
SCOTTISH STATUTORY INSTRUMENTS

2012 No. 89

The Utilities Contracts (Scotland) Regulations 2012

PART 9

APPLICATIONS TO THE COURT

Powers and duties of the court

45.—(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 utility in the course of following a procedure referred to in paragraph (i); and
- (b) if satisfied that a decision or action taken by a utility was in breach of the duty owed under regulation 44(1) or (2), may—
 - (i) order the setting aside of that decision or action;
 - (ii) order the utility 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 utility 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 46(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 utility 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 utility.

(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 46, 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 44(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) Where paragraph (9) applies, 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, the conclusion of a framework agreement or admission to a dynamic purchasing system, or its costs of participating in the procedure leading to the determination of the design contest.

(9) This paragraph applies where, in proceedings under this Part, the Court is satisfied that an economic operator would have had a real chance of being awarded a contract, becoming a party to a framework agreement, being admitted to a dynamic purchasing system 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 regulation 44(1) or (2).

(10) 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.

(11) Sections 21 and 42 of the Crown Proceedings Act 1947(1) do not apply in proceedings brought under this Part against the Crown.

(1) 1947 c.44 (10 and 11 Geo 6).