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DRAFT STATUTORY INSTRUMENTS

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**2019 No.**

**The Public Procurement (Amendment  
etc.) (EU Exit) Regulations 2019**

**PART 3**

**AMENDMENT OF SECONDARY LEGISLATION**

**CHAPTER 2**

**THE CONCESSION CONTRACTS REGULATIONS 2016**

**Amendments commenced on exit day**

- 7.—(1) The Concession Contracts Regulations 2016<sup>(1)</sup> are amended as follows.
- (2) In regulation 2 (definitions), in paragraph (1)—
- (a) omit the definition of “the Commission”;
  - (b) after the definition of “contracting authorities” insert—
    - “covered by regulation 7(3)”, in relation to an activity, an element, a part of a contract, or procurement, means that regulation 7(3)—
      - (a) applies to that activity, element, part or procurement, or
      - (b) would do so if these Regulations applied;”;
  - (c) after the definition of “CPV” insert—
    - “devolved Northern Ireland authority” means a contracting authority whose functions are wholly or mainly functions which could be conferred by provision included in an Act of the Northern Ireland Assembly made without the consent of the Secretary of State (see sections 6 to 8 of the Northern Ireland Act 1998);
    - “devolved Welsh authority” has the meaning given by section 157A of the Government of Wales Act 2006;”;
  - (d) in the definition of “exclusive right”, before “Treaties” insert “Retained”;
  - (e) after the definition of “execution of works” insert—
    - “GPA” means the Agreement on Government Procurement between certain parties to the World Trade Organisation signed in Marrakesh on 15th April 1994 as amended before exit day<sup>(2)</sup>;”;
  - (f) after the definition of “prior information notice” insert—
    - “the Retained Treaties” means anything which is retained EU law by virtue of section 4 of the European Union (Withdrawal) Act 2018 because of the effect which

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(1) [S.I. 2016/273](#).

(2) All the substantive provisions of the Agreement were substituted by the Protocol which was approved, on behalf of the EU, by Council [Decision 2014/115/EU](#) (OJ No L 68, 7.3.2014, p 1), to which the text of the Protocol is attached (at OJ No L 68, 7.3.2014, p 2).

the Treaty on European Union or TFEU had immediately before exit day in giving rise to any of the rights, powers, liabilities, obligations, restrictions, remedies and procedures mentioned in that section.”;

- (g) omit the definition of “the Treaties”;
- (h) before the definition of “utilities” insert—
  - “the UK e-notification service” has the meaning mentioned in regulation 33(5), and references (in whatever terms) to the submission of notices to that service are to be construed in accordance with the provisions applied (and adapted) by regulation 33(5);”.
- (3) In regulation 5 (meaning of “utilities”), in paragraph (4)(b), before “Treaties” insert “Retained”.
- (4) In regulation 7 (subject-matter and scope of these Regulations), for paragraph (3) substitute—
  - “(3) These Regulations—
    - (a) do not oblige the United Kingdom to supply information the disclosure of which it considers contrary to the essential interests of its security;
    - (b) do not preclude the United Kingdom from taking such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production or trade in arms, munitions and war material, provided that such measures do not adversely affect the conditions of competition regarding products which are not intended for specifically military purposes.
  - (4) The arms, munitions and war material to which paragraph (3)(b) applies are, subject to paragraph (6), those included in the 1958 List.
  - (5) Subject to the effect of any regulations made under paragraph (6), any measures which, if they had been taken immediately before exit day, would have been covered by Article 346 of TFEU shall be regarded as measures covered by paragraph (3).
  - (6) The Secretary of State may make regulations providing that the 1958 List is to be treated for the purposes of these Regulations as if it were changed in respects specified in the regulations.
  - (7) In this regulation, “the 1958 List” means the list of arms, munitions and war material adopted by the Council of the European Economic Community in its decision 255/58 of 15th April 1958.”.
- (5) In regulation 9 (threshold amounts and methods for calculating the estimated value of concession contracts)—
  - (a) in paragraph (1), for the words from “the sum” to the end substitute “£4,551,413”;
  - (b) omit paragraph (2);
  - (c) in paragraph (4), for “sent” substitute “submitted”.
- (6) After regulation 9 insert—

**“Review and amendment of the threshold in regulation 9(1)**

**9A.**—(1) Every two years the Minister for the Cabinet Office must review the threshold mentioned in regulation 9(1) to verify whether it corresponds with the threshold established in the GPA for works concessions.

