
STATUTORY INSTRUMENTS

2016 No. 273

The Concession Contracts Regulations 2016

PART 5

Remedies

CHAPTER 1

Facilitation of remedies

Scope of Chapter 1

46. This Chapter applies to concession contracts falling within the scope of Parts 1 to 4.

Notices of decisions to award a concession contract

47.—(1) Subject to paragraphs (5) and (6), a contracting authority or utility shall send to each candidate and tenderer a notice communicating its decision to award the concession contract.

Content of notices

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

- (a) the criteria for the award of the concession contract;
- (b) 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 48, 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 authority or utility will not, in conformity with regulation 48, enter into the concession contract.

(3) The reasons referred to in paragraph (2)(b) shall include the reason for any decision by the contracting authority or utility that the economic operator did not meet the technical and functional requirements in an equivalent manner as mentioned in regulation 36(6).

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

- (a) 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).

Exemptions

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

- (a) where the concession contract is permitted by these Regulations to be awarded without prior publication of a concession notice in the Official Journal;
- (b) where the only tenderer is the one who is to be awarded the concession contract, and there are no candidates.

(6) A contracting authority or utility may withhold any information to be provided in accordance with the preceding requirements of this regulation where 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.

Meaning of “candidate” and “tenderer”

(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 2 of this Part; 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 53(4) and (5).

Standstill period

48.—(1) Where regulation 47(1) applies, the contracting authority or utility must not enter into the concession contract before the end of the standstill period.

(2) Where the contracting authority or utility sends a regulation 47 notice to all the relevant economic operators by facsimile or electronic means, the standstill period ends at midnight at the end of the 10th day after the relevant sending date.

(3) Where the contracting authority or utility sends a regulation 47 notice to all the relevant economic operators only by other means, the standstill period ends at whichever of the following occurs first—

- (a) midnight at the end of the 15th day after the relevant sending date;
- (b) midnight at the end of 10th day after the date on which the last of the economic operators to receive such a notice receives it.

(4) In paragraphs (2) and (3), “the relevant sending date” means the date on which the regulation 47 notice is sent to the relevant economic operators, and if the notices are sent to different relevant economic operators on different dates, the relevant sending date is the date on which the last of the notices is sent.

(5) Where the contracting authority or utility sends the regulation 47 notice to one or more of the relevant economic operators by facsimile or electronic means and to the others by other means, the standstill period ends at whichever of the following two times occurs latest—

- (a) midnight at the end of the 10th day after the date on which the last notice is sent by facsimile or electronic means;
 - (b) the time when whichever of the following occurs first—
 - (i) midnight at the end of the 15th day after the date on which the last notice is sent by other means;
 - (ii) midnight at the end of the 10th day after the date on which the last of the economic operators to receive a notice sent by any such other means receives it.
- (6) In this regulation—
- (a) “regulation 47 notice” means a notice given in accordance with regulation 47; and
 - (b) “relevant economic operators” means economic operators to which regulation 47 requires a notice to be sent.

CHAPTER 2

Applications to the court

Interpretation of Chapter 2

49.—(1) In this Chapter—

“claim form” includes, in Northern Ireland, the originating process by which the proceedings are commenced;

“declaration of ineffectiveness” means a declaration made under regulation 59(2)(a);

“economic operator” has the meanings given by paragraph (2);

“grounds for ineffectiveness” has the meaning given by regulation 60;

“proceedings” means court proceedings taken for the purposes of regulation 52; and

“standstill period”, and references to its end, have the same meaning as in regulation 48.

(2) In regulations 50 and 51, “economic operator” has its usual meaning (in accordance with regulation 2(1)), but in the other provisions of this Chapter “economic operator” has the narrower meaning of an economic operator (as defined by regulation 2(1)) to which a duty is owed in accordance with regulation 50 or 51.

Duty owed to economic operators from EEA states

50.—(1) This regulation applies to the obligation on a contracting authority or utility to comply with—

- (a) these Regulations; and
- (b) any enforceable EU obligation in the field of procurement in respect of a concession contract falling within the scope of these Regulations.

(2) That obligation is a duty owed to an economic operator from the United Kingdom or from another EEA state.

