

*These are draft Regulations as issued by the Cabinet Office for consultation on 19 September 2014. They should be read in conjunction with the Consultation Document of that date and the supporting Technical Note which explain the approach that has been taken to the drafting of these Regulations*

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STATUTORY INSTRUMENTS

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**2015 No.**

**PUBLIC PROCUREMENT**

**The Public Contracts Regulations 2015**

<i>Made</i>	- - - -	2015
<i>Laid before Parliament</i>		2015
<i>Coming into force</i>	- -	2015

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The Minister for the Cabinet Office is designated(a) for the purposes of section 2(2) of the European Communities Act 1972(b) in relation to public procurement.

The Minister for the Cabinet Office makes these Regulations in exercise of the powers conferred by section 2(2) of, as read with paragraph 1A(c) of Schedule 2 to, that Act.

These Regulations make provision for a purpose mentioned in section 2(2) of that Act, and it appears to the Minister for the Cabinet Office that it is expedient for certain references to provisions of EU instruments to be construed as references to those provisions as amended from time to time.

PART 1  
GENERAL

**Citation, commencement, extent and application**

1.—(1) These Regulations may be cited as the Public Contracts Regulations 2015.

*Commencement*

(2) Except for the provisions mentioned in paragraphs (3) to (6), these Regulations come into force on [*date to be inserted*].

(3) Paragraphs (1) to (7) of Regulation 22 come into force—

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(a) S.I. 2010/2473.

(b) 1972 c.68; [section 2(2) was amended by the European Union (Amendment) Act 2008, Part 1 of the Schedule].

(c) Paragraph 1A was inserted by the Legislative and Regulatory Reform Act 2006 (c.51), section 28, [and was amended by the European Union (Amendment) Act 2008, Part 1 of the Schedule].

- (a) for the purposes of regulations 27(6), 28(9), 34(14), 36(4), 53(3) and 119(2)(a), on [*date to be copied from paragraph (2)*];
  - (b) for the purposes of regulation 37(7), on 18th April 2017;
  - (c) for all other purposes, on 18th October 2018.
- (4) Regulation 37(7) comes into force on 18th April 2017.
- (5) Regulations 59(7) and 61 come into force on 18th October 2018.

*Extent and application*

(6) [*Parts 2 and 3 will extend to Northern Ireland and apply in Wales. It is to be decided to what extent, if any, Parts 4 and 5 will do so and to what extent, if any, the Regulations will apply in Scotland. Extent and application provisions will be drafted once this been determined.* ]

**Definitions**

2.—(1) In these Regulations, except where the context otherwise requires,—

“Academy” means a person who is the proprietor of an Academy (see section 17(4) of the Academies Act 2010 and section 579(1) of the Education Act 1996(a));

“accelerated procedure” means any of the following:—

- (a) an open procedure in which the contracting authority has exercised the power conferred by regulation 27(5) to fix a time limit for the receipt of tenders that is shorter than the minimum specified in regulation 27(2);
- (b) a restricted procedure in which the contracting authority has exercised the power conferred by regulation 28(10) to fix a time limit—
  - (i) for the receipt of requests to participate that is shorter than the minimum specified in regulation 28(2); or
  - (ii) for the receipt of tenders that is shorter than the minimum specified in regulation 28(5);
- (c) a competitive procedure with negotiation in which the contracting authority has exercised the power conferred by regulation 28(10) (as applied by regulation 29(6)) to fix a time limit—
  - (i) for the receipt of requests to participate that is shorter than the minimum specified in regulation 29(4); or
  - (ii) for the receipt of initial tenders that is shorter than the minimum specified in regulation 29(5).

“ancillary purchasing activities” means activities consisting [in] the provision of support to purchasing activities, in particular in the following forms:—

- (a) technical infrastructure enabling contracting authorities to award public contracts or to conclude framework agreements for works, supplies or services;
- (b) advice on the conduct or design of public procurement procedures;
- (c) preparation and management of procurement procedures on behalf and for the account of the contracting authority concerned;

“bodies governed by public law” means bodies that have all of the following characteristics:—

- (a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- (b) they have legal personality; and
- (c) they have any of the following characteristics:—

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(a) footnote to be inserted.

- (i) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law;
- (ii) they are subject to management supervision by those authorities or bodies; or
- (iii) they have an administrative, managerial or supervisory board, more than half of [whose] members are appointed by the State, regional or local authorities, or by other bodies governed by public law;

“call for competition” means a call for competition made in a manner required or permitted by regulation 26(7) to (9);

“candidate” means an economic operator that has sought an invitation or has been invited to take part in a restricted procedure, [a competitive procedure with negotiation, a negotiated procedure without prior publication, a competitive dialogue or an innovation partnership];

“central government authorities” means the contracting authorities listed in Schedule 1 [and, where relevant, their successor entities];

“central purchasing body” means a contracting authority which provides centralised purchasing activities [and, possibly,] ancillary purchasing activities;

“centralised purchasing activities” has the meaning given by regulation 37(10);

“the Commission” means the European Commission;

“common technical specification” means a technical specification in the field of information and communication technology laid down in accordance with Articles 13 and 14 of Regulation (EU) 1025/2012(a);

“contracting authorities” means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law;

“CPV” means the Common Procurement Vocabulary as adopted by Regulation (EC) No. 2195/2002(b) as amended from time to time;

“Defence and Security Regulations” means the Defence and Security Public Contracts Regulations 2011(c);

“design contests” means those procedures which enable [the] contracting authority to acquire, mainly in the fields of town and country planning, architecture and engineering or data processing, a plan or design selected by a jury after being put out to competition with or without the award of prizes;

“economic operator” means any [natural or legal] person or [public entity] or group of such persons [and/or entities], including any temporary association of undertakings, which offers the execution of [works and/or a work], the supply of products or the provision of services on the market;

“electronic means” means electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire,[by] radio, [by] optical means or [by] any other electromagnetic means;

“ESPD” means the European Single Procurement Document mentioned in regulation 59(1);

“EU Publications Office” means the Publications Office of the EU;

“European standard” means a standard adopted by a European standardisation organisation and made available to the general public;

“European Technical Assessment” means the documented assessment of the performance of a construction product, in relation to its essential characteristics, in accordance with the [respective] European Assessment Document as defined in point 12 of Article 2 of Regulation (EU) No 305/2011 of the European Parliament and of the Council(d);

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(a)

(b) OJ L 340, 16.12.2002, p. 1.

(c) S.I. 2011/1848. [any relevant amendments to be noted].

(d)

“framework agreement” has the meaning given by regulation 33(2);

“GPA” means the World Trade Organisation Agreement on Government Procurement(a);

“innovation” means the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations [inter alia] with the purpose of helping to solve societal challenges or to support [the Europe 2012 strategy] for smart, sustainable and inclusive growth;

“international standard” means a standard adopted by an international standardisation organisation and made available to the general public;

“invitation to confirm interest” means an invitation which a contracting authority sends in order to comply with regulation 54(2);

“label” means any document, certificate or attestation confirming that the works, products, services, processes or procedures in question meet certain requirements;

“label requirements” means the requirements to be met by the works, products, services, processes or procedures in order to obtain the label concerned;

“life cycle” means all consecutive and/or interlinked stages, including research and development to be carried out, production, trading and its conditions, transport, use and maintenance, throughout the existence of the product or the works or the provision of the service, from raw material acquisition or generation of resources to disposal, clearance and end of service or utilisation;

“maintained school” means the governing body of a maintained school (see section 19 of the Education Act 2002)(b);

“national standard” means a standard adopted by a national standardisation organisation and made available to the general public;

“Official Journal” means the Official Journal of the EU;

“prior publication” means prior publication of a call for competition;

“procurement document” means any document produced or referred to by [the] contracting authority to describe or determine elements of the procurement or the procedure, including [the] contract notice, [the] prior information notice where it is used as a means of calling for competition, the technical specifications, the descriptive document, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents;

“procurement service provider” means a public or private body which offers ancillary purchasing activities on the market;

“public contracts” means contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities [and having] as their object the execution of works, the supply of products or the provision of services;

“Public Contracts Directive” means Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014(c);

“public service contracts” means public contracts which have as their object the provision of services other than [those referred to in the definition of “public works contract”];

“public supply contracts” means public contracts which have as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products, whether or not the contract also includes, as an incidental matter, siting and installation operations;

“public works contracts” means public contracts which have as their object one of the following:—

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(a)  
(b) footnote to be inserted.  
(c) [Insert ref when available]

- (a) the execution, or both the design and execution, of works related to one of the activities listed in Schedule 2;
- (b) the execution, or both the design and execution, of a work;
- (c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work;

“standard” means a technical specification, adopted by a recognised standardisation body, for repeated or continuous application, with which compliance is not compulsory, and which is an international standard, a European standard or a national standard;

“sub-central contracting authorities” means all contracting authorities which are not central government authorities;

“technical reference” means any deliverable produced by European standardisation bodies, other than European standards, according to procedures adapted to the development of market needs;

“technical specifications” means the matters referred to in regulation 42(2) to (7);

“tenderer” means an economic operator that has submitted a tender;

“TFEU” means the Treaty on the Functioning of the European Union(a);

“the Treaties” means the Treaty on European Union(b) and TFEU;

“VAT” means value added tax;

[“work”, as a singular noun,] means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function;

“working day” means a day other than a Saturday, Sunday, Christmas Day, Good Friday or bank holiday within the meaning of the Banking and Financial Dealings Act 1971(c); and

“written” or “in writing” means any expression consisting of words or figures which can be read, reproduced and subsequently communicated, including information transmitted and stored by electronic means.

(2) [Unless the context otherwise requires], any expression used both in [Part 2] and in the Public Contracts Directive has the meaning that it bears in that Directive.]

(3) [Except in Part 3, where a thing is required to be done under these Regulations—

- (a) within a certain period after an action is taken, the day on which that action is taken shall not be counted in the calculation of that period;
- (b) within a certain period, that period must include at least two working days; and
- (c) within a certain period and the last day of that period is not a working day, the period shall be extended to include the next working day.]

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(a) OJ No C 115, 9.5.2008, p.47.  
 (b) OJ No [to be completed]  
 (c) 1971 c.80.

**PART 2**  
**RULES IMPLEMENTING THE PUBLIC CONTRACTS DIRECTIVE**

**CHAPTER 1**

**SCOPE AND GENERAL PRINCIPLES**

**SECTION 1**

*Scope*

**SUB-SECTION 1**

*Subject-matter and mixed procurement*

**Subject-matter and scope of Part 2**

**3.**—(1) This Part establishes rules on the procedures for procurement by contracting authorities with respect to public contracts, and design contests, [whose] value is estimated to be not less than the [relevant threshold] mentioned in regulation 5.

(2) Procurement within the meaning of this Part is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.

(3) This Part is subject to Article 346 of TFEU.

**Mixed procurement**

**4.**—(1) Paragraphs (2) and (3) apply to mixed contracts which have as their subject-matter different types of procurement all of which are [covered by] this Part.

(2) Contracts which have as their subject-matter two or more types of procurement (works, services or supplies) shall be awarded in accordance with the provisions applicable to the type of procurement that characterises the main subject of the contract in question.

(3) In the case of—

- (a) mixed contracts consisting partly of services [to which Section 7 applies] and partly of other services, or
- (b) mixed contracts consisting partly of services and partly of supplies,

the main subject shall be determined in accordance with which of the estimated values of the respective services, or of the respective services and supplies, is the highest.

(4) Paragraphs (5) to (10) apply to mixed contracts which have as their subject procurement [covered by] this Part and procurement [covered by other legal regimes].

(5) Where the different parts of a given contract are objectively separable, paragraphs (6) to (9) apply.

(6) Where part of a given contract is covered by Article 346 of TFEU or the Defence and Security Regulations, regulation 16 applies.

(7) In the case of contracts which have as their subject-matter procurement [covered by] this Part and procurement not covered by this Part, contracting authorities may choose to award separate contracts for the separate parts or to award a single contract.

(8) Where contracting authorities choose to award separate contracts for separate parts, the decision as to which [legal regime] applies to any one of such separate contracts shall be taken on the basis of the characteristics of the separate part concerned.

(9) Where contracting authorities choose to award a single contract, this Part applies, subject to regulation 16, to the ensuing mixed contract, irrespective of—

- (a) the value of the parts that would otherwise fall under [a different legal regime], and
- (b) which [legal regime] those parts would otherwise have been subject to.

(10) Where the different parts of a given contract are objectively not separable, the [applicable legal regime] shall be determined on the basis of the main subject-matter of that contract.

## SUB-SECTION 2

### *Thresholds*

#### **Threshold amounts**

**5.**—(1) This Part applies to procurements with a value net of VAT estimated to be equal to or greater than the following thresholds:—

- (a) for public works contracts, the sum specified in Article 4(a) of the Public Contracts Directive;
- (b) for public supply and [public] service contracts awarded by central government authorities, and design contests organised by such authorities, the sum specified in Article 4(b) of the Public Contracts Directive, subject to paragraph (2);
- (c) for public supply and [public] service contracts awarded by sub-central contracting authorities, and design contests organised by such authorities, the sum specified in Article 4(c) of the Public Contracts Directive;
- (d) for public service contracts for [social and other specific services listed in Schedule 3], the sum specified in Article 4(d) of the Public Contracts Directive.

(2) Where public supply contracts are—

- (a) awarded by central government authorities operating in the field of defence, and
- (b) concern products not covered by Schedule 4,

the applicable threshold for the purposes of paragraph (1) is the sum specified in Article 4(c) of the Public Contracts Directive.

(3) References in paragraphs (1) and (2) to the Public Contracts Directive are references to that Directive as amended from time to time.

(4) The value in pounds sterling of any amount expressed in euro in any of the provisions of the Public Sector Directive mentioned in this regulation shall be taken to be the value for the time being determined by the Commission for the purpose of that provision and published from time to time in the Official Journal in accordance with Article 6 of the Public Contracts Directive.

#### **Methods for calculating the estimated value of procurement**

##### *General rules*

**6.**—(1) The calculation of the estimated value of a procurement shall be based on the total amount payable, net of VAT, as estimated by the contracting authority, including any form of option and any renewals of [the contracts] as explicitly set out in the procurement documents.

(2) Where the contracting authority provides for prizes or payments to candidates or tenderers it shall take them into account when calculating the estimated value of the procurement.

(3) Where a contracting authority is comprised of separate operational units, account shall be taken of the total estimated value for all those units.

(4) But where a separate operational unit is independently responsible for its procurement, or certain categories of its procurement, the values may be estimated at the level of [that unit].

(5) The choice of the method used to calculate the estimated value of a procurement shall not be made with the intention of excluding it from the scope of this Part.

(6) A procurement shall not be subdivided with the effect of preventing it from falling within the scope of this Part, unless justified by objective reasons.

(7) The estimated value shall be [valid] at the moment at which the call for competition is sent or, in cases where a call for competition is not foreseen, at the moment at which the contracting authority commences the procurement procedure (for example, where appropriate, by contacting economic operators in relation to the procurement).

(8) In the case[s] of framework agreements and dynamic purchasing systems, the value to be taken into consideration shall be the maximum estimated value, net of VAT, of all the contracts envisaged for the total term of the framework agreement or the dynamic purchasing system.

(9) In the case of innovation partnerships, the value to be taken into consideration shall be the maximum estimated value, net of VAT, of the research and development activities to take place during all stages of the envisaged partnership as well as of the supplies, services or works to be developed and procured at the end of the envisaged partnership.

(10) [In the case of] public works contracts, the calculation of the estimated value shall take account of both the cost of the works and the total estimated value of the supplies and services that are made available to the contractor by the contracting authority provided that they are necessary for executing the works.

#### *Treatment of lots*

(11) Where a proposed work or a proposed provision of services may result in contracts being awarded in the form of separate lots, account shall be taken of the total estimated value of all such lots.

(12) Where a proposal for the acquisition of similar supplies may result in contracts being awarded in the form of separate lots, account shall be taken of the total estimated value of all such lots when applying regulation 5(1)(b) and (c) [(read with regulation 5(2))].

(13) For the purposes of paragraphs (11) and (12), where the aggregate value of the lots is equal to or exceeds the relevant threshold mentioned in regulation 5, this Part applies to the awarding of each lot.

(14) Despite] paragraphs (11) to (13), contracting authorities may, subject to paragraph (15), award contracts for individual lots without applying the procedures [provided for by this Part], but only if the estimated value, net of VAT, of the lot concerned is less than—

- (a) 80,000 euro for supplies or services; or
- (b) 1 million euro for works.

(15) The aggregate value of the lots awarded pursuant to paragraph (14) shall not exceed 20% of the aggregate value of all the lots into which the proposed work, the proposed acquisition of similar supplies, or the proposed provision of services, has been divided.

