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SCOTTISH STATUTORY INSTRUMENTS

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**2015 No. 446**

**The Public Contracts (Scotland) Regulations 2015**

**PART 2**

**RULES IMPLEMENTING THE PUBLIC CONTRACTS DIRECTIVE**

**CHAPTER 2**

**RULES ON PUBLIC CONTRACTS**

*SECTION 6*

*Contract Performance*

**Modification of contracts during their term**

**72.—(1)** A contract and framework agreement may be modified without a new procurement procedure—

- (a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses or options, provided that such clauses—
  - (i) state the scope and nature of possible modifications or options as well as the conditions under which they may be used; and
  - (ii) do not provide for modifications or options that would alter the overall nature of the contract or framework agreement;
- (b) to provide for additional works, supplies or services by the original contractor that have become necessary and were not included in the initial procurement, where a change of contractor—
  - (i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement; and
  - (ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority,provided that any increase in price does not exceed 50% of the initial contract value;
- (c) where all of the following conditions are fulfilled—
  - (i) the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen;
  - (ii) the modification does not alter the overall nature of the contract or framework;
  - (iii) any increase in price does not exceed 50 % of the initial contract value or framework agreement;

**Status:** Point in time view as at 31/12/2020.

**Changes to legislation:** The Public Contracts (Scotland) Regulations 2015, Section 72 is up to date with all changes known to be in force on or before 11 June 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details)

- (d) where a new contractor replaces one to which the contracting authority had initially awarded the contract or framework as a consequence of—
- (i) an unequivocal review clause or option in conformity with sub-paragraph (a); or
  - (ii) complete or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, by another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract or framework and is not aimed at circumventing the application of this Part;
- (e) where the modifications, irrespective of their value, are not substantial (as defined in paragraph (8)); or
- (f) where paragraph (5) applies.
- (2) Where several successive modifications are made—
- (a) the limitations imposed by the proviso at the end of paragraph (1)(b) and in paragraph (1)(c)(iii) shall apply to the value of each modification; and
  - (b) such successive modifications must not be aimed at circumventing these Regulations.
- (3) A contracting authority which has modified a contract or framework in either of the cases described in paragraph (1)(b) and (c) must [<sup>F1</sup>submit] a notice to that effect for publication in accordance with regulation 52 ([<sup>F2</sup>publication on the UK e-notification service]).
- (4) Such a notice must contain the information set out in Part G of Annex V to the Directive [<sup>F3</sup>, but as if—
- (a) paragraph 9 (financing by EU funds) were omitted,
  - (b) in paragraph 11, “in the *Official Journal of the European Union*” read “on the UK e-notification service (within the meaning of the Public Contracts (Scotland) Regulations 2015)”, and
  - (c) in paragraph 12, “date of dispatch” were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations].
- (5) This paragraph applies where the value of the modification is below both of the following values—
- (a) the relevant threshold mentioned in regulation 5 (thresholds); and
  - (b) 10 % of the initial contract value for service and supply contracts or frameworks and 15% of the initial contract value for works contracts or frameworks,
- provided that the modification does not alter the overall nature of the contract or framework agreement.
- (6) For the purposes of paragraph (5), where several successive modifications are made, the value must be the net cumulative value of the successive modifications.
- (7) For the purpose of the calculation of—
- (a) the price mentioned in paragraph (1)(b) and (c); and
  - (b) the values mentioned in paragraph (5)(b),
- the updated figure shall be the reference figure when the contract or framework includes an indexation clause.
- (8) A modification of a contract or a framework agreement during its term must be considered substantial for the purpose of paragraph (1)(e) where—
- (a) the modification renders the contract or the framework agreement materially different in character from the one initially concluded;

- (b) the modification introduces conditions which, had they been part of the initial procurement procedure, would have—
    - (i) allowed for the admission of candidates other than those initially selected;
    - (ii) allowed for the acceptance of a tender other than that originally accepted; or
    - (iii) attracted additional participants in the procurement procedure;
  - (c) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;
  - (d) the modification extends the scope of the contract or framework agreement considerably; or
  - (e) a new contractor replaces one to which the contracting authority had initially awarded the contract or framework in cases other than those provided for in paragraph (1)(d).
- (9) A new procurement procedure in accordance with these Regulations is required for modifications of the provisions of a public contract or a framework agreement during its term other than those provided for in this regulation.

#### Textual Amendments

- F1** Word in [reg. 72\(3\)](#) substituted (31.12.2020) by [The Public Procurement etc. \(EU Exit\) \(Scotland\) \(Amendment\) Regulations 2020 \(S.S.I. 2020/468\)](#), regs. 1(2), [4\(50\)\(a\)\(i\)](#) (with sch. paras. 1-5)
- F2** Words in [reg. 72\(3\)](#) substituted (31.12.2020) by [The Public Procurement etc. \(EU Exit\) \(Scotland\) \(Amendment\) Regulations 2020 \(S.S.I. 2020/468\)](#), regs. 1(2), [4\(50\)\(a\)\(ii\)](#) (with sch. paras. 1-5)
- F3** [Reg. 72\(4\)\(a\)-\(c\)](#) and words inserted (31.12.2020) by [The Public Procurement etc. \(EU Exit\) \(Scotland\) \(Amendment\) Regulations 2020 \(S.S.I. 2020/468\)](#), regs. 1(2), [4\(50\)\(b\)](#) (with sch. paras. 1-5)

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