



Procurement Act 2023

2023 CHAPTER 54

PART 9

REMEDIES FOR BREACH OF STATUTORY DUTY

100 Duties under this Act enforceable in civil proceedings

- (1) A contracting authority's duty to comply with Parts 1 to 5, 7 and 8 is enforceable in civil proceedings under this Part.
- (2) For the purposes of this Part, the duty is owed to any supplier that is—
 - (a) a United Kingdom supplier, or
 - (b) a treaty state supplier.
- (3) Proceedings under this Part may be brought in the court by a supplier that—
 - (a) is a United Kingdom or treaty state supplier, and
 - (b) has suffered, or is at risk of suffering, loss or damage in consequence of a breach of the duty.
- (4) See section 106 for time limits applicable in respect of claims under this Part.
- (5) A contracting authority's duty to comply with section 12(4) (requirement to have regard to barriers facing SMEs), or section 13(9) or 14(8) (requirement to have regard to procurement policy statements), is not enforceable in civil proceedings under this Part.
- (6) A contracting authority's duty to comply with section 90 (treaty state suppliers: non-discrimination) in relation to a procurement is not enforceable in civil proceedings under this Part, except in relation to a covered procurement.
- (7) A supplier may not bring proceedings under this Part on the grounds that one or more of the following decisions of a Minister of the Crown was unlawful—
 - (a) a decision to enter a supplier's name on the debarment list;
 - (b) a decision relating to the information included in an entry on the debarment list;

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- (c) a decision not to remove an entry from the debarment list, or revise information included in such an entry,
 (see section 65 (debarment decisions: appeals)).
- (8) This Part applies irrespective of section 2(2) and 21 of the Crown Proceedings Act 1947.
- (9) In this Part—
 - “claimant”—
 - (a) in relation to a claim in Northern Ireland, means plaintiff;
 - (b) in relation to a claim in Scotland, means pursuer;
 - “the court” means—
 - (a) in England and Wales, the High Court,
 - (b) in Northern Ireland, the High Court, and
 - (c) in Scotland, the Court of Session.

101 Automatic suspension of the entry into or modification of contracts

- (1) A contracting authority may not enter into a public contract, or modify a public contract or a convertible contract, if during any applicable standstill period—
 - (a) proceedings under this Part are commenced in relation to the contract, and
 - (b) the contracting authority is notified of that fact.
- (2) The court may lift or modify the restriction in subsection (1) by order under section 102.
- (3) The restriction in subsection (1) does not apply if—
 - (a) the proceedings at first instance have been determined, discontinued or otherwise disposed of, and
 - (b) the court has not made an order to extend the restriction.
- (4) In this section “convertible contract” has the meaning given in section 74.
- (5) See sections 51 and 76 for provision about standstill periods.

102 Interim remedies

- (1) In proceedings under this Part, the court may make one or more of the following orders—
 - (a) an order lifting or modifying the restriction in section 101(1);
 - (b) an order extending the restriction or imposing a similar restriction;
 - (c) an order suspending the effect of any decision made or action taken by the contracting authority in carrying out the procurement;
 - (d) an order suspending the procurement or any part of it;
 - (e) an order suspending the entry into or performance of a contract;
 - (f) an order suspending the making of a modification of a contract or performance of a contract as modified.
- (2) In considering whether to make an order under subsection (1), the court must have regard to—
 - (a) the public interest in, among other things—

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- (i) upholding the principle that public contracts should be awarded, and contracts should be modified, in accordance with the law;
 - (ii) avoiding delay in the supply of the goods, services or works provided for in the contract or modification (for example, in respect of defence or security interests or the continuing provision of public services);
 - (b) the interests of suppliers, including whether damages are an adequate remedy for the claimant;
 - (c) any other matters that the court considers appropriate.
- (3) An order under subsection (1) may not permit a contract to be entered into or modified before the end of any applicable standstill period (see sections 51 and 76).
- (4) An order under subsection (1) may provide for undertakings or conditions.

103 Pre-contractual remedies

- (1) This section applies if the court is satisfied that a decision made, or action taken, by a contracting authority breached the duty referred to in section 100(1) and—
- (a) the contract in relation to which the breach occurred has not been entered into, or
 - (b) where the breach occurred in relation to a modification of a contract, the modification has not yet been made.
- (2) The court may make one or more of the following orders—
- (a) an order setting aside the decision or action;
 - (b) an order requiring the contracting authority to take any action;
 - (c) an order for the award of damages;
 - (d) any other order that the court considers appropriate.

