
SCOTTISH STATUTORY INSTRUMENTS

2012 No. 88

The Public Contracts (Scotland) Regulations 2012

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(11), 40 and 41(1), 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, 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) Subject to paragraph (3), 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;
- (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).

(3) The duty owed to a GPA economic operator referred to in paragraph (2) is only 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) Notwithstanding regulation 4, references to an “economic operator” in this Part—

- (a) where the duty owed under paragraph (1) is the obligation on a concessionaire to comply with regulation 37(3), include any person—
 - (i) 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
 - (ii) who is a national of and established in a relevant State; and
- (b) except in paragraph (1) of this regulation, include a reference to a GPA economic operator.

(5) A breach of the duty owed in accordance with paragraph (1) or (2) is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage and those proceedings must be brought in the Sheriff Court or the Court of Session.

- (6) 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—
 - (i) the breach or apprehended breach of the duty owed to it in accordance with paragraph (1) or (2); 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 (7).
- (7) For the purpose of paragraph (6)(b), proceedings must be brought—
- (a) in the case of proceedings seeking an ineffectiveness order (as defined in regulation 49)—
 - (i) where paragraph (8) 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.
- (8) For the purpose of paragraph (7)(a)(i), this paragraph applies where—
- (a) the contracting authority has sent a contract award notice to the Official Journal in accordance with regulation 31 (contract award notice), including reasons for its decision to enter into the contract or conclude the framework agreement without prior publication of a contract notice, in which case the relevant date is the date of publication of the notice in the Official Journal; or
 - (b) the contracting authority 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 32(2)(d), in which case the relevant date is the date of sending of the notice.
- (9) Except in the case of a contract or framework agreement to which regulation 6 applies, and without prejudice to the application of any relevant standstill period, where proceedings under this Part are served on a contracting authority or concessionaire in relation to a contract that has not been entered into or a framework agreement that has not been concluded, the contracting authority must 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.
- (10) 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⁽¹⁾; and

(1) 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.

“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.

Powers and duties of the court

48.—(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 contracting authority or concessionaire, as the case may be, in the course of following a procedure referred to in paragraph (i); and
- (b) if satisfied that a decision or action taken by a contracting authority or concessionaire was in breach of the duty owed under regulation 47(1) or (2), may—
 - (i) order the setting aside of that decision or action;
 - (ii) order the contracting authority 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 contracting authority 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 49(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 contracting authority 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 contracting authority.

(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 49, 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 47(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) Sections 21 and 42 of the Crown Proceedings Act 1947(2) do not apply in proceedings brought under this Part against the Crown.

Ineffectiveness orders

49.—(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 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 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 contracting authority has entered into a contract or has concluded a framework agreement without sending a contract notice 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.

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

- (a) the contracting authority 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, expressing its intention to enter into the contract or to conclude the framework agreement and containing—
 - (i) the name and contact details of the contracting authority;
 - (ii) a description of the object of the contract or framework agreement;
 - (iii) a justification of the decision of the contracting authority 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 contracting authority considered useful; and
- (b) the contracting authority 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 contracting authority entered into the contract or concluded the framework agreement.

- (7) The second ground for ineffectiveness is that—
- (a) the contracting authority has breached regulation 32(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 47(9) (prohibition on entering into a contract or concluding a framework agreement when proceedings are brought);
 - (b) the contracting authority'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;
 - (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), 8(21), 32(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 based on a framework agreement or a contract awarded under a dynamic purchasing system;
 - (b) the contract was awarded in breach of—
 - (i) regulation 19(7)(b) or (8), 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 20(11), (12), (13) or (14), 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 not less than the relevant threshold.
- (9) The third ground for ineffectiveness does not apply where—
- (a) the contracting authority 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(9)(e) or 20(15), and the notice includes the information referred to in regulation 32(2)(d); and
 - (b) the contracting authority 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 contracting authority 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 contracting authority 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 contracting authority 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 48(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 48(5) and (6) applies to an order made under paragraph (15)(b) as it applies to an order made under regulation 48(3)(b).
- (18) In proceedings under this Part to which regulation 47(7)(b) applies, the Court does not have power to make an ineffectiveness order if the proceedings would be incompetent if regulation 47(7)(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 8.

Financial penalties

- 50.**—(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; or
 - (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).

(3) 1998 c.46.

