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DRAFT SCOTTISH STATUTORY INSTRUMENTS

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**2019 No.**

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

**PART 3**

**AMENDMENT OF SECONDARY LEGISLATION**

**CHAPTER 3**

**THE CONCESSION CONTRACTS (SCOTLAND) REGULATIONS 2016**

**Amendments commenced on exit day**

- 7.—(1) The Concession Contracts (Scotland) Regulations 2016<sup>(1)</sup> are amended as follows.
- (2) In regulation 2 (interpretation), in paragraph (1)—
- (a) omit the definition of “Commission”,
  - (b) after the definition of “contracting entity”<sup>(2)</sup> insert—
    - “covered by regulation 7(2)”, in relation to an activity, an element, a part of a contract or a procurement, means that regulation 7(2)—
    - (a) applies to that activity, element, part or procurement, or
    - (b) would do so if these Regulations applied;”,
  - (c) in the definition of “exclusive right”, delete “of a member State”; and before “Treaties” insert “Retained”,
  - (d) 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 15 April 1994 as amended before exit day<sup>(3)</sup>”,
  - (e) omit the definition of “Official Journal”,
  - (f) after the definition of “procurement” 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 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”,

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(1) [S.S.I. 2016/65](#), amended by [S.S.I. 2016/125](#).

(2) The definition in [S.S.I. 2016/65](#) was amended by [S.S.I. 2016/125](#), regulation 2(2)(a).

(3) 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).

- (h) before the definition of “utility” insert—
- “the UK e-notification service” has the meaning given in regulation 35(5).”
- (3) In regulation 5 (meaning of “utility”), in paragraph (4)(b)—
- (a) delete “of a member State”,
- (b) before “Treaties” insert “Retained”.
- (4) In regulation 7 (subject-matter and application of these regulations), for paragraph (2) substitute—
- “(2) 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.
- (3) The arms, munitions and war material to which paragraph (2)(b) applies are those included in the 1958 List.
- (4) 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 (2)(b).
- (5) 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 15 April 1958 as that list is to be treated for the purpose of the Concession Contracts Regulations 2016(4).”.
- (5) In regulation 8 (thresholds and methods for calculating the estimated value of the concession contract)—
- (a) in paragraph (1), for the words from “the amount” to the end substitute “£4,551,413”,
- (b) omit paragraph (2),
- (c) in paragraph (4), for “sent” substitute “submitted”.
- (6) After regulation 8 insert—

**“Review and amendment of the threshold in regulation 8(1)**

**8A.**—(1) Every two years the Scottish Ministers must review the threshold specified in regulation 8(1) to verify whether it corresponds with the threshold established in the GPA for works concessions.

(2) The Scottish Ministers 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 31 August.

(3) The Scottish Ministers 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 set by regulation 8(1) in respect of the threshold, the Scottish Ministers must make regulations amending regulation 8(1) so as to substitute for that sum the sum equal to that value.

