
SCOTTISH STATUTORY INSTRUMENTS

2006 No. 2

The Utilities Contracts (Scotland) Regulations 2006

PART 9

APPLICATIONS TO THE COURT

Enforcement of obligations

45.—(1) The obligation on a utility to comply with the provisions of these Regulations other than regulations 30(9) and 38, and with any enforceable Community obligation in respect of a contract or design contest (other than one excluded from the application of these Regulations by regulation 6, 7, 8, 9 or 34) 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; and
- (b) a contract for research and development services specified in category 8 of Part A of Schedule 3;

is a duty owed also to a GPA economic operator.

(3) References to an “economic operator” in paragraphs (4), (5), (8) and (9) shall be construed as including a reference to a GPA economic operator.

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

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

- (a) the economic operator bringing the proceedings has informed the utility of the breach or apprehended breach of the duty owed to it in accordance with paragraph (1) or (2) by that utility 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.

(6) Subject to paragraph (7), 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 the contract of which the breach of the duty owed in accordance with paragraphs (1) or (2) is alleged, or suspend the implementation of any decision or action taken by the utility in the course of following such a procedure; and
- (b) if satisfied that a decision or action taken by a utility was in breach of the duty owed in accordance with paragraphs (1) or (2)—

- (i) order the setting aside of that decision or action or order the utility 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.

(7) In proceedings under this regulation 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 in accordance with paragraphs (1) or (2) if the contract in relation to which the breach occurred has been entered into.

(8) Where, in proceedings under this regulation, the Court is satisfied that an economic operator would have had a real chance of being awarded a contract or winning a design contest if that chance had not been adversely affected by a breach of the duty owed to it by the utility in accordance with paragraphs (1) or (2) the economic operator shall be entitled to damages amounting to its costs in preparing its tender and in participating in the procedure leading to the award of the contract or its costs of participating in the procedure leading to the determination of the design contest.

(9) Paragraph (8) 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 is without prejudice to the matters on which an economic operator may be required to satisfy the Court in respect of any other such claim.

(10) Notwithstanding sections 21 and 42 of the Crown Proceedings Act 1947⁽¹⁾, 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⁽²⁾; and

“relevant time” means—

- (i) if the utility selects economic operators to tender for or to negotiate the contract in accordance with a qualification system established in accordance with regulation 25, the date on which the selection commences;
- (ii) if the utility satisfies the requirement that there be a call for competition by indicating the intention to award the contract in a periodic indicative notice in accordance with regulation 16(2)(a)(i), the date on which the notice is sent to the Official Journal; or
- (iii) in any other case, the date on which a contract notice or design contest notice would be sent to the Official Journal if the requirement that there be a call for competition applied and the utility decided to satisfy that requirement by sending such a notice.

Conciliation

46.—(1) An economic operator which considers that—

- (a) a utility has breached or may breach the duty referred to in regulation 45(1) and (2); and
- (b) in consequence that economic operator has suffered, or risks suffering, loss or damage;

(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.

and which wishes to use the conciliation procedure provided for in Articles 10 and 11 of the Utilities Remedies Directive shall send a request for the application of the procedure to the Minister for onward transmission as soon as possible to the Commission.

(2) Neither the request for nor any action taken in accordance with the conciliation procedure referred to in paragraph (1) shall affect the rights or liabilities of—

- (a) the economic operator requesting it;
- (b) the utility in respect of which the request is made; or
- (c) any other person.