Duty owed to economic operators from certain other states

51.—(1) The duty owed in accordance with regulation 50 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.
- (2) For the purposes of paragraph (1)(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.
- (3) For the purposes of paragraph (1)(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 regulation 50.
- (4) In this regulation—
- (a) “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);
 - (b) “GPA state” means any country, other than an EEA state, which at the relevant time is a signatory to the GPA; and
 - (c) “relevant time” means the date on which the contracting authority or utility 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.

Enforcement of duties through the Court

52.—(1) A breach of the duty owed in accordance with regulation 50 or 51 is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage.

(2) Proceedings for that purpose must be started in the High Court, and regulations 53 to 64 apply to such proceedings.

General time limits for starting proceedings

53.—(1) This regulation limits the time within which proceedings may be started where the proceedings do not seek a declaration of ineffectiveness.

(2) Subject to paragraphs (3) to (5), such proceedings must be started 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.

(3) Paragraph (2) does not require proceedings to be started before the end of any of the following periods—

- (a) where the proceedings relate to a decision which is sent to the economic operator by facsimile or electronic means, 10 days beginning with—

(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 No L 68, 7.3.2014, p1), to which the text of the Protocol is attached (at OJ No L 68, 7.3.2014, p2). In accordance with Article 3 of the Protocol, the Protocol has entered into force for the EU.

- (i) the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;
 - (ii) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;
 - (b) where the proceedings relate to a decision which is sent to the economic operator by other means, whichever of the following periods ends first—
 - (i) 15 days beginning with the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;
 - (ii) 10 days beginning with—
 - (aa) the day after the date on which the decision is received, if the decision is accompanied by a summary of the reasons for the decision; or
 - (bb) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;
 - (c) where sub-paragraphs (a) and (b) do not apply but the decision is published, 10 days beginning with the day on which the decision is published.
- (4) Subject to paragraph (5), the Court may extend the time limits imposed by this regulation (but not any of the limits imposed by regulation 54) where the Court considers that there is a good reason for doing so.
- (5) The Court must not exercise its power under paragraph (4) so as to permit proceedings to be started more than 3 months after the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.
- (6) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is issued.

Special time limits for seeking a declaration of ineffectiveness

54.—(1) This regulation limits the time within which proceedings may be started where the proceedings seek a declaration of ineffectiveness.

- (2) Such proceedings must be started—
 - (a) where paragraph (3) or (5) applies, within 30 days beginning with the relevant date mentioned in that paragraph;
 - (b) in any event, within 6 months beginning with the day after the date on which the concession contract was entered into.
- (3) This paragraph applies where a relevant concession award notice has been published in the Official Journal, in which case the relevant date is the day after the date on which the notice was published.
- (4) For that purpose, a concession award notice is relevant if, and only if—
 - (a) the concession contract was awarded without prior publication of a concession notice in the Official Journal; and
 - (b) the concession award notice includes justification of the decision of the contracting authority or utility to award the concession contract without prior publication of a concession notice in the Official Journal.
- (5) This paragraph applies where the contracting authority or utility has informed the economic operator of—
 - (a) the conclusion of the concession contract, and
 - (b) a summary of the relevant reasons,

in which case the relevant date is the day after the date on which the economic operator was informed of the award or, if later, was informed of a summary of the relevant reasons.

(6) In paragraph (5), “the relevant reasons” means the reasons which the economic operator would have been entitled to receive in response to a request under regulation 40(2).

(7) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is issued.

Starting proceedings

55.—(1) Where proceedings are started, the economic operator must serve the claim form on the contracting authority or utility within 7 days after the date of issue.

(2) Paragraph (3) applies where proceedings are started—

- (a) seeking a declaration of ineffectiveness; or
- (b) alleging a breach of regulation 48, 56 or 57(1)(b) where the concession contract has not been fully performed.

(3) In those circumstances, the economic operator must, as soon as practicable, send a copy of the claim form to each person, other than the contracting authority or utility, who is a party to the concession contract in question.

(4) The contracting authority or utility must, as soon as practicable, comply with any request from the economic operator for any information that the economic operator may reasonably require for the purpose of complying with paragraph (3).

(5) In this regulation, “serve” means serve in accordance with rules of court, and for the purposes of this regulation a claim form is deemed to be served on the day on which it is deemed by rules of court to be served.