#### *Other specific rules*

(16) In the case of public supply or service contracts which are regular in nature or which are intended to be renewed within a given period, the calculation of the estimated contract value shall be based on [either of] the following:—

- (a) the total actual value of the successive contracts of the same type awarded during the preceding 12 months or financial year adjusted, where possible, to take account of the changes in quantity or value which would occur in the course of the 12 months following the initial contract;
- (b) the total estimated value of the successive contracts awarded during the 12 months following the first delivery, or during the financial year where that is longer than 12 months.

(17) In the case of public supply contracts relating to the leasing, hire, rental or hire purchase of products, the value to be taken as a basis for calculating the estimated contract value shall be as follows:—

- (a) in the case of fixed-term public contracts, where that term is less than or equal to 12 months, the total estimated value for the term of the contract or, where the term of the contract is greater than 12 months, the total value including the estimated residual value;
- (b) in the case of public contracts without a fixed term or [public contracts] the term of which cannot be defined, the monthly value multiplied by 48.

(18) In the case of public service contracts, the basis for calculating the estimated contract value shall, where [relevant] be the following:—

- (a) in the case of insurance services, the premium payable and other forms of remuneration;

- (b) in the case of banking and other financial services, the fees, commissions payable, interest and other forms of remuneration;
- (c) in the case of design contracts, the fees, commissions payable and other forms of remuneration;

(19) In the case of public service contracts which do not [indicate] a total price, the basis for calculating the estimated contract value shall be the following:—

- (a) in the case of fixed-term contracts where that term is less than or equal to 48 months, the total value for their full term;
- (b) in the case of contracts without a fixed term or with a term greater than 48 months, the monthly value multiplied by 48.

### SUB-SECTION 3

#### *Exclusions*

#### **Utilities**

7. This Part does not apply to the seeking of offers in relation to a proposed public contract, framework agreement or dynamic purchasing system where the contracting authority is a utility within the meaning of regulation 3 of the Utilities Contracts Regulations 2006(a) and—

- (a) that contract is for the purposes of carrying out an activity listed in any Part of Schedule 1 to those Regulations in which the utility is specified;
- (b) that contract is for the provision of bus services to the public where other entities are free to provide those services, either in general or in a particular geographical area, under the same conditions as the utility;
- (c) that contract is for the purpose of acquiring goods, work, works or services in order to sell, hire or provide them to another person unless the utility has a special or exclusive right to sell, hire or provide such goods, work, works or services or other persons are not free to sell, hire or provide them under the same conditions;
- (d) that contract is for the purchase of water, where that utility is engaged in the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transportation or distribution of drinking water or the supply of drinking water to such networks;
- (e) that contract is for the supply of energy or of fuels for the production of energy, where that utility is engaged in—
  - (i) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas or heat or the supply of gas or heat to such networks;
  - (ii) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity or the supply of electricity to such networks; or
  - (iii) exploring for or extracting oil, gas, coal or other solid fuels; or
- (f) where that utility is engaged in an activity excluded from the Utilities Contracts Regulations 2006 by virtue of regulation 9 of those Regulations.

#### **Specific exclusions in the field of electronic communications**

8.—(1) This Part does not apply to public contracts, or design contests, for the principal purpose of permitting the contracting authorities to provide or exploit public communications networks or to provide to the public one or more electronic communications services.

(2) [For the purposes of this Regulation—

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(a) marker footnote.

- (a) “public communications network” means an electronic communications network used wholly or mainly for the provision of electronic communications services available to the public which support the transfer of information between network termination points;
- (b) “electronic communications network” means transmission systems and, where applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed (circuit and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed;]
- (c) “network termination point” means the physical point at which a subscriber is provided with access to a public communications network and, in the case of networks involving switching or routing, this point is identified by means of a specific network address which may be linked to a subscriber number or name; [and]
- (d) “electronic communications service” means a service normally provided for remuneration which consists wholly or mainly [of] the conveyance of signals on electronic communications networks—
  - (i) including telecommunications services and transmission services in networks used for broadcasting; but
  - (ii) excluding—
    - (aa) services providing, or exercising editorial control over, content transmitted using electronic communications networks [and] services; [and]
    - (bb) information society services, as defined in [], which do not consist wholly or mainly in the conveyance of signals on electronic communications networks.]

**Public contracts awarded, and design contests organised, pursuant to international rules**

9.—(1) This Part does not apply to public contracts, [or] design contests, which the contracting authority is obliged to award or organise in accordance with procurement procedures which are different from those [laid down by] this Part and are established by any of the following:—

- (a) a legal instrument creating international law obligations, such as an international agreement, concluded in conformity with the Treaties, between a member State and one or more third countries (or subdivisions of such countries) and covering works, supplies or services intended for the joint implementation or exploitation of a project by its signatories;
- (b) an international organisation.

(2) This Part does not apply to public contracts [or] design contests which the contracting authority awards or organises in accordance with procurement rules provided by an international organisation or international financing institution where the public contracts [or] design contests concerned are fully financed by that organisation or institution.

(3) In the case of public contracts [or] design contests co-financed for the most part by an international organisation or international financing institution, [the parties] shall agree on applicable procurement procedures.

(4) In relation to contracts and design contests involving defence or security aspects which are awarded or organised pursuant to international rules, regulation 17 applies instead of paragraphs (1) to (3) of this regulation.

**Specific exclusions for service contracts**

10.—(1) This Part does not apply to public service contracts for—

- (a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights [thereon];

- (b) the acquisition, development, production or co-production of programme material intended for audiovisual media services or radio media services, that are awarded by audiovisual or radio media service providers; or contracts for broadcasting time or programme provision that are awarded to audiovisual or radio media service providers;
  - (c) arbitration [or] conciliation services;
  - (d) any of the following legal services:—
    - (i) legal representation of a client by a lawyer within the meaning of [Article 1 of Council Directive 77/249/EEC of [insert date](a)] in:—
      - (aa) an arbitration or conciliation held in a Member State, a third country or before an international arbitration or conciliation [instance]; or
      - (bb) judicial proceedings before the courts, tribunals or public authorities of a member State or a third country or before international courts, tribunals or institutions;
    - (ii) legal advice given in preparation [of] any of the proceedings referred to in paragraph (i) or where there is a tangible indication and high probability that the matter to which the advice relates will become the subject of such proceedings, provided that the advice is given by [a lawyer within the meaning of Article 1 of Directive 77/249/EEC [of...];
    - (iii) document certification and authentication services which must be provided by notaries;
    - (iv) legal services provided by trustees or appointed guardians or other legal services the providers of which are designated by a court or tribunal in the member State concerned or are designated by law to carry out specific tasks under the supervision of such tribunals or courts; [or]
    - (v) other legal services which in the member State concerned are connected, even occasionally, with the exercise of official authority;
  - (e) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of [Directive 2004/39/EC of ...](b)], central bank services and operations conducted with the [European Financial Stability Facility and the European Stability Mechanism];
  - (f) loans, whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments;
  - (g) employment contracts;
  - (h) civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations, and which are covered by CPV codes 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8, 98113100-9 and 85143000-3 except patient transport ambulance services;
  - (i) public passenger transport services by rail or metro; [or]
  - (j) political campaign services covered by CPV codes 79341400-0, 92111230-3 and 92111240-6, when awarded by a political party in the context of an election campaign.
- (2) For the purposes of this Regulation—
- (a) “audiovisual media services” and “media service providers” have, respectively, the same meaning as [pursuant to] [Articles 1(1)(a) and 1(1)(d) of Directive 2010/13/EU of ...];
  - (b) “programme” has the same meaning as [pursuant to] Article 1(1)(b) of that Directive, but also includes radio programmes and radio programme materials; and
  - (c) “programme material” has the same meaning as “programme”.

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(a) Footnote to be inserted.

(b) Footnote to be inserted.

## **Service contracts awarded on the basis of an exclusive right**

11. This Part does not apply to public service contracts awarded by a contracting authority to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which [they] enjoy pursuant to a law, regulation or published administrative provision which is compatible with TFEU.

## **Public contracts between entities within the public sector**

### *Award of contracts to controlled persons*

12.—(1) A public contract awarded by a contracting authority to a [legal] person governed by private or public law falls outside the scope of this Part where all of the following conditions are fulfilled:—

- (a) the contracting authority exercises over the [legal] person concerned a control which is similar to that which it exercises over its own departments;
- (b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other [legal] persons controlled by that contracting authority; and
- (c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by [national legislative provisions], [in conformity with the Treaties], which do not exert a decisive influence on the controlled legal person.

(2) A public contract also falls outside the scope of this Part where a controlled [legal] person which is a contracting authority awards the contract to—

- (a) its controlling contracting authority, or
- (b) another [legal] person controlled by the same contracting authority,

provided that there is no direct private capital participation in the [legal] person being awarded the public contract with the exception of non-controlling and non-blocking forms of private capital participation required by [national legislative provisions], [in conformity with the Treaties], which do not exert a decisive influence on the controlled legal person.

(3) A contracting authority shall be [deemed] to exercise over a [legal] person a control similar to that which it exercises over its own departments within the meaning of paragraph 1(a) where—

- (a) it exercises a decisive influence over both strategic objectives and significant decisions of the controlled [legal] person; or
- (b) the control is exercised by another [legal] person which is itself controlled in the same way by the contracting authority

and references to “control”, “controlled” and “controlling” in paragraphs (1) to (3) have congruent meanings.

### *Award of contracts where there is joint control*

(4) A contracting authority which does not exercise control over a [legal] person governed by private or public law control within the meaning of paragraph (3) may nevertheless award a public contract to that [person] without applying this Part where all of the following conditions are fulfilled—

- (a) the contracting authority exercises jointly with other contracting authorities a control over that [legal] person which is similar to that which they exercise over their own departments;
- (b) more than 80% of the activities of that [legal] person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or by other [legal] persons controlled by the same contracting authorities; and
- (c) there is no direct private capital participation in the controlled [legal] person with the exception of non-controlling and non-blocking forms of private capital participation

required by [national legislative provisions], [in conformity with the Treaties], which do not exert a decisive influence on the controlled legal person.

(5) For the purposes of paragraph (4)(a), contracting authorities exercise joint control over a [legal] person where all of the following conditions are fulfilled:—

- (a) the decision-making bodies of the controlled [legal] person are composed of representatives of all participating contracting authorities;
- (b) those contracting authorities are able [to jointly exert] decisive influence over the strategic objectives and significant decisions of the controlled [legal] person; and
- (c) the controlled [legal] person does not pursue any interests which are contrary to those of the controlling contracting authorities.

(6) For the purposes of paragraph (5)(a), individual representatives may represent several or all of the participating contracting authorities.

*Contracts which establish or implement co-operation between contracting authorities*

(7) A contract concluded exclusively between two or more contracting authorities falls outside the scope of this Part where all of the following conditions are fulfilled:—

- (a) the contract establishes or implements [a] co-operation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;
- (b) the implementation of that co-operation is governed solely by considerations relating to the public interest; and
- (c) the participating contracting authorities perform on the open market less than 20% of the activities concerned by the co-operation.

*Determination of percentages*

(8) For the determination of the percentage of activities referred to in paragraphs (1)(b), (4)(b) and (7)(c), the average total turnover, or an appropriate alternative activity-based measure such as costs incurred by the relevant [legal] person or contracting authority with respect to services, supplies and works for the three years preceding the contract award shall be taken into consideration.

(9) Where, because of—

- (a) the date on which the relevant [legal] person or contracting authority was created or commenced activities, or
- (b) a reorganisation of its activities

the turnover, or alternative activity-based measure such as costs, are either not available for the preceding three years or no longer relevant, it shall be sufficient to show that the measurement of activity is credible, particularly by means of business projections.

SUB-SECTION 4

*Specific situations*

**Contracts subsidised by contracting authorities**

**13.—**(1) This Part applies to the awarding of the following contracts:—

- (a) works contracts which are subsidised directly by contracting authorities by more than 50% and the estimated value of which, net of VAT, is equal to or greater than the sum specified in Article 13(a) of the Public Contracts Directive, where those contracts involve one of the following activities:—
  - (i) [civil engineering activities as listed] in Schedule 2;
  - (ii) building work for hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes;
- (b) service contracts which are subsidised directly by contracting authorities by more than 50% and the estimated value of which, net of VAT, is equal to or greater than the sum

specified in Article 13(b) of the Public Contracts Directive and which are connected to a works contract as referred to in paragraph (a).

(2) References in paragraph (1) to the Public Contracts Directive are references to that Directive as amended from time to time.

(3) The contracting authorities providing the subsidies referred to in paragraph (1) shall ensure compliance with this Part where they do not themselves award the subsidised contract or where they award that contract for and on behalf of other entities.

### **Research and development services**

**14.** This Part applies to public service contracts for research and development services which are covered by CPV codes 73000000-2 to 73120000-9, 73300000-5, 73420000-2 and 73430000-5 only if—

- (a) the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs; and
- (b) the service provided is wholly remunerated by the contracting authority.

### **Defence and security**

**15.—**(1) This Part applies to the awarding of public contracts and to design contests organised in the fields of defence and security, with the exception of the following contracts:—

- (a) contracts falling within the scope of the Defence and Security Regulations;
- (b) contracts to which those Regulations do not apply pursuant to regulations 7 or 9 of those Regulations.

(2) This Part does not apply to public contracts and design contests not otherwise exempted by paragraph (1)—

- (a) to the extent that the protection of the essential security interests of the United Kingdom or another member State cannot be guaranteed by less intrusive measures, for example by imposing requirements aimed at protecting the confidential nature of information which the contracting authority makes available in a contract award procedure as provided for in this Part;
- (b) to the extent that the application of this Part would oblige the United Kingdom to supply information the disclosure of which it considers contrary to the essential interests of its security.

(3) Where the procurement and performance of the public contract or design contest are classified as secret or must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in any part of the United Kingdom, this Part does not apply provided that the United Kingdom has determined that the essential interests concerned cannot be guaranteed by less intrusive means, such as those referred to in paragraph (2)(a).

### **Mixed procurement involving defence or security aspects**

**16.—**(1) This regulation applies in the case of mixed contracts which have as their subject procurement covered by this Part and procurement covered by Article 346 of TFEU or the Defence and Security Regulations.

(2) Where the different parts of a given public contract are objectively separable, contracting authorities may choose to award separate contracts for the separate parts or to award a single contract.

(3) The decision to award a single contract shall not, however, be taken for the purpose of excluding contracts from the application of either this Part or the Defence and Security Regulations.

(4) Where contracting authorities choose to award separate contracts for separate parts, the decision of which legal regime applies to any one of such separate contracts shall be taken on the basis of the characteristics of the separate part concerned.

(5) Where contracting authorities choose to award a single contract, the following criteria shall apply to determine the applicable legal regime:—

- (a) where part of a given contract is covered by Article 346 of TFEU, the contract may be awarded without applying this Part, provided that the award of a single contract is justified by objective reasons;
- (b) where part of a given contract is covered by the Defence and Security Regulations, the contract may be awarded in accordance with those Regulations, provided that the award of a single contract is justified by objective reasons.

(6) Paragraph (5)(b) is without prejudice to the thresholds and exclusions for which the Defence and Security Regulations provide.

(7) Paragraph (5)(a) applies to mixed contracts to which both paragraph (5)(a) and (b) could otherwise apply.

(8) Where the different parts of a given contract are objectively not separable, the contract may be awarded without applying this Part where it includes elements to which Article 346 of TFEU applies; otherwise it may be awarded in accordance with the Defence and Security Regulations.

### **Public contracts and design contests involving defence or security aspects which are awarded or organised pursuant to international rules**

**17.—**(1) This Part does not apply to public contracts [or] design contests involving defence or security aspects which the contracting authority is obliged to award or organise in accordance with procurement procedures which are different from those [laid down by] this Part and are established by any of the following:—

- (a) an international agreement or arrangement, concluded in conformity with the Treaties, between a Member State and one or more third countries (or subdivisions of such countries) and covering works, supplies or services intended for the joint implementation or exploitation of a project by its signatories;
- (b) an international agreement or arrangement relating to the stationing of troops and concerning the undertakings of a member State or a third country;
- (c) an international organisation.

(2) This Part does not apply to public contracts [or] design contests involving defence or security aspects which the contracting authority awards in accordance with procurement rules provided by an international organisation or international financing institution where the public contracts [or] design contests concerned are fully financed by that organisation or institution.

(3) In the case of public contracts [or] design contests co-financed for the most part by an international organisation or international financing institution, the parties shall agree on applicable procurement procedures.

## SECTION 2

### *General Rules*

### **Principles of procurement**

**18.—**(1) Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

(2) The design of the procurement shall not be made with the intention of excluding it from the scope of this Part or of artificially narrowing competition.

(3) [For that purpose], competition shall be considered to be [artificially narrowed] where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

## **Economic operators**

**19.**—(1) Economic operators that, under the law of the member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of [England and Wales or, as the case may be, Northern Ireland], they would be required to be either natural or legal persons.

(2) In the case of—

- (a) public service contracts,
- (b) public works contracts, and
- (c) public supply contracts which cover in addition services or siting and installation operations,

legal persons may be required to indicate, in the tender or the request to participate, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract in question.