(2) The Minister must do so by calculating the sterling value of the threshold on the basis of the average daily value of sterling in terms of the special drawing rights mentioned in the GPA over a period of 24 months ending with 31st August.

- (3) The Minister must make that calculation using the applicable conversion rates in the monthly International Financial Statistics published from time to time by the International Monetary Fund.
- (4) If the sterling value of the threshold so calculated differs from the sum for the time being mentioned in regulation 9(1) in respect of the threshold, the Minister must make regulations amending regulation 9(1) so as to substitute for that sum the sum equal to that value.
- (5) Such regulations—
- (a) must be made and laid before Parliament before 1st November following the end of the 24 month period covered by the review; and
  - (b) must provide for the substitution to come into force on the following 1st January.
- (6) The first review under this regulation must relate to the 24 month period ending with 31st August 2019.”.
- (7) In regulation 10 (general exclusions)—
- (a) in paragraph (2), omit the words from “that has” to the end;
  - (b) in paragraph (5)(a)—
    - (i) before “Treaties” insert “Retained”;
    - (ii) for “a member State and one or more third” substitute “the United Kingdom and one or more other”;
  - (c) in paragraph (9)—
    - (i) in sub-paragraph (a)—
      - (aa) for “one or more member States” substitute “the United Kingdom”;
      - (bb) for “third” substitute “other”;
    - (ii) in sub-paragraph (b), for “a member State or a third” substitute “the United Kingdom or another”;
    - (iii) in sub-paragraph (c), for “a member State” substitute “the United Kingdom”;
    - (iv) in sub-paragraph (g)—
      - (aa) for “third country” substitute “country other than the United Kingdom or Gibraltar”;
      - (bb) for “territory of the EU” substitute “United Kingdom and Gibraltar” ;
  - (d) in paragraph (10), omit “or another member State”;
  - (e) in paragraph (11)(d)—
    - (i) in paragraph (i)—
      - (aa) in sub-paragraph (aa), for “a member State, a third” substitute “the United Kingdom, another”;
      - (bb) in sub-paragraph (bb), for “a member State or a third” substitute “the United Kingdom or another”;
    - (ii) in both paragraph (iv) and (v), for “member State concerned” substitute “United Kingdom”;
  - (f) in paragraph (14)—
    - (i) for “third country” substitute “country other than the United Kingdom”;
    - (ii) for “EU” substitute “United Kingdom”.
- (8) In regulation 13 (concession contracts awarded to an affiliated undertaking), in paragraph (5)

- (a) in sub-paragraph (a), for the words from “Directive” to “Council” substitute “Part 15 of the Companies Act 2006(3)”;
- (b) in sub-paragraph (b), in the words before paragraph (i), for “Directive” substitute “Part”.
- (9) Omit regulation 15 (notification of information by utilities).
- (10) In regulation 17 (concession contracts between entities within the public sector) in paragraphs (1)(c), (2) and (4)(c), before “Treaties” insert “Retained”.
- (11) In regulation 20 (mixed contracts), in paragraph (5), for “Article 346 of TFEU” substitute “regulation 7(3)”.
- (12) In regulation 21 (mixed procurement contracts involving defence or security aspects)—
  - (a) in paragraphs (1), (2) and (in both places in) (6)(a), for “Article 346 of TFEU” substitute “regulation 7(3)”;
  - (b) in paragraph (8), for “to which Article 346 of TFEU applies” substitute “covered by regulation 7(3)”.
- (13) In regulation 22 (contracts covering both activities listed in Schedule 2 and other activities), in paragraph (6), for “Article 346 of TFEU” substitute “regulation 7(3)”.
- (14) In regulation 23 (contracts covering both activities listed in Schedule 2 and activities involving defence or security aspects), in paragraphs (1), (5)(a) and (7), for “Article 346 of TFEU” substitute “regulation 7(3)”.
- (15) In regulation 24 (reserved concession contracts), in paragraph (2), for “Article 24 of the Concessions Directive” substitute “this regulation”.
- (16) In regulation 26 (economic operators), omit paragraph (1).
- (17) In regulation 31 (concession notices)—
  - (a) in paragraph (2)(a), after “Directive,” insert—
    - “but as if—
      - (i) in paragraph 3, “Article 34(2)” were a reference to regulation 34(3) of these Regulations;
      - (ii) in paragraph 10, “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; and
      - (iii) paragraph 15 (financing by EU funds) were omitted”;
  - (b) in paragraph (5), for “send” substitute “submit”;
  - (c) in paragraph (6)(a), for the words from “and that” to the end substitute—
    - “and that—
      - (i) a report is sent to the Minister for the Cabinet Office if the Minister so requests;
      - (ii) where the contracting authority or utility is a devolved Welsh authority, a report is sent to the Welsh Ministers if they so request (whether or not the Minister for the Cabinet Office also makes a request under paragraph (i));
      - (iii) where the contracting authority or utility is a devolved Northern Ireland authority, a report is sent to a Northern Ireland department if that department so requests (whether or not the Minister for the Cabinet Office also makes a request under paragraph (i));”.
- (18) In regulation 32 (concession award notices)—

