

SCHEDULE

Regulation 2

TRANSITIONAL AND SAVINGS PROVISIONS

PART 1

INTERPRETATION

Interpretation of Schedule

1.—(1) In this Schedule—

“amendment” includes modification and revocation,

“the Procurement Regulations” means the following and, in relation to any procedure, means whichever of the following applies to that procedure—

- (a) the Public Contracts (Scotland) Regulations 2012,
- (b) the Utilities Contracts (Scotland) Regulations 2012,
- (c) the Public Contracts (Scotland) Regulations 2015,
- (d) the Concession Contracts (Scotland) Regulations 2016,
- (e) the Utilities Contracts (Scotland) Regulations 2016,

“the second commencement date” is defined by paragraph 10,

“steady state amendments” is defined by paragraph 2.

(2) In this Schedule, the following have the same meaning as in the Procurement Regulations—

- (a) contracting authority,
- (b) design contest,
- (c) dynamic purchasing system,
- (d) economic operator,
- (e) framework agreement,
- (f) notices on the existence of a qualification system
- (g) periodic indicative notice,
- (h) prior information notice,
- (i) utility,
- (j) voluntary ex ante transparency notice.

(3) None of the savings in this Schedule imply any limitation of the scope of any of the other savings in this Schedule.

PART 2

PROCUREMENTS PENDING ETC. ON IP COMPLETION DAY

Meaning of “steady state amendments”

2. In this Part, “steady state amendments” means—

- (a) amendments made by these Regulations, and

- (b) any other amendments, including future amendments, to the Procurement Regulations that—
 - (i) come into force on, or begin to apply from, IP completion day or any time after IP completion day, and
 - (ii) are not made by or under any of sections 7A, 7B and 7C and paragraphs 11G and 11M of Schedule 2 of the European Union (Withdrawal) Act 2018(1).

Saving for procedures launched, but not finalised, before IP completion day

3.—(1) Steady state amendments do not affect any procedure launched by a contracting authority or a utility under the Procurement Regulations if the procedure—

- (a) was launched before IP completion day, and
- (b) was not yet finalised by IP completion day.

(2) But regulation 62 (recourse to e-Certis) of the Public Contracts (Scotland) Regulations 2015 (which is omitted by regulation 4(44) of these Regulations) ceases to be saved at the beginning of the day that is 9 months after the day on which IP completion day falls.

Meaning of ‘procedure’

- (3) In sub-paragraph (1), “procedure” includes—
 - (a) a procedure using a dynamic purchasing system,
 - (b) a procedure for which the call for competition takes the form of—
 - (i) a prior information notice,
 - (ii) a periodic indicative notice, or
 - (iii) a notice on the existence of a qualification system.

Meaning of ‘launched’

- (4) For the purposes of sub-paragraph (1), a procedure is launched—
 - (a) when a call for competition or any other invitation to submit applications has been made in accordance with the Procurement Regulations,
 - (b) where the Procurement Regulations do not require such a call or invitation, when the contracting authority or utility contacted economic operators in relation to the specific procedure.

Meaning of ‘finalised’

- (5) For the purposes of sub-paragraph (1), a procedure is finalised—
 - (a) upon publication of a contract award notice in accordance with the Procurement Regulations,
 - (b) where the Procurement Regulations do not require the publication of such a notice, upon conclusion of the relevant contract,
 - (c) where the contracting authority or utility decided not to award a contract, upon informing the tenderers, or persons otherwise entitled to submit applications, of the reasons why the contract was not awarded.

(1) [2018 c.16](#). Sections 7A, 7B, 7C, 8B and 8C were inserted by the European Union (Withdrawal Agreement) Act 2020 (c.1), sections 5, 6, 26(2), 18 and 21 respectively.

Saving for call-off procedures under certain framework agreements

4.—(1) If the condition in sub-paragraph (2) is met, steady state amendments do not affect any procedure relating to the performance of a framework agreement, including the award of contracts based on such an agreement, under—

- (a) regulation 34(3) to (10) of the Public Contracts (Scotland) Regulations 2015,
- (b) regulation 49(3) to (6) of the Utilities Contracts (Scotland) Regulations 2016.

(2) The condition is that the framework agreement—

- (a) was concluded before IP completion day and had neither expired nor been terminated before IP completion day, or
- (b) was concluded after IP completion day in accordance with a procedure to which paragraph 3 applied.

Transitional modification of the Procurement Regulations

5.—(1) In relation to a procedure to which paragraphs 3 or 4 apply, the Procurement Regulations are to be read, on and after IP completion day, and so far as the context permits or requires, as if—

- (a) any reference (however expressed) to a member State or EEA state included the United Kingdom,
- (b) any reference (however expressed) to—
 - (i) EU law,
 - (ii) any particular EU Treaty or any part of it,
 - (iii) any EU instrument, or other document of an EU entity or of the EU, or any part of any such instrument or document,
 - (iv) any part of EU law not falling within sub-paragraph (ii) or (iii),
 - (v) any tax, duty, levy or interests of the EU, or
 - (vi) any arrangements involving, or otherwise relating to, the EU of a kind not falling within sub-paragraph (i), (ii), (iii), (iv) or (v),

were a reference to any such thing (including any such thing as may have existed previously) so far as it is applicable to and in the United Kingdom by virtue of the relevant withdrawal provisions,

- (c) any reference (however expressed) to the area of the EU or of the EEA included the United Kingdom,
- (d) any reference (however expressed) to a citizen of the EU or a national of the EEA included a United Kingdom national (within the meaning given by Article 2(d) of the withdrawal agreement),
- (e) any reference to an enforceable EU obligation were a reference to an obligation that is enforceable by virtue of section 7A or 7B of the European Union (Withdrawal) Act 2018(2), and
- (f) such other modifications were made as are necessary for any purpose of the relevant withdrawal provisions and are capable of being ascertained from any such purpose or otherwise from those provisions.

