



STATUTORY INSTRUMENTS.

S.I. No. 131 of 2010



EUROPEAN COMMUNITIES (AWARD OF CONTRACTS BY UTILITY
UNDERTAKINGS) (REVIEW PROCEDURES) REGULATIONS 2010

(Prn. A10/0449)

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I, BRIAN LENIHAN, Minister for Finance, 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 92/13EEC¹, as amended by Directive 2007/66/EC², hereby make the following regulations:

Citation

1. These Regulations may be cited as the European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010.

Interpretation — general

2. (1) In these Regulations—

“contracting entity” has the meaning given by the Utility Undertakings’ 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 contract” means a contract to which the Utility Undertakings’ Contracts Regulations apply, and includes a dynamic purchasing system, a framework agreement, a contract awarded under a dynamic purchasing system and a design contest;

“Revised Remedies Directive” means Council Directive 92/13/EEC of 25 February 1992, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007;

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

“Utility Undertakings’ Contracts Regulations” means the European Communities (Award of Contracts by Utility Undertakings) Regulations 2007 (S.I. No. 50 of 2007)).

(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—

¹O.J. No. L076, 23/3/1992, p.14

²O.J. No. L335, 20.12.2007, p.31.

Notice of the making of this Statutory Instrument was published in “Iris Oifigiúil” of 30th March, 2010.

- (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 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 paragraphs (2) and (3) of Regulation 7 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 Utility Undertakings' Contracts Regulations has, unless the contrary intention appears, the same meaning in these Regulations as in the Utility Undertakings' 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 entities in relation to reviewable contracts, regardless of when the relevant 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 contract if the person—

- (a) has, or has had, an interest in obtaining the reviewable 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 contract, of Community law in the field of public procurement, or of a law of the State transposing that law.

Standstill period

5. (1) A contracting entity shall not conclude a reviewable contract (other than such a contract of a kind for which, under paragraph (2), there is no standstill period) within the standstill period for the contract.

(2) There is no standstill period for—

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

- (c) a specific contract based on a dynamic purchasing system in accordance with paragraphs (5) to (12) of Regulation 29 of the Utility Undertakings' Contracts Regulations.

(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.

Notices to unsuccessful tenderers and candidates

6. (1) The notice referred to in Regulation 5(3), or a notice to an unsuccessful tenderer for a contract based on a dynamic purchasing system, 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, the conclusion of a framework agreement or admittance to a dynamic purchasing system, including the grounds for any decision not to award a contract, conclude a framework agreement or implement a dynamic purchasing system for which there has been a call for competition,
- (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,
- (b) the name of the successful tenderer, or, in the case of a framework agreement, the names of the parties to it, and
- (c) in the cases referred to in paragraphs (6) to (8) of Regulation 36 of the Utilities Undertakings' Contracts Regulations, the reasons for the contracting entity's decision of non-equivalence or its decision that

the works, supplies or services do not meet the performance or functional requirements.

(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 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 entity.

(6) In the case of a framework agreement to which more than one tenderer has been admitted, the information to be provided under paragraph (2)(c)(ii) may be provided by setting out—

- (a) the score obtained by the unsuccessful tenderer concerned, and
- (b) the score obtained by the lowest scoring tenderer who was admitted to the framework in respect of each criterion assessed by the contracting entity.

(7) However, a contracting entity may decide to withhold any information referred to in paragraph (2)(c) regarding the award of a contract, the conclusion of a framework agreement or admittance to a dynamic purchasing system if the release of such information—

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

Time limits for applications to Court

7. (1) Subject to any order of the Court made under a rule referred to in Regulation 10(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 published a contract award notice in accordance with Regulations 45 and 46 of the Utility Undertakings' Contracts Regulations, and, in the case of a contract awarded without prior publication of a contract notice in the Official Journal, on condition that the contract award notice sets out the justification of the contracting authority's decision not to publish a contract notice;
- (b) where the contracting authority 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);
- (c) the cases of a contract based on a framework agreement, and of a specific contract based on a dynamic purchasing system, where the contracting authority has given notice in accordance 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 cases mentioned in subparagraphs (b) and (c) of paragraph (3), the period begins on the day after the contracting authority gives the notice referred to in the relevant 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 interlocutory orders with the aim of correcting an alleged infringement or preventing further damage to an eligible person's interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of the contract concerned or the implementation of any decision taken by the contracting entity,
- (b) for review of the 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 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.

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

(4) A person intending to make an application to the Court in accordance with this Regulation shall first notify the 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.

(5) A person who has applied to the Court under paragraph (1), (2) or (3) shall give the contracting entity concerned notice of the application by serving a copy of the originating motion on the entity as soon as reasonably practicable.

(6) Nothing in this Regulation prevents an eligible person from applying to the Court for any other remedy that may be available in the particular circumstances.

