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STATUTORY INSTRUMENTS

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**2011 No. 1848**

**The Defence and Security Public Contracts Regulations 2011**

**PART 9**

**Applications to the Court**

**Interpretation of Part 9**

**50.**—(1) In this Part, except where the context otherwise requires—

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

“contract”, except in regulation 64, means a contract or a framework agreement;

“declaration of ineffectiveness” means a declaration made under regulation 59(2)(a) or 64(3);

“grounds for ineffectiveness” has the meaning given to it by regulation 60;

“proceedings” means court proceedings taken for the purposes of regulation 52; and

“standstill period”, and references to its end, have the same meaning as in regulation 34.

(2) In this Part, except in regulation 53(2), any reference to a period of time, however expressed, is to be interpreted subject to the requirement that, if the period would otherwise have ended on a day which is not a working day, the period is to end at the end of the next working day.

**Duty owed to economic operators**

**51.**—(1) This regulation applies to the obligation on a contracting authority to comply with—

(a) the provisions of these Regulations, other than regulations 16(2), 31(9), 33(12), 46 and 47(1) and (2); and

(b) any enforceable EU obligation in respect of a contract (other than one excluded from the application of these Regulations by regulation 7 or 9).

(2) That obligation is a duty owed to an economic operator.

**Enforcement of duties through the Court**

**52.**—(1) A breach of the duty owed in accordance with regulation 51 is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage.

(2) Proceedings for that purpose must be started in England and Wales and in Northern Ireland in the High Court or in Scotland in either the Sheriff Court or the Court of Session, and regulations 53 to 65 apply to such proceedings.

(3) Proceedings for that purpose must not be brought unless the economic operator bringing the proceedings has informed the contracting authority of the breach or the apprehended breach of the duty owed to it and of its intention to bring proceedings in respect of it.

(4) In these Regulations “the Court” means whichever Court in which proceedings are being conducted

**General time limits for starting proceedings**

**53.**—(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 within 3 months beginning with the date when the economic operator first knew or ought to have known that grounds for starting proceedings had arisen.

(3) Paragraph (2) does not require proceedings 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 beginning with—
  - (i) the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;
  - (ii) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;
- (b) where the proceedings relate to a decision which is sent to the economic operator by other means, whichever of the following periods ends first—
  - (i) 15 days beginning with the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;
  - (ii) 10 days beginning with—
    - (aa) the day after the date on which the decision is received, if the decision is accompanied by a summary of the reasons for the decision; or
    - (bb) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;
- (c) where sub-paragraphs (a) and (b) do not apply but the decision is published, 10 days beginning with 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 54) where the Court considers that there is a good reason for doing so.

(5) For the purposes of this regulation, proceedings are to be regarded as started only when the claim form is served, or in Scotland proceedings are served, in compliance with regulation 55(1).

**Special time limits for seeking a declaration of ineffectiveness**

**54.**—(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 beginning with the relevant date mentioned in that paragraph;
- (b) in any event, within six months beginning with the day after the date on which the contract was entered into.

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

(4) For the purposes of paragraph (3), a contract award notice is relevant if, and only if—

- (a) the contract was awarded without the 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 the prior publication of a contract notice.

(5) This paragraph applies where the contracting authority has informed the economic operator of—

- (a) the conclusion of the contract, and
- (b) a summary of the relevant reasons,

in which case the relevant date is the day after the date on which the economic operator was informed of the conclusion or, if later, was informed of a summary or the relevant reasons.

(6) In paragraph (5), “the relevant reasons” means the reasons which the economic operator would have been entitled to receive in response to a request under regulation 33(7).

(7) In this regulation, “contract award notice” means a notice in accordance with regulation 32(1).

(8) For the purposes of this regulation, proceedings are to be regarded as started only when the claim form is served, or in Scotland proceedings are served, in compliance with regulation 55(1).

### **Starting proceedings**

**55.**—(1) Where proceedings are to be started, the economic operator must—

- (a) after filing the claim form, serve it on the contracting authority; or
- (b) in Scotland, serve the proceedings on the contracting authority.

(2) Paragraph (3) applies where proceedings are started—

- (a) seeking a declaration of ineffectiveness; or
- (b) alleging a breach of regulation 34, 56 or 57(1)(b) where the contract has not been fully performed.