### *Groups of economic operators*

(3) Groups of economic operators, including temporary associations, may participate in procurement procedures and shall not be required by contracting authorities to have a specific legal form in order to submit a tender or a request to participate.

(4) Where necessary, contracting authorities may clarify in the procurement documents how groups of economic operators are to meet the requirements as to economic and financial standing or technical and professional ability referred to in regulation 58 provided that this is justified by objective reasons and is proportionate.

(5) Any conditions for the performance of a contract by such groups [of economic operators] which are different from those imposed on individual participants shall also be justified by objective reasons and shall be proportionate.

(6) Contracting authorities may, however, require groups of economic operators to assume a specific legal form once they have been awarded the contract, to the extent that such a change is necessary for the satisfactory performance of the contract.

## **Reserved contracts**

**20.**—(1) Contracting authorities may—

- (a) reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons, or
- (b) [provide for] such contracts to be performed in the context of sheltered employment programmes

provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.

(2) The call for competition shall make reference to Article 20 of the Public Sector Directive.

## **Confidentiality**

**21.**—(1) A contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.

(2) Paragraph (1) is without prejudice to—

- (a) [any other provision of this Part, such as the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in regulations 50 and 55;

- (b) the Freedom of Information Act 2000(a);
- (c) any other requirement, or permission, for the disclosure of information that is applicable under the law of England and Wales or, as the case may be, Northern Ireland.]

(3) Contracting authorities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure.

### **Rules applicable to communication**

#### *General principles about the use of electronic and non-electronic means of communication*

**22.**—(1) Subject to paragraphs (3), (5), (8) and (10), all communication and information exchange [under] this Part, [including electronic submission], shall be performed using electronic means of communication in accordance with [the requirements of] this regulation.

(2) Subject to paragraph (13), the tools and devices to be used for communicating by electronic means, and their technical characteristics, shall be non-discriminatory, generally available and interoperable with the information and communication technology products in general use and shall not restrict economic operators' access to the procurement procedure.

(3) Contracting authorities are not obliged to require electronic means of communication in [the submission process] in the following situations:—

- (a) due to the specialised nature of the procurement, the use of electronic means of communication would require specific tools, devices or file formats that are not generally available or supported by generally available applications;
- (b) the applications supporting file formats that are suitable for the description of the tenders use file formats that cannot be handled by any other open or generally available applications or are under a proprietary licensing scheme and cannot be made available for downloading or remote use by the contracting authority;
- (c) the use of electronic means of communication would require specialised office equipment that is not generally available to contracting authorities; [or]
- (d) the procurement documents require the submission of physical or scale models which cannot be transmitted using electronic means.

(4) In respect of communications for which electronic means of communication are not used [pursuant to] paragraph (3), communication shall be carried out—

- (a) by post or by other suitable carrier, or
- (b) by a combination of post or other suitable carrier and electronic means.

(5) Contracting authorities are not obliged to require electronic means of communication in [the submission process] to the extent that the use of means of communication other than electronic means is necessary either—

- (a) because of a breach of security of the electronic means of communication, or
- (b) for the protection of information of a particularly sensitive nature requiring such a high level of protection that it cannot be properly ensured by using electronic tools and devices that are either generally available to economic operators or can be made available to them by alternative means of access within the meaning of paragraph (14).

(6) It [shall be] the responsibility of the contracting authorities requiring, in accordance with paragraph (3), means of communication other than electronic means in the submission process to indicate in the report referred to in regulation 84(1) the reasons for this requirement.

(7) Where applicable, contracting authorities shall indicate in that report the reasons why use of means of communication other than electronic means has been considered necessary in application of paragraph (5).

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(a) insert footnote

(8) Oral communication may be used in respect of communications other than those concerning the essential elements of a procurement procedure, provided that the content of the oral communication is documented to [a sufficient] degree.

(9) For that purpose, the essential elements of a procurement procedure include the procurement documents, requests to participate, confirmations of interest and tenders.

(10) In particular, oral communications with tenderers which could have a substantial impact on the content and assessment of the tenders shall be documented to a sufficient extent and by appropriate means, such as written or audio records or summaries of the main elements of the communication.

(11) In all communication, exchange and storage of information, contracting authorities shall ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved.

(12) Contracting authorities shall examine the content of tenders and requests to participate only after the time limit set for submitting them has expired.

*Use of tools and devices not generally available*

(13) Contracting authorities may, where necessary, require the use of tools and devices which are not generally available, provided that the contracting authorities offer alternative means of access.

(14) Contracting authorities shall be deemed to offer [suitable] alternative means of access where they [do any of the following]:—

- (a) offer unrestricted and full direct access free of charge by electronic means to the tools and devices concerned from the date of publication of [the] notice in accordance with regulation 51 or from the date when the invitation to confirm interest is sent;
- (b) ensure that tenderers having no access to the tools and devices concerned, or no possibility of obtaining them within the relevant time limits, provided that the lack of access is not attributable to the tenderer concerned, may access the procurement procedure through the use of provisional tokens made available free of charge online; or
- (c) support an alternative channel for electronic submission of tenders.

(15) For the purposes of paragraph (14)(a)—

- (a) “publication of the notice” means whichever of the following is relevant (and where both are relevant, the earliest of them):—
  - (i) its publication in the Official Journal after being sent in accordance with regulation 51;
  - (ii) its publication on a buyer profile in accordance with regulation 52; and
- (b) the text of the notice or the invitation to confirm interest shall specify the internet address at which the tools and devices are accessible.

*Technical etc requirements for tools and devices*

(16) Tools and devices for the electronic receipt of tenders, requests to participate [as well as] plans and projects in design contests must at least guarantee, through technical means and appropriate procedures, that—

- (a) the exact time and date of the receipt of tenders, requests to participate and the submission of plans and projects can be determined precisely;
- (b) it may be reasonably ensured that, before the time limits laid down, no-one can have access to data transmitted under the requirements in this paragraph;
- (c) only authorised persons may set or change the dates for opening data received;
- (d) during the different stages of the procurement procedure, or of the design contest, access to all data submitted, or to part of such data, [must] be possible only for authorised persons;
- (e) only authorised persons [may] give access to data transmitted and only after the prescribed date;

- (f) data received and opened in accordance with these requirements must remain accessible only to persons authorised to acquaint themselves with the data;
- (g) [it must be reasonably ensured that any infringement, or attempted infringement, of the access prohibitions or conditions referred to in sub-paragraphs (b) to (f) are clearly detectable.]

(17) In addition to those requirements, the following rules shall apply to tools and devices for the electronic transmission and receipt of tenders and for the electronic receipt of requests to participate:—

- (a) information on specifications for the electronic submission of tenders and requests to participate, including encryption and time-stamping, shall be available to interested parties;
- (b) [contracting authorities] shall, acting in accordance with paragraphs (18) and (19), specify the level of security required for the electronic means of communication in the various stages of the specific procurement procedure, and that level shall be proportionate to the risks attached;
- (c) where contracting authorities conclude that the level of risk[s], assessed in accordance with paragraphs (18) and (19), is such that advanced electronic signatures as defined by [Directive 1999/93/EC of the European Parliament and of the Council(a)] are required, contracting authorities shall accept advanced electronic signatures supported by a [qualified certificate], taking into account whether the certificate is provided by a certificate services provider which is on a trusted list provided for in Commission Decision 2009/767/EC(b), created with or without a secure signature creation device, subject to compliance with the following conditions:—
  - (i) (aa) [the contracting authorities] shall establish the required advanced signature format on the basis of formats established in Commission Decision 2011/130/EU(c) and put in place necessary measures to be able to process these formats technically;
  - (bb) in case a different format of electronic signature is used, the electronic signature or the electronic document carrier shall include information on existing validation possibilities [];
  - (cc) the validation possibilities shall allow the contracting authority to validate online, free of charge and in a way that is understandable for non-native speakers, the received electronic signature as an advanced electronic signature supported by a qualified certificate;
- (ii) where a tender is signed with the support of a qualified certificate that is included on a trusted list, contracting authorities must not apply additional requirements that may hinder the use of those signatures by tenderers.

#### *Security requirements*

(18) In deciding the level of security required at each stage of a procurement procedure, and in concluding whether the level of risk is such that advanced electronic signatures are required, contracting authorities shall assess the risks having regard to both the likelihood that particular risks will materialise and the potential adverse consequences if those risks materialise.

(19) In doing so, contracting authorities shall have particular regard to the following matters:—

- (a) the risk to the proper functioning and integrity of the specific procurement process, including risks of breach of this Part;
- (b) risks to national security;
- (c) the risk of inadvertent or unauthorised disclosure of, or access to, any economic operator's confidential information;

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(a) OJ L 13, 19.1.2000, p. 12.

(b) OJ L 274, 20.10.2009, p. 36.

(c) OJ L 53, 26.2.2011, p. 66.

- (d) the risk of inadvertent or unauthorised disclosure of, or access to, information held by the contracting authority including information relating to the specific procurement;
- (e) the risk that use of electronic communications could provide opportunity for malicious attacks on the electronic systems of, or data held by, the authority, any economic operator or any other person, including introduction of malware or denial of service attacks;
- (f) other material risks relating to the procurement procedure in question;
- (g) the need for consistency as between similar procurements performed by the same contracting authority;
- (h) the need for proportionality between, on the one hand the expected benefits of any particular security requirements (in terms of eliminating or reducing any of the risks referred to in sub-paragraphs (a) to (g)), and on the other hand the costs, burdens and obligations which those requirements may impose on economic operators.

#### *Electronic signatures*

(20) In respect of documents used in the context of a procurement procedure that are signed by a competent authority of a Member State or by another issuing entity, the competent issuing authority or entity may establish the required advanced signature format in accordance with the requirements set out in [Article 1(2) of Commission Decision 2011/130/EU], and—

- (a) they shall put in place the necessary measures to be able to process that format technically by including the information required for the purpose of processing the signature in the document concerned;
- (b) such documents shall contain in the electronic signature or in the electronic document carrier information on existing validation possibilities that allow the validation of the received electronic signature online, free of charge and in a way that is understandable for non-native speakers.

#### **Nomenclatures**

**23.** Any references to nomenclatures in the context of public procurement shall be made using the CPV.

#### **Conflicts of interest**

**24.—(1)** Contracting authorities shall take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.

(2) [For the purposes of paragraph (1),] the concept of conflicts of interest shall at least cover any situation where relevant staff members have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

(3) In paragraph (2), “relevant staff members” means staff members of the contracting authority, or of a procurement service provider acting on behalf of the contracting authority, who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure.

## CHAPTER 2

### RULES ON PUBLIC CONTRACTS

#### SECTION 3

##### *Procedures*

#### **Conditions relating to the GPA and other international agreements**

**25.** In so far as they are covered by Annexes 1, 2, 4 and 5 and the General Notes to the EU’s Appendix 1 to the GPA and by the other international agreements by which the EU is bound,

contracting authorities shall accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the EU.

## **Choice of procedures**

### *General*

**26.**—(1) When awarding public contracts, contracting authorities shall apply [procedures that conform to this Part], [provided that, without prejudice to regulation 32, a call for competition has been published in accordance with this Part or the Public Contracts Directive].

(2) Contracting authorities may apply:—

- (a) open or restricted procedures as regulated by this Part;
- (b) innovation partnerships as regulated by this Part.

(3) Contracting authorities may apply a competitive procedure with negotiation or a competitive dialogue in the following situations:—

- (a) with regard to works, supplies or services fulfilling one or more of the following criteria:—
  - (i) the needs of the contracting authority cannot be met without adaptation of readily available solutions;
  - (ii) they include design or innovative solutions;
  - (iii) the contract cannot be awarded without prior negotiation because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of risks attaching to them;
  - (iv) the technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, European Technical Assessment, common technical specification or technical reference;
- (b) with regard to works, supplies or services where, in response to an open or a restricted procedure, only irregular or unacceptable tenders are submitted.

### *Irregular and unacceptable tenders*

(4) Where paragraph (3)(b) applies, contracting authorities are not required to publish a contract notice where they include in the procedure all of, and only, the tenderers which satisfy the criteria set out in regulations 57 to 64 and which, during the prior open or restricted procedure, submitted tenders in accordance with the formal requirements of the procurement procedure.

(5) In particular, tenders—

- (a) which do not comply with the procurement documents,
- (b) which were received late,
- (c) [where] there is evidence of collusion or corruption, or
- (d) which have been found by the contracting authority to be abnormally low,

shall be considered as being irregular for the purposes of paragraph (3)(b).

(6) In particular,—

- (a) tenders submitted by tenderers which do not have the required qualifications, and
- (b) tenders whose price exceeds the contracting authority's budget as determined and documented prior to the launching of the procurement procedure,

shall be considered as [being] unacceptable for the purposes of paragraph (3)(b).

### *Calling for competition etc*

(7) Subject to paragraph (8), the call for competition shall be made by means of a contract notice in accordance with regulation 49.

(8) Where the contract is awarded by restricted procedure or competitive procedure with negotiation, sub-central contracting authorities may make the call for competition by means of a prior information notice in accordance with regulation 48(6) to (8).

(9) Where the call for competition is made by means of a prior information notice [in accordance with regulation 48(6) to (8)], economic operators which have expressed their interest following the publication of the prior information notice shall subsequently be invited to confirm their interest in writing by means of an invitation to confirm interest in accordance with regulation 54.

(10) [In, and only in, the specific cases and circumstances referred to expressly in regulation 32, contracting authorities may apply a negotiated procedure without prior publication of a call for competition.]

### **Open procedure**

**27.**—(1) In open procedures, any interested economic operator may submit a tender in response to a call for competition.

(2) The minimum time limit for the receipt of tenders shall be 35 days from the date on which the contract notice was sent, [subject to paragraphs (4) to (6)].

(3) The tender shall be accompanied by the information for qualitative selection that is requested by the contracting authority.

(4) Where contracting authorities have published a prior information notice which was not itself used as a means of calling for competition, the minimum time limit for the receipt of tenders [as laid down in paragraph (2)] may be shortened to 15 days, provided that all of the following conditions are fulfilled:—

- (a) the prior information notice included all the information required for the contract notice in [section 1 of Part B of Schedule 5] insofar as that information was available at the time the prior information notice was published;
- (b) the prior information notice was sent for publication between 35 days and 12 months before the date on which the contract notice was sent.

(5) Where a state of urgency duly substantiated by the contracting authority renders impracticable the time limit down in paragraph (2), it may fix a time limit which shall be not less than 15 days from the date on which the contract notice was sent.

(6) The contracting authority may reduce by five days the time limit for receipt of tenders set out in paragraph (2) where it accepts that tenders may be submitted by electronic means in accordance with regulation 22.

### **Restricted procedure**

**28.**—(1) In restricted procedures, any economic operator may submit a request to participate in response to a call for competition containing the information set out in [Parts B or C, as the case may be, of Schedule 5] by providing the information for qualitative selection that is requested by the contracting authority.

(2) The minimum time limit for receipt of requests to participate shall, subject to paragraph (10), be 30 days from the date on which—

- (a) the contract notice is sent, or
- (b) where a prior information notice is used as a means of calling for competition, the invitation to confirm interest is sent.

(3) Only those economic operators invited to do so by the contracting authority following its assessment of the information provided may submit a tender.

(4) Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 65.

(5) The minimum time limit for the receipt of tenders shall, subject to paragraphs (6) to (10), be 30 days from the date on which the invitation to tender was sent.

(6) Where contracting authorities have published a prior information notice which was not itself used as a means of calling for competition, the minimum time limit for the receipt of tenders [as laid down in paragraph (5)] may be shortened to 10 days, provided that all of the following conditions are fulfilled:—

- (a) the prior information notice included all the information required in [section 1 of Part B of Schedule 5], insofar as that information was available at the time the prior information notice was published;
- (b) the prior information notice was sent for publication between 35 days and 12 months before the date on which the contract notice was sent.

(7) Sub-central contracting authorities may set the time limit for the receipt of tenders by mutual agreement between the contracting authority and the selected candidates, provided that all selected candidates have the same time to prepare and submit their tenders.

(8) In the absence of such an agreement, the time limit shall be at least 10 days from the date on which the invitation to tender was sent.

(9) The time limit for receipt of tenders provided for by paragraph (5) may be reduced by five days where the contracting authority accepts that tenders may be submitted by electronic means in accordance with regulation 22.

(10) Where a state of urgency duly substantiated by the contracting authorities renders impracticable the time limits down in this regulation, they may fix:—

- (a) a time limit for the receipt of requests to participate which shall not be less than 15 days from the date on which the contract notice was sent;
- (b) a time limit for the receipt of tenders which shall not be less than 10 days from the date on which the invitation to tender was sent.

### **Competitive procedure with negotiation**

#### *Starting the procedure*

**29.**—(1) In competitive procedures with negotiation, any economic operator may submit a request to participate in response to a call for competition containing the information set out in Parts B and C of Schedule 5 by providing the information for qualitative selection that is requested by the contracting authority.