104 Post-contractual remedies

- (1) This section applies if the court is satisfied that a decision made, or action taken, by a contracting authority breached the duty referred to in section 100(1) and—
- (a) the contract in relation to which the breach occurred has already been entered into, or
 - (b) where the breach occurred in relation to a modification of a contract, the modification has already been made.
- (2) The court—
- (a) must, if a set aside condition in section 105 is met, make an order setting aside the contract or modification, and
 - (b) may, in any case, make an order for the award of damages.
- (3) The duty in subsection (2)(a) does not apply if the court is satisfied that there is an overriding public interest in not setting aside the contract or modification (for example, in respect of defence or security interests or the continuing provision of public services).
- (4) In which case, the court may make an order reducing—
- (a) the term of the contract;
 - (b) the goods, services or works to be supplied under the contract.

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- (5) In considering whether there is an overriding public interest in not setting aside a contract or modification, the court—
- (a) may have regard to the financial consequences of setting aside the contract or modification only in exceptional circumstances, and
 - (b) must in any event disregard costs that are directly associated with—
 - (i) the contracting authority having to award another contract or enter into a contract to a different supplier,
 - (ii) a delay in the performance of the contract or the contract as modified, or
 - (iii) any legal obligations arising from setting aside the contract or modification.
- (6) If a contract or modification is set aside, it is to be treated as without effect from the date of the order.
- (7) An order setting aside a framework or modification of a framework may not operate to set aside contracts already awarded under the framework.
- (8) An order setting aside or reducing the term of, or supplies under, a contract may make provision for restitution and other consequential or supplementary matters.

105 Post-contractual remedies: set aside conditions

- (1) A set aside condition is met if the court is satisfied that the claimant was denied a proper opportunity to seek a remedy under section 103 (pre-contractual remedies) because—
- (a) a required contract award notice was not published;
 - (b) the contract was entered into or modified before the end of any applicable standstill period (see sections 51 and 76);
 - (c) the contract was entered into or modified during a period of automatic suspension under section 101 or in breach of a court order;
 - (d) in the case of a contract of a kind described in section 51(3) (exceptions to mandatory standstill), the breach became apparent only on publication of a contract award notice;
 - (e) in the case of a modification under section 74, the breach became apparent only on publication of a contract change notice;
 - (f) the breach became apparent only after the contract was entered into or modified.
- (2) Subsection (1)(d) does not apply if—
- (a) the contract award notice provided for a standstill period, and
 - (b) the contract was not entered into before the end of that standstill period.
- (3) Subsection (1)(e) does not apply if—
- (a) the contract change notice provided for a standstill period, and
 - (b) the modification was not made before the end of that standstill period.
- (4) References in this section to a notice not being published include references to a notice that, though published, did not provide accurate information in respect of the contract as entered into.

106 Time limits on claims

- (1) A supplier must commence any specified set-aside proceedings before the earlier of—
 - (a) the end of the period of 30 days beginning with the day on which the supplier first knew, or ought to have known, about the circumstances giving rise to the claim;
 - (b) the end of the period of six months beginning with the day the contract was entered into or modified.
- (2) A supplier must commence any other proceedings under this Part before the end of the period of 30 days beginning with the day on which the supplier first knew, or ought to have known, about the circumstances giving rise to the claim.
- (3) The court may make an order extending a time limit referred to in subsection (1)(a) or (2) if it considers there to be a good reason for doing so.
- (4) An order under subsection (3) may not permit proceedings to be commenced after—
 - (a) in the case of specified set-aside proceedings, the end of the period referred to in subsection (1)(b), and
 - (b) in any case, the end of the period of 3 months beginning with the day on which the supplier first knew, or ought to have known, about the circumstances giving rise to the claim.
- (5) In this section, “specified set-aside proceedings” means proceedings under section 104(2) to—
 - (a) set aside a public contract in circumstances where the contracting authority did not publish a contract details notice in respect of the contract in accordance with section 53, or
 - (b) set aside a modification of a contract.

107 Part 9 proceedings and closed material procedure

Part 2 of the Justice and Security Act 2013 (disclosure of sensitive material) applies in relation to proceedings under this Part as if, in each of the following provisions, each reference to the Secretary of State included a reference to the Minister for the Cabinet Office—

- (a) section 6(2)(a), (7) and (9)(a) and (c);
- (b) section 7(4)(a);
- (c) section 8(1)(a);
- (d) section 11(3);
- (e) section 12(2)(a) and (b).