

SCHEDULES

SCHEDULE 4

Article 88(3).

CERTIFIED CONTRACTS OF A BOARD

Certified contracts assumed to be intra vires

1.—(1) Where a board has entered into a contract, the contract shall, if it is a certified contract, have effect (and be deemed always to have had effect) as if the board had had power to enter into it (and had exercised that power properly in entering into it).

(2) For the purposes of this Schedule a contract entered into by a board is a certified contract if (and, subject to sub-paragraphs (3) and (4), only if) the certification requirements have been satisfied by the board with respect to the contract and they were so satisfied before the end of the certification period.

(3) A contract entered into by a board shall be treated as a certified contract during the certification period if the contract provides that the certification requirements are intended to be satisfied by the board with respect to the contract before the end of that period.

(4) Where a board has entered into a contract which is a certified contract (“the existing contract”) and the existing contract is replaced by a contract entered into by it with a person or persons not identical with the person or persons with whom it entered into the existing contract, the replacement contract is also a certified contract if—

- (a) the period for which it operates or is intended to operate ends at the same time as the period for which the existing contract was to operate; and
- (b) apart from that, its provisions are the same as those of the existing contract.

(5) Subject to sub-paragraph (6), in this Schedule “the certification period”, in relation to a contract entered into by a board, means the period of 6 weeks beginning with the day on which the board entered into the contract.

(6) In relation to a contract entered into before the day on which this paragraph comes into operation, “the certification period” means the period of 6 weeks beginning with that day.

(7) Sub-paragraph (1) is subject to paragraph 3 (special provisions about judicial reviews).

(8) The application of sub-paragraph (1) in relation to a contract entered into by a board does not affect any claim for damages made by a person who is not (and has never been) a party to the contract in respect of a breach by the board of any duty to do, or not to do, something before entering into the contract (including, in particular, any such duty imposed by a statutory provision for giving effect to any Community obligation relating to public procurement or by Article 20 of the Education and Libraries (Northern Ireland) Order 1993).

The certification requirements

2.—(1) In this Schedule “the certification requirements”, in relation to a contract entered into by a board, means the requirements specified in sub-paragraphs

(2) to (4).

Status: This is the original version (as it was originally made).

(2) The requirement specified in this sub-paragraph is that the board must have issued a certificate (whether before or after the contract is entered into)—

- (a) including details of the period for which the contract operates or is to operate;
- (b) describing the purpose of the contract;
- (c) containing a statement that the contract is or is to be a contract falling within sub-paragraph (5) or (6);
- (d) stating that the board had or has power to enter into the contract and specifying the statutory provision, or each of the statutory provisions, conferring the power;
- (e) stating that a copy of the certificate has been or is to be given to each person to whom a copy is required to be given by regulations;
- (f) dealing in a manner prescribed by regulations with any matters required by regulations to be dealt with in certificates under this paragraph; and
- (g) confirming that the board has complied with or is to comply with any requirement imposed by regulations with respect to the issue of certificates under this paragraph.

(3) The requirement specified in this sub-paragraph is that the board must have secured that the certificate is signed by any person who is required by regulations to sign it.

(4) The requirement specified in this sub-paragraph is that the board must have obtained consent to the issue of a certificate under this paragraph from each of the persons with whom the board has entered, or is to enter, into the contract.

(5) A contract entered into by a board falls within this sub-paragraph if—

- (a) it is entered into with another person for the provision or making available of services (whether or not together with assets) for the purposes of, or in connection with, the discharge by the board of any of its functions; and
- (b) it operates, or is intended to operate, for a period of at least 5 years.

(6) A contract entered into by a board falls within this sub-paragraph if it is entered into, in connection with a contract falling within sub-paragraph (5), with—

- (a) a person who, in connection with that contract, makes a loan to, or provides any other form of finance for, a party to that contract other than the board; or
- (b) any insurer of or trustee for such a person.

(7) The Department may by regulations subject to affirmative resolution amend sub-paragraph (5) or (6).

(8) Where the certification requirements have been satisfied in relation to a contract by a board, the certificate which has been issued shall have effect (and be deemed always to have had effect) as if the board had had power to issue it (and had exercised that power properly in issuing it); and a certificate which has been so issued is not invalidated by reason that anything in the certificate is inaccurate or untrue.

(9) Where the certification requirements have been satisfied in relation to a contract by a board, the board shall secure that throughout the period for which the contract operates—

- (a) a copy of the certificate which has been issued is open to inspection by members of the public at all reasonable times without payment; and
- (b) members of the public are afforded facilities for obtaining copies of that certificate on payment of a reasonable fee.

Special provision for judicial review

3.—(1) Paragraph 1(1) does not apply for the purposes of determining any question arising on an application for judicial review as to whether a board had power to enter into a contract (or exercised any power properly in entering into a contract).

(2) Paragraph 1(1) has effect subject to any determination or order made in relation to a certified contract on an application for judicial review.

(3) Where, on an application for judicial review relating to a certified contract entered into by a board, a court—

- (a) is of the opinion that the board did not have power to enter into the contract (or exercised any power improperly in entering into it); but
- (b) (having regard in particular to the likely consequences for the financial position of the board, and for the provision of services to the public, of a decision that the contract should not have effect) considers that the contract should have effect, the court may determine that the contract has (and always has had) effect as if the board had had power to enter into it (and had exercised that power properly in entering into it).

(4) In this paragraph and paragraphs 4 and 5 references to an application for judicial review include any appeal (or further appeal) against a determination or order made on such an application.

Relevant discharge terms

4.—(1) No determination or order made in relation to a certified contract on an application for judicial review shall affect the enforceability of any relevant discharge terms relating to the contract.

(2) In this paragraph and paragraph 5 “relevant discharge terms”, in relation to a contract entered into by a board, means terms—

- (a) which have been agreed by the board and any person with whom the board entered into the contract;
- (b) which either form part of the contract or constitute or form part of another agreement entered into by them not later than the day on which the contract was entered into; and
- (c) which provide for a consequence mentioned in sub-paragraph (3) to ensue in the event of the making of a determination or order in relation to the contract on an application for judicial review.

(3) Those consequences are—

- (a) the payment of compensatory damages (measured by reference to loss incurred or loss of profits or to any other circumstances) by one of the parties to the other;
- (b) the adjustment between the parties of rights and liabilities relating to any assets provided or made available under the contract; or
- (c) both of those things.

(4) Where a board has agreed relevant discharge terms with any person with whom it has entered into a contract and the contract is a certified contract, the relevant discharge terms shall have effect (and be deemed always to have had effect) as if the board had had power to agree them (and had exercised that power properly in agreeing them).

Absence of relevant discharge terms

5.—(1) Sub-paragraph (2) applies where—

Status: This is the original version (as it was originally made).

- (a) the result of a determination or order made by a court on an application for judicial review is that a certified contract does not have effect; and
 - (b) there are no relevant discharge terms having effect between the board and a person who is a party to the contract.
- (2) That person shall be entitled to be paid by the board such sums (if any) as he would have been entitled to be paid by the board if the contract—
- (a) had had effect until the time when the determination or order was made; but
 - (b) had been terminated at that time by acceptance by him of a repudiatory breach by the board.
- (3) For the purposes of this paragraph the circumstances in which there are no relevant discharge terms having effect between the board and a person who is a party to the contract include (as well as circumstances in which no such terms have been agreed) circumstances in which the result of a determination or order of a court, made (despite paragraph 4(4)) on an application for judicial review, is that such terms do not have effect.