

Defence and Security Public Contracts Regulations 2011

Chapter 17 – Legal Review, Remedies and Ineffectiveness

Purpose

1. This guidance explains the provisions of Part 9 of the Defence and Security Public Contracts Regulations (DSPCR) 2011, which relate to applications to the Court to review the actions of procurers during the procurement process.
2. Specifically, the guidance describes the legal framework, the duty owed by procurers to suppliers to comply with the DSPCR, the legal review procedures for suppliers and procurers to follow when a supplier pursues a claim for breach of that duty and the remedies available to suppliers that the Courts can impose to rectify the breach.
3. You should read this guidance in conjunction with the guidance on Chapter 16 – Standstill Period, Contract Award and Voluntary Transparency.

What are legal review, remedies and ineffectiveness?

4. By “legal review”, we mean the processes for suppliers to follow when making an application to the Court claiming that the procurer has failed to comply with his duties under the DSPCR.
5. By “remedies”, we mean the remedies a Court can impose to protect the rights of suppliers taking part in procurement procedures (at any stage of the process including after contract award) when a procurer fails to comply with the legal framework.
6. By “ineffectiveness”, we mean the particular remedy that enables a Court to strike down a contract subject to the DSPCR that a procurer awarded in serious breach of the relevant procedures in the DSPCR.

What is the legal framework?

7. Regulations 50 to 65 (Applications to the court) of the DSPCR details the specific rules relating to legal review including the conduct of legal challenges and the remedies available.
8. The provisions of these regulations are very similar to those introduced into the Public Contracts Regulation (PCR) 2006 in December 2009 and differ in only a few aspects which are highlighted in this guidance.
9. The Public Procurement (Miscellaneous Amendments) 2011 (‘the Miscellaneous Amendments Regulations’) amended both the PCR and DSPCR on 1 October 2011 to incorporate the decision of the Court of Justice of the European Union in the [‘Uniplex’ case](#). They introduced changes to the:
 - a. time limits for Court challenges;

- b. service of the claim form; and
- c. automatic suspension rules.

What duty do you owe to suppliers?

10. Under Regulation 51 (Duty owed to economic operators), procurers owe a duty to suppliers to comply with the DSPCR in respect of any contract award procedure under the DSPCR. Specifically, these suppliers are nationals of, and established in, a European Union (EU) Member State. In contrast to the PCR, the duty in the DSPCR does not extend to any suppliers outside the EU.

How is the duty of compliance enforced?

11. Any supplier that suffers, or risks suffering, loss or damage because of a breach of the duty owed to it by a procurer, may seek to enforce the duty through the Courts.

12. The DSPCR requires the supplier to issue a pre-litigation notice. This means that any supplier wishing to bring proceedings in the Courts must not do so unless they first inform the procurer of the breach or alleged breach, and of its intention to bring proceedings. The principal merit of this approach is to allow both parties to discuss the claim, and possibly resolve it without the need for expensive, adversarial Court proceedings.

13. Proceedings can only start in the High Court, except in Scotland where proceedings can start in either the Sheriff Court or Court of Session.

What are the time limits for starting Court proceedings?

General time limits - supplier not seeking declaration of ineffectiveness

14. Regulation 53 (as amended by Regulation 26 of the Miscellaneous Amendments Regulations) sets out the following general time limit within which a supplier (referred to here as the “challenger”) must start proceedings for remedies other than for a declaration of ineffectiveness:

- a. 30 days beginning with the date when the challenger first knew or ought to have known the grounds for starting the proceedings had arisen, i.e. the “date of knowledge”; or
- b. Up to a maximum of 3 months from the “date of knowledge” at the discretion of the Court where it considers there is a good reason for doing so.

15. The “date of knowledge” is the date of either the publication of the:

- a. Voluntary Transparency Notice (VTN) for non-competitive procurement; or
- b. Contract Award Decision Notice (CADN) for competitive procurement; or
- c. Contract Award Notice (CAN) if:
 - there is no VTN for non-competitive procurement; or
 - an aggrieved party does not receive a CADN.

16. The general time limits at paragraph 14 above do not require proceedings to be started before the expiry of either 10 days (if sent by facsimile or electronic means) or 15 days (if sent by other means) from the:

- a. date of publication of the procurer's decision; or
- b. date on which the procurer communicates the decision to the challenger with a summary of the reasons for the decision in accordance with Regulation 33(7).

17. Paragraph 16b means that even though the 30 days period has expired, a challenger may have a further right to challenge where you have made the award decision but fail to publish or communicate the decision to the challenger.

