



STATUTORY INSTRUMENTS.

S.I. No. 326 of 2017



EUROPEAN UNION (AWARD OF CONCESSION CONTRACTS)
(REVIEW PROCEDURES) REGULATIONS 2017

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I, PASCHAL DONOHOE, Minister for Public Expenditure and Reform, in exercise of the powers conferred on me by section 3 of the European Communities Act 1972 (No. 27 of 1972), and for the purpose of giving effect to Council Directive 89/665/EEC and Council Directive 92/13/EEC, as amended by Directive 2007/66/EC of the European Parliament and of the Council and Directive 2014/23/EU of the European Parliament and of the Council, hereby make the following regulations:

Citation

1. These Regulations may be cited as the European Union (Award of Concession Contracts) (Review Procedures) Regulations 2017.

Interpretation — general

2. (1) In these Regulations—

“Award of Concession Contracts Regulations” means the European Union (Award of Concession Contracts) Regulations 2017;

“contracting authority” has the same meaning as in the Award of Concession Contracts Regulations;

“contracting entity” has the same meaning as in the Award of Concession Contracts Regulations;

“Court” means the High Court;

“eligible person” has the meaning given by Regulation 4;

“Official Journal” means the Official Journal of the European Union;

“reviewable concession contract” means a contract referred to in the Award of Concession Contracts Regulations, the awarding of which is governed by one or more of the Parts (or a Chapter or Chapters of those Parts) of those Regulations;

“Revised Remedies Directive” means—

(a) in the case of a decision taken by a contracting authority — Council Directive 89/665/EEC of 21 December 1989, or

(b) in the case of a decision taken by a contracting entity — Council Directive 92/13/EEC,

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“Iris Oifigiúil” of 25th July, 2017.*

in each case as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 and Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014;

“standstill period” has the meaning given by Regulation 5.

(2) For the purposes of these Regulations, a contract has been concluded when it has been entered into and is legally binding.

(3) For the purposes of these Regulations—

(a) a tenderer is concerned if he or she has not been definitively excluded from a contract award procedure, and

(b) a candidate is concerned if the contracting authority or contracting entity has not made information available to him or her about the rejection of his or her application before the notification of the contract award decision to the tenderers concerned.

(4) For the purposes of paragraph (3)(a), the exclusion of a tenderer is definitive if it has been notified to the tenderer in accordance with Regulation 6 and—

(a) has been declared lawful by the Court, or

(b) is not, or can no longer be, subject to a review procedure.

(5) A word or expression used in both these Regulations and the Award of Concession Contracts Regulations has, unless the contrary intention appears, the same meaning in these Regulations as in the Award of Concession Contracts Regulations.

Application of these Regulations to contracts and decisions

3. These Regulations apply to decisions taken, after the coming into operation of these Regulations, by contracting authorities or contracting entities in relation to the award of reviewable concession contracts, regardless of when the relevant concession contract award procedure commenced.

Persons to whom review procedures are available

4. For the purposes of these Regulations, a person is an eligible person in relation to a reviewable concession contract if the person—

(a) has, or has had, an interest in obtaining the reviewable concession contract,

and

(b) alleges that he or she has been harmed, or is at risk of being harmed, by an infringement, in relation to that reviewable concession contract, of the law of the European Union in the field of public procurement, or of a law of the State transposing that law.

Standstill period

5. (1) A contracting authority or contracting entity shall not conclude a reviewable concession contract to which a standstill period applies under these Regulations within the standstill period for the contract.

(2) There is no standstill period for—

- (a) a contract where the Award of Concession Contracts Regulations do not require prior publication of a concession notice in the Official Journal, or
- (b) a contract where the only tenderer concerned is the one who is awarded the contract and there are no candidates concerned.

(3) The standstill period for a contract begins on the day after the day on which each tenderer and candidate concerned is sent a notice, in accordance with paragraphs (2) and (3) of Regulation 6, of the outcome of his or her tender or application.

(4) The duration of the standstill period must be at least—

- (a) if the notice under Regulation 6 is sent by fax or electronic means, 14 calendar days, or
- (b) if the notice is sent by any other means, 16 calendar days.

(5) For the avoidance of doubt, nothing in the subsequent provisions of these Regulations enables a Court to make an order permitting a reviewable concession contract to be concluded during the period specified in paragraph (1).

Notices to unsuccessful tenderers and candidates

6. (1) The notice referred to in Regulation 5(3) shall be as set out in this Regulation.

