
SCOTTISH STATUTORY INSTRUMENTS

2012 No. 89

The Utilities Contracts (Scotland) Regulations 2012

PART 9

APPLICATIONS TO THE COURT

Enforcement of obligations

44.—(1) The obligation on a utility to comply with the provisions of these Regulations, other than regulations 30(9) and 38, and with any enforceable EU obligation in respect of a contract, framework agreement, dynamic purchasing system or design contest (other than one excluded from the application of these Regulations by regulation 6, 7, 8, 9, 11 or 34) is a duty owed to an economic operator.

(2) The duty owed to an economic operator in accordance with paragraph (1) is also owed to a GPA economic operator, except in relation to—

- (a) a Part B services contract; or
- (b) a contract for research and development services specified in category 8 of Part A of Schedule 3.

(3) Notwithstanding regulation 4, references to an “economic operator” in this Part, except in paragraph (1) of this regulation, include a reference to a GPA economic operator.

(4) A breach of the duty owed under paragraph (1) or (2) is actionable by any economic operator which, in consequence of the breach, suffers, or risks suffering, loss or damage and such proceedings may be brought in either the Sheriff Court or the Court of Session.

(5) Proceedings under this Part shall not be brought unless—

- (a) the economic operator bringing the proceedings has informed the utility of—
 - (i) the breach or apprehended breach of the duty owed to it in accordance with paragraph (1) or (2); and
 - (ii) 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 (6).

(6) For the purposes of paragraph (5)(b), proceedings shall be brought—

- (a) in the case of proceedings seeking an ineffectiveness order (as defined in regulation 46)—
 - (i) where paragraph (7) applies, within 30 days from the relevant date referred to in that paragraph; or
 - (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.

- (7) For the purposes of paragraph (6)(a)(i), this paragraph applies where—
- (a) the utility has sent a contract award notice to the Official Journal in accordance with regulation 32 (contract award notices), including reasons for its decision to enter into the contract or conclude the framework agreement without making a call for competition, in which case the relevant date is the date of publication of the notice in the Official Journal; or
 - (b) the utility 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 33(2)(d), in which case the relevant date is the date of sending of the notice.
- (8) Except in the case of a contract or framework agreement to which regulation 6, 7 or 9 applies, and without prejudice to the application of any relevant standstill period, where proceedings under this Part are served on a utility in relation to a contract that has not been entered into or a framework agreement that has not been concluded, the utility shall not enter into the contract or conclude the framework agreement unless—

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

- (9) In this regulation—

“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 other than a relevant State which at the relevant time is a signatory to the GPA and has agreed with the European Union that the GPA applies to a contract of the type to be awarded; and

“relevant time” has the same meaning it has in regulation 11(19).

Powers and duties of the court

45.—(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—
 - (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; and
 - (ii) the implementation of any decision or action taken by the utility in the course of following a procedure referred to in paragraph (i); and
- (b) if satisfied that a decision or action taken by a utility was in breach of the duty owed under regulation 44(1) or (2), may—
 - (i) order the setting aside of that decision or action;
 - (ii) order the utility to amend any document; and
 - (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 utility 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 46(7)(a) 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 utility of a financial penalty; or
- (b) where 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, the shortening of the duration of the contract or framework agreement.

(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 utility.

(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 46, 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 44(1) or (2) 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) Where paragraph (9) applies, the economic operator is entitled to damages amounting to its costs in preparing its tender and in participating in the procedure leading to the award of the contract, the conclusion of a framework agreement or admission to a dynamic purchasing system, or its costs of participating in the procedure leading to the determination of the design contest.

(9) This paragraph applies where, in proceedings under this Part, the Court is satisfied that an economic operator would have had a real chance of being awarded a contract, becoming a party to a framework agreement, being admitted to a dynamic purchasing system or winning a design contest if that chance had not been adversely affected by a breach of the duty owed to it by the utility in accordance with regulation 44(1) or (2).

(10) Paragraph (8) does not affect a claim by an economic operator that it has suffered other loss or damage or that it is entitled to relief other than damages and is without prejudice to the matters on which an economic operator may be required to satisfy the Court in respect of any other such claim.

