

SCHEDULE

Regulation 1(6)

TRANSITIONAL ETC. PROVISION

PART 1

INTERPRETATION

**Interpretation of Schedule**

1.—(1) In this Schedule—

“amendment” includes modification and revocation;

“the Procurement Regulations” means the following and, in relation to any procedure, means whichever of the following applies to that procedure—

- (a) the Public Contracts Regulations 2006;
- (b) the Utilities Contracts Regulations 2006;
- (c) the Public Contracts Regulations 2015;
- (d) the Concession Contracts Regulations 2016;
- (e) the Utilities Contracts Regulations 2016;

“the second commencement date” is defined by paragraph 10;

“steady state amendments” is defined by paragraph 2.

(2) In this Schedule, the following have the same meaning as in the Procurement Regulations—

- (a) contracting authority;
- (b) design contest;
- (c) dynamic purchasing system;
- (d) economic operator;
- (e) framework agreement;
- (f) notice on the existence of a qualification system;
- (g) periodic indicative notice;
- (h) prior information notice;
- (i) utility;
- (j) voluntary transparency notice.

(3) None of the savings in this Schedule implies any limitation of the scope of any of the other savings in this Schedule<sup>(1)</sup>.

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(1) For example, regulation 60(2) of the Concession Contracts Regulations 2016 is mentioned only in paragraph 8, which saves its previous wording in certain cases, but that does not prevent the more general saving in paragraph 3 from applying to save the previous wording of regulation 60(2) in other cases; nor does the slight overlap between those paragraphs (in cases in which a contract might, before IP completion day, have been awarded but not yet ‘finalised’ as defined in paragraph (3) affect the interpretation of either saving.

## PART 2

### PROCUREMENTS PENDING ETC. ON IP COMPLETION DAY

#### **Meaning of “steady state amendments”**

2. In this Part, “steady state amendments” means—
- (a) amendments made by these Regulations; and
  - (b) any other amendments, including future amendments, to the Procurement Regulations that—
    - (i) come into force on, or begin to apply from, IP completion day or any time after IP completion day; and
    - (ii) are not made by or under any of sections 7A, 7B, 7C, 8B and 8C of the European Union (Withdrawal) Act 2018(2).

#### **Saving for procedures launched, but not finalised, before IP completion day**

3.—(1) Steady state amendments do not affect any procedure launched by a contracting authority or a utility under the Procurement Regulations if the procedure —

- (a) was launched before IP completion day, and
- (b) was not yet finalised by IP completion day.

(2) But regulation 61 (recourse to e-Certis) of the Public Contracts Regulations 2015 (which is omitted by regulation 6(42) of these Regulations) ceases to be saved at the beginning of the day that is 9 months after the day on which IP completion day falls.

#### *Meaning of ‘procedure’*

- (3) In sub-paragraph (1), “procedure” includes—
- (a) a procedure using a dynamic purchasing system;
  - (b) a procedure for which the call for competition takes the form of—
    - (i) a prior information notice;
    - (ii) a periodic indicative notice; or
    - (iii) a notice on the existence of a qualification system.

#### *Meaning of ‘launched’*

- (4) For the purposes of sub-paragraph (1), a procedure is launched—
- (a) when a call for competition or any other invitation to submit applications has been made in accordance with the Procurement Regulations;
  - (b) where the Procurement Regulations do not require such a call or invitation, when the contracting authority or utility contacted economic operators in relation to the specific procedure.

#### *Meaning of ‘finalised’*

- (5) For the purposes of sub-paragraph (1), a procedure is finalised—

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(2) 2018 c. 16; sections 7A, 7B, 7C, 8B and 8C were inserted by the European Union (Withdrawal Agreement) Act 2020 (c. 1), sections 5, 6, 26(2), 18 and 21 respectively.

- (a) upon publication of a contract award notice in accordance with the Procurement Regulations;
- (b) where the Procurement Regulations do not require the publication of such a notice, upon conclusion of the relevant contract;
- (c) where the contracting authority or utility decided not to award a contract, upon informing the tenderers, or persons otherwise entitled to submit applications, of the reasons why the contract was not awarded.

#### **Saving for call-off procedures under certain framework agreements**

4.—(1) If the condition in sub-paragraph (2) is met, steady state amendments do not affect any procedure relating to the performance of a framework agreement, including the award of contracts based on such an agreement, under—

- (a) regulation 33(4) to (11) of the Public Contracts Regulations 2015;
- (b) regulation 51(4) to (6) of the Utilities Contracts Regulations 2016.

(2) The condition is that the framework agreement—

- (a) was concluded before IP completion day and had neither expired nor been terminated before IP completion day; or
- (b) was concluded after IP completion day in accordance with a procedure to which paragraph 3 applied.