(2) Such a notice—

- (a) shall inform the candidates and tenderers concerned of the decisions reached concerning the award of the contract including the grounds for any decision not to award a contract, for which there has been publication of a concession notice or to recommence the procedure,
- (b) shall state the exact standstill period applicable to the contract, and
- (c) for each unsuccessful tenderer or candidate, shall include—
 - (i) in the case of an unsuccessful candidate, a summary of the reasons for the rejection of his or her application,
 - (ii) in the case of an unsuccessful tenderer, a summary of the reasons for the rejection of his or her tender.

(3) In the case of a tenderer who has submitted an admissible tender (that is, a tender that qualifies for evaluation under the rules of the relevant tender process), the summary required by paragraph (2)(c)(ii) shall comprise—

- (a) the characteristics and relative advantages of the tender selected, and
- (b) the name of the successful tenderer.

(4) In the case of an unsuccessful candidate, the information to be provided under paragraph (2)(c)(i) may be provided by setting out—

- (a) the score obtained by the candidate concerned, and
- (b) the score achieved by the lowest-scoring candidate who was considered to meet the pre-qualification requirements, in respect of each criterion assessed by the contracting authority or contracting entity.

(5) In the case of an unsuccessful tenderer, the information to be provided under paragraph (2)(c) (ii) and subparagraphs (a) and (b) of paragraph (3) may be provided by setting out—

- (a) the score obtained by the unsuccessful tenderer concerned, and
- (b) the score obtained by the successful tenderer in respect of each criterion assessed by the contracting authority or contracting entity.

(6) However, a contracting authority or contracting entity may decide to withhold any information referred to in paragraph (2)(c) regarding the award of a contract if the release of such information—

- (a) would impede law enforcement,
- (b) would otherwise be contrary to the public interest,
- (c) would prejudice the legitimate commercial interests of economic operators, whether public or private, or
- (d) might prejudice fair competition between economic operators whether public or private.

Time limits for applications to Court

7. (1) Subject to any order of the Court made under a rule referred to in Regulation 11(2), an application to the Court shall be made within the relevant period determined in accordance with this Regulation.

(2) An application referred to in subparagraph (a) or (b) of Regulation 8(1) shall be made within 30 calendar days after the applicant was notified of the decision, or knew or ought to have known of the infringement alleged in the application.

(3) An application for a declaration that a contract is ineffective shall be made within 30 calendar days (commencing on the appropriate date determined in

accordance with paragraph (4) or (5), as the case requires), in the following cases—

- (a) where the contracting authority or contracting entity published a contract award notice in accordance with Regulations 31 and 32 of the Award of Concession Contracts Regulations, and, in the case of a contract awarded without prior publication of a concession notice in the Official Journal, on condition that the contract award notice sets out the justification of the contracting authority's or contracting entity's decision not to publish a concession notice;
- (b) where the contracting authority or contracting entity notified each tenderer or candidate concerned of the outcome of his or her tender or application, and that notice contained a summary of the relevant reasons that complied with Regulation 6(2).

(4) In the case mentioned in paragraph (3)(a), the period begins on the day after the notice is published in the Official Journal.

(5) In the case mentioned in subparagraph (b) of paragraph (3), the period begins on the day after the contracting authority or contracting entity gives the notice referred to in that subparagraph.

(6) In any other case an application for a declaration that a contract is ineffective shall be made within 6 months after the conclusion of the relevant contract.

Application to Court

8. (1) An eligible person may apply to the Court—

- (a) for an order to correct an alleged infringement or prevent further damage to the eligible person's interests, including measures to suspend or to ensure the suspension of the procedure for the award of the concession contract concerned or the implementation of any decision taken by the contracting authority or contracting entity, or
- (b) for review of the contracting authority's or contracting entity's decision to award the contract to a particular tenderer or candidate.

(2) If a person applies to the Court under paragraph (1), the contracting authority or contracting entity shall not conclude the contract until—

- (a) the Court has determined the matter, or
- (b) the Court gives leave to lift any suspension of a procedure, or
- (c) the proceedings are discontinued or otherwise disposed of, but this is subject to paragraph (3).

(3) Notwithstanding that—

- (a) an application has been made under paragraph (1), and
- (b) the matter concerned has not been determined by the Court,

the contracting authority or contracting entity may conclude the contract if, on application to the Court under Regulation 9, the Court so orders.