(11) Sections 21 and 42 of the Crown Proceedings Act 1947(1) do not apply in proceedings brought under this Part against the Crown.

Ineffectiveness orders

46.—(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 paragraph (10)(b), 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 awarded under 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 under the framework agreement.

(4) Subject to paragraphs (12) and (18), the Court must make an ineffectiveness order where one of the grounds for ineffectiveness set out in paragraphs (5), (7) and (8) applies.

(5) The first ground for ineffectiveness is that the utility has entered into a contract or has concluded a framework agreement without making a call for competition in circumstances where the contract or framework agreement was not exempt from the requirement to make a call for competition.

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

- (a) the utility sent to the Official Journal a notice in the form of the voluntary ex ante transparency notice in Annex XIV to Commission Regulation (EC) No 1564/2005⁽²⁾, expressing its intention to enter into the contract or to conclude the framework agreement and containing—
 - (i) the name and contact details of the utility;
 - (ii) a description of the object of the contract or framework agreement;
 - (iii) a justification of the decision of the utility to award the contract or conclude the framework agreement without making a call for competition;
 - (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 utility considered useful; and
- (b) the utility allowed a period of at least 10 days to elapse between the date of publication in the Official Journal of the notice referred to in sub-paragraph (a) and the date on which the utility entered into the contract or concluded the framework agreement.

(7) The second ground for ineffectiveness is that—

- (a) the utility has breached regulation 33(1) (requirement to send decision notice to all tenderers and all candidates concerned) or (3) (requirement to delay entering into a contract or concluding a framework agreement for an applicable standstill period) or 44(8) (prohibition on entering into a contract or concluding a framework agreement when proceedings are brought);
- (b) the utility's breach prevented the economic operator from bringing proceedings or obtaining a remedy before the contract was entered into or the framework agreement was concluded;

(2) The annex to [Commission Regulation \(EC\) No 1564/2005](#) was amended by [Commission Regulation \(EC\) 1150/2009](#), OJ L 313, 29.11.2009, p.3.

- (c) in awarding the contract or concluding the framework agreement there has been another breach of these Regulations, other than a breach of regulation 4(3) (in the case of a Part B services contract), 11(20), 33(1) or (3) or this Part; and
 - (d) the 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.
- (8) The third ground for ineffectiveness is that—
- (a) the contract is a contract awarded under a dynamic purchasing system;
 - (b) the contract was awarded in breach of regulation 19(11), (12), (13) or (14) (rules governing the award of contracts under a dynamic purchasing system); and
 - (c) the estimated value of the contract at the relevant time is not less than the relevant threshold.
- (9) The third ground for ineffectiveness does not apply where—
- (a) the utility has by notice in writing informed the economic operators that submitted tenders of its decision in relation to the award of the contract in accordance with regulation 19(15), and the notice includes the information referred to in regulation 33(2)(d); and
 - (b) the utility allowed a period of at least the relevant standstill period to elapse between the date of sending of the notice referred to in sub-paragraph (a) and the date on which the utility entered into the contract.
- (10) If an ineffectiveness order is made, the Court must, without prejudice to the other powers of the Court—
- (a) order the payment by the utility 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.
- (11) Before making an order under paragraph (10)(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.
- (12) 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.
- (13) For the purposes of paragraph (12)—
- (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.
- (14) For the purposes of paragraph (13)(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;
 - (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.

(15) Where the Court declines to make an ineffectiveness order under paragraph (12), the Court must, without prejudice to the other powers of the Court, order—

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

(16) In determining what order to make under paragraph (10)(a) or (15), regulation 45(4) applies and, in the case of an order made under paragraph (10)(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.

(17) Regulation 45(5) and (6) applies to an order made under paragraph (15)(b) as it applies to an order made under regulation 45(3)(b).

(18) In proceedings under this Part to which regulation 44(6)(b) applies, the Court does not have power to make an ineffectiveness order if the proceedings would be incompetent if regulation 44(6)(a) applied to the proceedings.

(19) In paragraph (8)(c), “estimated value”, “relevant time” and “relevant threshold” have the same meanings they have in regulation 11.

Financial penalties

47.—(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.

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

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