
SCOTTISH STATUTORY INSTRUMENTS

2016 No. 65

The Concession Contracts (Scotland) Regulations 2016

PART 5

REMEDIES

CHAPTER 8

FACILITATION OF REMEDIES

Scope of Chapter 8

48. This Chapter applies to procurement for the award of a concession contract falling within the scope of these Regulations.

Notice of a decision to award a concession contract

49.—(1) Subject to paragraphs (5) and (6), a contracting entity must send to each candidate and tenderer a notice communicating its decision to award the concession contract.

(2) If it is to be sent to a tenderer, the notice referred to in paragraph (1) must include—

- (a) the criteria for the award of the concession contract;
- (b) a summary of the reasons for the decision, including the characteristics and relative advantages of the successful tender, the score (if any) obtained by—
 - (i) the tenderer which is to receive the notice; and
 - (ii) the tenderer to be awarded the concession contract;and anything required by paragraph (3);
- (c) the name of the tenderer to be awarded the concession contract; and
- (d) a precise statement of either—
 - (i) when, in accordance with regulation 50 (standstill period), the standstill period is expected to end and, if relevant, how the timing of its ending might be affected by any and, if so what, contingencies; or
 - (ii) the date before which the contracting entity will not, in conformity with regulation 50 enter into the concession contract .

(3) The reasons referred to in paragraph (2)(b) must include the reason for any decision by the contracting entity that the economic operator did not meet the technical and functional requirements in an equivalent manner as mentioned in regulation 38(6) (technical and functional requirements).

(4) If it is to be sent to a candidate, the notice referred to in paragraph (1) must include—

- (a) a summary of the reasons why the candidate was unsuccessful; and
- (b) the information mentioned in paragraph (2), but as if the words “and relative advantages” were omitted from sub-paragraph (b).

(5) A contracting entity need not comply with paragraph (1) in any of the following cases—

- (a) if the concession contract is permitted by these Regulations to be awarded without prior publication of a concession notice;
 - (b) if the only tenderer is the one who is to be awarded the concession contract, and there is no candidate.
- (6) A contracting entity may withhold any information to be provided in accordance with the preceding requirements of this regulation if the release of such information—
- (a) would impede law enforcement or would otherwise be contrary to the public interest;
 - (b) would prejudice the legitimate commercial interests of a particular economic operator, whether public or private; or
 - (c) might prejudice fair competition between economic operators.
- (7) In this regulation—
- (a) “candidate” means a candidate, as defined in regulation 2(1), which—
 - (i) is not a tenderer, and
 - (ii) has not been informed of the rejection of its application and the reasons for it;
 - (b) “tenderer” means a tenderer, as defined in regulation 2(1), which has not been definitively excluded.
- (8) For the purposes of paragraph (7)(b), an exclusion is definitive if, and only if, the tenderer has been notified of the exclusion and either—
- (a) the exclusion has been held to be lawful in proceedings under Chapter 9; or
 - (b) the time limit for starting such proceedings has expired even on the assumption that the Court would have granted the maximum extension permitted by regulation 52(4) and (5) (enforcement of duties through the Courts).

Standstill period

50.—(1) A contracting entity must allow a period of at least the relevant standstill period to elapse between the date of despatch of the notice referred to in regulation 49(1) (notice of a decision to award a concession contract) and the date on which that contracting entity enters into the concession contract.

(2) Paragraph (1) does not apply if—

- (a) the concession contract is exempt from the requirement for prior publication of a concession notice;
- (b) there are no tenderers concerned or candidates concerned;
- (c) a notice is not required to be given under regulation 49(1) (notice of a decision to award a concession contract).

(3) If notice is sent to all economic operators by facsimile or electronic means, the standstill period is a period of 10 days ending at midnight at the end of the 10th day after that on which the last notice is sent.

(4) If notice is sent to any economic operators only by other means, the standstill period is a period of 15 days ending at midnight at the end of the 15th day after that on which the last notice is sent.

CHAPTER 9 APPLICATIONS TO THE COURT

Duty owed to economic operators

51.—(1) The obligation on a contracting entity to comply with the provisions of these Regulations (except where otherwise specified), and with any enforceable EU obligation in respect of a concession contract 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 if 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 concession 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 concession contract of that description, and
 - (ii) the economic operator is from that GPA state.
- (4) For the purpose 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” means the Agreement on Government Procurement between certain parties to the World Trade Organisation signed in Marrakesh on 15th April 1994 as amended⁽¹⁾;

“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; and

“relevant time” means the date on which the contracting entity sent a concession notice in respect of the concession contract to the Publications Office of the European Union or would have done so if it had been required by these Regulations to do so.

(1) All the substantive provisions of the Agreement were substituted by the Protocol which was approved, on behalf of the EU, by Council [Decision 2014/115/EU](#) (OJ L 68, 7.3.2014, p.1), to which the text of the Protocol is attached. In accordance with Article 3 of the Protocol, the Protocol has entered into force for the EU.

Enforcement of duties through the Courts

52.—(1) A breach of the duty owed in accordance with regulation 51 (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) Proceedings by an economic operator in respect of a breach of duty referred to in 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 contracting entity of—
 - (i) the breach or apprehended breach of the duty owed to it in accordance with regulation 51 (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 55 (ineffectiveness orders))—
 - (i) if 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 concession contract being entered into; 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 if—

- (a) the contracting entity has sent a concession contract award notice to the Official Journal in accordance with regulation 35 (form and matter of publication of notices), including reasons for its decision to enter into the concession contract without prior publication of a concession notice, in which case the relevant date is the date of publication of the notice in the Official Journal; or
- (b) the contracting entity 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 concession contract and the notice includes the information referred to in regulation 49(2)(b) or (4) (a) (notice of decision to award a concession contract) as the case may be, in which case the relevant date is the date of sending of the notice.