- (a) in paragraphs (1) and (2), for “send” substitute “submit”;
  - (b) in paragraph (3), for “A concession award” substitute “Subject to paragraph (4), a concession award”;
  - (c) after paragraph (3) insert—
    - “(4) In paragraph (3), the reference to Annex VII is a reference to that Annex, but as if—
      - (i) in paragraph 7, “Article 41” were a reference to regulation 41 of these Regulations;
      - (ii) in paragraph 11(c), “Article 8(3)” were a reference to regulation 9(6) and (7) of these Regulations;
      - (iii) paragraph 12 (financing by EU funds) were omitted;
      - (iv) in paragraph 14, “in the *Official Journal of the European Union*” read “on the UK e-notification service (within the meaning of the Concession Contracts Regulations 2016)”; and
      - (v) in paragraph 15, “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.”.
- (19) In regulation 33 (form and manner of publication of notices)—
- (a) in paragraph (1)—
    - (i) in the words before sub-paragraph (a)—
      - (aa) for “sent” substitute “submitted”;
      - (bb) after “notices” insert “shall be submitted to the UK e-notification service for publication.”;
    - (ii) omit sub-paragraphs (a) and (b);
  - (b) in paragraph (2)—
    - (i) for “EU Publications Office” substitute “the provider of the UK e-notification service”;
    - (ii) omit “the receipt of the notice and of”;
  - (c) in paragraph (3)—
    - (i) for “at national level” substitute “otherwise than on the UK e-notification service”;
    - (ii) for “by the EU Publications Office” substitute “on that service”;
    - (iii) for “by that Office” substitute “on that service”;
    - (iv) for the words from “it confirms” to the end substitute “the notice was submitted to that service”;
  - (d) in paragraph (4)—
    - (i) for “at national level” substitute “otherwise than on the UK e-notification service”;
    - (ii) for “sent to the EU Publications Office” substitute “submitted to that service”;
    - (iii) for “sending of the notice to that Office” substitute “submission of the notice to that service”;
  - (e) after paragraph (4) insert—
    - “(5) In these Regulations, “the UK e-notification service” has the meaning given by regulation 51(5) of the Public Contracts Regulations 2015, and regulation 51(6) and (7) of those Regulations apply for the purposes of these Regulations as if the reference

to “paragraph (3)” in regulation 51(6)(b) were a reference to paragraph (2) of this regulation.”.

(20) In regulation 34 (electronic availability of concession documents), in paragraph (1), for “in the Official Journal” substitute “on the UK e-notification service”.

(21) In regulation 38 (selection of and qualitative assessment of candidates)—

(a) in paragraph (8)—

(i) omit sub-paragraph (e);

(ii) in sub-paragraph (o), in the words before paragraph (i), for “Article 38(4)” substitute “Article 38(4)(a), (b), (d), (e) or (f)”;

(b) in paragraph (16)(a)—

(i) omit “EU law,”;

(ii) after “agreements or” insert “, subject to paragraphs (26) and (27),”;

(c) after paragraph (25) insert—

*“Power to modify effect of paragraph (16)(a)*

(26) Where—

(a) the United Kingdom has ratified an international agreement establishing obligations in any of the fields mentioned in paragraph (16)(a), and

(b) the agreement is not already listed,

the Minister for the Cabinet Office may make regulations providing that paragraph (16)(a) is to have effect as if it the agreement were listed.

(27) Where the United Kingdom has ceased to ratify an international agreement that is already listed, the Minister for the Cabinet Office may make regulations providing that paragraph (16)(a) is to have effect as if it the agreement were not listed.

(28) In paragraphs (26) and (27)—

(a) “listed” means listed as described in paragraph (16)(a); and

(b) where paragraph (16)(a) already has effect as if an agreement were listed, “already listed” includes that agreement.”.

(22) In regulation 39 (time limits for receipt of applications and tenders for the concession contract), in paragraph (3), for “sent” substitute “submitted”.