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

(4) 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 (3).

(5) In this regulation “serve” means serve in accordance with rules of court, and for the purposes of this regulation a claim form is, or in Scotland proceedings are, deemed to be served on the day on which it is, or they are, deemed by rules of court to be served.

### **Contract-making suspended by challenge to award decision**

**56.**—(1) Where—

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

the starting of the proceedings 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 57(1)(a);
- (b) the proceedings at first instance are determined, discontinued or otherwise disposed of and no order has been made continuing the requirement (for example in connection with an appeal or the possibility of an appeal).

(3) For the purposes of paragraph (1), proceedings are to be regarded as started only when the claim form is, or in Scotland proceedings are, served in compliance with regulation 55(1).

- (4) This regulation does not affect the obligations imposed by regulation 34.

### **Interim orders**

**57.**—(1) In proceedings, the Court may, where relevant, make an interim order—

- (a) bringing to an end the requirement imposed by regulation 56(1);
- (b) restoring or modifying that requirement;
- (c) suspending the procedure leading to the award of the contract in relation to which the breach of the duty owed in accordance with regulation 51 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) When deciding whether to make an order under paragraph (1), the Court must take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and in particular defence or security interests.

(3) When deciding whether to make an order under paragraph (1)(a)—

- (a) the Court must also consider whether, if regulation 56(1) were not applicable, it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract; and
- (b) only if the Court considers that it would not be appropriate to make such an interim order may it make an order under paragraph (1)(a).

(4) If the Court considers that it would not be appropriate to make an interim order of the kind mentioned in paragraph (3)(a) in the absence of undertakings or conditions, it may require or impose such undertakings or conditions in relation to the requirement in regulation 56(1).

(5) The Court may not make an order under paragraph (1)(a) or (b) or (4) before the end of the standstill period.

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

### **Remedies where the contract has not been entered into**

**58.**—(1) Paragraph (2) applies where—

- (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 51; 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**

**59.**—(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 51; and
- (b) the contract has already been entered into.

- (2) In those circumstances, the Court—
- (a) must, if it is satisfied that any of the grounds for ineffectiveness applies, make a declaration of ineffectiveness in respect of the contract unless regulation 61 requires the Court not to do so;
  - (b) must, where required by regulation 63, 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 subparagraphs (a) and (b);
  - (d) must not order any other remedies.

(3) Paragraph (2)(d) is subject to regulation 64(3) and 64(9) (additional relief in respect of specific contracts where a framework agreement is ineffective) and does not prejudice any power of the Court under regulation 62(3) or 63(14) (orders which supplement a declaration of ineffectiveness or a contract-shortening order).

### **Grounds for ineffectiveness**

**60.**—(1) There are three grounds for ineffectiveness.

#### *The first ground*

(2) Subject to paragraph (3), the first ground applies where the contract has been awarded without the 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 considered the award of the contract without the prior publication of a contract notice to be permitted by these Regulations;
  - (b) the contracting authority has had published in the Official Journal a voluntary transparency notice 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 beginning with the day after the date on which the voluntary transparency notice was published in the Official Journal.
- (4) In paragraph (3), “voluntary transparency notice” means a notice—
- (a) which contains the following information—
    - (i) the name and contact details of the contracting authority;
    - (ii) a description of the object of the contract;
    - (iii) a justification of the decision of the contracting authority to award the contract without the prior publication of a contract notice;
    - (iv) the name and contact details of the economic operator to be awarded the contract; and
    - (v) where appropriate, any other information which the contracting authority considers it useful to include; and
  - (b) which, if [Commission Regulation \(EC\) No 1564/2005](#) sets out a form to be used for the purposes of paragraph (3), is in that form.

#### *The second ground*

- (5) The second ground applies where all the following apply—
- (a) the contract has been entered into in breach of any requirement imposed by—

- (i) regulation 34 (the standstill period);
- (ii) regulation 56 (contract-making suspended by challenge to award); or
- (iii) regulation 57(1)(b) (interim order restoring or modifying a suspension originally imposed by regulation 56);
- (b) there has also been a breach of the duty owed to the economic operator in accordance with regulation 51 in respect of obligations other than those imposed by regulation 34 (the standstill period) and this Part;
- (c) the breach mentioned in sub-paragraph (a) has deprived the economic operator of the possibility of starting proceedings in respect of the breach mentioned in sub-paragraph (b), or pursuing them to a proper conclusion, before the contract was entered into; and
- (d) the breach mentioned in sub-paragraph (b) has affected the chances of the economic operator obtaining the contract.