(2) In sub-paragraph (1), “relevant withdrawal provisions” means—

(2) 2018 c.16. Sections 7A and 7B were inserted by the European Union (Withdrawal Agreement) Act 2020 (c.1), sections 5 and 6 respectively.

- (a) Title 8 of Part 3 of the withdrawal agreement (ongoing public procurement and similar procedures),
- (b) Title 5 of Part 3 of the EEA EFTA separation agreement (ongoing public procurement and similar procedures).

PART 3

PROVISIONS COMMENCED ON IP COMPLETION DAY

Procurement involving contracting authorities or utilities from other member States

- 6.—(1) This paragraph applies in relation to the omission, by these Regulations, of—
- (a) regulation 40 of the Public Contracts (Scotland) Regulations 2015 (procurement involving contracting authorities from different member States),
 - (b) regulation 55 of the Utilities Contracts (Scotland) Regulations 2016 (procurement involving utilities from different member States).
- (2) Those omissions do not imply—
- (a) any prohibition of the activities authorised by the omitted regulations (which activities might, accordingly, be carried on to any extent that would have been lawful if the omitted regulations had never existed), or
 - (b) that any matters provided for in those regulations are necessarily to have a different effect unless so required by applicable law (including rules for resolving any conflicts between the laws of different jurisdictions).

Saving of implied power to terminate contracts

- 7.—(1) This paragraph applies where—
- (a) a contract was awarded before IP completion day, and
 - (b) immediately before IP completion day, the contract contained a power—
 - (i) implied by regulation 73(3) of the Public Contracts (Scotland) Regulations 2015 to terminate the contract on the ground mentioned in regulation 73(1)(c) of those Regulations,
 - (ii) implied by regulation 47(3) of the Concession Contracts (Scotland) Regulations 2016 to terminate the contract on the ground mentioned in regulation 47(1)(c) of those Regulations, or
 - (iii) implied by regulation 87(3) of the Utilities Contracts (Scotland) Regulations 2016 to terminate the contract on the ground mentioned in regulation 87(1)(c) of those Regulations.
- (2) On and after IP completion day, that power continues despite the omission, by these Regulations, of regulations 73(1)(c), 47(1)(c) or 87(1)(c), as the case may be.

Saving of regulation 55(5) of the Concession Contracts Regulations 2016

8. The amendment made by these Regulations to regulation 55(5) of the Concession Contracts (Scotland) Regulations 2016 (application of the first ground of ineffectiveness) does not apply where the contract referred to in regulation 55(5) was awarded before IP completion day.

Saving in relation to voluntary ex ante transparency notices

- 9.**—(1) This paragraph applies in relation to the amendments made by these Regulations to—
- (a) regulation 91(7) of the Public Contracts (Scotland) Regulations 2015,
 - (b) regulation 104(7) of the Utilities Contracts (Scotland) Regulations 2016,
 - (c) regulation 55(6) of the Concession Contracts (Scotland) Regulations 2016.
- (2) Those amendments do not apply in relation to a voluntary transparency notice that was published in the Official Journal of the European Union if the notice was sent, before IP completion day, to be so published.

PART 4

PROVISIONS COMMENCED 12 MONTHS AFTER IP COMPLETION DAY

Saving in relation to procurements commenced before regulations 5, 7 and 9 come into force

10. The amendments made by regulations 5, 7 and 9 do not affect any procurement commenced before the date on which those amendments come into force (“the second commencement date”).

11. For the purposes of this Part, a procurement has been commenced before the second commencement date if, before that date—

- (a) a notice has been submitted to the UK e-notification service in accordance with applicable Procurement Regulations in order to—
 - (i) invite offers or requests to be selected to tender for or to negotiate in respect of a proposed contract, framework agreement or dynamic purchasing system, or
 - (ii) publicise an intention to hold a design contest,
- (b) the contracting authority or utility has had published any form of advertisement seeking offers or expressions of interest in a proposed contract, framework agreement or dynamic purchasing system, or
- (c) the contracting authority or utility has contacted any economic operator in order to—
 - (i) seek expressions of interest or offers in respect of a proposed contract, framework agreement or dynamic purchasing system, or
 - (ii) respond to an unsolicited expression of interest or offer received from that economic operator in relation to a proposed contract, framework agreement or dynamic purchasing system.

12. For the purposes of this Part, a procurement covers the whole of the procedures which stem from that commencement.

13. Accordingly, for example, if a contract notice in relation to a proposed framework agreement under the Public Contracts (Scotland) Regulations 2015 has, before the second commencement date, been submitted as described in paragraph 11(a), paragraph 10 applies to the award of any contracts based on that framework agreement regardless of whether the relevant specific procedure for the award of any such contract under regulation 34(6) to (10) of the Public Contracts (Scotland) Regulations 2015 had itself been commenced before the second commencement date.

14. Procedures taken for the purpose of modifying a contract or framework agreement are not to be regarded, for the purposes of paragraph 12, as stemming from the commencement of the procurement from which the award of that contract or framework agreement had itself stemmed.

Draft Legislation: This is a draft item of legislation. This draft has since been made as a Scottish Statutory Instrument: *The Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020 No. 468*

15. A procedure commenced as described in paragraph 11(a)(i), (b) or (c) is not to be regarded, for the purposes of paragraph 12, as stemming from the commencement of any design contest that had previously been held in relation to the subject-matter of the procurement.