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## STATUTORY INSTRUMENTS

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# 2016 No. 273

## The Concession Contracts Regulations 2016

### PART 4

#### Rules on the performance of concession contracts

##### **Subcontracting**

##### *Giving information to contracting authority or utility*

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**42.**—(1) In the concession documents, the contracting authority or utility may ask the tenderer to indicate in its tender any share of the concession contract that it may intend to subcontract to third parties and any proposed subcontractors.

(2) Paragraph (1) is without prejudice to the question of the concessionaire's liability.

(3) In the case of a works concession contract and in respect of services to be provided at a facility under the oversight of the contracting authority or utility, after the award of the concession contract and at the latest when the performance of the concession contract commences, the contracting authority or utility shall require the concessionaire to notify to the contracting authority or utility the name, contact details and legal representatives of its subcontractors involved in such works or services, in so far as known at the time.

(4) The contracting authority or utility shall require the concessionaire to notify it of—

- (a) any changes to the information notified under paragraph (3) during the course of the concession contract; and
- (b) the name, contact details and legal representatives of any new subcontractors which it subsequently involves in such works or services.

(5) Paragraphs (3) and (4) do not apply to suppliers.

(6) Contracting authorities and utilities may extend the obligations provided for in paragraphs (3) and (4) to, for example—

- (a) services concession contracts (other than those concerning services to be provided at the facilities under the oversight of the contracting authority or utility) or suppliers involved in works concession contracts or services concession contracts;
- (b) subcontractors of the concessionaire's subcontractors or subcontractors further down the subcontracting chain.

##### *Excluding subcontractors*

(7) Contracting authorities and utilities may verify whether there are grounds for exclusion of subcontractors under regulation 38(8) to (25).

(8) In such cases, the contracting authority or utility—

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- (a) shall require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion; and
- (b) may require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.

### **Modification of concession contracts during their term**

**43.**—(1) Concession contracts may be modified without a new concession contract award procedure in accordance with these Regulations in any of the following cases—

- (a) where the modifications, irrespective of their monetary value, have been provided for in the initial concession documents in clear, precise and unequivocal review clauses, which may include value 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) for additional works or services by the original concessionaire that have become necessary and were not included in the initial concession contract where 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 concession contract, and
  - (ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority or utility,
 provided, in the case of a concession contract awarded by a contracting authority, that any increase in value does not exceed 50% of the value of the original concession contract;
- (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 or utility could not have foreseen,
  - (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, any increase in value does not exceed 50% of the value of the original concession contract;
- (d) where a new concessionaire replaces the one to which the contracting authority or utility had initially awarded the concession contract as a consequence of—
  - (i) an unequivocal review clause or option in conformity with sub-paragraph (a),
  - (ii) universal or partial succession into the position of the initial concessionaire, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of these Regulations;
- (e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph (9);
- (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 by sub-paragraph (c)(iii) shall apply to the value of each modification; and

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

(3) Contracting authorities and utilities which have modified a concession contract in either of the cases described in paragraph (1)(b) and (c) shall [<sup>F1</sup>submit] a notice to that effect for publication in accordance with regulation 33.

(4) Such a notice shall contain the information set out in Annex XI to the Concessions Directive [<sup>F2</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 Concession Contracts 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 where the value of the modification is below both of the following values—

- (a) the threshold mentioned in regulation 9, and
- (b) 10% of the value of the initial concession contract,

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

(6) For the purposes of paragraph (5), where several successive modifications are made, the value shall 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 shall be the reference value when the concession contract includes an indexation clause but if the concession contract does not include an indexation clause, the updated value shall be calculated taking into account the average inflation in the United Kingdom.

(8) For the purposes of paragraph (7), average inflation shall be determined by reference to any one or more of the following indices published by the Statistics Board <sup>M1</sup> or, if any such index ceases to be published, such other index as may replace it—

- (a) the Retail Prices Index, being the general index of retail prices (for all items);
- (b) the Consumer Prices Index, being the general index of consumer prices (for all items);
- (c) the Producer Prices Index, being the index of price changes of goods bought and sold by United Kingdom manufacturers;
- (d) the Services Producer Price Index, being the index of changes in the price received for selected services provided by United Kingdom businesses to other United Kingdom businesses and government.