(4) A person who is an eligible person in relation to a reviewable concession contract that has been concluded may apply to the Court for a declaration that the contract is ineffective.

(5) A person intending to make an application to the Court in accordance with this Regulation shall first notify the contracting authority or contracting entity in writing of—

- (a) the alleged infringement,
- (b) his or her intention to make an application to the Court, and
- (c) the matters that in his or her opinion constitute the infringement.

(6) A person who has applied to the Court under paragraph (1), (2) or (4) shall give the contracting authority or contracting entity concerned notice of the application by serving a copy of the originating motion on the authority or entity as soon as reasonably practicable.

(7) Nothing in this Regulation prevents an eligible person, the contracting authority or the contracting entity from applying to the Court for any other remedy that may be available in the particular circumstances.

Exception to prohibition in Regulation 8(2)

9. (1) On application made to it under this Regulation by the contracting authority or contracting entity, the Court may, notwithstanding the matters referred to in Regulation 8(3)(a) and (b), make an order permitting the contracting authority or contracting entity to conclude the contract referred to in Regulation 8(1).

(2) When deciding whether to make an order under this Regulation—

(a) the Court shall consider whether, if Regulation 8(2)(a) were not applicable, it would be appropriate to grant an injunction restraining the contracting authority or contracting entity from entering into the contract,

and

(b) only if the Court considers that it would not be appropriate to grant such an injunction may it make an order under this Regulation.

(3) The Court may, if it considers just to do so, specify in the order it makes under this Regulation that the order shall operate subject to there being satisfied

one, or more than one, condition that it determines to be appropriate and specifies in the order.

(4) A person who has applied to the Court under this Regulation shall give the eligible person concerned notice of the application by serving a copy of the originating motion on the eligible person as soon as reasonably practicable.

Powers of Court

10. (1) The Court—

(a) may set aside, vary or affirm a decision to which these Regulations apply,

(b) may declare a reviewable concession contract ineffective, and

(c) may impose alternative penalties on a contracting authority or contracting entity, and may make any necessary consequential order.

(2) The Court may make interlocutory orders with the aim of correcting an alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a concession contract or the implementation of a decision of the contracting authority or contracting entity.

(3) The Court may set aside any discriminatory technical, economic or financial specification in an invitation to tender, contract document or other document relating to a contract award procedure.

(4) When considering whether to make an interim or interlocutory order, the Court may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to make such an order when its negative consequences could exceed its benefits.

(5) The Court may by order suspend the operation of a decision or a contract.

(6) The Court may award damages as compensation for loss resulting from a decision that is an infringement of the law of the European Union, or of a law of the State transposing such law.

Rules of court

11. (1) The rules of court may provide for a preliminary procedure to decide whether an applicant under Regulation 8 is an eligible person in relation to a particular reviewable concession contract.

(2) The rules of court may provide for the Court to grant leave, if the Court considers that there is good reason to do so, to make an application under Regulation 8 after the latest time permitted by Regulation 7(2).

Declaration by Court that a contract is ineffective

12. (1) For the purposes of this Regulation—
- (a) a Regulation 5(1) infringement is an infringement where—
 - (i) the relevant contract is one to which a standstill period applies, and
 - (ii) the contracting authority or contracting entity has concluded the contract during the standstill period, and
 - (b) a Regulation 8(2) infringement is an infringement where—
 - (i) a tenderer or candidate has applied to the Court in accordance with Regulation 8 for review of a contract award decision in relation to a reviewable concession contract, and
 - (ii) the contracting authority or contracting entity has concluded the contract before the Court has made its decision.
- (2) The reference in paragraph (1)(b)(ii) to the contracting authority or contracting entity having concluded the contract (the “relevant act”) before the Court has made its decision does not include a reference to either of the following cases—
- (a) a case in which the Court has made an order under Regulation 9 permitting the relevant act, or
 - (b) if such an order has been made but is specified to operate subject to one, or more than one, condition being satisfied, a case in which the relevant act complies with that condition or those conditions.
- (3) Subject to paragraphs (4), (5) and (6), the Court shall declare a reviewable concession contract ineffective in the following cases:
- (a) the case where the contracting authority or contracting entity has concluded the contract without first publishing a concession notice in the Official Journal and concluding the contract without publishing such a notice is not permitted by the Award of Concession Contracts Regulations;
 - (b) the cases of a Regulation 5(1) infringement or a Regulation 8(2) infringement where the infringement—
 - (i) has deprived the tenderer or candidate applying for review of the possibility of pursuing pre-contractual remedies, and
 - (ii) was combined with an infringement of the Award of Concession Contracts Regulations that has affected the chances of the tenderer applying for a review to obtain the contract.

