

SCHEDULE 3

Regulation 4(2)

Decisions taken in accordance with paragraph 3 of Article 5 of Regulation (EC) No. 1370/2007

PART 1

Information about contract award procedures

Award decision notice

1. Subject to paragraph 8 the Department shall, as soon as possible after the decision under Article 5(3) of Regulation (EC) No. 1370/2007 has been made, inform the tenderers and the candidates of its decision to award the contract, and shall do so by notice in writing by the most rapid means of communication practicable.

2. Where it is to be sent to a tenderer, the notice referred to in paragraph 1 shall include –

(1) the criteria for the award of the contract;

(2) the reasons for the decision, including the characteristics and relative advantages of the successful tender, the score (if any) obtained by –

(a) the person who is to receive the notice; and

(b) the person to be awarded the contract,

and anything required by paragraph 6.

(3) the name of the person to be awarded the contract; and

(4) a precise statement of either –

(a) when, in accordance with paragraphs 12 to 17 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

(b) the date before which the Department will not, in conformity with paragraphs 12 to 17, enter into the contract.

3. Where it is to be sent to a candidate, the notice referred to in paragraph 1 shall include –

(1) the reasons why the candidate was unsuccessful; and

(2) the information mentioned in paragraph 2, but as if the words “and relative advantages” were omitted from subparagraph (2).

4. Where the only tenderer is the one who is to be awarded the contract, and there are no candidates, the Department need not comply with paragraph 1.

Reasons to be given on request

5. Except to the extent that the Department has already informed the person whether by notice under paragraph 1 or otherwise), and subject to paragraph 8 the Department shall within 15 days of the date on which it receives a request in writing from any person who was unsuccessful –

(1) inform that person of the reasons why he was unsuccessful; and

(2) if the person submitted an admissible tender, the Department shall inform that person of the characteristics and relative advantages of the successful tender and the name of the person to be awarded the contract.

Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.

6. The reasons referred to in paragraph 2(2) and 5(1) shall include any reason for the Department's decision that the person did not meet the technical specifications required for the contract.

Abandonment or recommencement of procedure

7. Subject to paragraph 9 the Department shall, as soon as possible after the decision has been made, inform any candidates and tenderers of its decision to abandon or to recommence a contract award procedure in relation to the award of a contract.

8. Where the Department informs a person of its decision in accordance with paragraph 7 it shall
- (1) include the reasons for its decision; and
 - (2) provide the decision and reasons in writing if requested by the person.

Grounds for withholding information

9. The Department may withhold any information to be provided in accordance with paragraph 1, 2, 5, 6, 7 or 8 where the disclosure of such information –

- (a) would impede law enforcement;
- (b) would otherwise be contrary to the public interest;
- (c) would prejudice legitimate commercial interests; or
- (d) might prejudice fair competition.

Definitions

10. For the purposes of this Part –

(1) “candidate” means a person (other than a tenderer) who applied to be included amongst those to be selected to tender or to negotiate the contract, but does not include any person who has been informed of the rejection of his application, and the reasons for it; and

(2) “tenderer” means a person who submitted an offer and has not been definitively excluded.

11. For the purposes of paragraph 10(2) –

- (a) a tenderer has been excluded if his offer has been excluded from consideration; and
- (b) an exclusion is definitive if, and only if, the tenderer has been notified of the exclusion and either –
 - (i) the exclusion has been held to be lawful in proceedings under this Schedule; or
 - (ii) the time limit for starting such proceedings has expired even on the assumption that the Court would have granted the maximum extension permitted by paragraphs 19(4) and (5).

PART 2

Standstill period

12. The Department must not enter into the contract before the end of the standstill period.

13. Subject to paragraph 17, where the Department sends a paragraph 1 notice to all the relevant persons by facsimile or electronic means, the standstill period ends at midnight at the end of the 10th day after the relevant sending date.

14. Subject to paragraph 17, where the Department sends a paragraph 1 notice to all the relevant persons only by other means, the standstill period ends at whichever of the following occurs first –

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

15. In paragraphs 13 and 14, “the relevant sending date” means the date on which the paragraph 1 notices are sent to the relevant persons, and if the notices are sent to different relevant persons on different dates, the relevant sending date is the date on which the last of the notices is sent.

16. Subject to paragraph 17, where the Department sends a paragraph 1 notice to one or more of the relevant persons 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 –

- (1) midnight at the end of the 10th day after the date on which the last notice is sent by facsimile or electronic means;
- (2) the time when whichever of the following occurs first –
 - (a) midnight at the end of the 15th day after the date on which the last notice is sent by facsimile or electronic means;
 - (b) midnight at the end of the 10th day after the date on which the last of the persons to receive a notice sent by any such other means receives it.

17. Where the last day of the standstill period reckoned in accordance with paragraphs 13 to 16 is not a working day, the standstill period is extended to midnight at the end of the next working day.