Special time limit - supplier seeking a declaration of ineffectiveness

18. If a challenger seeks a declaration of ineffectiveness, the time limits for starting proceedings are:

- a. within 30 days of either:
 - day after the date the CAN was published in OJEU; or
 - date on which the procurer communicates the decision to the challenger with a summary of the reasons for the decision in accordance with Regulation 33(7).
- b. in any other case, within 6 months from the date of contract award

Time limits rules and risks

19. If Court proceedings started prior to 1 October 2011, the time limits are the same as before the introduction of the Miscellaneous Amendments Regulations.

20. The 30 days limit must end on a working day. If the 30 days limit ends on a non-working day, the time limit will extend to the next working day.

21. You should mitigate the risk of inadvertently lengthening the time limit for starting proceedings by ensuring that you communicate decisions to candidates and tenderers in accordance with in accordance with Regulation 33 (7) as soon as practicable.

How does a supplier start proceedings?

22. In England, Wales and Northern Ireland, proceedings start when the challenger issues the claim form, i.e. the challenger has merely to issue the claim form within the 30 days limit, rather than issue and serve the claim form. However, claimants must serve the claim form within 7 days of issue. In Scotland, proceedings start when proceedings is served.

23. The challenger must, as soon as practicable, send a copy of the claim form (or in Scotland, the proceedings) to each person (other than the procurer) who is a party to the contract in question (as long as the contract still has time to run at the date proceedings are started), if the supplier is starting proceedings which:

- a. seek a declaration of ineffectiveness;
- b. allege a breach of Standstill rules;

- c. allege a breach of the rules for the automatic suspension of a contract award; or
- d. allege a breach of an interim order by the Court in relation to suspension.

24. If the challenger requests information to help them meet the obligation at paragraph 23 (and the request is for information they might reasonably require), the procurer must comply with the request as soon as practicable.

Can you award the contract if there is a challenge during the standstill period?

25. The mandatory 10 days standstill period between contract award decision and the award of the contract should start at the same time as the start of the time limit for bringing proceedings.

26. If no claim forms are issued or proceedings served within the 10 days standstill period then you can award the contract. However, 20 days will remain of the time limit in which a challenger may start proceedings. You should therefore award the contract as soon as the 10 days standstill period has expired, as a challenge after the standstill period cannot prevent the contract being executed.

27. If proceedings are started after you make the decision to award the contract but before you enter into the contract (and the procurer is aware that the proceedings have been issued), there is an automatic suspension of the contract award procedure.

28. The procurer must not enter into that contract until either:

- a. the Court issues an interim order allowing it to do so; or
- b. the proceedings are determined, discontinued or otherwise come to an end and no order has been made continuing the legal review (e.g. in connection with, or the possibility of, an appeal).

What interim orders are available to the Court?

29. During proceedings the DSPCR allows the Court (without prejudice to any of its existing powers) to make an interim order depending on the circumstances which:

- a. lifts the automatic suspension (i.e. allows the procurer to enter into the contract);
- b. restores or modifies the automatic suspension;
- c. suspends the contract award procedure (i.e. in circumstances where the automatic suspension is not relevant as the decision or action of the procurer being challenged is not the decision to award the contract);
- d. suspends the implementation of any action or decision taken while following a particular procedure (i.e. in circumstances where the automatic suspension is not relevant as the decision or action of the procurer being challenged is not the decision to award the contract).

30. Specifically in the context of the DSPCR, in deciding whether to grant any interim order, the Court must take into account the probable consequences of the proposed order for all likely harm to public interests and in particular defence or security interests (see below).

What remedies are available before contract award?

31. If the Court decides that a decision or action taken by a procurer has breached their duty to a supplier, and the contract has not been entered into, the Court may do one or more of the following:

- a. order the procurer to set aside the decision or action;
- b. order the procurer to amend any document; or
- c. award damages to the economic operator if it has suffered damage or loss as a consequence of the breach.

What remedies are available after contract award?

32. If the procurer has already entered into the contract, and the Court decides that a procurer has breached its duties, the Court:

- a. must declare the contract ineffective (i.e. to strike down a contract) but only if:
 - (1) the grounds for ineffectiveness apply;
 - (2) the complainant has applied for an order of ineffectiveness, and
 - (3) the general interest grounds or the grounds referred to in Regulation 61(5) (see paragraph 38 below) for not making a declaration, do not prevent it;
- b. must impose any penalties required by Regulation 63 in accordance with that regulation (see below);
- c. may award damages to a supplier who has suffered loss or damage as a consequence of the breach;
- d. must not order any other remedies (except for consequential orders arising out of an order for ineffectiveness).

33. If the Court orders ineffectiveness and a penalty, damages may be in addition to this.

34. If ineffectiveness does not apply (or where the specific circumstances referred to in Regulation 63 do not apply) damages will continue to be the only remedy.

What are the grounds for ineffectiveness?