*The third ground*

- (6) Subject to paragraph (7), the third ground applies where all the following apply—
  - (a) the contract is based on a framework agreement;
  - (b) the contract was awarded in breach of any requirement imposed by regulation 20(7)(b), (8), and (9) (award of particular contracts under framework agreements through re-opening of competition); and
  - (c) the estimated value of the contract is equal to or exceeds the relevant threshold for the purposes of regulation 9.
- (7) The third ground does not apply if all the following apply—
  - (a) the contracting authority considered the award of the contract to be in accordance with the provisions mentioned in paragraph (6)(b);
  - (b) the contracting authority has, despite regulation 33(6), voluntarily complied with the requirements set out in regulation 33(1) to (3); and
  - (c) the contract has not been entered into before the end of the standstill period.

**General interest grounds for not making a declaration of ineffectiveness**

**61.**—(1) Subject to paragraph (5), where the Court is satisfied that any of the grounds for ineffectiveness applies, 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, first and foremost in connection with defence or security interests, 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.

(5) The Court must not make a declaration of ineffectiveness if the consequences of that ineffectiveness would seriously endanger the existence of a wider defence or security programme which is essential for the United Kingdom's security interests.

(6) For the purposes of paragraph (1)(b), overriding reasons may be taken to require that the effects of the contract should be maintained even if they do not require the Court to refrain from shortening the duration of the contract by an order under regulation 63(3)(a).

### **The consequences of ineffectiveness**

**62.**—(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 and, accordingly, those obligations under the contract which at that time have yet to be performed are not to be performed.

(2) Paragraph (1) does not prevent the exercise of any power under which the 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 so as to achieve an outcome which the Court considers to be just in all the circumstances.

(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 such a declaration 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**

**63.**—(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 applies but does not make a declaration of ineffectiveness because regulation 61 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 34, 56, or 57(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 considering 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 51;
  - (b) the behaviour of the contracting authority;
  - (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.

#### *Civil financial penalties*

- (7) Subject to paragraphs (8) and (9), where a contracting authority is ordered by the High Court of England and Wales to pay a civil financial penalty under this regulation—
- (a) the Court's order must state that the penalty is payable to the Minister for the Cabinet Office;
  - (b) the Court must send a copy of the order to the Minister;
  - (c) the contracting authority must pay the penalty to the Minister; and
  - (d) the Minister must, on receipt of the penalty, pay it into the Consolidated Fund.
- (8) Where the Minister for the Cabinet Office, or the Cabinet Office, is ordered to pay a civil financial penalty under this Part—
- (a) paragraph (7) does not apply; and
  - (b) the Minister for the Cabinet Office must pay the penalty into the Consolidated Fund.
- (9) Where the Secretary of State for Defence, or the Ministry of Defence, is ordered to pay a civil financial penalty under this Part—
- (a) paragraph (7) does not apply; and
  - (b) the Secretary of State for Defence must pay the penalty into the Consolidated Fund.
- (10) Where a contracting authority is ordered by the Sheriff Court or the Court of Session to pay a civil financial penalty under this regulation—
- (a) the Court's order must state that the penalty is payable to the Scottish Ministers;
  - (b) the Court must send an extract of the decree (without charge) to the Scottish Ministers;
  - (c) the contracting authority must pay the penalty to the Scottish Ministers; and
  - (d) the Scottish Ministers must, when they receive the penalty, pay it into the Scottish Consolidated Fund.
- (11) Paragraph (10) does not apply to any civil financial penalty ordered to be paid by the Scottish Ministers or an office in the Scottish Administration which is not a ministerial office.
- (12) An office in the Scottish Administration which is not a ministerial office must pay any civil financial penalty ordered to be paid by them into the Scottish Consolidated Fund.
- (13) 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(1).



(14) Subject to paragraph (15), where a contracting authority is ordered by the High Court of Northern Ireland to pay a civil financial penalty under this regulation—

- (a) the Court’s order must state that the penalty is payable to the Department of Finance and Personnel;
- (b) the Court must send a copy of the order to the Department;
- (c) the contracting authority must pay the penalty to the Department; and
- (d) the Department must, when it receives the penalty, pay it into the Consolidated Fund of Northern Ireland.