Concession contract-making suspended by challenge to award decision

56.—(1) Where—

- (a) a claim form has been issued in respect of a contracting authority or utility’s decision to award the concession contract,
- (b) the contracting authority or utility has become aware that the claim form has been issued and that it relates to that decision, and
- (c) the concession contract has not been entered into,

that contracting authority or utility is required to refrain from entering into the concession contract.

(2) The requirement continues until any of the following occurs—

- (a) the Court brings the requirement to an end by interim order under regulation 57(1)(a);
- (b) the proceedings at first instance are determined, discontinued or otherwise disposed of and no order has been made continuing the requirement (for example in connection with an appeal or the possibility of an appeal).

(3) This regulation does not affect the obligations imposed by regulation 48.

Interim orders

57.—(1) In proceedings, the Court may, where relevant, make an interim order—

- (a) bringing to an end the requirement imposed by regulation 56(1);
- (b) restoring or modifying that requirement;

- (c) suspending the procedure leading to the award of the concession contract in relation to which the breach of the duty owed in accordance with regulation 50 or 51 is alleged;
- (d) suspending the implementation of any decision or action taken by the contracting authority or utility in the course of following such a procedure.
- (2) When deciding whether to make an order under paragraph (1)(a)—
 - (a) the Court must consider whether, if regulation 56(1) were not applicable, it would be appropriate to make an interim order requiring the contracting authority or utility to refrain from entering into the concession contract; and
 - (b) only if the Court considers that it would not be appropriate to make such an interim order may it make an order under paragraph (1)(a).
- (3) If the Court considers that it would not be appropriate to make an interim order of the kind mentioned in paragraph (2)(a) in the absence of undertakings or conditions, it may require or impose such undertakings or conditions in relation to the requirement in regulation 56(1).
- (4) The Court may not make an order under paragraph (1)(a) or (b) or (3) before the end of the standstill period.
- (5) This regulation does not prejudice any other powers of the Court.

Remedies where the concession contract has not been entered into

58.—(1) Paragraph (2) applies where—

- (a) the Court is satisfied that a decision or action taken by a contracting authority or utility was in breach of the duty owed in accordance with regulation 50 or 51; and
- (b) the concession contract has not yet been entered into.
- (2) In those circumstances, the Court may do one or more of the following—
 - (a) order the setting aside of the decision or action concerned;
 - (b) order the contracting authority or utility to amend any document;
 - (c) award damages to an economic operator which has suffered loss or damage as a consequence of the breach.
- (3) Where the Court is satisfied that the economic operator would have had a real chance of being awarded the contract if that chance had not been affected by the breach mentioned in paragraph (1)(a), 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.
- (4) Paragraph (3)—
 - (a) only applies in the case of a breach mentioned in paragraph (1)(a) by a utility;
 - (b) 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
 - (c) is without prejudice to the matters on which an economic operator may be required to satisfy the Court in respect of any such other claim.
- (5) This regulation does not prejudice any other powers of the Court.

Remedies where the concession contract has been entered into

59.—(1) Paragraph (2) applies if—

- (a) the Court is satisfied that a decision or action taken by a contracting authority or utility was in breach of the duty owed in accordance with regulation 50 or 51; and
- (b) the concession contract has already been entered into.

- (2) In those circumstances, the Court—
- (a) must, if it is satisfied that any of the grounds for ineffectiveness applies, make a declaration of ineffectiveness in respect of the concession contract unless regulation 61 requires the Court not to do so;
 - (b) must, where required by regulation 63, impose penalties in accordance with that regulation;
 - (c) may award damages to an economic operator which has suffered loss or damage as a consequence of the breach, regardless of whether the Court also acts as described in subparagraphs (a) and (b);
 - (d) must not order any other remedies.
- (3) Paragraph (2)(d) does not prejudice any power of the Court under regulation 62(3) or 63(12).
- (4) Regulation 58(3) and (4)(b) and (c) apply for the purposes of this regulation in the case of a breach mentioned in paragraph (1)(a) by a utility.

Grounds for ineffectiveness

60.—(1) There are two grounds for ineffectiveness.

The first ground

(2) Subject to paragraph (3), the first ground applies where the concession contract has been awarded without prior publication of a concession notice in the Official Journal in any case in which these Regulations required the prior publication of a concession notice.