35. There are three grounds for ineffectiveness:

- a. Illegal direct award – where a contract was awarded without prior publication of a contract notice where there should have been one, unless all the following conditions apply:

- (1) the procurer considered that the award of a contract without prior publication of a contract notice was permitted; and
 - (2) the procurer published a Voluntary Ex-Ante Transparency Notice (VEAT) expressing its intention to enter into a contract; and
 - (3) there was a standstill period of 10 days from the day after the date of they published the VEAT in the OJEU.
- b. Procedural breach – where:
 - (1) a contract was awarded in breach of the standstill period (see Regulation 34), or an automatic suspension (see Regulation 56), or an interim order restoring or modifying a suspension, see Regulation 57(1)(b); and
 - (2) there has also been a substantive breach of the DSPCR, and the substantive breach has “affected the chances of the economic operator obtaining the contract”.
- c. Framework agreement breach – where the call-off is equal to or above the financial threshold and there is a breach of the rules relating to call-offs at Regulation 20 (7)(b), (8) and (9) unless all the following conditions apply:
 - (1) the procurer considered the call-off award to be in accordance with at Regulation 20 (7)(b), (8) and (9); and
 - (2) the procurer voluntarily applied a standstill period in accordance with Regulation 33(1) to (3) by sending an award decision notice to all relevant suppliers on the framework; and
 - (3) the procurer did not enter into the call-off contract until the standstill period expired.

When will the Court not declare ineffectiveness?

36. The Court will not apply the remedy of ineffectiveness if there are compelling reasons for the contract to continue. The reasons must be “overriding reasons relating to a general interest, in particular defence or security interests, or both, which require that the effects of the contract should be maintained”.

37. Specifically in the context of the DSPCR, the Court is obliged to take into account first and foremost any defence or security interests that require that the contract to be maintained, which should include examination of the following factors:

- a. the harm to the defence interests of the United Kingdom (UK) and its Allies, if, for example, declaring the contract ineffective would prejudice the:
 - (1) effective conduct of military operations;
 - (2) safety of members of our Armed Forces or our Allies;
 - (3) operational sovereignty of our Armed Forces; or
 - (4) key defence industrial or technical capabilities regarded as essential for national security reasons

- b. the harm to the security interests of the UK and its partner nations, if, for example, declaring the contract ineffective would prejudice the:
 - (1) effective conduct of security or police operations;
 - (2) safety of members of our security agencies and police forces;
 - (3) ability of our security agencies and police forces to conduct future operations as required by the Government; or
 - (4) key security industrial or technical capabilities regarded as essential for national security reasons.

38. In exceptional circumstances, indirect economic consequences of ineffectiveness – where these are disproportionate – may constitute “overriding reasons in the general interest”, but only if they are not directly linked to the contract. For example, the following direct economic consequences will not be taken into account:

- a. costs resulting from the delay in the execution of the contract;
- b. costs resulting from the commencement of a new procurement procedure;
- c. costs resulting from change of the supplier performing the contract;
- d. costs of legal obligations resulting from the ineffectiveness.

39. The Court cannot apply the remedy of ineffectiveness if the consequence of the ineffectiveness will seriously endanger the very existence of a wider defence or security programme essential to UK security interests.

40. In seeking to apply the overriding reasons in the general interests test the Court is likely to balance the weight of defence and security interests and other general interests having due regard for the full circumstances of the case, including:

- a. the nature and seriousness of the alleged breach of the DSPCR; and
- b. the practicality, cost and timing implications of requiring a new competition under the DSPCR.

41. If the Court decides not to apply the remedy of ineffectiveness to in the circumstances above then it must impose alternative penalties described below.

What are the consequences of ineffectiveness?

42. A declaration of ineffectiveness from the Court cancels a contract from the date of the declaration. This means that the declaration cancels any obligations under the contract that the contractor has yet to perform. However, any obligations that the contractor has already performed will not be affected by the cancellation (i.e. the cancellation will not be applied retrospectively).

43. When making a declaration of ineffectiveness, or at any time afterward, the Court may make any order that deals with the consequences of ending the contract. For example, it may order the parties to provide for:

- a. restitution of money already paid or property transferred, under the contract; or
- b. compensation to the supplier who originally won the contract in good faith but was then deprived of it following the ineffectiveness ruling.

44. Parties to a contract can make advance contractual provisions to address how they would exit the contract in the event of an ineffectiveness ruling, which may avoid the need for the Court to rule on consequential matters. Such contractual conditions may define the obligations of the parties in the event of an ineffectiveness ruling (e.g. who owes what to whom). However, they must not undermine the basic core elements of ineffectiveness. Should they do so, the Court will disregard them or declare them unenforceable.