#### **Transitional modification of the Procurement Regulations**

5.—(1) In relation to a procedure to which paragraph 3 or 4 applies, the Procurement Regulations are to be read, on and after IP completion day, and so far as the context permits or requires, as if—

- (a) any reference (however expressed) to a member State or EEA state included the United Kingdom;
- (b) any reference (however expressed) to—
  - (i) EU law;
  - (ii) any particular EU Treaty or any part of it;
  - (iii) any EU instrument, or other document of an EU entity or of the EU, or any part of any such instrument or document;
  - (iv) any part of EU law not falling within sub-paragraph (ii) or (iii);
  - (v) any tax, duty, levy or interests of the EU, or
  - (vi) any arrangements involving, or otherwise relating to, the EU of a kind not falling within sub-paragraph (i), (ii), (iii), (iv) or (v),

were a reference to any such thing (including any such thing as may have existed previously) so far as it is applicable to and in the United Kingdom by virtue of the relevant withdrawal provisions;

- (c) any reference (however expressed) to the area of the EU or of the EEA included the United Kingdom;
- (d) any reference (however expressed) to a citizen of the EU or a national of the EEA included a United Kingdom national (within the meaning given by Article 2(d) of the withdrawal agreement);
- (e) any reference to an enforceable EU obligation were a reference to an obligation that is enforceable by virtue of section 7A or 7B of the European Union (Withdrawal) Act 2018; and

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- (f) such other modifications were made as are necessary for any purpose of the relevant withdrawal provisions and are capable of being ascertained from any such purpose or otherwise from those provisions.
- (2) In sub-paragraph (1), “relevant withdrawal provisions” means—
  - (a) Title 8 of Part 3 of the withdrawal agreement (ongoing public procurement and similar procedures);
  - (b) Title 5 of Part 3 of the EEA EFTA separation agreement (ongoing public procurement and similar procedures).

## PART 3

### PROVISIONS COMMENCED ON IP COMPLETION DAY

#### **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 39 of the Public Contracts Regulations 2015 (procurement involving contracting authorities from other member States);
  - (b) regulation 57 of the Utilities Contracts 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 of implied power to terminate contracts**

- 7.—(1) This paragraph applies where—
  - (a) a contract was awarded before IP completion day; and
  - (b) immediately before IP completion day, the contract contained a power—
    - (i) implied by regulation 73(3) of the Public Contracts Regulations 2015 to terminate the contract on the ground mentioned in regulation 73(1)(c) of those Regulations;
    - (ii) implied by regulation 44(3) of the Concession Contracts Regulations 2016 to terminate the contract on the ground mentioned in regulation 44(1)(c) of those Regulations; or
    - (iii) implied by regulation 89(3) of the Utilities Contracts Regulations 2016 to terminate the contract on the ground mentioned in regulation 89(1)(c) of those Regulations.
- (2) On and after IP completion day, that power continues despite the omission, by these Regulations, of regulation 73(1)(c), 44(1)(c) or 89(1)(c), as the case may be.

#### **Saving of regulation 60(2) of the Concession Contracts Regulations 2016**

- 8. The amendment made by these Regulations to regulation 60(2) of the Concession Contracts Regulations 2016 (application of the first ground of ineffectiveness) does not apply where the contract referred to in regulation 60(2) was awarded before IP completion day.

### **Saving in relation to voluntary transparency notices**

- 9.**—(1) This paragraph applies in relation to the amendments made by these Regulations to—
- (a) regulation 99(3) and (4) of the Public Contracts Regulations 2015;
  - (b) regulation 114(3) and (4) of the Utilities Contracts Regulations 2016;
  - (c) regulation 60(3) and (4) of the Concession Contracts Regulations 2016.
- (2) Those amendments do not apply in relation to a voluntary transparency notice that was published in the Official Journal of the European Union if the notice was sent, before IP completion day, to be so published.

## **PART 4**

### **PROVISIONS COMMENCED 12 MONTHS AFTER IP COMPLETION DAY**

#### **Saving in relation to procurements commenced before regulations 7, 9 and 11 come into force**

**10.** The amendments made by regulations 7, 9 and 11 do not affect any procurement commenced before the date on which those amendments come into force (“the second commencement date”).

**11.** For the purposes of this Part, a procurement has been commenced before the second commencement date if, before that date—

- (a) a notice has been sent to the UK e-notification service in accordance with 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.

**12.** For the purposes of this Part, a procurement covers the whole of the procedures which stem from that commencement.

**13.** Accordingly, for example, if a contract notice in relation to a proposed framework agreement under the Public Contracts Regulations 2015 has, before the second commencement date, been sent as described in paragraph 11(a), paragraph 10 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 33(7) to (11) of the Public Contracts Regulations 2015 had itself been commenced before the second commencement date.

**14.** Procedures taken for the purpose of modifying a contract or framework agreement are not to be regarded, for the purposes of paragraph 12, as stemming from the commencement of the procurement from which the award of that contract or framework agreement had itself stemmed.

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**15.** A procedure commenced as described in paragraph 11(a)(i), (b) or (c) is not to be regarded, for the purposes of paragraph 11, as stemming from the commencement of any design contest that had previously been held in relation to the subject-matter of the procurement.