(15) Where the Department of Finance and Personnel is ordered to pay a civil financial penalty under this Part—

- (a) paragraph (14) does not apply; and
- (b) the Department must pay the penalty into the Consolidated Fund of Northern Ireland.

(16) Where a contracting authority is a non-Crown body—

- (a) any payment due under paragraph (7) may be enforced by the Minister for the Cabinet Office as a judgment debt due to the Minister; and
- (b) any payment due under paragraph (14) may be enforced by the Department of Finance and Personnel as a judgment debt due to it.

#### *Contract shortening*

(17) When making an order under paragraph (3)(a), or at any time after doing so, the Court may make any order that it thinks appropriate for addressing the consequences of the shortening of the duration of the contract.

(18) 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 so as to achieve an outcome which the Court considers to be just in all the circumstances.

(19) Paragraph (20) applies where the parties to the contract have, at any time before the order under paragraph (3)(a) is made, agreed by contract any provisions for the purposes of regulating their mutual rights and obligations in the event of such an order being made.

(20) In those circumstances, the Court must not exercise its power to make an order under paragraph (17) 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 primary order that is being made, or has been made, under paragraph (3)(a).

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

#### **Ineffectiveness etc in relation to specific contracts based on a framework agreement**

**64.**—(1) In this regulation, “specific contract” means a contract which—

- (a) is based on the terms of a framework agreement; and
- (b) was entered into before a declaration of ineffectiveness (if any) was made in respect of the framework agreement.

(2) A specific contract is not to be considered to be ineffective merely because a declaration of ineffectiveness has been made in respect of the framework agreement.

(3) Where a declaration of ineffectiveness has been made in respect of the framework agreement, the Court must, subject to paragraph (5), make a separate declaration of ineffectiveness in respect of each relevant specific contract.

(4) For that purpose, a specific contract is relevant only if a claim for a declaration of ineffectiveness in respect of that specific contract has been made—

- (a) within the time limits mentioned in regulation 54 as applicable to the circumstances of the specific contract;
- (b) regardless of whether the claim was made at the same time as any claim for a declaration of ineffectiveness in respect of the framework agreement.

(5) Regulation 61 (general interest grounds for not making a declaration of ineffectiveness) applies for the purposes of paragraph (3), insofar as the overriding reasons relate specifically to the circumstances of the specific contract.

(6) This regulation does not prejudice the making of a declaration of ineffectiveness in relation to a specific contract in accordance with other provisions of these Regulations on the basis of—

- (a) the third ground of ineffectiveness set out in regulation 60(6) and (7); or
- (b) the second ground of ineffectiveness set out in regulation 60(5), where—
  - (i) the relevant breach of the kind mentioned in regulation 60(5)(a) is entering into the specific contract in breach of regulation 56 or 57(1)(b); and
  - (ii) the relevant breach of the kind mentioned in regulation 60(5)(b) relates specifically to the award of the specific contract and the procedure relating to that award, rather than to the award of the framework agreement and the procedure relating to it.

(7) A declaration of ineffectiveness must not be made in respect of a specific contract otherwise than in accordance with paragraph (3) or on a basis mentioned in paragraph (6).

(8) Where a declaration of ineffectiveness is made in respect of a specific contract in accordance with paragraph (3)—

- (a) regulation 62 (the consequences of ineffectiveness) applies;
- (b) regulation 63(1) (requirement to impose a civil financial penalty) does not apply.

(9) Where the Court refrains, by virtue of paragraph (5), from making a declaration of ineffectiveness which would otherwise have been required by paragraph (3), the Court must, subject to paragraph (10), order that the duration of the contract be shortened to the extent specified in the order.

(10) The extent by which the duration of the contract is to be shortened under paragraph (9) is the maximum extent, if any, which the Court considers to be possible having regard to what is required by the overriding reasons mentioned in paragraph (5).

(11) In paragraphs (9) and (10), “duration of the contract” refers only to its prospective duration as from the time when the Court makes the order.

### **Injunctions against the Crown**

**65.** In proceedings against the Crown, the Court has power to grant an injunction or interdict despite sections 21 and 42 of the Crown Proceedings Act 1947(2).