- (5) Such regulations—
  - (a) must be made and laid before the Scottish Parliament before 1 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 1 January.
- (6) The first review under this regulation must relate to the 24 month period ending with 31 August 2019.”.
- (7) In regulation 9 (exclusions: concession contracts awarded on the basis of an exclusive right)—
  - (a) in paragraph (1)(b), omit the words from “granted in accordance with” to the end,
  - (b) omit paragraph (2).
- (8) In regulation 10 (exclusions: concession contracts awarded pursuant to international rules)—
  - (a) in sub-paragraph (1)(a) before “Treaties” insert “Retained”,
  - (b) for “third” substitute “other”.
- (9) In regulation 11 (exclusions: concession contracts involving defence or security aspects which are awarded or organised pursuant to international rules)—
  - (a) in paragraph (1)—
    - (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 (f), for “a member State or a State which is not a member State” substitute “the United Kingdom, Gibraltar or another country”,
    - (v) in sub-paragraph (g)—
      - (aa) for “third country” substitute “country other than the United Kingdom or Gibraltar”,
      - (bb) for “territory of the European Union” substitute “United Kingdom and Gibraltar”,
  - (b) in paragraph (2), omit “or another member State”.
- (10) In regulation (12) (Exclusions: Specific service contracts)—
  - (a) in paragraph (1)(e)—
    - (i) in paragraph (i)(aa), for “a member State, a third” substitute “the United Kingdom, another”,
    - (ii) in paragraph (i)(bb), for “a member State or a third” substitute “the United Kingdom or another”,
    - (iii) in both paragraphs (iv) and (v), for “member State concerned” substitute “United Kingdom”,
  - (b) in paragraph (1)(o)—
    - (i) for “third country” substitute “country other than the United Kingdom”,
    - (ii) for “European Union” substitute “United Kingdom”.
- (11) In regulation 15 (exclusions: 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(5)”,
- (b) in sub-paragraph (b), in the words before paragraph (i), for “Directive” substitute “Part”.
- (12) Omit regulation 17 (notification of information by utilities).
- (13) In regulation 19 (concession contracts between entities within the public sector), in paragraphs (2)(c) and (5)(c), before “Treaties” insert “Retained”.
- (14) In regulation (22) (mixed procurement), in paragraph (5), for “Article 346 of TFEU” substitute “regulation 7(2)”.
- (15) In regulation 23 (mixed procurement involving defence or security aspects)—
  - (a) in paragraph (1) for “Article 346 of the Treaty” substitute “regulation 7(2),
  - (b) in paragraphs (2) and (6)(a), for “Article 346 of the TFEU” substitute “regulation 7(2)”.
- (16) In regulation 25 (contracts covering both activities listed in schedule 2 and activities involving defence or security aspects), in paragraph (1), for “Article 346 of the TFEU” substitute “regulation 7(2)”.
- (17) In regulation 26 (reserved concession contracts), in paragraph (3), for “Article 24 of the Concession Contracts Directive” substitute “this regulation”.
- (18) In regulation 29 (economic operators), omit paragraph (1).
- (19) In regulation 33 (concession notice)—
  - (a) in paragraph (2)(a), after “Directive,” insert—
    - “but as if—
    - (i) in paragraph 3, “Article 34(2)” were a reference to regulation 36(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 (2) omit the words after the end of paragraph (b),
  - (c) in paragraph (5)(a), for “European Commission if it so requests” substitute “Scottish Ministers if they so request”.
- (20) In regulation 34 (concession contract award notice)—
  - (a) in paragraphs (1) and (2), for “send” substitute “submit”,
  - (b) in paragraph (3), for “A concession contract award” substitute “Subject to paragraph (4), a concession contract award”,
  - (c) after paragraph (3) insert—
    - “(4) In paragraph (3), the reference to Annex VII is a reference to that Annex, but as if—
    - (a) in paragraph (7), “Article 41” were a reference to regulation 44 of these Regulations,
    - (b) in paragraph (11)(c), “Article 8(3)” were a reference to regulation 8(6) and (7) of these Regulations,
    - (c) paragraph (12) (financing by EU funds) were omitted,

- (d) 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 (Scotland) Regulations 2016), and
  - (e) 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.”.
- (21) In regulation 35 (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 “a notice”) insert “must 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”,
    - (iii) for “sent” substitute “submitted”,
  - (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 52(5) of the Public Contracts (Scotland) Regulations 2015.
    - (6) For the purposes of these Regulations, a notice of any description is submitted to the UK e-notification service if the information comprising the notice is entered in the portal in such form or manner as the portal may elicit it and in compliance with any specific instructions that are given within the portal about how the information, or any particular element of it, is to be entered.”.
- (22) In regulation 36 (electronic availability of concession documents), in paragraph (1), for “in the *Official Journal*” substitute “on the UK e-notification service”.
- (23) In regulation 40 (exclusion grounds)—
- (a) in paragraph (1)—
    - (i) omit sub-paragraph (e),