(2) In the procurement documents, contracting authorities shall—

- (a) identify the subject-matter of the procurement by providing a description of their needs and the characteristics required of the supplies, works or services to be procured,
- (b) indicate which elements of the description define the minimum requirements to be met by all tenders, and
- (c) specify the contract award criteria.

(3) The information provided shall be sufficiently precise to enable economic operators to identify the nature and scope of the procurement and decide whether to request to participate in the procedure.

#### *Time limits*

(4) The minimum time limit for receipt of requests to participate shall, subject to paragraph (6), be 30 days from—

- (a) the date on which the contract notice was sent, or
- (b) where a prior information notice is used as a means of calling for competition, the date on which the invitation to confirm interest was sent.

(5) The minimum time limit for the receipt of initial tenders shall, subject to paragraph (6), be 30 days from the date on which the invitation was sent.

- (6) [Paragraphs (6) to (10) of regulation 28 apply for the purposes of this regulation, as if—
- (a) references in those paragraphs to “tenders” were references to “initial tenders”;
  - (b) the reference in paragraph (6) of that regulation to “paragraph (5)” were a reference to paragraph (5) of this regulation; and
  - (c) the reference in paragraph (8) of that regulation to “paragraph (2)” were a reference to paragraph (4) of this regulation.]

*Tenders and negotiations*

(7) Only those economic operators invited by the contracting authority following its assessment of the information provided may submit an initial tender which shall be the basis for the subsequent negotiations.

(8) Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 65.

(9) [Subject to paragraph (11),] contracting authorities shall negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve its content.

(10) The minimum requirements and the award criteria shall not be subject to negotiation.

(11) Contracting authorities may award contracts on the basis of the initial tenders without negotiation where they have indicated, in the contract notice or in the invitation to confirm interest, that they reserve the possibility of doing so.

(12) During the negotiations, contracting authorities shall ensure equal treatment of all tenderers and, to that end —

- (a) they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others;
- (b) they shall inform all tenderers whose tenders have not been eliminated [pursuant to] paragraph 15, in writing, of any changes to the technical specifications or other procurement documents, other than those setting out the minimum requirements;
- (c) following any such changes, they shall provide sufficient time for tenderers to modify and re-submit amended tenders, as appropriate.

(13) In accordance with regulation 21, contracting authorities shall not reveal to the other participants confidential information communicated by a candidate or tenderer participating in the negotiations without its agreement.

(14) Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

(15) Competitive procedures with negotiation may take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria specified in the contract notice, in the invitation to confirm interest or in another procurement document.

(16) In the contract notice, the invitation to confirm interest or in another procurement document, the contracting authority shall indicate whether it will use the option described in paragraph (15).

*Concluding the procedure*

(17) Where the contracting authority intends to conclude the negotiations, it shall—

- (a) inform the remaining tenderers and set a common deadline to submit any new or revised tenders,
- (b) verify that the final tenders are in conformity with the minimum requirements and comply with regulation 56(1),
- (c) assess the final tenders on the basis of the award criteria, and
- (d) award the contract in accordance with regulations 66 to 69.

## **Competitive dialogue**

### *General and selection of participants*

**30.**—(1) In competitive dialogues, any economic operator may submit a request to participate in response to a contract notice by providing the information for qualitative selection that is requested by the contracting authority.

(2) The minimum time limit for receipt of requests to participate shall be 30 days from the date on which the contract notice was sent.

(3) Only those economic operators invited by the contracting authority following the assessment of the information provided may participate in the dialogue.

(4) Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 65.

(5) The contract shall be awarded on the sole basis of the award criterion of the best price-quality ratio in accordance with regulation 67.

(6) Contracting authorities shall set out their needs and requirements in the contract notice and they shall define those needs and requirements in that notice and/or in a descriptive document.

(7) At the same time and in the same documents, contracting authorities shall also set out and define the chosen award criteria and set out an indicative timeframe.

### *Conduct of the dialogue*

(8) Contracting authorities—

(a) shall open, with the participants selected in accordance with the relevant provisions of regulations 56 to 66, a dialogue the aim of which shall be to identify and define the means best suited to satisfying their needs, and

(b) may discuss all aspects of the procurement with the chosen participants during this dialogue.

(9) During the dialogue, contracting authorities shall ensure equality of treatment among all participants and, to that end, they shall not provide information in a discriminatory manner which may give some participants an advantage over others.

(10) In accordance with regulation 21, contracting authorities shall not reveal to the other participants solutions proposed by a candidate or tenderer participating in the dialogue without its agreement.

(11) Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

(12) Competitive dialogues may take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria laid down in the contract notice or in the descriptive document.

(13) In the contract notice or the descriptive document, the contracting authority shall indicate whether it will use the option described in paragraph (12).

(14) The contracting authority shall continue the dialogue until it can identify the solution or solutions which are capable of meeting its needs.

### *Final tenders*

(15) Having declared that the dialogue is concluded and having so informed the remaining participants, contracting authorities shall ask each of them to submit their final tender[s] on the basis of the solution or solutions presented and specified during the dialogue.

(16) Those tenders shall contain all the elements required and necessary for the performance of the project.

(17) Those tenders may be clarified, specified and optimised at the request of the contracting authority.

(18) But such clarifications, specification, optimisation [or additional information] may not involve changes to the essential aspects of the tender or of the public procurement, including the

needs and requirements set out in the contract notice or in the descriptive document, where variations to those aspects, needs and requirements are likely to distort competition or have a discriminatory effect.

(19) Contracting authorities shall assess the tenders received on the basis of the award criteria laid down in the contract notice or in the descriptive document.

(20) At the request of the contracting authority, negotiations with the tenderer identified as having submitted the tender presenting the best price-quality ratio in accordance with regulation 67 may be carried out to confirm financial commitments or other terms contained in the tender by finalising the terms of the contract, provided this—

- (a) does not have the effect of materially modifying essential aspects of the tender or of the public procurement, including the needs and requirements set out in the contract notice or in the descriptive document, and
- (b) does not risk distorting competition or causing discrimination.

#### *Prizes and payments*

(21) Contracting authorities may specify prizes or payments to the participants in the dialogue.

### **Innovation partnership**

**31.**—(1) In innovation partnerships, any economic operator may submit a request to participate in response to a contract notice by providing the information for qualitative selection that is requested by the contracting authority.

(2) In the procurement documents, the contracting authority shall—

- (a) identify the need for an innovative product, service or works that cannot be met by purchasing products, services or works already available on the market, and
- (b) shall indicate which elements of this description define the minimum requirements to be met by all tenders.

(3) The information provided shall be sufficiently precise to enable economic operators to identify the nature and scope of the required solution and decide whether to request to participate in the procedure.

(4) The contracting authority may decide to set up the innovation partnership with one partner or with several partners conducting separate research and development activities.

(5) The minimum time limit for receipt of requests to participate shall be 30 days from the date on which the contract notice is sent.

(6) Only those economic operators invited by the contracting authority following the assessment of the information provided may participate in the procedure.

(7) Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 65.

(8) The contracts shall be awarded on the sole basis of the award criterion of the best price-quality ratio in accordance with regulation 67.

(9) The innovation partnership shall aim at the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works, provided that they correspond to the performance levels and maximum costs agreed between the contracting [authorities] and the participants.

(10) The innovation partnership shall be structured in successive phases following the sequence of steps in the research and innovation process, which may include the manufacturing of the products, the provision of the services or the completion of the works.

(11) The innovation partnership shall set intermediate targets to be attained by the partners and provide for payment of the remuneration in appropriate instalments.

(12) Based on those targets, the contracting authority may decide after each phase to—

- (a) terminate the innovation partnership, or

- (b) in the case of an innovation partnership with several partners, reduce the number of partners by terminating individual contracts

provided that the contracting authority has indicated in the procurement documents those possibilities and the conditions for their use.

(13) [Unless otherwise provided for in this regulation] contracting authorities shall negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve its content.

(14) The minimum requirements and the award criteria shall not be subject to negotiation.

(15) During the negotiations, contracting authorities shall ensure equal treatment of all tenderers and—

- (a) [], they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others;
- (b) they shall inform all tenderers whose tenders have not been eliminated [pursuant to] paragraph (18), in writing, of any changes to the technical specifications or other procurement documents, other than those setting out the minimum requirements;
- (c) following any such changes, contracting authorities shall provide sufficient time for tenderers to modify and re-submit amended tenders, as appropriate.

(16) In accordance with regulation 21, contracting authorities shall not reveal to the other participants confidential information communicated by a candidate or tenderer participating in the negotiations without its agreement.

(17) Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

(18) Negotiations during innovation partnership procedures may take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria specified in the contract notice, in the invitation to confirm interest or in another procurement document.

(19) In the contract notice, the invitation to confirm interest or in another procurement document, the contracting authority shall indicate whether it will use the option described in paragraph (18).

(20) In selecting candidates, contracting authorities shall in particular apply criteria concerning the candidates' capacity in the field of research and development and of developing and implementing innovative solutions.

(21) Only those economic operators invited by the contracting authority following its assessment of the requested information may submit research and innovation projects aimed at meeting the needs identified by the contracting authority that cannot be met by existing solutions.

(22) In the procurement documents, the contracting authority shall define the arrangements applicable to intellectual property rights.

(23) In the case of an innovation partnership with several partners, the contracting authority shall not, in accordance with regulation 21, reveal to the other partners solutions proposed or other confidential information communicated by a partner in the framework of the partnership without that partner's agreement.

(24) Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

(25) The contracting authority shall ensure that the structure of the partnership and, in particular, the duration and value of the different phases reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities required for the development of an innovative solution not yet available on the market.

(26) The estimated value of supplies, services or works shall not be disproportionate in relation to the investment required for their development.

## **Use of the negotiated procedure without prior publication**

**32.—(1)** In the specific cases and circumstances laid down in this regulation, contracting authorities may award public contracts by a negotiated procedure without prior publication.

### *General grounds*

(2) The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:—

- (a) where no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Commission where it so requests;
- (b) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons:—
  - (i) the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance;
  - (ii) competition is absent for technical reasons;
  - (iii) the protection of exclusive rights, including intellectual property rights;but only, in the case of paragraphs (ii) and (iii), where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement;
- (c) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with.

(3) For the purposes of paragraph (2)(a),—

- (a) a tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority's needs and requirements as specified in the procurement documents;
- (b) a request [to participate] shall be considered not to be suitable where the economic operator concerned—
  - (i) is to be or may be excluded [in accordance with] regulation 57, or
  - (ii) does not meet the selection criteria set out by the contracting authority [in accordance with] regulation 58.

(4) For the purposes of paragraph (2)(c), the circumstances invoked to justify extreme urgency [must] not in any event be attributable to the contracting authority.

### *Additional grounds relevant to public supply contracts*

(5) The negotiated procedure without prior publication may be used for public supply contracts—

- (a) where the products involved are manufactured purely for the purpose of research, experimentation, study or development, but contracts awarded [pursuant to] this subparagraph shall not include quantity production to establish commercial viability or to recover research and development costs;
- (b) for additional deliveries by the original supplier which are intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire supplies having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance;
- (c) for supplies quoted and purchased on a commodity market;
- (d) for the purchase of supplies or services on particularly advantageous terms, from either a supplier which is definitively winding up its business activities, or the liquidator in an

insolvency procedure, an arrangement with creditors, or a similar procedure under national laws or regulations.

(6) For the purposes of paragraph (5)(b), the duration of [such] contracts, as well as that of recurrent contracts shall not, [except in exceptional circumstances], exceed three years.

*Additional ground relevant to public service contracts that follow a design contest*

(7) The negotiated procedure without prior publication may be used for public service contracts where the contract concerned—

- (a) follows a design contest organised in accordance with this Part, and
- (b) is to be awarded, under the rules provided for in the design contest, to the winner or one of the winners of the design contest.

(8) In the case of several winners, all of them must be invited to participate in the negotiation.

*Additional ground relevant to new works or services which repeat similar ones*

(9) The negotiated procedure without prior publication may be used for new works and services consisting [of] the repetition of similar works or services entrusted to the economic operator to which the same contracting authorit[y] awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded [pursuant to] a procedure in accordance with regulation 26(1).

(10) The basic project shall indicate the extent of possible additional works or services and the conditions under which [they] will be awarded.

(11) As soon as the first project is put up for tender, the possible use of this procedure shall be disclosed and the total estimated cost of subsequent works or services shall be taken into consideration by [the] contracting authorit[ies] when they apply regulation 5.

(12) This procedure may be used only during the three years following the conclusion of the original contract.

## SECTION 4

### *Techniques and Instruments for Electronic and Aggregated Procurement*

#### **Framework agreements**

**33.**—(1) Contracting authorities may conclude framework agreements, provided that they apply the procedures provided for in [this Part].

(2) In these regulations, “framework agreement” means an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

(3) The term of a framework agreement shall not exceed four years, save in exceptional cases duly justified, in particular by the subject of the framework agreement.

(4) Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in this regulation.

(5) Those procedures may be applied only between those contracting authorities clearly identified for that purpose in the call for competition or the invitation to confirm interest and those economic operators party to the framework agreement as concluded.

(6) Contracts based on a framework agreement may under no circumstances entail substantial modifications to the terms laid down in that framework agreement, in particular in the case referred to in paragraph (7).

*Awarding contracts based on a framework agreement*

(7) Where a framework agreement is concluded with a single economic operator—

- (a) contracts based on that agreement shall be awarded within the limits laid down in the framework agreement; and

- (b) for the award of those contracts, contracting authorities may consult the economic operator which is party to the framework agreement in writing, requesting it to supplement its tender as necessary.
- (8) Where a framework agreement is concluded with more than one economic operator, [that framework agreement shall be performed] in one of the following ways:—
- (a) following the terms and conditions of the framework agreement, without reopening competition, where it sets out—
- (i) all the terms governing the provision of the works, services and[/or] supplies concerned, and
  - (ii) the objective conditions for determining which of the economic operators which are party to the framework agreement shall [provide] them (which conditions shall [have been] indicated in the procurement documents for the framework agreement);
- (b) where the framework agreement sets out all the terms governing the provision of the works, services and[/or] supplies concerned,—
- (i) partly without [a] reopening of competition in accordance with sub-paragraph (a), and
  - (ii) partly with [a] reopening of competition amongst the economic operators which are party to the framework agreement in accordance with sub-paragraph (c),
- where this possibility has been stipulated by the contracting authorities in the procurement documents for the framework agreement;
- (c) where not all the terms governing the provision of the works, services or supplies are laid down in the framework agreement, through reopening competition amongst the economic operators which are parties to the framework agreement.
- (9) For the purposes of paragraph (8)(b)—
- (a) the choice of whether specific works, supplies or services shall be acquired following a reopening of competition or directly on the terms set out in the framework agreement shall be made pursuant to objective criteria, which shall be set out in the procurement documents for the framework agreement;
  - (b) those procurement documents shall also specify which terms may be subject to [a] reopening of competition.
- (10) The possibilities provided for in paragraph (8)(b) shall also apply to any lot of a framework agreement for which all the terms governing the provision of the works, services and[/or] supplies concerned are set out in the framework agreement, regardless of whether all the terms governing the provision of the works, services and[/or] supplies concerned under other lots have been set out.
- (11) The competitions referred to in paragraph (8)(b) and (c) shall be based on the same terms as applied for the award of the framework agreement and, where necessary, more precisely formulated terms and, where appropriate, other terms referred to in the procurement documents for the framework agreement, in accordance with the following procedure:—
- (a) for every contract to be awarded, contracting authorities shall consult in writing the economic operators capable of performing the contract;
  - (b) contracting authorities shall fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject-matter of the contract and the time needed to send in tenders;
  - (c) tenders shall be submitted in writing, and their content shall not be opened until the stipulated time limit for reply has expired;
  - (d) contracting authorities shall award each contract to the tenderer that has submitted the best tender on the basis of the award criteria set out in the procurement documents for the framework agreement.

## **Dynamic purchasing systems**

### *General features*

34.—(1) Contracting authorities may use a dynamic purchasing system for commonly used purchases the characteristics of which, as generally available on the market, meet their requirements.

(2) The dynamic purchasing system shall be operated as a completely electronic process, and shall be open throughout the period of validity of the purchasing system to any economic operator that satisfies the selection criteria.

(3) The dynamic purchasing system may be divided into categories of products, works or services that are objectively defined on the basis of characteristics of the procurement to be undertaken under the category concerned.

(4) Such characteristics may include reference to the maximum allowable size of the subsequent specific contracts or to a specific geographic area in which subsequent specific contracts will be performed.

(5) In order to procure under a dynamic purchasing system, contracting authorities shall follow the rules of the restricted procedure, [subject to the following provisions of this regulation].

(6) All the candidates satisfying the selection criteria shall be admitted to the system, and the number of candidates to be admitted to the system shall not be limited in accordance with regulation[s 28(4) and] 65.

(7) Where contracting authorities have divided the system into categories of products, works or services in accordance with paragraph (3), they shall specify the applicable selection criteria for each category.

### *Time limits*

(8) Despite regulation 28, the following time limits shall apply.