Powers of Court

9. (1) The Court—

- (a) may set aside, vary or affirm a decision to which these Regulations apply,
- (b) may declare a reviewable contract ineffective, and
- (c) may impose alternative penalties on a 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 contract or the implementation of a decision of the 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 Community law, or of a law of the State transposing Community law.

Rules of court

10. (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 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

11. (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 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 contract,
- (ii) the contracting entity has concluded the contract before the Court has made its decision.

(2) Subject to paragraphs (3), (4) and (5), the Court shall declare a reviewable contract ineffective in the following cases:

- (a) the case where the contracting entity has concluded the contract without first publishing a contract notice in the Official Journal and concluding the contract without publishing such a notice is not permitted by the Utility Undertakings' 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 Utility Undertakings' Contracts Regulations that has affected the chances of the tenderer or candidate applying for a review to obtain the contract;
- (c) a case referred to in subparagraph (c) of Regulation 5(2) where—
 - (i) there has been an infringement of any of paragraphs (9) to (12) of Regulation 29 of the Utility Undertakings' Contracts Regulations, and
 - (ii) the value of the contract concerned equals or exceeds the relevant value threshold set out for the time being in Regulation 12 of the Utility Undertakings' Contracts Regulations.
- (3) Paragraph (2)(a) does not apply where—
 - (a) the contracting entity considered that the award of a contract without prior publication of a contract notice in the Official Journal was permitted by the Utility Undertakings' Contracts Regulations,
 - (b) the 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.
- (4) Paragraph (2)(c) does not apply where—
 - (a) the contracting entity considered that the award of the contract was in accordance with paragraphs (9) to (12) of Regulation 29 of the Utility Undertakings' Contracts Regulations,
 - (b) the contracting entity sent a notice of the contract award decision, together with a summary of reasons complying with Regulation 6(2)(c), and, if applicable, Regulation 6(3), to the tenderers concerned, and
 - (c) the contract was not concluded before the end of the period of—
 - (i) 14 days beginning on the day following the day on which notice of the contract award decision is sent to the tenderers concerned if fax or electronic means are used, or
 - (ii) 16 days beginning on the day following the day on which notice of the contract award decision is sent to the tenderers concerned if another means of communication is used.
- (5) Despite paragraph (2), 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. 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 (2)(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 (3)(b)—

- (a) shall be in the format set out in Commission Regulation 1150/2009³,
- (b) shall include—
 - (i) the name and contact details of the contracting entity,
 - (ii) a description of the object of the contract,
 - (iii) a justification of the decision of the contracting entity to award the contract without prior publication of a contract notice in the Official Journal of the European Union, 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 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.

³O.J. L313, 28.11.2009, p.3–35

Effect of declaration that a contract is ineffective

12. (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, 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

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

- (a) under Regulation 11(5), it declines to declare a contract ineffective, or
- (b) in the case of an alleged infringement referred to in Regulation 11(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 entity of a civil financial penalty of up to 10 percent 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 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 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

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

Revocation

15. (1) The European Communities (Review Procedures for the Award of Contracts by Entities Operating in the Water, Energy, Transport and Telecommunications Sectors) Regulations 1993 (S.I. No. 104 of 1993) are revoked.

(2) Paragraphs (4) to (9) of Regulation 51 of the Utility Undertakings' Contracts Regulations are revoked.



GIVEN under my Official Seal,
25 March 2010.

BRIAN LENIHAN,
Minister for Finance.

EXPLANATORY NOTE

(This note is not part of the Instrument and does not purport to be a legal interpretation)

These Regulations implement Directive 2007/66/EC insofar as it amends Remedies Directive 92/13/EEC. They cover procurement procedures of entities operating in the water, energy, transport and postal sectors.

The Regulations strengthen the remedies available to candidates and tenderers who feel their rights have been infringed in the award of contracts. They improve the opportunities for unsuccessful tenderers to challenge unlawful awards and increase the possible penalties on contracting entities for making such awards. In the case of a contract awarded in serious breach of the rules, the Court has powers to declare it “ineffective”.

National Public Procurement Policy Unit

BAILE ÁTHA CLIATH
ARNA FHOILSIÚ AG OIFIG AN tSOLÁTHAIR
Le ceannach díreach ón
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TEACH SUN ALLIANCE, SRÁID THEACH LAIGHEAN, BAILE ÁTHA CLIATH 2,
nó tríd an bpost ó
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AONAD 20 PÁIRC MIONDÍOLA COIS LOCHA, CLÁR CHLAINNE MHUIRIS,
CONTAE MHAIGH EO,
(Teil: 01 - 6476834 nó 1890 213434; Fax: 094 - 9378964 nó 01 - 6476843)
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