- (ii) in sub-paragraph (k) for “Article 38(4)” substitute “Article 38(4)(a), (b), (d), (e) or (f)”,
- (b) in paragraph (9)(a)—
  - (i) omit “European Union law,”,
  - (ii) after “agreements or” insert “, subject to paragraphs (19) and (20),”,
- (c) after paragraph (18) insert—
  - “(19) Where—
    - (a) the United Kingdom has ratified an international agreement establishing obligations in any of the fields mentioned in paragraph (9)(a), and
    - (b) the agreement is not already listed,
 the Scottish Ministers may make regulations providing that paragraph (9)(a) is to have effect as if the agreement were listed.
  - (20) Where the United Kingdom has ceased to ratify an international agreement that is already listed, the Scottish Ministers may make regulations providing that paragraph (9) (a) is to have effect as if the agreement were not listed.
  - (21) In paragraphs (19) and (20)—
    - (a) “listed” means listed as described in paragraph (9)(a), and
    - (b) where paragraph (9)(a) already has effect as if an agreement were listed, “already listed” includes that agreement.”.
- (24) In regulation 42 (time limits for receipt of applications and tenders for the concession contract), in paragraph (3), for “sent” substitute “submitted”.
- (25) In regulation 44 (concession contract award criteria), in paragraph (9), omit “the Europe 2020 strategy for smart,”.
- (26) In regulation 46 (modification of concession contract during contract 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 (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”.
- (27) In regulation 47 (termination of concession contract), in paragraph (1)—
  - (a) after paragraph (a), insert “or”,
  - (b) after paragraph (b), omit “or”,
  - (c) omit paragraph (c).
- (28) In regulation 51 (duty owed to economic operators)—
  - (a) in paragraph (1)—
    - (i) for “enforceable EU obligation” substitute “retained EU obligation that is enforceable by virtue of section 4 of the European Union (Withdrawal) Act 2018”,
    - (ii) for “another EEA state” substitute “the United Kingdom or Gibraltar”,

- (b) for paragraph (2) substitute—
  - “(2) The duty owed in accordance with paragraph (1) is a duty owed also to an economic operator from a country other than the United Kingdom, but only where Condition 1 or Condition 2 applies to the procurement concerned.”.
- (c) for paragraph (3) substitute—
  - “(3) 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 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 contract of that description.
  - (3A) 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 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 contract of that description.”.
- (d) omit paragraph (4),
- (e) in paragraph (5)—
  - (i) 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”,
  - (ii) 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 52 (enforcement of duties through the courts), in paragraph (5)(a)—
  - (a) for “sent” substitute “submitted”,
  - (b) for “to the Official Journal” substitute “to the UK e-notification service”,
  - (c) for “form and matter of publication of notices” substitute “form and manner of publication of notices”,
  - (d) for “in the Official Journal” substitute “on the UK e-notification service”.
- (30) In regulation 55 (ineffectiveness orders)—
  - (a) in paragraph (5) for “in the Official Journal” substitute “on the UK e-notification service”,
  - (b) for paragraph (6)(a) substitute—
    - “(a) the contracting authority submitted to the UK e-notification service for publication a voluntary ex ante transparency notice expressing its intention to enter into the contract or to conclude the framework agreement and containing—
      - (i) the name and contact details of the contracting authority,
      - (ii) a description of the object of the contract or framework agreement,
      - (iii) a justification of the decision of the contracting authority to award the contract or conclude the framework agreement without prior publication of a contract notice,
      - (iv) the name and contact details of the economic operator to be awarded the contract or to become party to the framework agreement, and

- (v) any other information which the contracting authority considered useful, and”,
  - (c) in paragraph (6)(b) for “in the Official Journal” substitute “on the UK e-notification service”.
- (31) In Part 6 (reports), before regulation 60 insert—

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

**60ZA.**—(1) Regulations under these Regulations are to be made by statutory instrument subject to annulment in pursuance of a resolution of the Scottish Parliament.

(2) Regulations under these Regulations may make supplementary, incidental, transitional or saving provision.”.

(32) In schedule 1 (activities constituting works), after “[Council Regulation \(EEC\) No 3037/90](#) on the statistical classification of economic activities in the European Community” insert “as that Regulation had effect in EU law immediately before exit day”.

**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(2) to (5) (duty owed to economic operators).