(9) The minimum time limit for receipt of requests to participate shall be 30 days from the date on which—

- (a) the contract notice is sent, or
- (b) where a prior information notice is used a means of calling for competition, the invitation to confirm interest is sent.

(10) No further time limits for receipt of requests to participate shall apply once the invitation to tender for the first specific procurement under the dynamic purchasing system has been sent.

(11) The minimum time limit for receipt of tenders shall be at least 10 days from the date on which the invitation to tender is sent.

(12) Where [appropriate], regulation 28(7) and (8) shall apply.

(13) Regulation 28(6) and (9) shall not apply.

### *Requirement to use electronic communication*

(14) All communications in the context of a dynamic purchasing system shall only be made by electronic means in accordance with regulation 22(1) to (7) and (11) to (20).

### *The call for competition etc*

(15) For the purposes of awarding contracts under a dynamic purchasing system, contracting authorities shall—

- (a) publish a call for competition making it clear that a dynamic purchasing system is involved;
- (b) indicate in the procurement documents at least the nature and estimated quantity of the purchases envisaged, as well as all the necessary information concerning the dynamic purchasing system, including how the dynamic purchasing system operates, the electronic equipment used and the technical connection arrangements and specifications;
- (c) indicate [in the procurement documents] any division into categories of products, works or services and the characteristics defining them;

- (d) offer unrestricted and full direct access, as long as the system is valid, to the procurement documents in [conformity] with regulation 53.

*Requests to participate and their [evaluation]*

(16) Contracting authorities shall give any economic operator, throughout the entire period of validity of the dynamic purchasing system, the possibility of requesting to participate in the system under the conditions referred to in paragraphs (5) to (13).

(17) Contracting authorities shall finalise their [evaluation] of such requests in accordance with the selection criteria within 10 [working days] following their receipt.

(18) That deadline may be prolonged to 15 [working] days in individual cases where justified, in particular because of the need to examine additional documentation or to otherwise verify whether the selection criteria are met.

(19) Despite paragraphs (17) and (18), as long as the invitation to tender for the first specific procurement under the dynamic purchasing system has not been sent, contracting authorities may extend the evaluation period provided that no invitation to tender is issued during the extended evaluation period.

(20) [Where applicable,] contracting authorities shall indicate in the procurement documents the length of the extended period that they intend to apply.

(21) Contracting authorities shall inform the economic operator concerned at the earliest possible opportunity of whether or not it has been admitted to the dynamic purchasing system.

*Tendering and the award of the contract*

(22) Contracting authorities shall invite all admitted participants to submit a tender for each specific procurement under the dynamic purchasing system, in accordance with regulation 54.

(23) Where the dynamic purchasing system has been divided into categories of works, products or services, contracting authorities shall invite all participants having been admitted to the category corresponding to the specific procurement concerned to submit a tender.

(24) Contracting authorities shall award [any] contract to the tenderer that submitted the best tender on the basis of the award criteria set out in the contract notice for the dynamic purchasing system or, where a prior information notice is used as a means of calling for competition, in the invitation to confirm interest.

(25) Those criteria may, where appropriate, be formulated more precisely in the invitation to tender.

*Means of proof*

(26) Contracting authorities may, at any time during the period of validity of the dynamic purchasing system, require admitted participants to submit a renewed ESPD within five working days from the date on which that request is transmitted.

(27) Regulation 59(8) to (12) shall apply throughout the entire period of validity of the dynamic purchasing system.

*Period of validity of the system*

(28) Contracting authorities shall indicate the period of validity of the dynamic purchasing system in the call for competition.

(29) Contracting authorities shall notify the Commission of any change in the period of validity, using the following standard forms:—

- (a) where the period of validity is changed without terminating the system, the form used initially for the call for competition for the dynamic purchasing system;
- (b) where the system is terminated, a contract award notice [referred to in regulation 50].

*Charges*

(30) No charges may be billed, prior to or during the period of validity of the dynamic purchasing system, to the economic operators [which are] interested in or party to the dynamic purchasing system.

## **Electronic auctions**

**35.**—(1) Contracting authorities may use electronic auctions, in which—

- (a) new prices, revised downwards, and/or
- (b) new values concerning certain elements of tenders

are presented.

(2) For that purpose, contracting authorities shall structure the electronic auction as a repetitive electronic process, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.

*When electronic auctions may and may not be used*

(3) Public service contracts, and public works contracts, which have as their subject-matter intellectual [activities] (such as the design of works) which cannot be ranked using automatic evaluation methods, shall not be the [object] of electronic auctions.

(4) In open or restricted procedures or competitive procedures with negotiation, contracting authorities may decide that the award of a public contract shall be preceded by an electronic auction when the content of the procurement documents, in particular the technical specifications, can be established with precision.

(5) In open or restricted procedures or competitive procedures with negotiation, an electronic auction may be held—

- (a) on the reopening of competition among the parties to a framework agreement as provided for in regulation 33(8)(b) or (c), and
- (b) on the opening for competition of contracts to be awarded under [the dynamic purchasing system referred to in regulation 34].

(6) The electronic auction shall be based on one of the following elements of the tenders:—

- (a) solely on prices where the contract is awarded on the basis of price only;
- (b) on prices and/or on the new values of the features of the tenders indicated in the procurement documents where the contract is awarded—
  - (i) on the basis of the best price-quality ratio, or
  - (ii) to the tender with the lowest cost using a cost-effectiveness approach.

*Preliminary requirements*

(7) Contracting authorities which decide to hold an electronic auction shall state that fact in the contract notice or in the invitation to confirm interest.

(8) Where contracting authorities have decided to hold an electronic auction, the procurement documents shall include at least the following details:—

- (a) the features, the values for which will be the subject of electronic auction, provided that such features are quantifiable and can be expressed in figures or percentages;
- (b) any limits on the values which may be submitted, as they result from the specifications relating to the subject of the contract;
- (c) the information which will be made available to tenderers in the course of the electronic auction and, where appropriate, when it will be made available to them;
- (d) the relevant information concerning the electronic auction process;
- (e) the conditions under which the tenderers will be able to bid and, in particular, the minimum differences which will, where appropriate, be required when bidding;
- (f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.

*Admissibility of tenders*

(9) Before proceeding with an electronic auction, contracting authorities shall make a full initial evaluation of the tenders in accordance with the award [criterion or criteria] and with the weighting fixed for them.

- (10) A tender shall be considered admissible where—
- (a) it has been submitted by a tenderer who has not been excluded pursuant to regulation 57 and who meets the selection criteria; and
  - (b) it is in conformity with the technical specifications without being irregular, unacceptable or unsuitable.

(11) In particular, tenders—

- (a) which do not comply with the procurement documents,
- (b) which were received late,
- (c) [where] there is evidence of collusion or corruption, or
- (d) which have been found by the contracting authority to be abnormally low,

shall be considered [as being] irregular for the purposes of paragraph (10)(b).

(12) In particular tenders—

- (a) submitted by tenderers which do not have the required qualifications, or
- (b) [whose] price exceeds the contracting authority's budget as determined and documented prior to the launching of the procurement procedure,

shall be considered [as being] unacceptable for the purposes of paragraph (10)(b).

(13) For the purposes of paragraph (10)(b)—

- (a) a tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority's needs and requirements as specified in the procurement documents;
- (b) a request [for participation] shall be considered not to be suitable where the economic operator concerned—
  - (i) is to be or may be excluded [pursuant to] regulation 57, or
  - (ii) does not meet the selection criteria set out by the contracting authority [pursuant to] regulation 58.

#### *Commencement and structure of the auction*

(14) All tenderers that have submitted admissible tenders shall be invited [simultaneously] to participate in the electronic auction using, as of the [specified] date and time, the connections in accordance with the instructions set out in the invitation.

(15) The electronic auction may take place in a number of successive phases.

(16) The electronic auction shall not start sooner than two working days after the date on which invitations are sent out.

(17) The invitation shall be accompanied by the outcome of a full evaluation of the relevant tender, carried out in accordance with the weighting provided for in regulation 67(8).

#### *The formula to be used*

(18) The invitation shall also state the mathematical formula to be used in the electronic auction to determine the automatic re-rankings on the basis of the new prices and/or new values submitted.

(19) Except where the most economically advantageous offer is identified on the basis of price alone, that formula shall incorporate the weighting of all the criteria established to determine the most economically advantageous tender, as indicated in the notice used as a means of calling for competition or in other procurement documents.

(20) For that purpose, any ranges shall, however, be reduced beforehand to a specified value.

(21) Where variants are authorised, a separate formula shall be provided for each variant.

#### *Communication of information*

(22) Throughout each phase of an electronic auction the contracting authorities shall instantaneously communicate to all tenderers at least sufficient information to enable them to ascertain their relative rankings at any moment.

(23) Contracting authorities may, where this has been previously indicated, communicate other information concerning other prices or values submitted.

(24) Contracting authorities may also at any time announce the number of participants in [the current phase of] the auction.

(25) In no case, however, may contracting authorities disclose the identities of the tenderers during any phase of an electronic auction.

*Closing the auction and awarding the contract*

(26) Contracting authorities shall close an electronic auction in one or more of the following manners:—

- (a) at the previously indicated date and time;
- (b) when they receive no more new prices or new values which meet the requirements concerning minimum differences, provided that they have previously stated the time which they will allow to elapse after receiving the last submission before they close the electronic auction; or
- (c) when the previously indicated number of phases in the auction has been completed.

(27) Where [the] contracting authorities intend to close an electronic auction in accordance with paragraph 26(c), [possibly in combination with] the arrangements laid down in paragraph (26)(b), the invitation to take part in the auction shall indicate the timetable for each phase of the auction.

(28) After closing an electronic auction, contracting authorities shall award [any] contract in accordance with regulation 67 on the basis of the results of the electronic auction.

## **Electronic catalogues**

*Generally*

**36.—**(1) Where the use of electronic means of communication is required, contracting authorities may require tenders to be presented in the format of an electronic catalogue or to include an electronic catalogue.

(2) Tenders presented in the form of an electronic catalogue may be accompanied by other documents, completing the tender.

(3) Electronic catalogues shall be established by the candidates or tenderers with a view to participating in a given procurement procedure in accordance with the technical specifications and format established by the contracting authority.

(4) Electronic catalogues shall also comply with [the requirements for electronic communication tools set out in regulation 22] as well as with any additional requirements set by the contracting authority in accordance with that regulation.

(5) Where the presentation of tenders in the form of electronic catalogues is accepted or required, contracting authorities shall—

- (a) state so in the contract notice, or in the invitation to confirm interest where a prior information notice is used as a means of calling for competition; [and]
- (b) indicate in the procurement documents all the necessary information pursuant to regulation 22[(16) to (20)] concerning the format, the electronic equipment used and the technical connection arrangements and specifications for the catalogue.

*Framework agreements*

(6) Where a framework agreement has been concluded with more than one economic operator following the submission of tenders in the form of electronic catalogues, contracting authorities may provide that the reopening of competition for specific contracts [is to take place] on the basis of updated catalogues.

(7) In such a case, contracting authorities shall [use one of the following methods]:—

- (a) invite tenderers to resubmit their electronic catalogues, adapted to the requirements of the contract in question; or

- (b) notify tenderers that they intend to collect from the electronic catalogues which have already been submitted the information needed to constitute tenders adapted to the requirements of the contract in question, provided that the use of that method has been [announced] in the procurement documents for the framework agreement.

(8) Where contracting authorities reopen competition for specific contracts in accordance with paragraph (7)(b), they shall—

- (a) notify tenderers of the date and time at which they intend to collect the information needed to constitute tenders adapted to the requirements of the specific contract in question, and
- (b) give tenderers the possibility to refuse such collection of information.

(9) Contracting authorities shall allow for an adequate period between the notification and the actual collection of information.

(10) Before awarding the contract, contracting authorities shall present the collected information to the tenderer concerned so as to give it the opportunity to contest or confirm that the tender thus constituted does not contain any material errors.

#### *Dynamic purchasing systems*

(11) Contracting authorities may award contracts based on a dynamic purchasing system by requiring that offers for a specific contract are to be presented in the format of an electronic catalogue.

(12) Contracting authorities may also award contracts based on a dynamic purchasing system in accordance with paragraphs (7)(b) and (8) provided that the request for participation in the dynamic purchasing system is accompanied by an electronic catalogue in accordance with the technical specifications and format established by the contracting authority.

(13) [For the purposes of paragraph (12),] the catalogue shall be completed subsequently by the candidates, when they are informed of the contracting authority's intention to constitute tenders by means of the procedure set out in paragraph (7)(b).

### **Centralised purchasing activities and central purchasing bodies**

**37.—**(1) Contracting authorities may acquire supplies [and/or] services from a central purchasing body offering the centralised purchasing activity referred to paragraph (10)(a).

(2) Contracting authorities may acquire works, supplies [and/or] services by—

- (a) using contracts awarded by a central purchasing body,
- (b) using dynamic purchasing systems operated by a central purchasing body, or
- (c) to the extent set out in regulation 33(5), by using a framework agreement concluded by a central purchasing body offering the centralised purchasing activity referred to in paragraph (10)(b).

(3) Where a dynamic purchasing system which is operated by a central purchasing body may be used by other contracting authorities, this shall be mentioned in the call for competition setting up that dynamic purchasing system.

(4) A contracting authority fulfils its obligations pursuant to [this Part] when it acquires supplies or services from a central purchasing body offering the centralised purchasing activity referred to in paragraph (10)(b).

(5) A contracting authority also fulfils its obligations pursuant to this Part where it acquires works, supplies or services by—

- (a) using contracts awarded by the central purchasing body,
- (b) using dynamic purchasing systems operated by the central purchasing body, or
- (c) to the extent set out in regulation 33(5), by using a framework agreement concluded by the central purchasing body offering the centralised purchasing activity referred to in paragraph (10)(b).

(6) However, the contracting authority concerned shall be responsible for fulfilling the obligations [pursuant to] this Part in respect of any parts [of the procedure] that it conducts itself, such as—

- (a) awarding a contract under a dynamic purchasing system[, which] is operated by a central purchasing body;
- (b) conducting a reopening of competition under a framework agreement that has been concluded by a central purchasing body;
- (c) determining, pursuant to regulation 33(8)(a) or (b), which of the economic operators, party to the framework agreement, shall perform a given task under a framework agreement that has been concluded by a central purchasing body.

(7) All procurement procedures conducted by a central purchasing body shall be performed using electronic means of communication, in accordance with the requirements set out in regulation 22.

(8) Contracting authorities may, without applying the procedures provided for in this Part, award a public service contract for the provision of centralised purchasing activities to a central purchasing body.

(9) Such public service contracts may also include the provision of ancillary purchasing activities.

(10) In these Regulations, “centralised purchasing activities” means activities conducted on a permanent basis in one of the following forms:—

- (a) the acquisition of supplies and/or services intended for contracting authorities;
- (b) the award of public contracts or the conclusion of framework agreements for works, supplies or services intended for contracting authorities.

### **Occasional joint procurement**

**38.**—(1) Two or more contracting authorities may agree to perform certain specific procurements jointly.

(2) Where the conduct of a procurement procedure in its entirety is carried out jointly in the name and on behalf of all the contracting authorities concerned, they shall be jointly responsible for fulfilling their obligations [under] this Part.

(3) [Such joint responsibility] applies also in cases where one contracting authority manages the procedure, acting on its own behalf and on the behalf of the other contracting authorities concerned.

(4) Where the conduct of a procurement procedure is not in its entirety carried out in the name and on behalf of the contracting authorities concerned—

- (a) they shall be jointly responsible only for those parts carried out jointly, and
- (b) each contracting authority shall have sole responsibility for fulfilling its obligations [under] this Part in respect of the parts it conducts in its own name and on its own behalf.

### **Procurement involving contracting authorities from different member States**

**39.**—(1) Without prejudice to regulation 12, contracting authorities [from different member States] may act jointly in the award of public contracts by using one of the means provided for in this regulation.

(2) Contracting authorities shall not use the means [provided in this regulation] for the purpose of avoiding the application of [mandatory public law provisions in the applicable national law (in conformity with EU law)] to which they are subject.

(3) Contracting authorities shall be free to use centralised purchasing activities offered by central purchasing bodies located in another member State.

### *Centralised purchasing*

(4) The provision of centralised purchasing activities by a central purchasing body located in another member State shall be conducted in accordance with the national [provisions] of [the member State where the central purchasing body is located].

(5) The national provisions of the member State where the central purchasing body is located shall also apply to the following:—

- (a) the award of a contract under a dynamic purchasing system;
- (b) the conduct of a reopening of competition under a framework agreement;
- (c) the determination, pursuant to regulation 33(8)(a) and (b), of which of the economic operators which are party to the framework agreement shall perform a given task.

### *Joint procurement*

(6) Several contracting authorities from different member States may jointly award a public contract, conclude a framework agreement or operate a dynamic purchasing system.

(7) They may also, to the extent set out in regulation 33(5), award contracts based on the framework agreement or on the dynamic purchasing system.