(4) Paragraph (3)(a) does not apply where—

- (a) the contracting authority or contracting entity considered that the award of a contract without prior publication of a concession notice in the Official Journal was permitted by the Award of Concession Contracts Regulations,
- (b) the contracting authority or contracting entity published, in the Official Journal, a notice complying with paragraph (8) stating that it intended to conclude the contract, and
- (c) the contract was not concluded before the end of the period of 14 calendar days beginning on the day after the day of publication of that notice.

(5) Despite paragraph (3), the Court may decline to declare a contract ineffective if it finds, after having examined all aspects of the matter that it considers relevant, that overriding reasons relating to a general interest require that the effects of the contract should be maintained.

(6) Economic interests in the effectiveness of the contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences. For the purposes of this Regulation, economic interests directly linked to the contract are not overriding reasons relating to a general interest. “Economic interests directly linked to the contract” includes (but is not limited to)—

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

(7) In the case of a Regulation 5(1) infringement or a Regulation 8(2) infringement (being, in each case, an infringement not covered by paragraph (3)(b)), the Court may, after having assessed all aspects that it considers relevant, declare the relevant contract ineffective.

(8) A notice referred to in paragraph (4)(b)—

- (a) shall be in the format set out in Commission Regulation 1150/2009,
- (b) shall include—
 - (i) the name and contact details of the contracting authority or contracting entity,
 - (ii) a description of the object of the contract,

- (iii) a justification of the decision of the contracting authority or contracting entity to award the contract without prior publication of a concession notice in the Official Journal, and
 - (iv) the name and contact details of the economic operator in favour of whom a contract award decision has been taken, and
- (c) may include any other information that the contracting authority or contracting entity considers useful.

(9) The Court may make any order necessary in the interests of justice to ensure that proper payment is made for any work done, or goods or services provided, in good faith in reliance on a contract that has been declared ineffective.

Effect of declaration that a contract is ineffective

13. (1) If the Court declares a contract ineffective, any contractual obligations not already performed are cancelled. Contractual obligations already performed are not affected.

(2) Paragraph (1) does not prevent the exercise of any power under which an order or decision of the Court may be stayed, but, if a declaration of ineffectiveness is stayed, then, at the end of the period during which the declaration is stayed, the contract shall be taken to have been ineffective from the making of the declaration.

Alternative penalties

14. (1) The Court shall impose an alternative penalty if—

- (a) under Regulation 12(5), it declines to declare a contract ineffective, or
- (b) in the case of an alleged infringement referred to in Regulation 12(7), it finds that the infringement occurred but declines to declare the contract ineffective.

(2) The alternative penalty shall be either or both of the following:

- (a) the imposition on the contracting authority or contracting entity of a civil financial penalty of up to 10 per cent of the value of the contract;
- (b) the termination, or shortening of the duration, of the contract.

(3) The Court may take into account all the relevant factors, including the seriousness of the infringement, the behaviour of the contracting authority or contracting entity and any extent to which the contract remains in force. For that purpose, the Court needs to be satisfied of the relevant facts only on the balance of probabilities.

(4) A civil financial penalty payable pursuant to an order under paragraph (2)(a) shall be paid into the Central Fund.

(5) If the Court orders the payment of a civil financial penalty under paragraph (2)(a), the amount of the penalty may be recovered as a debt in any court of competent jurisdiction. For the purposes of such recovery, the order of the Court is conclusive that the amount of the penalty is due and payable by the contracting authority or contracting entity ordered to pay it.

(6) The award of damages is not an appropriate alternative penalty for the purposes of this Regulation.

Non-exclusion of other remedies

15. Nothing in these Regulations affects any power of the Court to grant any other remedy in relation to a contract.



GIVEN under my Official Seal,
17 July 2017.

PASCHAL DONOHOE,
Minister for Public Expenditure and Reform.

BAILE ÁTHA CLIATH
ARNA FHOILSIÚ AG OIFIG AN tSOLÁTHAIR
Le ceannach díreach ó
FOILSEACHÁIN RIALTAIS,
52 FAICHE STIABHNA, BAILE ÁTHA CLIATH 2
(Teil: 01 - 6476834 nó 1890 213434; Fax: 01 - 6476843)
nó trí aon díoltóir leabhar.

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