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SCOTTISH STATUTORY INSTRUMENTS

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**2006 No. 1**

**The Public Contracts (Scotland) Regulations 2006**

**PART 9**

**APPLICATIONS TO THE COURT**

**Enforcement of obligations**

**47.**—(1) The obligation on—

- (a) a contracting authority to comply with the provisions of these Regulations, other than regulations 14(2), 30(9), 32(14), 40 and 41(1), and with any enforceable Community obligation in respect of a public contract or design contest (other than one excluded from the application of these Regulations by regulation 6, 8 or 33); and
- (b) a concessionaire to comply with the provisions of regulation 37(3);

is a duty owed to an economic operator.

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

- (a) a Part B services contract;
- (b) a contract for research and development services specified in category 8 of Part A of Schedule 3;
- (c) regulation 34;
- (d) regulation 36;
- (e) regulation 37(1); or
- (f) regulation 37(2);

is a duty owed also to a GPA economic operator.

(3) The duty owed to a GPA economic operator referred to in paragraph (2) shall only be owed by the Secretary of State for Defence in relation to public supply contracts for the purchase or hire of goods specified in Schedule 5.

(4) References to an “economic operator” in paragraphs (6), (7) and (8) shall be construed as including a reference to a GPA economic operator.

(5) In this regulation and notwithstanding regulation 4, references to an “economic operator” include, where the duty owed in accordance with paragraph (1) is the obligation on a concessionaire to comply with regulation 37(3), any person—

- (a) who sought, who seeks or would have wished, to be the person to whom a contract to which regulation 37(3) applies is awarded; and
- (b) who is a national of a relevant State and established in a relevant State.

(6) A breach of the duty owed in accordance with paragraph (1) or (2) shall be actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage and those

proceedings shall be brought in the Sheriff Court, the Court of Session, or in England and Wales and Northern Ireland, the High Court.

(7) Proceedings under this regulation may not be brought unless—

- (a) the economic operator bringing the proceedings has informed the contracting authority or concessionaire, as the case may be, of the breach or apprehended breach of the duty owed to it in accordance with paragraph (1) or (2) by that contracting authority or concessionaire and of its intention to bring proceedings under this regulation in respect of it; and
- (b) those proceedings are brought promptly and in any event within 3 months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending the period within which proceedings may be brought.

(8) Subject to paragraph (9), but otherwise without prejudice to any other powers of the Court, in proceedings brought under this regulation the Court may—

- (a) by interim order suspend the procedure leading to the award of the contract or the procedure leading to the determination of a design contest in relation to the award of which the breach of the duty owed in accordance with paragraph (1) or (2) is alleged, or suspend the implementation of any decision or action taken by the contracting authority or concessionaire, as the case may be, in the course of following such a procedure; and
- (b) if satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with paragraph (1) or (2)—
  - (i) order the setting aside of that decision or action or order the contracting authority to amend any document;
  - (ii) award damages to an economic operator which has suffered loss or damage as a consequence of the breach; or
  - (iii) do both of those things.

(9) In proceedings under this regulation the Court shall not have power to order any remedy other than an award of damages in respect of a breach of the duty owed in accordance with paragraph (1) or (2) if the contract in relation to which the breach occurred has been entered into.

(10) Notwithstanding sections 21 and 42 of the Crown Proceedings Act 1947<sup>(1)</sup>, in proceedings brought under this regulation against the Crown the Court shall have power to grant an interim order.

(11) 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 Community that the GPA shall apply to a contract of the type to be awarded<sup>(2)</sup>; and

“relevant time” means the date on which the contracting authority would have sent a contract notice in respect of the contract to the Official Journal if it had been required by these Regulations to do so.

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(1) 1947 c. 44. There are amendments to this Act which are not relevant to these Regulations.

(2) Information on the detailed application of the GPA under bilateral agreements between the EU and other signatories is maintained in the Annexes and general notes in Appendix 1 to the GPA. Access to this information is available through the World Trade Organisation website at [www.wto.org](http://www.wto.org).