(8) [Unless the necessary elements have been regulated by an international agreement concluded between the member States concerned,] the participating contracting authorities shall conclude an agreement that determines:—

- (a) the responsibilities of the parties and the relevant applicable national provisions;
- (b) the internal organisation of the procurement procedure, including the management of the procedure, the distribution of the works, supplies or services to be procured, and the conclusion of contracts.

(9) A participating contracting authority fulfils its obligations [under] this Part when it purchases works, supplies or services from a contracting authority which is responsible for the procurement procedure.

(10) When determining responsibilities and the applicable national law as referred to in paragraph (8)(a), the participating contracting authorities may allocate specific responsibilities among them and determine the applicable provisions of the national laws of any of their respective member States.

(11) The allocation of responsibilities and the applicable national law shall be referred to in the procurement documents for jointly awarded public contracts.

### *Joint entities*

(12) Where several contracting authorities from different member States have set up a joint entity, including European Groupings of territorial cooperation under Regulation (EC) No 1082/2006 of the European Parliament and of the Council<sup>(a)</sup> or other entities established under EU law, the participating contracting authorities shall, by a decision of the competent body of the joint entity, agree on the applicable national procurement rules of one of the following member States:—

- (a) the national provisions of the member State where the joint entity has its registered office;
- (b) the national provisions of the member State where the joint entity is carrying out its activities.

(13) The agreement referred to in paragraph (12) may either apply for an [undetermined] period, when fixed in the [constitutive act] of the joint entity, or may be limited to a certain period of time, certain types of contracts or [to] one or more individual contract awards.

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(a) marker footnote

SECTION 5  
*Conduct of the Procedure*  
SUB-SECTION 5  
*Preparation*

**Preliminary market consultations**

**40.**—(1) Before [commencing] a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements.

(2) For this purpose, contracting authorities may, for example, seek or accept advice from independent experts or authorities or from market participants.

(3) Such advice may be used in the planning and conduct of the procurement procedure, provided that it does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.

**Prior involvement of candidates or tenderers**

**41.**—(1) Where a candidate or tenderer, or an [undertaking related to] a candidate or tenderer,—

(a) has advised the contracting authority, whether [in the context of] regulation 40 or not, or

(b) has otherwise been involved in the preparation of the procurement procedure,

the contracting authority shall take appropriate measures to ensure that competition is not distorted by [the participation] of that candidate or tenderer.

(2) Such measures shall include—

(a) the communication to the other candidates and tenderers of relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure, and

(b) the fixing of adequate time limits for the receipt of tenders.

(3) The candidate or tenderer concerned shall only be excluded from the procedure where there are no other means to ensure compliance with the duty to [treat economic operators equally in accordance with regulation 18(1)].

(4) Prior to any such exclusion, candidates or tenderers shall be given the opportunity to prove that their involvement in preparing the procurement procedure is not capable of distorting competition.

(5) The measures taken shall be documented in the report referred to in regulation 84(1).

**Technical specifications**

**42.**—(1) The technical specifications shall be set out in the procurement documents.

*Scope of the technical specifications*

(2) The technical specifications shall lay down the characteristics required of [a] works, service or supply.

(3) In the case of a public works contract, the technical specifications shall define any characteristics required of a material, product or supply so that it fulfils the use for which it is intended by the contracting authority.

(4) The characteristics referred to in paragraph (3) may include—

(a) levels of environmental and climate performance, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions and production processes and methods at any stage of the life cycle of the works;

- (b) rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve.

(5) In the case of public supply or service contracts, the required characteristics may include quality levels, environmental and climate performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods at any stage of the life cycle of the supply or service and conformity assessment procedures.

(6) In the case of any public contract, the required characteristics may also refer to—

- (a) the specific process or method of production or provision of the requested works, supplies or services, or
- (b) a specific process for another stage of its life cycle,

even where such factors do not form part of their material substance provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.

(7) The technical specifications may also specify whether the transfer of intellectual property rights will be required.

*Formulating the technical specifications*

(8) For all procurement which is intended for use by natural persons, whether the general public or staff of the contracting authority, the technical specifications shall, except in duly justified cases, be drawn up so as to take into account accessibility criteria for persons with disabilities or design for all users.

(9) Where mandatory accessibility requirements are adopted by a legal act of the EU, technical specifications shall, as far as accessibility criteria for persons with disabilities or design for all users are concerned, be defined by reference [thereto].

(10) Technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

(11) Without prejudice to mandatory national technical rules, [to the extent that they are compatible with EU law], the technical specifications shall be formulated in one of the following ways:—

- (a) in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract;
- (b) by reference to technical specifications and, in order of preference, to—
  - (i) national standards transposing European standards,
  - (ii) European Technical Assessments,
  - (iii) common technical specifications,
  - (iv) international standards,
  - (v) other technical reference systems established by the European standardisation bodies, or
  - (vi) when [none of the above exist], national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies,

[but] each reference shall be accompanied by the words ‘or equivalent’;

- (c) in terms of performance or functional requirements as referred to in sub-paragraph (a), with reference to the technical specifications referred to in sub-paragraph (b) as a means of presuming conformity with such performance or functional requirements;
- (d) by reference to the technical specifications referred to in sub-paragraph (b) for certain characteristics, and by reference to the performance or functional requirements referred to in sub-paragraph (a) for other characteristics.

(12) Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products.

(13) Such reference [is] permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraph (11) is not possible, [in which case the reference] shall be accompanied by the words "or equivalent".

#### *Applying the technical specifications*

(14) Where a contracting authority uses the option of referring to the technical specifications referred to in paragraph (11)(b), it shall not reject a tender on the grounds that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred, once the tenderer proves in its tender by any appropriate means, including the means of proof referred to in regulation 44, that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications.

(15) Where a contracting authority uses the option laid down in paragraph (11)(a) to formulate technical specifications in terms of performance or functional requirements, it shall not reject a tender for works, supplies or services which comply with a national standard transposing a European standard, a European technical approval, a common technical specification, an international standard or a technical reference system established by a European standardisation body, where those [specifications] address the performance or functional requirements which it has laid down.

(16) In its tender, the tenderer shall prove by any appropriate means, including those referred to in regulation 44, that the work, supply or service in compliance with the standard meets the performance or functional requirements of the contracting authority.

## **Labels**

**43.—**(1) Where contracting authorities intend to purchase works, supplies or services with specific environmental, social or other characteristics they may, in the technical specifications, the award criteria or the contract performance conditions, require a specific label as means of proof that the works, services or supplies correspond to the required characteristics, provided that all of the following conditions are fulfilled:—

- (a) the label requirements only concern criteria which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract;
- (b) the label requirements are based on objectively verifiable and non-discriminatory criteria;
- (c) the labels are established in an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate;
- (d) the labels are accessible to all interested parties;
- (e) the label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.

(2) Where contracting authorities do not require the works, supplies or services to meet all of the label requirements, they shall indicate which label requirements are [required].

(3) Contracting authorities requiring a specific label shall accept all labels that confirm that the works, supplies or services meet equivalent label requirements.

(4) Where an economic operator had demonstrably no possibility of obtaining the specific label indicated by the contracting authority, or an equivalent label, within the relevant time limits for reasons that are not attributable to that economic operator, the contracting authority shall accept other appropriate means of proof, which may include a technical dossier from the manufacturer, provided that the economic operator concerned proves that the works, supplies or services to be provided by it fulfil the requirements of the specific label or the specific requirements indicated by the contracting authority.

(5) Where a label fulfils the conditions mentioned in paragraph (1)(b), (c), (d) and (e) but also sets out requirements not linked to the subject-matter of the contract, contracting authorities shall not require the label as such but may define the technical specification by reference to those of the detailed specifications of that label, or, where necessary, parts of it, that are linked to the subject-matter of the contract and are appropriate to define characteristics of that subject-matter.

### **Test reports, certificates and other means of proof**

**44.**—(1) Contracting authorities may require that economic operators provide a test report from a conformity assessment body or a certificate issued by such a body as means of proof of conformity with requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

(2) Where contracting authorities require the submission of certificates drawn up by a specific conformity assessment body, certificates from equivalent other conformity assessment bodies shall also be accepted by the contracting authorities.

(3) In paragraphs (1) and (2), “conformity assessment body” means a body that performs conformity assessment activities including calibration, testing, certification and inspection accredited in accordance with Regulation (EC) No 765/2008 of the European Parliament and of the Council<sup>(a)</sup>.

(4) Contracting authorities shall accept appropriate means of proof other than those referred to in paragraphs (1) and (2), such as a technical dossier of the manufacturer, where the economic operator concerned had no access to the certificates or test reports referred to in paragraphs (1) and (2), or no possibility of obtaining them within the relevant time limits, provided that—

- (a) the lack of access is not attributable to the economic operator concerned, and
- (b) the economic operator concerned [thereby] proves that the works, supplies or services provided by it meet the requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

### **Variants**

**45.**—(1) Contracting authorities may authorise or require tenderers to submit variants.

(2) Contracting authorities shall indicate in the contract notice or, where a prior information notice is used as a means of calling for competition, in the invitation to confirm interest, whether or not they authorise or require variants.

(3) Variants shall not be authorised without such an indication and shall be linked to the subject-matter of the contract.

(4) Contracting authorities authorising or requiring variants shall state in the procurement documents the minimum requirements to be met by the variants and any specific requirements for their presentation, in particular [whether] variants may be submitted only where a tender which is not a variant has also been submitted.

(5) Contracting authorities shall ensure that the chosen award criteria can be applied to variants meeting those minimum requirements as well as to conforming tenders which are not variants.

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(a) [Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 (OJ L 218, 13.8.2008, p. 30).]

(6) Only variants meeting the minimum requirements laid down by the contracting authorities shall be taken into consideration.

(7) In procedures for awarding public supply or service contracts, contracting authorities that have authorised or required variants shall not reject a variant on the sole ground that it would, [where successful], lead to either a [public] service contract rather than a public supply contract or a [public] supply contract rather than a public service contract.

### **Division of contracts into lots**

**46.**—(1) Contracting authorities may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots.

(2) Contracting authorities shall provide an indication of the main reasons for their decision not to subdivide into lots, which shall be included in the procurement documents or the report referred to in regulation 84(1).

(3) Contracting authorities shall indicate, in the contract notice or in the invitation to confirm interest, whether tenders may be submitted for one, for several or for all of the lots.

(4) Contracting authorities may, even where tenders may be submitted for several or all lots, limit the number of lots that may be awarded to one tenderer, provided that the maximum number of lots per tenderer is stated in the contract notice or in the invitation to confirm interest.

(5) Contracting authorities shall indicate in the procurement documents the objective and non-discriminatory criteria or rules they intend to apply for determining which lots will be awarded where the application of the award criteria would result in one tenderer being awarded more lots than the maximum number.

(6) Where more than one lot may be awarded to the same tenderer, contracting authorities may award contracts combining several or all lots where they have specified in the contract notice or in the invitation to confirm interest that they reserve the possibility of doing so and indicate the lots or groups of lots that may be combined.

### **Setting time limits**

**47.**—(1) When fixing the time limits for the receipt of tenders and requests to participate, contracting authorities shall take account of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set out in regulations 27 to 31.

(2) Where tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the procurement documents, the time limits for the receipt of tenders, which shall be longer than the minimum time limits set out in regulations 27 to 31, shall be fixed so that all economic operators concerned may be aware of all the information needed to produce tenders.

(3) Contracting authorities shall extend the time limits for the receipt of tenders so that all economic operators concerned may be aware of all the information needed to produce tenders in the following cases:—

- (a) where, for whatever reason, additional information, although requested by the economic operator in good time, is not supplied at the latest six days before the time limit fixed for the receipt of tenders;
- (b) where significant changes are made to the procurement documents.

(4) In the case of an accelerated procedure, the period mentioned in paragraph (3)(a) shall be four days.

(5) The length of the extension shall be proportionate to the importance of the information or change.

(6) Where [the] additional information has either not been requested in good time or its importance with a view to preparing [responsive] tenders is insignificant, contracting authorities are not required to extend [the time limits].

SUB-SECTION 6  
*Publication and transparency*

**Prior information notices**

**48.**—(1) Contracting authorities may make known [their intentions of planned procurements] through the publication of a prior information notice.

(2) Such notices shall contain the information set out in [section 1 of part B of Schedule 5].

(3) A contracting authority wishing to publish a prior information notice shall—

(a) send it for publication in accordance with regulation 51; or

(b) publish it on the contracting authority's buyer profile in accordance with regulation 52.

(4) Where the prior information notice is published by the contracting authority on its buyer profile, the contracting authority shall send for publication, in accordance with regulation 51, a notice of the publication on its buyer profile.

(5) Prior information notices shall contain the information set out in [Part A of Schedule 5].

(6) Where sub-central contracting authorities use a prior information notice as a call for competition pursuant to regulation 26(8), the notice must fulfil all of the following conditions:—

(a) it refers specifically to the supplies, works or services that will be the subject of the contract to be awarded;

(b) it indicates that the contract will be awarded by restricted procedure or competitive procedure with negotiation without further publication of a call for competition and invites interested economic operators to express their interest;

(c) it contains, in addition to the information set out in [section 1 of part B of Schedule 5], the information set out in [section 2 of that Part];

(d) it has been sent for publication between [35 days and 12 months] prior to the date on which an invitation is sent for the purposes of regulation 54(1) or (2).

(7) In such cases, paragraph (3)(b) shall not apply to the notice, but additional publication at national level pursuant to regulation 52, if any, may be made on a buyer profile.

(8) The period covered by [the] prior information notice shall be a maximum of 12 months from the date [on which] the notice is transmitted for publication.

(9) [However,] in the case of public contracts for social and other specific services, the prior information notice referred to in regulation 75(1)(b) may cover a period which is longer than 12 months.

**Contract notices**

**49.**—(1) [Contract notices shall be used as a means of calling for competition in respect of all procedures, [without prejudice] to regulations 26(8) and 33.]

(2) Contract notices shall contain the information set out in [Part C of Schedule 5] and shall be sent for publication in accordance with regulation 51.

**Contract award notices**

**50.**—(1) Not later than 30 days after the conclusion of a contract or of a framework agreement, following the decision to award or conclude it, contracting authorities shall send for publication a contract award notice on the results of the procurement procedure.

(2) Such notices shall contain the information set out in [Part D of Schedule 5] and shall be sent for publication in accordance with regulation 51.

(3) Where the call for competition for the contract concerned has been made in the form of a prior information notice and the contracting authority has decided that it will not award further contracts during the period covered by the prior information notice, the contract award notice shall contain a specific indication to that effect.

(4) In the case of framework agreements [concluded in accordance with regulation 33], contracting authorities shall not be bound to send a notice of the results of the procurement procedure for each contract based on that agreement.

(5) Contracting authorities shall send a contract award notice within 30 days after the award of each contract based on a dynamic purchasing system.

(6) They may, however, group such notices on a quarterly basis, in which case they shall send the grouped notices within 30 days of the end of each quarter.

(7) Certain information on the contract award or the conclusion of the framework agreement may be withheld from publication where its release—

- (a) would impede law enforcement or [would] otherwise be contrary to the public interest,
- (b) would harm the legitimate commercial interests of a particular economic operator, [whether] public or private, or
- (c) might prejudice fair competition between economic operators.

### **[Form and manner of] sending notices for publication at EU level**

**51.**—(1) The notices required by regulations 48, 49, 50, 72, 75 and 79 to be sent for publication in accordance with this regulation shall be sent by electronic means to the EU Publications Office for publication.

(2) Contracting authorities [shall ensure that they are] able to supply proof of the dates on which notices are sent to the EU Publications Office for publication.

(3) [Where the EU Publications Office has given the contracting authority confirmation of the receipt of the notice and of the publication of the information sent, indicating the date of that publication, that confirmation shall constitute proof of publication.]

(4) Contracting authorities may send notices [for] public contracts to the EU Publications Office for publication even where they are not required by this Part to do so.

(5) Such notices shall be sent by electronic means.

### **Publication otherwise than at EU level**

#### *Publication on buyer profiles*

**52.**—(1) In addition to the publication of the notices referred to in regulations 48, 49, 50, 75 and 79 by the EU Publications Office, contracting authorities may publish the information contained in them on the internet on a buyer profile.

(2) A buyer profile may also include—

- (a) prior information notices which are published on it pursuant to regulation 48(3)(b);
- (b) information on ongoing invitations to tender, scheduled purchases, contracts concluded, procedures cancelled; and
- (c) any useful general information, such as a contact point, a telephone and a fax number, a postal address and an e-mail address.

#### *Timing and content of publication at national level*

(3) [The] notices referred to in regulations 48, 49, 50 [and 79], and the information contained [in them], shall not be published at national level before [they are published] by the EU Publications Office.

(4) But publication may in any event take place at national level where contracting authorities have not been notified of the publication [at EU level] within 48 hours after confirmation of the receipt of the notice in accordance with Article 51(5) of the Public Contracts Directive.

