
SCOTTISH STATUTORY INSTRUMENTS

2016 No. 49

The Utilities Contracts (Scotland) Regulations 2016

PART 5

REMEDIES

CHAPTER 2

APPLICATIONS TO THE COURT

Duty owed to economic operators

100.—(1) The obligation on a utility to comply with the provisions of these Regulations (except where otherwise specified), and with any enforceable EU obligation 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 an EEA state.

- (2) The duty owed in accordance with paragraph (1) is a duty owed also to—
- (a) an economic operator from a GPA state, but only where the GPA applies to the procurement concerned; and
 - (b) an economic operator which is not from an EEA state or a GPA state, but only if a relevant bilateral agreement applies.
- (3) For the purposes of paragraph (2)(a), the GPA applies to a procurement if—
- (a) the procurement may result in the award of a contract of any description; and
 - (b) at the relevant time—
 - (i) a GPA state has agreed with the EU that the GPA shall apply to a contract of that description; and
 - (ii) the economic operator is from that GPA state.
- (4) For the purposes of paragraph (2)(b), a relevant bilateral agreement applies if—
- (a) there is an international agreement, other than the GPA, by which the EU is bound; and
 - (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).

- (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, other than an EEA state, which at the relevant time is a signatory to the GPA;

“relevant time” means the date on which the utility sent a call for competition in respect of the contract to the EU Publications Office or would have done so had it been required by these Regulations to do so.

Enforcement of duties through the courts

101.—(1) A breach of the duty owed in accordance with regulation 100 (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—

(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 regulation 100 (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 104 (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 utility has sent a contract award notice to the Official Journal in accordance with regulation 69 (form and manner of sending notices for publication at EU level), including reasons for its decision to enter into the contract or conclude the framework agreement without prior publication of 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 98(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.

Automatic Suspension of utility’s power to proceed with contract award

102. 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, a framework agreement that has not been concluded or a dynamic purchasing system that has not

been established, the utility 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

103.—(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 utility in the course of following a procedure referred to in paragraph (i);
- (b) if satisfied that a decision or action taken by a utility was in breach of the duty owed under regulation 100 (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 utility 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 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 104(8)(a) (ineffectiveness orders) applies but the second ground for ineffectiveness (within the meaning of regulation 104(8)) 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) 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 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 104 (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 100 (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⁽¹⁾ do not apply in proceedings brought under this Part against the Crown.

Ineffectiveness orders

104.—(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 regulation 105(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 106 (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 101(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 101(4)(a) applied to the proceedings.

First ground for ineffectiveness

(6) The first ground for ineffectiveness applies where the utility has entered into a contract or has concluded a framework agreement without sending a call for competition to the Official Journal 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—

- (a) the utility sent to the Official Journal a notice in the form of the voluntary ex ante transparency notice in Annex XII to Commission Implementing Regulation (EU) No 2015/1986 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) No 842/2011⁽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;

(1) 1947 c.44.

(2) OJ L 296, 12.11.2015 p.1.

- (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 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 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.

Second ground for ineffectiveness

- (8) The second ground for ineffectiveness applies where all of the following apply—
- (a) the utility has breached regulation 98(1) (notices of decisions to award a contract or conclude a framework agreement), 99(1) (standstill period) or 102 (automatic suspension of utility's power to proceed with contract award);
 - (b) the utility'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 98(1) (notices of decisions to award a contract or conclude a framework agreement), 99(1) (standstill period) or this Chapter;
 - (d) the utility's 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) regulation 49(5) (framework agreements), 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 50(17) to (19), (21) or (22) (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 utility—
- (a) considered the award of the contract to be in accordance with the provisions mentioned in paragraph (9)(b);
 - (b) has, despite regulation 98(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 included the information referred to in regulation 98(1) to (3); 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 utility entered into the contract.

Powers of the court: ineffectiveness order

105.—(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 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.

(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

106.—(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;
- (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

107.—(1) Where the court declines to make an ineffectiveness order under regulation 106 (general interest grounds for not making a declaration of ineffectiveness), 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.

(2) In determining what order to make under paragraph (1)(a), regulation 103(4) (powers and duties of the court) applies.

(3) Regulation 103(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 103(3)(b).

Financial penalties

108.—(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(3).