(9) A modification of a concession contract during its term shall be considered substantial for the purposes of paragraph (1)(e), where 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 they been part of the initial concession contract award procedure, would have—
  - (i) allowed for the admission of other applicants than those originally selected,
  - (ii) allowed for the acceptance of a tender other than that originally accepted, or
  - (iii) attracted additional participants in the concession contract award 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 the one to which the contracting authority or utility had initially awarded the concession contract in cases other than those provided for in paragraph (1)(d).

(10) A new concession contract award procedure in accordance with these Regulations shall be required for modifications of the provisions of a concession contract during its term other than those provided for in this regulation.

**F1** Word in reg. 43(3) substituted (31.12.2020) by [The Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(S.I. 2020/1319\)](#), regs. 1(2), **8(24)(a)** (with Sch. paras. 3-5)

**F2** Words in reg. 43(4) inserted (31.12.2020) by [The Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(S.I. 2020/1319\)](#), regs. 1(2), **8(24)(b)** (with Sch. paras. 3-5)

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**Marginal Citations**

**M1** In Welsh the Statistics Board is known as Y Bwrdd Ystadegau.

**Termination of concession contracts**

44.—(1) Contracting authorities and utilities shall ensure that every concession contract which they award contains provisions enabling them to terminate the concession contract where—

- (a) a modification of the concession contract has taken place, which would have required a new concession contract award procedure in accordance with regulation 43(10); [<sup>F3</sup>or]
- (b) in the case of a concession contract awarded by a contracting authority or a utility referred to in regulation 5(1)(a), the concessionaire has, at the time of the concession contract award, been in one of the situations referred to in regulation 38(8), including as a result of the application of regulation 38(9), and should therefore have been excluded from the concession contract award procedure <sup>F4</sup>...

<sup>F5</sup>(c) .....

(2) Those provisions may address the basis on which the power is to be exercisable in those circumstances, for example by providing for notice of termination to be given and by addressing consequential matters that will or might arise from the termination.

(3) To the extent that a concession contract does not contain provisions enabling the contracting authority or utility to terminate the contract on any of the grounds mentioned in paragraph (1), a power for the contracting authority or utility to do so on giving reasonable notice to the concessionaire shall be an implied term of that concession contract.

**F3** Word in reg. 44(1) inserted (31.12.2020) by [The Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(S.I. 2020/1319\)](#), regs. 1(2), **8(25)(a)** (with Sch. paras. 3-5)

**F4** Word in reg. 44(1) omitted (31.12.2020) by virtue of [The Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(S.I. 2020/1319\)](#), regs. 1(2), **8(25)(b)** (with Sch. paras. 3-5)

**F5** Reg. 44(1)(c) omitted (31.12.2020) by virtue of [The Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(S.I. 2020/1319\)](#), regs. 1(2), **8(25)(c)** (with Sch. paras. 3-5, 7)

**Reporting requirements**

45. Contracting authorities and utilities shall send to the Minister for the Cabinet Office a report containing such information as the Minister for the Cabinet Office may from time to time request in respect of—

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- (a) any concession contract within the scope of these Regulations; or
- (b) the procedure for the award of any such concession contract.

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**Changes and effects yet to be applied to :**

- Regulations revoked by [2023 c. 54 Sch. 11 para. 6](#)

**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. 8(5) words omitted by [S.I. 2023/506 reg. 3\(2\)](#) (This amendment not applied to [legislation.gov.uk](#). S.I. 2023/506 revoked before coming into force by The Public Procurement (International Trade Agreements) (Amendment) (Wales) (No. 2) Regulations 2023 (S.I. 2023/567), regs. 1(2), 6)
- reg. 9(9A) words omitted by [S.I. 2023/506 reg. 3\(3\)](#) (This amendment not applied to [legislation.gov.uk](#). S.I. 2023/506 revoked before coming into force by The Public Procurement (International Trade Agreements) (Amendment) (Wales) (No. 2) Regulations 2023 (S.I. 2023/567), regs. 1(2), 6)
- reg. 10(11)(d)(i)(aa) words substituted by [S.I. 2019/560 reg. 7\(7\)\(e\)\(i\)\(aa\)](#) (This amendment not applied to [legislation.gov.uk](#). Affecting Regulations revoked (20.11.2020) by S.I. 2020/1319, regs. 1(3), 2(a))
- reg. 10(11)(d)(i)(bb) words substituted by [S.I. 2019/560 reg. 7\(7\)\(e\)\(i\)\(bb\)](#) (This amendment not applied to [legislation.gov.uk](#). Affecting Regulations revoked (20.11.2020) by S.I. 2020/1319, regs. 1(3), 2(a))