(23) In regulation 41 (award criteria), in paragraph (9), omit “the Europe 2020 strategy for smart,”.

(24) In regulation 43 (modification of concession contracts during their term)—

(a) in paragraph (3), for “send” substitute “submit”;

(b) in paragraph (4), after “Directive” insert—

“, 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 Regulations 2016)”;

(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”.

(25) In regulation 44 (termination of concession contracts), in paragraph (1)—

- (a) after paragraph (a), insert “or”;
  - (b) after paragraph (b), omit “or”;
  - (c) omit paragraph (c).
- (26) In regulation 47 (notices of decisions to award a concession contract), in paragraph (5)(a), for “in the Official Journal” substitute “on the UK e-notification service”.
- (27) In regulation 50 (duty owed to economic operators from EEA states)—
- (a) in the heading, for “EEA states” substitute “the United Kingdom and Gibraltar”;
  - (b) in paragraph (1)(b), for “enforceable EU obligation” substitute “retained EU obligation that is enforceable by virtue of section 4 of the European Union (Withdrawal) Act 2018”;
  - (c) in paragraph (2), for “another EEA state” substitute “Gibraltar”.
- (28) In regulation 51 (duty owed to economic operators from certain other states)—
- (a) in paragraph (1)—
    - (i) in sub-paragraph (a)—
      - (aa) for “GPA state” substitute “country other than the United Kingdom”;
      - (bb) for “the GPA” substitute “Condition 1 or Condition 2”;
    - (ii) omit sub-paragraph (b) and the preceding “and”;
  - (b) for paragraph (2) substitute—

“(2) Condition 1 is that—

    - (a) at the relevant time the economic operator is from a GPA state;
    - (b) the procurement may result in the award of a concession contract of any description; and
    - (c) immediately before exit day that GPA state had agreed with the EU that the GPA shall apply to a concession contract of that description.

(2A) Condition 2 is that—

    - (a) at the relevant time the economic operator is from a country which, immediately before exit day, was a member State other than the United Kingdom;
    - (b) the procurement may result in the award of a concession contract of any description; and
    - (c) immediately before exit day the EU had agreed with a GPA state that the GPA shall apply to a concession contract of that description.”;
  - (c) omit paragraph (3);
  - (d) in paragraph (4)—
    - (i) omit the definition of “GPA”;
    - (ii) in the definition of “GPA state”, for “, other than an EEA state, which at the relevant time is” substitute “which immediately before exit day was”;
    - (iii) in the definition of “relevant time”—
      - (aa) for “sent” substitute “submitted”;
      - (bb) for “Publications Office of the European Union” substitute “UK e-notification service”.
- (29) In regulation 54 (special time limits for seeking a declaration of ineffectiveness), in paragraphs (3) and (4)(a) and (b), for “in the Official Journal” substitute “on the UK e-notification service”.

- (30) In regulation 60 (grounds for ineffectiveness)—
- (a) in paragraphs (2) and (3)(a), (b) and (c), for “in the Official Journal” substitute “on the UK e-notification service”;
  - (b) in paragraph (4), in the words before sub-paragraph (a), omit the words from “is in” to “and which”.
- (31) In Part 6, before regulation 65 insert—

**“General provisions about regulations under these Regulations**

- 65ZA.**—(1) Regulations under these Regulations are to be made by statutory instrument.
- (2) A statutory instrument containing regulations under regulation 7(6) (whether alone or with other provision) may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.
- (3) Any other statutory instrument containing regulations under these Regulations is subject to annulment in pursuance of a resolution of either House of Parliament.
- (4) Subject to paragraph (5), Regulations may not be made under regulation 38 without the consent of the Welsh Ministers and a Northern Ireland Department.
- (5) Regulations (“the amending regulations”) may be made under regulation 38 without such consent, but in such cases the amending regulations must make provision in such a way as to avoid altering the effect of that regulation in so far as it applies to—
- (a) devolved Welsh authorities, where the Welsh Ministers have not consented to the making of the amending regulations;
  - (b) devolved Northern Ireland authorities, where no Northern Ireland Department has consented to the making of the amending regulations.
- (6) Regulations under these Regulations may make supplementary, incidental, transitional, transitory or saving provision.”.

**Amendment commenced eight months after exit day**

- 8.**—(1) The Concession Contracts Regulations 2016 (as amended by regulation 7) are further amended as follows.
- (2) Omit regulation 51 (duty owed to economic operators from certain other states).