(3) The first ground does not apply if all the following apply—

- (a) the contracting authority or utility considered the award of the concession contract without prior publication of a concession notice in the Official Journal to be permitted by these Regulations;
- (b) the contracting authority or utility has had published in the Official Journal a voluntary transparency notice expressing its intention to enter into the concession contract; and
- (c) the concession contract has not been entered into before the end of a period of at least 10 days beginning with the day after the date on which the voluntary transparency notice was published in the Official Journal.

(4) In paragraph (3), “voluntary transparency notice” means a notice which is in the standard format set out in Annex XII to Commission Implementing Regulation (EU) 2015/1986(2) as amended from time to time and which contains the following information—

- (a) the name and contact details of the contracting authority or utility;
- (b) a description of the object of the concession contract;
- (c) a justification of the decision of the contracting authority or utility to award the concession contract without prior publication of a concession notice in the Official Journal;
- (d) the name and contact details of the economic operator to be awarded the concession contract; and
- (e) where appropriate, any other information which the contracting authority or utility considers it useful to include.

The second ground

(5) The second ground applies where all the following apply—

(2) OJ No L 296, 12.11.2015, p1.

- (a) the concession contract has been entered into in breach of any requirement imposed by—
 - (i) regulation 48,
 - (ii) regulation 56, or
 - (iii) regulation 57(1)(b);
- (b) there has also been a breach of the duty owed to the economic operator in accordance with regulation 50 or 51 in respect of obligations other than those imposed by regulation 48 and this Chapter;
- (c) the breach mentioned in sub-paragraph (a) has deprived the economic operator of the possibility of starting proceedings in respect of the breach mentioned in sub-paragraph (b), or pursuing them to a proper conclusion, before the concession contract was entered into; and
- (d) the breach mentioned in sub-paragraph (b) has affected the chances of the economic operator obtaining the concession contract.

General interest grounds for not making a declaration of ineffectiveness

61.—(1) Where the Court is satisfied that either of the grounds for ineffectiveness applies, the Court must not make a declaration of ineffectiveness if—

- (a) the contracting authority or utility or another party to the proceedings raises an issue under this regulation; and
- (b) the Court is satisfied that overriding reasons relating to a general interest require that the effects of the concession contract should be maintained.

(2) For that purpose, economic interests in the effectiveness of the concession contract may be considered as overriding reasons only if in exceptional circumstances ineffectiveness would lead to disproportionate consequences.

(3) However, economic interests directly linked to the concession contract cannot constitute overriding reasons relating to a general interest.

(4) For that purpose, economic interests directly linked to the concession contract include—

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

(5) For the purposes of paragraph (1)(b), overriding reasons may be taken to require that the effects of the concession contract should be maintained even if they do not require the Court to refrain from shortening the duration of the concession contract by an order under regulation 63(3)(a).

The consequences of ineffectiveness

62.—(1) Where a declaration of ineffectiveness is made, the concession contract is to be considered to be prospectively, but not retrospectively, ineffective as from the time when the declaration is made and, accordingly, those obligations under the concession contract which at that time have yet to be performed are not to be performed.

(2) Paragraph (1) does not prevent the exercise of any power under which the orders or decisions of the Court may be stayed, but at the end of any period during which a declaration of ineffectiveness is stayed, the concession contract is then to be considered to have been ineffective as from the time when the declaration had been made.

(3) When making a declaration of ineffectiveness, or at any time after doing so, the Court may make any order that it thinks appropriate for addressing—

- (a) the implications of paragraph (1) or (2) for the particular circumstances of the case;
- (b) any consequential matters arising from the ineffectiveness.

(4) Such an order may, for example, address issues of restitution and compensation as between those parties to the concession contract who are parties to the proceedings so as to achieve an outcome which the Court considers to be just in all the circumstances.

(5) Paragraph (6) applies where the parties to the concession contract have, at any time before the declaration of ineffectiveness is made, agreed by contract any provisions for the purpose of regulating their mutual rights and obligations in the event of such a declaration being made.

(6) In those circumstances, the Court must not exercise its power to make an order under paragraph (3) in any way which is inconsistent with those provisions, unless and to the extent that the Court considers that those provisions are incompatible with the requirement in paragraph (1) or (2).

Penalties in addition to, or instead of, ineffectiveness

63.—(1) Where the Court makes a declaration of ineffectiveness, it must also order that the contracting authority or utility pay a civil financial penalty of the amount specified in the order.