Automatic suspension of authority power to proceed with concession contract award

53. Without prejudice to the application of any relevant standstill period, if proceedings under this Part are served on a contracting entity or concessionaire in relation to a concession contract that has not been entered into, the contracting entity must not enter into the concession contract 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

54.—(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 concession contract; and
 - (ii) the implementation of any decision or action taken by the contracting entity 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 entity was in breach of the duty owed under regulation 51 (duty owed to economic operators), may—
 - (i) order the setting aside of that decision or action;
 - (ii) order the contracting entity 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 entity 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) If the court is satisfied that regulation 55(7)(a) (ineffectiveness orders) 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 entity of a financial penalty; or
- (b) the shortening of the duration of the concession contract 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 contracting entity.

(5) If 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 concession contract or on the rights and obligations of the parties to the concession contract.

(6) Before making an order under paragraph (5), the court must have regard to any terms of the concession contract or relating to the rights and obligations of the parties should the duration of the concession contract be shortened.

(7) Subject to paragraph (3) and regulation 55 (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 51 (duty owed to economic operators) if the concession contract in relation to which the breach occurred has been entered into.

(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

55.—(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 concession contract renders unenforceable all rights and obligations directly arising from the concession contract in respect of the period commencing on the date of the order.

(2) Subject to any order made under regulation 56(1)(b) (powers of the court), obligations rendered unenforceable by an ineffectiveness order made in relation to a concession contract must not be performed by the parties to the concession contract.

(3) Subject to paragraph (4) and regulation 57 (general interest grounds for not making a declaration of ineffectiveness), the court must make an ineffectiveness order if—

- (a) the first ground for ineffectiveness referred to in paragraph (5) applies; or
- (b) the second ground for ineffectiveness referred to in paragraph (7) applies.

(4) In proceedings under this Part to which regulation 52(4)(b)(powers and duties of the court) applies, the court does not have power to make an ineffectiveness order if the proceedings would be incompetent if the regulation 52(4)(a) applied to the proceedings.

First ground for ineffectiveness

(5) The first ground for ineffectiveness applies if the contracting entity has entered into a concession contract without prior publication of a concession notice in the Official Journal in circumstances where the concession contract was not exempt from the requirement for prior publication of a concession notice.

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

- (a) the contracting entity 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⁽³⁾, expressing its intention to enter into the concession contract and containing—
 - (i) the name and contact details of the contracting entity;
 - (ii) a description of the object of the concession contract;
 - (iii) a justification of the decision of the contracting entity to award the concession contract without prior publication of a concession notice;
 - (iv) the name and contact details of the economic operator to be awarded the concession contract; and
 - (v) any other information which the contracting entity considered useful; and
- (b) the contracting entity 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 entity entered into the concession contract.

Second ground for ineffectiveness

(7) The second ground for ineffectiveness applies if all of the following apply—

(2) 1947 c.44.

(3) OJ L 222, 12.11.2015 p.1.

- (a) the contracting entity has breached regulation 49(1) (notice of decision to award a concession contract), 50(1) (standstill period) or 53 (automatic suspension of authority power to proceed with concession contract award);
- (b) the contracting entity's breach referred to in sub-paragraph (a) prevented the economic operator from bringing proceedings or obtaining a remedy before the concession contract was entered into;
- (c) in awarding the concession contract there has been another breach of the duty owed to the economic operator under these Regulations, other than a breach of regulations 49(1) (notice of decision to award a concession contract), 51(1) (standstill period) or this Part; and
- (d) the contracting entity's breach referred to in sub-paragraph (c) has affected the chances of the economic operator bringing proceedings under this Part to obtain the concession contract.

Powers of the court

56.—(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 contracting entity 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 concession contract.

(2) In the case of an order made under paragraph (1)(a), the court must have regard to the extent to which the concession contract 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 concession contract or relating to the rights and obligations of the parties should an ineffectiveness order be made in relation to the concession contract.

General interest grounds for not making a declaration of ineffectiveness

57.—(1) The court may decline to make an ineffectiveness order if the court is satisfied that overriding reasons relating to a general interest require that the enforceability of the rights and obligations arising from the concession contract should be maintained.

(2) For the purposes of paragraph (1)—

- (a) economic interests directly linked to the concession contract do not constitute overriding reasons relating to a general interest; and
- (b) economic interests in the effectiveness of the concession contract 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 concession contract include the costs—

- (a) resulting from the delay in the performance of the concession contract;
- (b) resulting from the commencement of a new procurement;
- (c) resulting from the change of the economic operator performing the concession contract; and
- (d) of legal obligations resulting from an ineffectiveness order.

Other orders

58.—(1) If the court declines to make an ineffectiveness order under regulation 57 (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 contracting entity of a financial penalty; or
- (b) the shortening of the duration of the concession contract.

(2) In determining what order to make under paragraph (1)(a), regulation 54(4) applies (powers and duties of the court).

(3) Regulation 54(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 54(3)(b).

Financial penalties

59.—(1) Subject to paragraph (2), if 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(4).