

## SCHEDULE

Regulation 1(4)

### TRANSITIONAL AND SAVINGS PROVISIONS

#### Interpretation

1.—(1) In this schedule—

“amended”, in relation to a provision, means that provision as amended or substituted by these Regulations,

“amendments” (and cognate expressions) include the modifications made by regulations 10 and 11,

“Official Journal” means the Official Journal of the European Union,

“the Procurement Regulations” means—

- (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,

“unamended”, in relation to a provision, means that provision in the form in which it existed immediately before it was amended or substituted by these Regulations.

(2) In this schedule, the following have the same meaning as in whichever of the Procurement Regulations the context requires—

- (a) contracting authority,
- (b) design contest,
- (c) dynamic purchasing system,
- (d) framework agreement,
- (e) utility.

(3) For the purposes of this schedule, a procurement has been commenced before a particular date if, before that date—

- (a) a notice has been sent to the Official Journal in accordance with the 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.

(4) For the purposes of this schedule, a procurement covers the whole of the procedures which stem from that commencement.

(5) Accordingly, for example, if a contract notice in relation to a proposed framework agreement under the Public Contracts (Scotland) Regulations 2015 has, before exit day, been sent as described in sub-paragraph (3)(a), paragraph 3(1) 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 exit day.

(6) Procedures taken for the purpose of modifying a contract or framework agreement are not to be regarded, for the purposes of sub-paragraph (4), as stemming from the commencement of the procurement from which the award of that contract or framework agreement had itself stemmed.

(7) A procedure commenced as described in sub-paragraph (3)(a)(i), (b) or (c) is not to be regarded, for the purposes of sub-paragraph (4), as stemming from the commencement of any design contest that had previously been held in relation to the subject-matter of the procurement.

### **General principles**

2.—(1) Subject to the other provisions of this schedule, the amendments made by these Regulations apply prospectively even in relation to procurements which had commenced before the amendments came into force.

(2) But, subject to the following provisions of this schedule, an amendment made by these Regulations does not apply to the extent that the provision amended refers or relates (directly or indirectly) to something which in fact occurred before the amendments came into force.

(3) Accordingly, for example—

(a) where, before exit day, a contract notice was published in the Official Journal after being sent for such publication in accordance with unamended regulations 50 and 52 of the Public Contracts (Scotland) Regulations 2015, but exit day occurred before the sending of a contract award notice to the EU Publications Office in accordance with unamended regulations 51 and 52 of those Regulations in relation to that procurement—

(i) the contract award notice is, on or after exit day, to be submitted for publication on the UK e-notification service in accordance with amended regulations 51 and 52 of those Regulations, but

(ii) the information to be included in that notice by virtue of amended regulation 51(2) of those Regulations includes the date and reference of the publication of the contract notice in the Official Journal because that publication occurred before exit day and, accordingly, amended regulation 51(2)(a)(iv) of those Regulations is to be disregarded in relation to that publication,

(b) even in relation to a procurement that is commenced on or after exit day, the amendment made by regulation 3(11) of these Regulations to regulation 10(1)(a) of the Public Contracts (Scotland) Regulations 2015 does not apply if the legal instrument referred to in that regulation 10(1)(a) was concluded before exit day (and, in such circumstances, the test laid down by that regulation accordingly continues to be whether the instrument had been concluded in accordance with “the Treaties” as defined in the unamended regulation 2(1) of those Regulations rather than whether the instrument had been concluded in accordance with “the Retained Treaties” as defined by the amended regulation 2(1) of those Regulations).

### **Transitional provision for the Public Contracts (Scotland) Regulations 2015**

3. Where, in accordance with regulation 35 of the Public Contracts (Scotland) Regulations 2015, a contracting authority has established a dynamic purchasing system before exit day, paragraph (24)

of that regulation shall be read in relation to that system as if the reference to “a renewed SPD” were a reference to “an SPD or a renewed SPD”.

#### **Transitional provision for the Utilities Contracts (Scotland) Regulations 2016**

4. Where, in accordance with regulation 50 of the Utilities Contracts (Scotland) Regulations 2016, a contracting authority has established a dynamic purchasing system before exit day, paragraph (23) of that regulation shall be read in relation to that system as if the reference to “a renewed SPD” were a reference to “an SPD or a renewed SPD”.

#### **Savings in relation to procurements commenced before exit day**

5.—(1) The amendments made by these Regulations described in sub-paragraph (2) do not affect any procurement commenced before exit day.

