic operators) if the contract in relation to which the breach occurred has been entered into, or the framework agreement in relation to which the breach occurred has been concluded.

(8) Sections 21 and 42 of the Crown Proceedings Act 1947^{M1} do not apply in proceedings brought under this Part against the Crown.

Marginal Citations

M1 1947 c.44.

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 [F16]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 [F17]submitting] a contract notice to the [F18]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—

[F19](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—

- (i) the name and contact details of the contracting authority,

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- (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 [^{F20}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

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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

- F16** 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)**
- F17** 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)
- F18** 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)
- F19** 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)
- F20** 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)

Powers of the court

92.—(1) If an ineffectiveness order is made, the court must, without prejudice to the other powers of the court—

- (a) order the payment by the contracting authority of a financial penalty; and
- (b) make such other order as the court considers appropriate to address the consequences of the ineffectiveness order on the rights and obligations of the parties to the contract or framework agreement.

(2) In the case of an order made under paragraph (1)(a), the court must have regard to the extent to which the contract or framework agreement will remain in effect in respect of the period leading up to the date of the ineffectiveness order.

(3) Before making an order under paragraph (1)(b), the court must have regard to any terms of the contract or framework agreement relating to the rights and obligations of the parties should an ineffectiveness order be made in relation to the contract or framework agreement.

General interest grounds for not making a declaration of ineffectiveness

93.—(1) The court may decline to make an ineffectiveness order where the court is satisfied that overriding reasons relating to a general interest require that the enforceability of the rights and obligations arising from the contract or framework agreement should be maintained.

(2) For the purposes of paragraph (1)—

- (a) economic interests directly linked to the contract or framework agreement do not constitute overriding reasons relating to a general interest; and
- (b) economic interests in the effectiveness of the contract or framework agreement may only be considered as overriding reasons relating to a general interest in exceptional circumstances where ineffectiveness would lead to disproportionate consequences.

(3) For the purposes of paragraph (2)(a), economic interests directly linked to the contract or framework agreement include the costs—

- (a) resulting from the delay in the performance of the contract or framework agreement;
- (b) resulting from the commencement of a new procurement procedure;

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- (c) resulting from the change of the economic operator performing the contract or framework agreement; and
- (d) of legal obligations resulting from an ineffectiveness order.

Other orders

94.—(1) Where the court declines to make an ineffectiveness order under regulation 93, the Court must, without prejudice to the other powers of the court, order—

- (a) the payment by the contracting authority of a financial penalty; or
- (b) the shortening of the duration of the contract or framework agreement.

(2) In determining what order to make under paragraph (1)(a), regulation 90(4) (powers and duties of the court) applies.

(3) Regulation 90(5) and (6) (powers and duties of the court) applies to an order made under paragraph (1)(b) as it applies to an order made under regulation 90(3)(b) (powers and duties of the court).

Financial penalties

95.—(1) Subject to paragraph (2), where a financial penalty is ordered to be paid under this Part—

- (a) the order must state that the financial penalty must be paid to the Scottish Ministers; and
- (b) the clerk of the court must send an extract of the decree (without charge) to the Scottish Ministers.

(2) Paragraph (1) does not apply to any financial penalty ordered to be paid by the Scottish Ministers or an office in the Scottish Administration which is not a ministerial office.

(3) The Scottish Ministers must pay into the Scottish Consolidated Fund any financial penalty—

- (a) ordered to be paid by them under this Part; and
- (b) recovered by them under paragraph (1).

(4) An office in the Scottish Administration which is not a ministerial office must pay any financial penalty ordered to be paid by them under this Part into the Scottish Consolidated Fund.

(5) In this regulation, “an office in the Scottish Administration which is not a ministerial office” is construed in accordance with section 126(8) of the Scotland Act 1998 ^{M2}.

Marginal Citations

M2 1998 c.46.

Status:

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Changes to legislation:

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