Penalties in addition to, or instead of, ineffectiveness

45. If a Court declares a contract ineffective, it will also order the procurer to pay a civil financial penalty.

46. If a Court does not make a declaration of ineffectiveness either because of overriding reasons relating to a general interest ground or the wider defence or security interests ground or no additional substantive breach of the DSPCR where there has been an infringement of the standstill rules or the automatic suspension requirement that would trigger ineffectiveness - the Court must order one of, and may order both of, the following penalties:

- a. The shortening of the prospective duration of the contract (and may make orders dealing with the consequences of shortening the contract such

as providing for restitution and compensation between the parties to the contract).

b. The procurer must pay a civil financial penalty.

47. When making its judgement on the length of the contract shortening and / or the size of the civil financial penalty, the Court is required to ensure that the penalties are effective, proportionate and dissuasive. The Court is also required to take into account all the relevant factors including the seriousness of the breach, the behaviour of the procurer, and the extent (if at all) to which the contract remains in force.

48. Where the parties to the contract have reached prior agreement (i.e. before the order) detailing their mutual rights and obligations in the event of an order being made shortening the contract duration, the Court will be required to exercise its power in a way that is consistent with these provisions, unless they are incompatible with the primary order.

49. If more than one challenger starts proceedings in relation to the same contract, the Court will apply penalties that it considers, when taken together, are effective, proportionate and dissuasive.

How do procurers pay civil financial penalties?

England and Wales

50. Where the High Court orders the payment of a civil financial penalty, the procurer must pay the penalty to Minister for the Cabinet Office (who will pay it into the consolidated fund), unless the procurer is in, or controlled by, the Ministry of Defence (MOD). In this case, the MOD will pay the penalty directly into the Consolidated Fund.

Scotland

51. Where the Sheriff Court or Court of Session orders payment of a civil financial penalty, the procurer must pay it to the Scottish Ministers (or the relevant office in the Scottish Administration if not Ministerial in accordance with section 126(8) of the Scotland Act 1998(a)), and send an extract of the decree (without charge) to the Scottish Ministers. They will pay it into the Scottish Consolidated Fund.

Northern Ireland

52. Where the High Court of Northern Ireland orders the payment of a civil financial penalty, the procurer must pay it to the Department of Finance and Personnel, who will pay the penalty into the Consolidated Fund of Northern Ireland.

53. The Minister for Cabinet Office and the Department of Finance and Personnel (in Northern Ireland) may enforce orders made against non-Crown procurers as a judgement debt due to them.

Can a Court declare ineffective call-offs under framework agreements?

54. The Court cannot apply the remedy of ineffectiveness to a call-off contract under a framework agreement just because the framework itself was declared ineffective. The Court must make a separate declaration of ineffectiveness in respect of each call-off contract.

55. An aggrieved supplier must make a claim for a declaration of ineffectiveness against call-off contracts within the special time limits specified in paragraph 18, and regardless of whether the supplier makes the claim at the same time as any claim for ineffectiveness against the framework agreement.

56. The rules governing the general interest grounds for not declaring a contract ineffective, and the grounds for ineffectiveness, apply to call-off contracts, but only insofar as they directly relate to the circumstances of those specific call-off contracts (i.e. not the framework agreement).

57. If the Court declares a specific call-off contract ineffective, this will trigger contract shortening where possible. However, the Court cannot impose financial penalties.

How can procurers mitigate the risks?

58. The effects on any procurement from a successful remedies challenge are severe, but there is some risk mitigation the procurer can undertake during a procedure to limit the impact on the project. Following the detailed provisions in the DSPCR will take away the threat of the Courts declaring ineffectiveness.

59. There may very well be occasions where, despite the procurer acting in good faith, they do not adhere to the DSPCR. In such cases you can mitigate the risk of ineffectiveness as follows:

- a. to avoid ineffectiveness because of an illegal direct award the procurer may publish a VTN.
- b. to avoid ineffectiveness for procedural breach the procurer should ensure they adhere to the standstill and automatic suspension rules.
- c. to avoid ineffectiveness for a call-off under a framework breach the procurer may voluntarily apply the standstill period.

What are the key points to remember?

1. You must be aware that the risk and cost to your organisation of failing to comply with the DSPCR can be high.
2. You must calculate the standstill period correctly and wait until the end of the standstill period before entering into a contract.
3. You must advertise requirements, stick to your advertised evaluation criteria and make award decisions in an open and transparent way in order to avoid court proceedings
4. If proceedings are started during the standstill period it is automatically unlawful to enter into a contract until:
 - a. the Court issues an interim order allowing you to do so; or
 - b. the proceedings come to an end and no order has been made continuing the legal review.
5. You must be aware that the remedy of ineffectiveness enables a Court to strike down a contract subject to the DSPCR, which a procurer awarded in serious breach of the relevant procedures in the DSPCR.
6. You must be aware that the Court can award other remedies in addition to, or instead of, ineffectiveness that include civil financial penalties, damages and contract shortening.