(2) The amendments are—

- (a) the amendments to the following provisions of the Public Contracts (Scotland) Regulations 2015—
  - (i) the definition of “ESPD” in regulation 2(1) (interpretation),
  - (ii) regulation 26 (conditions relating to the GPA and other international agreements),
  - (iii) regulation 35(24) (which, as unamended, refers to a renewed ESPD as a means of proof in relation to dynamic purchasing systems),
  - (iv) regulation 43(8) (which, as unamended, refers to a legal act of the EU in relation to mandatory accessibility requirements in technical specifications),
  - (v) regulation 58 (exclusion grounds),
  - (vi) regulation 59 (selection criteria) and the related omission of schedule 5 (professional and trade registers etc),
  - (vii) regulation 60 (European Single Procurement Document),
  - (viii) in regulation 63 (quality assurance standards and environmental management standards), paragraph (2) and the words after paragraph (4)(c),
  - (ix) regulation 71(7) (which, as unamended, refers to ESPDs in respect of subcontractors),
- (b) the amendments made to regulation 40 (exclusion grounds) of the Concession Contracts (Scotland) Regulations 2016,
- (c) the amendments made to the following provisions of the Utilities Contracts (Scotland) Regulations 2016—
  - (i) regulation 41 (conditions relating to the GPA and other international agreements),
  - (ii) regulation 58(8) (which, as unamended, refers to a legal act of the EU in relation to mandatory accessibility requirements in technical specifications),
  - (iii) in regulation 79 (quality assurance standards and environmental management standards), paragraph (2) and the words after paragraph (4)(c),
  - (iv) regulation 85(7) (which, as unamended, refers to ESPDs within the meaning of regulation 60 of the Public Contracts (Scotland) Regulations 2015).

(3) To the extent that it is saved by paragraphs (1) and (2)(a)(vii), regulation 60(11)(a) of the Public Contracts (Scotland) Regulations 2015 has effect as if the reference in it to “any member State” continued to include the United Kingdom.

### **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 other member States),
  - (b) regulation 55 of the Utilities Contracts (Scotland) Regulations 2016 (procurement involving utilities from other 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 with modification of certain references to compatibility with EU law**

- 7.—(1) The omission by these Regulations of the words “to the extent that they are compatible with EU law” from—
- (a) regulation 43(10) of the Public Contracts (Scotland) Regulations 2015 (technical specifications), and
  - (b) regulation 58(10) of the Utilities Contracts (Scotland) Regulations 2016 (technical specifications),

does not affect any procurement commenced before exit day.

- (2) To the extent that those words are saved by paragraph (1), the reference to EU law is to be construed as referring to EU law as it had effect immediately before exit day.

### **Saving of implied power to terminate contracts**

- 8.—(1) This paragraph applies where—
- (a) a contract was awarded before exit day, and
  - (b) immediately before exit 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 exit day, that power continues despite the omission, by these Regulations, of that regulation 73(1)(c), 47(1)(c) or 87(1)(c).

### **Saving with modification of certain references to design contests in relation to procurements commenced before exit day**

- 9.—(1) The omission by these Regulations of—

- (a) regulation 79(2) of the Public Contracts (Scotland) Regulations 2015 (rules on the organisation of design contests and the selection of participants), and
- (b) regulation 93(2) of the Utilities Contracts (Scotland) Regulations 2015 (rules on the organisation of design contests and the selection of participants and the jury),

does not affect any procurement commenced before exit day.

(2) To the extent that they are saved by sub-paragraph (1), the omitted paragraphs have effect on and after exit day as if each reference in them to a ‘member State’ continued to include the United Kingdom.

#### **Saving, in relation to procurements commenced before exit day, of duty owed to economic operators from EEA states**

**10.**—(1) The amendments made by these Regulations to—

- (a) regulation 87(1) of the Public Contracts (Scotland) Regulations 2015 (duty owed to economic operators),
- (b) regulation 51(1) of the Concession Contracts (Scotland) Regulations 2016 (duty owed to economic operators),
- (c) regulation 100(1) of the Utilities Contracts (Scotland) Regulations 2016 (duty owed to economic operators),

do not affect any procurement commenced before exit day.

#### **Saving, in relation to procurements commenced before exit day, of duty owed to economic operators from states party to certain bilateral agreements**

**11.**—(1) The omission by these Regulations of—

- (a) paragraphs (2)(b) and (4) of regulation 87 of the Public Contracts (Scotland) Regulations 2015 (duty owed to economic operators),
- (b) paragraphs (2)(b) and (4) of regulation 51 of the Concession Contracts (Scotland) Regulations 2016 (duty owed to economic operators),
- (c) paragraphs (2)(b) and (4) of regulation 100 of the Utilities Contracts (Scotland) Regulations 2016 (duty owed to economic operators),

do not affect any procurement commenced before exit day.

(2) To the extent that they are saved by sub-paragraph (1), the unamended provisions referred to in sub-paragraph (1) have effect on and after exit day—

- (a) as if the United Kingdom were still an EEA state, and
- (b) as if, in each unamended paragraph (4)(a)—
  - (i) the words “there is” read “immediately before exit day there was”, and
  - (ii) the words “is bound” read “was bound”.

#### **Saving in relation to procurements commenced before regulations 4, 6 and 8 come into force**

**12.** The amendments made by regulations 4, 6 and 8 do not affect any procurement commenced before those regulations come into force.

#### **Saving in relation to affiliated undertakings**

**13.** Where—

- (a) a procurement was commenced before exit day, and

**Draft Legislation:** This is a draft item of legislation. This draft has since been made as a Scottish Statutory Instrument: *The Public Procurement etc. (Scotland) (Amendment) (EU Exit) Regulations 2019 (revoked) No. 112*

- (b) immediately before exit day, an undertaking fell within the definition of “affiliated undertaking” in regulation 15(5) of the Concession Contracts (Scotland) Regulations 2016 or regulation 28(5) of the Utilities Contracts (Scotland) Regulations 2016,

the amendments made by these Regulations do not prevent that undertaking from continuing, on and after exit day, to fall within that definition in relation to that procurement.