
SCOTTISH STATUTORY INSTRUMENTS

2016 No. 65

The Concession Contracts (Scotland) Regulations 2016

PART 4

RULES ON THE PERFORMANCE OF CONCESSION CONTRACTS

Modification of concession contract during contract term

46.—(1) A concession contract may be modified without procurement for a new concession contract in the following cases—

- (a) if the initial concession document provides for the modification, irrespective of its monetary value, 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 concession contract;
- (b) to provide for additional works or services by the original concessionaire that have become necessary and were not included in the initial procurement for a concession contract, if a change of concessionaire—
 - (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 entity,provided that any increase in price does not exceed 50% of the initial concession contract value;
- (c) if all of the following conditions are fulfilled—
 - (i) circumstances which a diligent contracting entity could not have foreseen brought about the need for modification;
 - (ii) the modification does not alter the overall nature of the concession contract;
 - (iii) in the case of a concession contract awarded by a contracting authority for the purposes of pursuing an activity other than one listed in Schedule 2 any increase in value does not exceed 50% of the initial concession contract value;
- (d) if a new concessionaire replaces one to which the contracting entity had initially awarded the concession contract—
 - (i) as a result of an unequivocal review clause or option in conformity with subparagraph (a); or
 - (ii) in the event of complete or partial succession into the position of the initial concessionaire, 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 concession contract and is not aimed at circumventing the application of these Regulations;

(iii) in the event that the contracting entity assumes the main concessionaire's obligations towards its subcontractors;

(e) if a modification, irrespective of value, is not substantial (within the meaning of paragraph (8)); or

(f) if paragraph (5) applies.

(2) If several successive modifications are made—

(a) the limitations imposed by the proviso at the end of paragraph (1)(b) and by paragraph (1)(c)(iii) apply to the value of each modification; and

(b) such successive modifications must not be aimed at circumventing these Regulations.

(3) A contracting entity which has modified a concession contract in either of the cases described in paragraph (1)(b) and (c) must [^{F1}submit] a notice to that effect, in accordance with regulation 35 (form and manner of publication of notices) for publication.

(4) Such a notice must contain the information set out in Annex XI to the Concession Contracts Directive^{F2}, 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 Concession Contracts (Scotland) Regulations 2016), 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 if the value of the modification is below both of the following values—

(a) the relevant threshold mentioned in regulation 8 (thresholds); and

(b) 10 % of the initial concession contract value,

provided that the modification does not alter the overall nature of the concession contract.

(6) For the purposes of paragraph (5), if 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 the values mentioned in paragraphs (1)(b) and (c) and (5)(b), the updated value must be the reference value when the concession contract includes an indexation clause but if the concession contract does not contain an indexation clause, the updated value must be calculated taking into account the average inflation in the United Kingdom.

(8) A modification of a concession contract during its term must be considered substantial for the purposes of paragraph (1)(e) if one or more of the following conditions is met—

(a) the modification renders the concession contract materially different in character from the one initially concluded;

(b) the modification introduces conditions which, had such conditions 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 concession contract in favour of the concessionaire in a manner which was not provided for in the initial concession contract;

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- (d) the modification extends the scope of the concession contract considerably;
- (e) a new concessionaire replaces one to which the contracting entity had initially awarded the concession contract in cases other than those provided for in paragraph (1)(d).

(9) A new procurement for the award of a concession contract in accordance with this Part is required for modifications of the provisions of a concession contract during its term other than those provided for in this regulation.

Textual Amendments

- F1** Word in [reg. 46\(3\)](#) substituted (31.12.2020) by [The Public Procurement etc. \(EU Exit\) \(Scotland\) \(Amendment\) Regulations 2020 \(S.S.I. 2020/468\)](#), regs. 1(2), **8(26)(a)** (with sch. paras. 1-5)
- F2** [Reg. 46\(4\)\(a\)-\(c\)](#) 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), **8(26)(b)** (with sch. paras. 1-5)

Commencement Information

- I1** [Reg. 46](#) in force at 18.4.2016, see [reg. 1\(2\)](#)

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Changes and effects yet to be applied to :

- Regulations applied by [2023 c. 54 s. 119\(2\)\(c\)](#)
- Regulations power to amend conferred by [2023 c. 54 s. 115\(3\)\(4\)](#)
- reg. 46(3) word substituted by [S.S.I. 2019/112 reg. 7\(26\)\(a\)](#) (This amendment not applied to legislation.gov.uk. S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))

Changes and effects yet to be applied to the whole Instrument associated Parts and Chapters:

Whole provisions yet to be inserted into this Instrument (including any effects on those provisions):

- reg. 7(2)-(5) substituted for reg. 7(2) by [S.S.I. 2019/112 reg. 7\(4\)](#) (This amendment not applied to legislation.gov.uk. S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))
- reg. 8A inserted by [S.S.I. 2019/112 reg. 7\(6\)](#) (This amendment not applied to legislation.gov.uk. S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))
- reg. 12(1)(e)(i)(aa) words substituted by [S.S.I. 2019/112 reg. 7\(10\)\(a\)\(i\)](#) (This amendment not applied to legislation.gov.uk. S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))
- reg. 12(1)(e)(i)(bb) words substituted by [S.S.I. 2019/112 reg. 7\(10\)\(a\)\(ii\)](#) (This amendment not applied to legislation.gov.uk. S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))
- reg. 33(2)(a)(i)-(iii) and words inserted by [S.S.I. 2019/112 reg. 7\(19\)\(a\)](#) (This amendment not applied to legislation.gov.uk. S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))
- reg. 34(4) inserted by [S.S.I. 2019/112 reg. 7\(20\)\(c\)](#) (This amendment not applied to legislation.gov.uk. S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))
- reg. 35(5)(6) inserted by [S.S.I. 2019/112 reg. 7\(21\)\(e\)](#) (This amendment not applied to legislation.gov.uk. S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))
- reg. 40(19)-(21) inserted by [S.S.I. 2019/112 reg. 7\(23\)\(c\)](#) (This amendment not applied to legislation.gov.uk. S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))
- reg. 46(4)(a)-(c) and words inserted by [S.S.I. 2019/112 reg. 7\(26\)\(b\)](#) (This amendment not applied to legislation.gov.uk. S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))
- reg. 51(3)(3A) substituted for reg. 51(3) by [S.S.I. 2019/112 reg. 7\(28\)\(c\)](#) (This amendment not applied to legislation.gov.uk. S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))
- reg. 51(4A) inserted by S.S.I. 2019/112, reg. 7(28)(da) (as substituted) by [S.S.I. 2019/114 reg. 2\(7\)\(b\)](#) (This amendment not applied to legislation.gov.uk. S.S.I. 2019/114 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(b))

- reg. 60ZA inserted by [S.S.I. 2019/112 reg. 7\(31\)](#) (This amendment not applied to [legislation.gov.uk](#). S.S.I. 2019/112 revoked immediately before IP completion day by S.S.I. 2020/468, regs. 1(3), 2(2)(a))