PART 3

Applications to the Court

18. Proceedings under this Part may be brought in the High Court by any person having or having had an interest in obtaining a particular public service contract and who has been or risks being harmed by an alleged infringement on the grounds that the decision has infringed European Union law.

General time limits for starting proceedings

19.—(1) This paragraph limits the time within which proceedings may be started.

(2) Subject to subparagraphs (3) to (5) such proceedings must be started within 30 days beginning with the date when the person first knew or ought to have known that grounds for starting the proceedings had arisen.

(3) Subparagraph (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 person by facsimile or electronic means, 10 days beginning with –
 - (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 person is informed of a summary of those reasons.
- (b) where the proceedings relate to a decision which is sent to the person by other means, whichever of the following periods ends first –

Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.

- (i) 15 days beginning with the day after the day 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 person is informed of a summary of those reasons;
 - (c) where heads (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 subparagraph (5) the Court may extend the time limit imposed by subparagraph (2) where the Court considers that there is a good reason for doing so.
- (5) The Court must not exercise its power under subparagraph (4) so as to permit proceedings to be started more than 3 months after the date when the person first knew or ought to have known that grounds for starting the proceedings had arisen.
- (6) For the purposes of this Part, proceedings are to be regarded as started when the originating process is issued.

Starting proceedings

- 20.—(1) Where proceedings are started by a person he must serve the originating process on the Department within 7 days after the date of issue.
- (2) Subparagraph (3) applies where proceedings are started alleging a breach of a requirement or suspension imposed by or under paragraph 21 or paragraph 22 where the contract has not been fully performed.
- (3) In those circumstances the person must, as soon as practicable, send a copy of the originating process to any other person who is a party to the contract in question.
- (4) The Department must, as soon as is practicable, comply with any request from the person who has started the proceedings for any information that he may reasonably require for the purpose of complying with subparagraph (3).
- (5) In this paragraph “serve” means serve in accordance with rules of court and for the purposes of this paragraph an originating process is deemed to be served on the day on which it is deemed by rules of court to be served.

Contract-making suspended by challenge to award decision

- 21.—(1) Where –
- (a) an originating process is issued in respect of the Department’s decision to award the contract;
 - (b) the Department has become aware that the originating process has been issued and that it relates to that decision; and
 - (c) the contract has not been entered into,
- the Department is required to refrain from entering into the contract.
- (2) The requirement continues until any of the following occurs –
- (a) the Court brings the requirement to an end by interim order under paragraph 22(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).

Interim orders

- 22.—(1) In proceedings the Court may, where relevant, make an interim order –
- (a) bringing to an end the requirement imposed by paragraph 21(1);
 - (b) restoring or modifying that requirement;
 - (c) suspending the procedure leading to the award of the contract;
 - (d) suspending the implementation of any decision or action taken by the Department in the course of following such a procedure.
- (2) When deciding whether to make an order under subparagraph (1)(a) –
- (a) the Court must consider whether, if paragraph 21(1) were not applicable, it would be appropriate to make an interim order requiring the Department to refrain from entering into the 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 subparagraph (1)(a).
- (3) If the Court considers that it would not be appropriate to make an interim order of the kind mentioned in subparagraph (2)(a) in the absence of undertakings or conditions, it may require or impose such undertakings or conditions in relation to the requirement in paragraph 21(1).
- (4) This paragraph does not prejudice any other powers of the Court.

Remedies where the contract has not been entered into

- 23.—(1) This paragraph applies where the Court is satisfied that a decision taken by the Department infringed European Union law and the 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 concerned;
 - (b) order the Department to amend any document;
 - (c) award damages to a person who has suffered loss and damage as a result of the infringement.
- (3) This paragraph does not prejudice any other powers of the Court.

Remedies where the contract has been entered into

- 24.—(1) Subparagraph (2) applies if the Court is satisfied that a decision taken by the Department infringed European Union law and the contract has already been entered into.
- (2) In those circumstances the Court –
- (a) may award damages to the person who has suffered loss or damage as a consequence of the infringement;
 - (b) must not order any other remedies.

Injunction against the Department

25. In proceedings against the Department the Court has power to grant an injunction despite section 21 of the Crown Proceedings Act 1947.

Interpretation of Schedule

- 26.—(1) In this Schedule –
- (a) “person” includes a body of persons corporate or unincorporated;

Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.

- (b) “paragraph 1 notice” means a notice given in accordance with paragraph 1 of Part 1; and
- (c) “relevant persons” means persons to whom paragraph 1 of Part 1 requires information to be given.

(2) For the purposes of this Schedule and notwithstanding section 39(2) of the Interpretation (Northern Ireland) Act 1954 where a period of time is expressed to begin on, or to be reckoned from a particular day, that day shall be included in the period.