(5) Notices published at national level shall not contain information other than that contained in the notices sent to the EU Publications Office or published on a buyer profile, but shall indicate the date of sending of the notice to the EU Publications Office or its publication on the buyer profile.

(6) Where a prior information notice is to be published on a buyer profile for the purposes of regulation 48(3)—

- (a) the prior information notice may not be so published before the sending, pursuant to regulation 48(4), of the notice of its publication in that form; and
- (b) the prior information notice shall indicate the date of that sending.

### **Electronic availability of procurement documents**

**53.**—(1) Contracting authorities shall by electronic means offer unrestricted and full direct access [on the internet] free of charge to the procurement documents from the date of publication of a notice in accordance with regulation 51 or the date on which an invitation to confirm interest was sent.

(2) The text of the notice or the invitation to confirm interest shall specify the internet address at which the procurement documents are accessible.

(3) Where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered for one of the reasons set out in regulation 22(3), contracting authorities may indicate in the notice or the invitation to confirm interest that the procurement documents concerned will be transmitted by means other than electronic means [in accordance with] paragraph[s] (7) [and (8)].

(4) In such a case, the time limit for the submission of tenders shall be prolonged by five days, except in the cases of duly substantiated urgency referred to in:—

- (a) regulation 27(5), and
- (b) regulation 28(10), including as applied by regulation 29(6).

(5) Where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered because contracting authorities intend to [apply regulation 21(3)], contracting authorities shall indicate in the notice or the invitation to confirm interest which measures aimed at protecting the confidential nature of the information they require and how access can be obtained to the documents concerned.

(6) In such a case, the time limit for the submission of tenders shall be prolonged by five days, except in the cases of duly substantiated urgency [mentioned in paragraph (4)].

(7) Provided that it has been requested in good time, contracting authorities shall supply to all tenderers taking part in the procurement procedure additional information relating to the specifications and any supporting documents not later than six days before the time limit fixed for the receipt of tenders.

(8) In the case of an accelerated procedure, the period mentioned in paragraph (7) shall be four days.

### **Invitations to candidates**

**54.**—(1) In restricted procedures, competitive dialogue procedures, innovation partnerships and competitive procedures with negotiation, contracting authorities shall simultaneously and in writing invite the selected candidates to submit their tenders or, in the case of a competitive dialogue, to take part in the dialogue.

(2) Where a prior information notice is used as a call for competition [in accordance with] regulation 48(6), contracting authorities shall simultaneously and in writing invite the economic operators which have expressed their interest to confirm their continuing interest.

(3) The invitations required by paragraphs (1) and (2) shall:—

- (a) include a reference to the electronic address at which the procurement documents have been made directly available by electronic means, and
- (b) be accompanied by the procurement documents, where those documents have not been the subject of unrestricted and full direct access, free of charge, for the reasons referred to in regulation 53(3) or (5) and have not already been made otherwise available.

(4) The invitations required by paragraph (1) shall also contain at least the following information:—

- (a) a reference to the call for competition published;
- (b) the deadline for the receipt of the tenders, the address to which the tenders must be sent and the language or languages in which the tenders must be drawn up;
- (c) in the case of competitive dialogue, the date and the address set for the start of consultation and the language or languages [to be] used;
- (d) a reference to any possible [adjoining] documents to be submitted, either in support of verifiable declarations by the tenderer in accordance with regulations 59 and 60 and, where appropriate, 62 or to supplement the information referred to in those regulations, and under the conditions laid down in regulations 59, 60 and 62;
- (e) the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance for such criteria, where they are not given in the contract notice, in the invitation to confirm interest, in the technical specifications or the descriptive document.

(5) But in the case of contracts awarded through a competitive dialogue or an innovation partnership, the information referred to in paragraph (4)(b) shall not appear in the invitation to participate in the dialogue or to negotiate but it shall appear in the invitation to submit a tender.

(6) The invitations required by paragraph (2) shall also contain at least the following information:—

- (a) [the] nature and quantity, including all options concerning complementary contracts and, where possible, the estimated time available for exercising [such] options for renewable contracts, the nature and quantity and, where possible, the estimated publication dates of future notices of competition for works, supplies or services to be put out to tender;
- (b) [the] type of procedure, [namely] restricted procedure or competitive procedure with negotiation;
- (c) where [appropriate], the date on which the delivery of supplies or the execution of works or services is to commence or terminate;
- (d) where electronic access cannot be offered, the address and closing date for the submission of requests for procurement documents and the language or languages in which they are to be drawn up;
- (e) the address of the contracting authority which is to award the contract;
- (f) economic and technical conditions, financial guarantees and information required from economic operators;
- (g) the form of the contract which is the subject of the invitation to tender, [namely] purchase, lease, hire or hire-purchase, or any combination of these; and
- (h) the contract award criteria and their weighting or, where appropriate, the order of importance of such criteria, where this information is not given in the prior information notice or the technical specifications or in the invitation to tender or to negotiate.

### **Informing candidates and tenderers**

**55.—**(1) Contracting authorities shall as soon as possible inform each candidate and tenderer of decisions reached concerning the conclusion of a framework agreement, the award of [a] contract or admittance to a dynamic purchasing system, including the grounds for any decision—

- (a) not to conclude a framework agreement,
- (b) not to award a contract for which there has been a call for competition,
- (c) to recommence the procedure, or
- (d) not to implement a dynamic purchasing system.

(2) On request from the candidate or tenderer concerned, the contracting authority shall as quickly as possible, and in any event within 15 days from receipt of a written request, inform—

- (a) any unsuccessful candidate of the reasons for the rejection of its request to participate;
- (b) any unsuccessful tenderer of the reasons for the rejection of its tender, including, for the cases referred to in regulation 42(14) and (15), the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements;
- (c) any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement;
- (d) any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.

(3) Contracting authorities may decide to withhold certain information referred to in paragraphs (1) and (2) regarding [the award of a contract, the conclusion of a framework agreement or admittance to a dynamic purchasing system], where the release of such information—

- (a) would impede law enforcement or would otherwise be contrary to the public interest;
- (b) would prejudice the legitimate commercial interests of a particular economic operator, whether public or private; or
- (c) might prejudice fair competition between economic operators.

#### SUB-SECTION 7

#### *Choice of participants and award of contracts*

### **General principles**

**56.**—(1) Contracts shall be awarded on the basis of criteria laid down in accordance with regulations 67 to 69, provided that the contracting authority has verified [in accordance with regulations 59 to 61] that all of the following conditions are fulfilled:—

- (a) the tender complies with the requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents, taking into account, where applicable, regulation 45;
- (b) the tender comes from a tenderer that—
  - (i) is not excluded in accordance with regulation 57, and
  - (ii) meets—
    - (aa) the selection criteria set out by the contracting authority in accordance with regulation 58, and
    - (bb) where applicable, the non-discriminatory rules and criteria referred to in regulation 65.

(2) Contracting authorities may decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with applicable obligations in the fields of environmental, social and labour law established by EU law, national law, collective agreements or by the international environmental, social and labour law provisions [listed in] Annex X to the Public Contracts Directive as amended from time to time.

(3) In open procedures, contracting authorities may decide to examine tenders before verifying the absence of grounds for exclusion and the fulfilment of the selection criteria in accordance with regulations 57 to 64.

(4) Where contracting authorities make use of that possibility, they shall ensure that the verification of absence of grounds for exclusion and of fulfilment of the selection criteria is carried out in an impartial and transparent manner so that no contract is awarded to a tenderer that—

- (a) should have been excluded [pursuant to] regulation 57, or
- (b) does not meet the selection criteria set out by the contracting authority.

(5) Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous, or where specific documents are missing, contracting authorities may

[request] the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.

## **Exclusion grounds**

### *Mandatory exclusions*

**57.**—(1) Contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established, by verifying in accordance with regulations 59, 60 and 61, or are otherwise aware that that economic operator has been convicted [by final judgment] of any of the following offences:—

- (a) conspiracy within the meaning of section 1 or 1A of the Criminal Law Act 1977 or article 9 or 9A of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 where that conspiracy relates to participation in a criminal organisation as defined in Article 2 of Council Framework Decision 2008/841/JHA;
- (b) corruption within the meaning of section 1(2) of the Public Bodies Corrupt Practices Act 1889 or section 1 of the Prevention of Corruption Act 1906, where the offence relates to active corruption;
- (c) the offence of bribery, where the offence relates to active corruption;
- (d) bribery within the meaning of sections 1 or 6 of the Bribery Act 2010;
- (e) any of the following offences, where the offence relates to fraud affecting the European Communities' financial interests as defined by Article 1 of the Convention on the protection of the financial interests of the European Communities:—
  - (i) the offence of cheating the Revenue;
  - (ii) the offence of conspiracy to defraud;
  - (iii) fraud or theft within the meaning of the Theft Act 1968, the Theft Act (Northern Ireland) 1969, the Theft Act 1978 or the Theft (Northern Ireland) Order 1978;
  - (iv) fraudulent trading within the meaning of section 458 of the Companies Act 1985, article 451 of the Companies (Northern Ireland) Order 1986 or section 993 of the Companies Act 2006;
  - (v) fraudulent evasion within the meaning of section 170 of the Customs and Excise Management Act 1979 or section 72 of the Value Added Tax Act 1994;
  - (vi) an offence in connection with taxation in the European Union within the meaning of section 71 of the Criminal Justice Act 1993;
  - (vii) destroying, defacing or concealing of documents or procuring the execution of a valuable security within the meaning of section 20 of the Theft Act 1968 or section 19 of the Theft Act (Northern Ireland) 1969;
  - (viii) fraud within the meaning of section 2, 3 or 4 of the Fraud Act 2006; or
  - (ix) the possession of articles for use in frauds within the meaning of section 6 of the Fraud Act 2006, or the making, adapting, supplying or offering to supply articles for use in frauds within the meaning of section 7 of that Act;
- (f) money laundering within the meaning of section 340(11) of the Proceeds of Crime Act 2002;
- (g) an offence in connection with the proceeds of criminal conduct within the meaning of section 93A, 93B or 93C of the Criminal Justice Act 1988 or article 45, 46 or 47 of the Proceeds of Crime (Northern Ireland) Order 1996;
- (h) an offence under section 4 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004;
- (i) an offence under section 59A of the Sexual Offences Act 2003;

- (j) an offence in connection with the proceeds of drug trafficking within the meaning of section 49, 50 or 51 of the Drug Trafficking Act 1994 or under section 71 of the Coroners and Justice Act 2009; or
- (k) any other offence within the meaning of Article 57(1) of the Public Contracts Directive as defined by the national law of any EEA state.

(2) In paragraph (1)(b) and (c), "active corruption" means corruption as defined in Article 3 of the Council Act of 26 May 1997 or Article 3(1) of Council Joint Action 98/742/JHA.

(3) The obligation to exclude an economic operator also applies where the person convicted [by final judgment] is a member of the [administrative, management or supervisory body of that economic operator] or has powers of representation, decision or control [therein].

*Mandatory and discretionary exclusions for non-payment of taxes etc*

(4) An economic operator shall be excluded from participation in a procurement procedure where the contracting authority is aware that the economic operator is in breach of its obligations relating to the payment of [taxes or social security contributions] and where this has been established by a [judicial or administrative decision having final and binding effect in accordance with the legal provisions of the country in which it is established] or with [those of any of the jurisdictions of the United Kingdom].

(5) [Furthermore,] contracting authorities [may] exclude [an economic operator] from participation in a procurement procedure where the contracting authority can demonstrate by [any appropriate means] that the economic operator is in breach of its obligations relating to the payment of [taxes or social security contributions].

(6) Paragraphs (4) and (5) cease to apply when the economic operator has fulfilled its obligations by paying, or entering into a binding arrangement with a view to paying, the taxes or social security contributions due, including, where applicable, any interest accrued or fines.

*Exceptions to mandatory exclusion*

(7) A contracting authority may disregard any of the prohibitions imposed by paragraphs (1) to (4), on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment.

(8) A contracting authority may also disregard the prohibition imposed by paragraph (4) where an exclusion would be clearly disproportionate, in particular—

- (a) where only minor amounts of taxes or social security contributions are unpaid, or
- (b) where the economic operator was informed of the exact amount due following its breach of its obligations relating to the payment of taxes or social security contributions at such time that it did not have the possibility of fulfilling its obligations in a manner described in paragraph (6) before expiration of the deadline for requesting participation or, in open procedures, the deadline for submitting its tender.

*Discretionary exclusions*

(9) Contracting authorities may exclude from participation in a procurement procedure any economic operator in any of the following situations:—

- (a) where the contracting authority can demonstrate by [any appropriate means] a violation of applicable obligations referred to in regulation 56(2);
- (b) where the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it is in an arrangement with creditors, where its business activities are suspended or it is in any [analogous situation arising from a similar procedure under national laws and regulations];
- (c) where the contracting authority can demonstrate by [appropriate means] that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;

- (d) where the contracting authority [has sufficiently plausible indications] to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;
- (e) where a conflict of interest within the meaning of regulation 24 cannot be effectively remedied by other less intrusive measures;
- (f) where a distortion of competition from the prior involvement of the economic operator in the preparation of the procurement procedure, as referred to in regulation 41, cannot be remedied by other, less intrusive measures;
- (g) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, [a prior contract with a contracting entity or a prior concession contract] which led to early termination of that prior contract, damages [or other comparable sanctions];
- (h) where the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, has withheld such information or is not able to submit the supporting documents required [pursuant to] regulation 59; or
- (i) where the economic operator has—
  - (i) [undertaken] to—
    - (aa) unduly influence the decision-making process of the contracting authority, or
    - (bb) obtain confidential information that may confer upon it undue advantages in the procurement procedure; or
  - (ii) negligently provided misleading information that may have a material influence on decisions concerning exclusion, selection or award.

*Exclusion during procedure*

(10) Contracting authorities shall at any time during the procedure exclude an economic operator where it [turns out] that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs (1) to (4).

(11) At any time during the procedure, contracting authorities may exclude an economic operator where it [turns out] that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraph[s (5) or] (9).

*Duration of exclusion*

(12) In the cases referred to in paragraphs (1) to (4), the period during which the economic operator shall be excluded is five years from the date of the conviction [by final judgment].

(13) In the cases referred to in paragraphs (5) and (9), the period during which the economic operator may be excluded is three years from the date of the relevant event.

(14) Paragraphs (12) and (13) are subject to paragraph[s (7) , (8) and] (16).

*Self-cleaning*

(15) Any economic operator that is in one of the situations referred to in paragraph (1) or (9) may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of [a relevant ground for exclusion].

(16) If such evidence [is considered] as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

(17) For [that] purpose, the economic operator shall prove that it has—

- (a) paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct,
- (b) clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities, and
- (c) taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

(18) The measures taken by the economic operator shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct.

(19) Where the measures [are considered] to be insufficient, the economic operator shall [be given] a statement of the reasons for that decision.

## **Selection criteria**

### *General principles*

**58.**—(1) — Selection criteria may relate to—

- (a) suitability to pursue a professional activity;
- (b) economic and financial standing;
- (c) technical and professional ability.

(2) Contracting authorities may impose on economic operators as requirements for participation only the criteria referred to in paragraphs (5) to (21).

(3) Contracting authorities shall limit any requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded.

(4) All requirements shall be related and proportionate to the subject-matter of the contract.

(5) With regard to suitability to pursue a professional activity, contracting authorities may require economic operators to be enrolled in one of the professional or trade registers kept in their member State of establishment, as described in Schedule 6, or to comply with any other request set out in that Schedule.

(6) In procurement procedures for services, in so far as economic operators have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, contracting authorities may require them to prove that they hold such authorisation or membership.

### *Economic and financial standing*

(7) With regard to economic and financial standing, contracting authorities may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract.

(8) For that purpose, contracting authorities may require, in particular, that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the [area] covered by the contract.

(9) In addition, contracting authorities may require that economic operators provide information on their annual accounts showing the ratios, for example, between assets and liabilities.

(10) Contracting authorities may also require an appropriate level of professional risk indemnity insurance.

(11) The minimum yearly turnover that economic operators are required to have shall not exceed twice the estimated contract value, except in duly justified cases, such as by reference to special risks attached to the nature of the works, services or supplies, in which case the contracting authority shall indicate their main reasons in the procurement documents or in the report referred to in regulation 84(1).

(12) Ratios, for example that between assets and liabilities, may be taken into consideration where the contracting authority specifies the methods and criteria for such consideration in the procurement documents.

(13) Such methods and criteria shall be transparent, objective and non-discriminatory.

### *Application to lots, framework agreements and dynamic purchasing systems*

(14) Where a contract is divided into lots this regulation shall apply in relation to each individual lot.

(15) But the contracting authority may set the minimum yearly turnover that economic operators are required to have by reference to groups of lots in the event that the successful tenderer is awarded several lots to be [performed] at the same time.

(16) Where contracts based on a framework agreement are to be awarded following a reopening of competition, the maximum yearly turnover requirement referred to in paragraph (11) shall be calculated on the basis of the expected maximum size of specific contracts that will be performed at the same time, or, where it is not known, on the basis of the estimated value of the framework agreement.