(2) Paragraph (3) applies where—

- (a) in proceedings for a declaration of ineffectiveness, the Court is satisfied that either of the grounds for ineffectiveness applies but does not make a declaration of ineffectiveness because regulation 61 requires it not to do so; or
- (b) in any proceedings, the Court is satisfied that the concession contract has been entered into in breach of any requirement imposed by regulation 48, 56 or 57(1)(b), and does not make a declaration of ineffectiveness (whether because none was sought or because the Court is not satisfied that either of the grounds for ineffectiveness applies).

(3) In those circumstances, the Court must order at least one, and may order both, of the following penalties—

- (a) that the duration of the concession contract be shortened to the extent specified in the order;
- (b) that the contracting authority or utility pay a civil financial penalty of the amount specified in the order.

(4) When the Court is considering what order to make under paragraph (1) or (3), the overriding consideration is that the penalties must be effective, proportionate and dissuasive.

(5) In determining the appropriate order, the Court must take account of all the relevant factors, including—

- (a) the seriousness of the relevant breach of the duty owed in accordance with regulation 50 or 51;
- (b) the behaviour of the contracting authority or utility;
- (c) where the order is to be made under paragraph (3), the extent to which the concession contract remains in force.

(6) Where more than one economic operator starts proceedings in relation to the same concession contract, paragraph (4) applies to the totality of penalties imposed in respect of the concession contract.

Civil financial penalties

(7) Subject to paragraph (8), where a contracting authority or utility is ordered by the High Court of England and Wales to pay a civil financial penalty under this regulation—

- (a) the Court's order must state that the penalty is payable to the Minister for the Cabinet Office;
 - (b) the Court must send a copy of the order to the Minister;
 - (c) the contracting authority or utility must pay the penalty to the Minister; and
 - (d) the Minister must, on receipt of the penalty, pay it into the Consolidated Fund.
- (8) Where the Minister for the Cabinet Office, or the Cabinet Office, is ordered to pay a civil financial penalty under this regulation—
- (a) paragraph (7) does not apply; and
 - (b) the Minister for the Cabinet Office must pay the penalty into the Consolidated Fund.
- (9) Subject to paragraph (10), where a contracting authority or utility is ordered by the High Court of Northern Ireland to pay a civil financial penalty under this regulation—
- (a) the Court's order must state that the penalty is payable to the Department of Finance and Personnel;
 - (b) the Court must send a copy of the order to the Department;
 - (c) the contracting authority or utility must pay the penalty to the Department; and
 - (d) the Department must, when it receives the penalty, pay it into the Consolidated Fund of Northern Ireland.
- (10) Where the Department of Finance and Personnel is ordered to pay a civil financial penalty under this regulation—
- (a) paragraph (9) does not apply; and
 - (b) the Department must pay the penalty into the Consolidated Fund of Northern Ireland.
- (11) Where a contracting authority or utility is a non-Crown body—
- (a) any payment due under paragraph (7) may be enforced by the Minister for the Cabinet Office as a judgment debt due to the Minister; and
 - (b) any payment due under paragraph (9) may be enforced by the Department of Finance and Personnel as a judgment debt due to it.

Concession contract shortening

(12) When making an order under paragraph (3)(a), or at any time after doing so, the Court may make any order that it thinks appropriate for addressing the consequences of the shortening of the duration of the concession contract.

(13) Such an order may, for example, address issues of restitution and compensation as between those parties to the concession contract who are parties to the proceedings so as to achieve an outcome which the Court considers to be just in all the circumstances.

(14) Paragraph (15) applies where the parties to the concession contract have, at any time before the order under paragraph (3)(a) is made, agreed by contract any provisions for the purpose of regulating their mutual rights and obligations in the event of such an order being made.

(15) In those circumstances, the Court must not exercise its power to make an order under paragraph (12) in any way which is inconsistent with those provisions, unless and to the extent that the Court considers that those provisions are incompatible with the primary order that is being made, or has been made, under paragraph (3)(a).

(16) In paragraph (3)(a), "duration of the concession contract" refers only to its prospective duration as from the time when the Court makes the order.

Injunctions against the Crown

64. In proceedings against the Crown, the Court has power to grant an injunction despite section 21 of the Crown Proceedings Act 1947**(3)**.