(17) In the case of [a dynamic purchasing system], the maximum yearly turnover requirement referred to in paragraph (11) shall be calculated on the basis of the expected maximum size of specific contracts to be awarded under that system.

#### *Technical and professional ability*

(18) With regard to technical and professional ability, contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard.

(19) Contracting authorities may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past.

(20) A contracting authority may assume that an economic operator does not possess the required professional abilities where the contracting authority has established that the economic operator has conflicting interests which may negatively affect the performance of the contract.

(21) In procurement procedures for supplies requiring siting or installation work, or for services or works, the professional ability of economic operators to provide the service or to execute the installation or the work may be evaluated with regard to their skills, efficiency, experience and reliability.

#### *Indicating requirements for participation*

(22) Contracting authorities shall indicate the requirements for participation, which may be expressed as minimum levels of ability, together with the appropriate means of proof, in the contract notice or in the invitation to confirm interest.

## **European Single Procurement Document**

### *Use, content and form of the ESPD*

**59.**—(1) At the time of submission of requests to participate or of tenders, contracting authorities shall accept [the] European Single Procurement Document, consisting of an updated self-declaration as preliminary evidence instead of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfils the following conditions:—

- (a) it is not in one of the situations referred to in regulation 57 in which economic operators shall or may be excluded;
- (b) it meets the relevant selection criteria that have been set out [pursuant to] regulation 58;
- (c) where applicable, it fulfils the objective rules and criteria that have been set out pursuant to regulation 65.

(2) Where the economic operator relies on the capacities of other entities [pursuant to] regulation 63, the ESPD shall also contain the information referred to in paragraph (1) in respect of such entities.

(3) The ESPD shall consist of a formal statement by the economic operator that the relevant ground for exclusion does not apply and/or that the relevant selection criterion is fulfilled and shall provide [the] relevant information as required by the contracting authority.

(4) The ESPD shall further identify the public authority or third party responsible for [establishing] the supporting documents and contain a formal statement to the effect that the economic operator will be able, upon request and without delay, to provide those supporting documents.

(5) Where the contracting authority can obtain the supporting documents directly by accessing a database as mentioned in paragraph (11), the ESPD shall also contain the information required for this purpose, such as the internet address of the database, any identification data and, where applicable, the necessary declaration of consent.

(6) Economic operators may reuse an ESPD which has already been used in a previous procurement procedure, provided that they confirm that the information contained in it continues to be correct.

(7) The ESPD shall be provided exclusively in electronic form.

#### *Supporting documentation*

(8) A contracting authority may require candidates and tenderers at any moment during the procedure to submit all or any of the supporting documents where this is necessary to ensure the proper conduct of the procedure.

(9) Before awarding the contract, the contracting authority shall, except in respect of contracts based on framework agreements where such contracts are concluded in accordance with regulation 33(7) or (8)(a), require the tenderer to which it has decided to award the contract to submit up-to-date supporting documents in accordance with regulation 60 and, where appropriate, regulation 62.

(10) The contracting authority may invite economic operators to supplement or clarify the certificates received [pursuant to] regulations 60 and 62.

(11) Despite paragraphs (8) to (10), economic operators shall not be required to submit supporting documents or other documentary evidence where and in so far as the contracting authority has the possibility of obtaining the certificates or the relevant information directly by accessing a national database in any member State that is available free of charge, such as a national procurement register, a virtual company dossier, an electronic document storage system or a prequalification system.

(12) Despite paragraphs (8) to (10), economic operators shall not be required to submit a supporting document which the contracting authority already possesses.

## **Means of proof**

### *General principles*

**60.—(1)**—Contracting authorities may require the certificates, statements and other means of proof referred to in this regulation as evidence for the absence of grounds for exclusion [as referred to in] regulation 57 and for the fulfilment of the selection criteria in accordance with regulation 58.

(2) Contracting authorities shall not require means of proof other than those referred to in this regulation and in regulation 62.

(3) [In respect of] regulation 63, economic operators may rely on any appropriate means to prove to the contracting authority that they will have the necessary resources at their disposal.

### *Proving the absence of grounds for exclusion*

(4) Contracting authorities shall accept the following as sufficient evidence that none of the cases specified in regulation 57 apply to the economic operator:—

(a) [as regards] regulation 57(1) to [(3)], the production of an extract from the relevant register, such as judicial records or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the member State or country of origin or the country where the economic operator is established showing that those requirements have been met;

(b) [as regards] regulation 57(4) to (6) and (9)(b), a certificate issued by the competent authority in the member State or country concerned.

(5) Where the member State or country in question does not issue such documents or certificates, or to the extent that these do not cover all the cases [specified in] regulation 57(1) to (6) and (9)(b), they may be replaced by a declaration on oath or, in member States or countries where there is no provision for declarations on oath, by a solemn declaration made by the person

concerned before a competent judicial or administrative authority, a notary or a competent professional or trade body, in the member State or country of origin or in the member State or country where the economic operator is established.

*Proving economic and financial standing*

(6) Proof of the economic operator's economic and financial standing may be provided by one or more of the following references:—

- (a) appropriate statements from banks or, where appropriate, evidence of relevant professional risk indemnity insurance;
- (b) the presentation of financial statements or extracts from the financial statements, where publication of financial statements is required under the law of the country in which the economic operator is established;
- (c) a statement of the undertaking's overall turnover and, where appropriate, of turnover in the [area] covered by the contract for a maximum of the last three financial years available, depending on the date on which the undertaking was set up or the economic operator started trading, as far as the information on those turnovers is available.

(7) Where the references mentioned in paragraph (6) are not appropriate in a particular case, the contracting authority may require the economic operator to provide other information to prove its economic and financial standing.

(8) Where, for any valid reason, the economic operator is unable to provide the references or other information required by the contracting authority, it may prove its economic and financial standing by any other document which the contracting authority considers appropriate.

*Proving technical abilities*

(9) Proof of the economic operator[']s technical abilities may be provided by one or more of the following means, in accordance with the nature, quantity or importance, and [the] use[,] of the works, supplies or services:—

- (a) the following lists:—
  - (i) a list of the works carried out over at the most the past five years, accompanied by certificates of satisfactory execution and outcome for the most important works; [but,] where necessary in order to ensure an adequate level of competition, contracting authorities may indicate that evidence of relevant works carried out more than five years before will be taken into account;
  - (ii) a list of the principal deliveries effected or the main services provided over at the most the past three years, with the sums, dates and recipients, whether public or private, involved[; but,] where necessary in order to ensure an adequate level of competition, contracting authorities may indicate that evidence of relevant supplies or services delivered or performed more than three years before will be taken into account;
- (b) an indication of the technicians or technical bodies involved, whether or not belonging directly to the economic operator's undertaking, especially those responsible for quality control and, in the case of public works contracts, those upon whom the contractor can call in order to carry out the work;
- (c) a description of the technical facilities and measures used by the economic operator for ensuring quality and the undertaking's study and research facilities;
- (d) an indication of the supply chain management and tracking systems that the economic operator will be able to apply when performing the contract;
- (e) where the products or services to be supplied are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authority[ies] or on [their] behalf by a competent official body of the country in which the supplier or service provider is established, subject to that body's agreement, on the production capacities of the supplier or the technical capacity of the service provider and, where necessary, on the means of study and research which are available to it and the quality control measures it will operate;

- (f) the educational and professional qualifications of the service provider or contractor or those of the undertaking's managerial staff, provided that they are not [to be] evaluated as an award criterion;
- (g) an indication of the environmental management measures that the economic operator will be able to apply when performing the contract;
- (h) a statement of the average annual manpower of the service provider or contractor and the number of managerial staff for the last three years;
- (i) a statement of the tools, plant or technical equipment available to the service provider or contractor for carrying out the contract;
- (j) an indication of the proportion of the contract which the economic operator [intends possibly] to subcontract;
- (k) with regard to the products to be supplied:—
  - (i) samples, descriptions or photographs, the authenticity of which must be certified where the contracting authority so requests;
  - (ii) certificates drawn up by official quality control institutes or agencies of recognised competence attesting the conformity of products clearly identified by references to technical specifications or standards.

### **Recourse to e-Certis**

**61.**—(1) Contracting authorities [shall have recourse to e-Certis and] shall require [primarily] such types of certificates or forms of documentary evidence as are [covered by] e-Certis.

(2) In this regulation, “e-Certis” means the online repository established by the Commission and referred to as “e-Certis” in the Public Contracts Directive.

### **Quality assurance standards and environmental management standards**

**62.**—(1) —Contracting authorities shall, where they require the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain quality assurance standards, including on accessibility for disabled persons, refer to quality assurance systems based on [the relevant European standards series certified by accredited bodies.]

(2) Contracting authorities shall recognise equivalent certificates from bodies established in other Member States.

(3) Contracting authorities shall also accept other evidence of equivalent quality assurance measures where the economic operator concerned had no possibility of obtaining such certificates within the relevant time limits for reasons that are not attributable to that economic operator, provided that the economic operator proves that the proposed quality assurance measures comply with the required quality assurance standards.

(4) Where contracting authorities require the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain environmental management systems or standards, they shall refer to—

- (a) the [Eco-Management and Audit Scheme (EMAS) of the EU],
- (b) other environmental management systems [as recognised in accordance with Article 45 of Regulation (EC) No 1221/2009], or
- (c) other environmental management standards based on the relevant [European or international standards] by [accredited bodies]

and shall recognise equivalent certificates from bodies established in other member States.

(5) Where an economic operator had demonstrably no access to such certificates, or no possibility of obtaining them within the relevant time limits for reasons that are not attributable to that economic operator, the contracting authority shall accept other evidence of [environmental management measures], provided that the economic operator proves that these measures are equivalent to those required under the applicable [environmental management system or standard].

## **Reliance on the capacities of other entities**

**63.**—(1) With regard to—

- (a) criteria relating to economic and financial standing as set out [pursuant to] regulation 58(7) to (17), and
- (b) criteria relating to technical and professional ability as set out [pursuant to] regulation 58(18) to (21),

an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them.

(2) With regard to criteria relating to the educational and professional qualifications [mentioned in] regulation 60(9)(f), or to relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required.

(3) Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example by producing a commitment by those entities to that effect.

(4) The contracting authority shall, in accordance with regulations 59 to 61, verify whether the entities on whose capacity the economic operator intends to rely fulfil the relevant selection criteria and whether there are grounds for exclusion [pursuant to] regulation 57.

(5) The contracting authority shall require that the economic operator replaces an entity which does not meet a relevant selection criterion, or in respect of which there are compulsory grounds for exclusion.

(6) The contracting authority may require that the economic operator substitutes an entity in respect of which there are non-compulsory grounds for exclusion.

(7) Where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the contracting authority may require that the economic operator and those entities be jointly liable for the execution of the contract.

(8) A group of economic operators [as referred to] in regulation 19(3) may rely on the capacities of participants in the group or of other entities, and paragraphs (1) to (7) apply in relation to such a group in the same way that they apply in relation to an economic operator.

(9) In the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators as [referred to] in regulation 19(3), by a participant in that group.

## **Recognition of official lists of approved economic operators and certification by certification bodies**

**64.**—(1) Economic operators registered on an official list or having a certificate issued by a certification body may, for each contract, submit to the contracting authority a certificate of registration issued by the competent authority or the certificate issued by the certification body.

(2) A certificate of either kind shall constitute a presumption of suitability with regard to requirements for qualitative selection encompassed by the certificate or the official list to which it relates.

(3) Information that can be deduced from registration on official lists or certification by certification bodies shall not be questioned without justification.

(4) With regard to the payment of social security contributions and taxes, an additional certificate may be required of any registered economic operator whenever a contract is to be awarded.

(5) In relation to an official list established or maintained by a member State other than the United Kingdom, paragraphs (1) and (3) apply only in favour of economic operators established in the member State holding the official list.

(6) The requirements of proof for the criteria for qualitative selection encompassed by the official list or certificate shall comply with regulation 60 and, where appropriate, regulation 62.

(7) Economic operators shall not be obliged to be registered on an official list or to provide a certificate issued by a certification body in order to participate in a public contract.

(8) Contracting authorities shall—

- (a) recognise equivalent certificates from bodies established in other member States, and
- (b) accept other equivalent means of proof.

(9) In this regulation—

“official list” means an official list of approved contractors, suppliers or service providers established or maintained by a member State pursuant to Article 64 of the Public Contracts Directive;

“certification body” means a certification body complying with European standards of certification, and “certificate issued by a certification body” means a certificate issued by such a body in accordance with certification arrangements for which a member State has provided in accordance with Article 64 of the Public Contracts Directive.

(10) For the purposes of this regulation, no official list or certification arrangements are established, maintained or provided for in relation to the jurisdictions to which this Part extends and, accordingly, in paragraph (9), “member State” includes the United Kingdom only insofar as the official list or the certification arrangements are established, maintained or provided for in respect of any other jurisdiction.

### **Reduction of the number of otherwise qualified candidates to be invited to participate**

**65.**—(1) — In restricted procedures, competitive procedures with negotiation, competitive dialogue procedures and innovation partnerships, contracting authorities may limit the number of candidates meeting the selection criteria that they will invite to tender or to conduct a dialogue, provided [that] the minimum number of qualified candidates is available, [in accordance with the following paragraphs of this regulation].

(2) [The] contracting authorities shall indicate, in the contract notice or in the invitation to confirm interest, the objective and non-discriminatory criteria or rules they intend to apply, the minimum number of candidates they intend to invite and, where [appropriate], the maximum number.

(3) In the restricted procedure, the minimum number of candidates shall be five.

(4) In the competitive procedure with negotiation, in the competitive dialogue procedure and in the innovation partnership [procedure] the minimum number of candidates shall be three.

(5) In any event the number of candidates invited shall be sufficient to ensure genuine competition.

(6) [The] contracting authorities shall invite a number of candidates at least equal to the minimum number.

(7) But where the number of candidates meeting [the selection criteria and the minimum levels of ability as referred to in regulation 58(22)] is below the minimum number, the contracting authority may continue the procedure by inviting the candidates with the required capabilities.

(8) In the context of the same procedure, the contracting authority shall not include economic operators that did not [request] to participate, or candidates that do not have the required capabilities.

(9) [In this regulation, “the minimum number” means the minimum number that had been indicated in accordance with paragraph (2).]

### **Reduction of the number of tenders and solutions**

**66.**—(1) Where contracting authorities exercise the option of reducing the number of tenders to be negotiated [as provided for in] regulation 29(15) [and (16)] or of solutions to be discussed [as

provided for in] regulation 30(12) [and (13)], they shall do so by applying the award criteria stated in the procurement documents.

(2) In the final stage, the number arrived at shall make for genuine competition in so far as there are enough tenders, solutions or qualified candidates.

### **Contract award criteria**

**67.**—(1) Contracting authorities shall base the award of public contracts on the most economically advantageous tender assessed from the point of view of the contracting authority.

(2) That tender shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with regulation 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, such as qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question.

(3) Such criteria may comprise, for example—

- (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;
- (b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or
- (c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

(4) The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.

(5) Award criteria shall be considered to be linked to the subject-matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in—

- (a) the specific process of production, provision or trading of those works, supplies or services; or
- (b) a specific process for another stage of their life cycle,

even where such factors do not form part of their material substance.

(6) Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority.

(7) Award criteria shall ensure the possibility of effective competition and—

- (a) shall be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria; and
- (b) in case of doubt, contracting authorities shall verify effectively the accuracy of the information and proof provided by the tenderers.

### *Weighting*

(8) The contracting authority shall specify, in the procurement documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender, except where this is identified on the basis of price alone.

(9) Those weightings may be expressed by providing for a range with an appropriate maximum spread.

(10) Where weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in decreasing order of importance.

### **Life-cycle costing**

**68.**—(1) Life-cycle costing shall to the extent relevant cover part[s] or all of the following costs over the life cycle of a product, service or works:—

- (a) costs, borne by the contracting authority or other users, such as—
  - (i) costs relating to acquisition,
  - (ii) costs of use, such as consumption of energy and other resources,
  - (iii) maintenance costs,
  - (iv) end of life costs, such as collection and recycling costs;
- (b) costs imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified.

(2) The costs [mentioned] in paragraph (1)(b) may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

(3) The method used for the assessment of costs imputed to environmental externalities shall fulfil all of the following conditions:—

- (a) it is based on objectively verifiable and non-discriminatory criteria and, in particular, where it has not been established for repeated or continuous application, it shall not unduly favour or disadvantage certain economic operators;
- (b) it is accessible to all interested parties;
- (c) the data required can be provided with reasonable effort by normally diligent economic operators, including economic operators from third countries party to the GPA or other international agreements by which the EU is bound.

(4) Where contracting authorities assess [the costs] using a life-cycle costing approach, they shall indicate in the procurement documents—

- (a) the data to be provided by the tenderers, and
- (b) the method which the contracting authority will use to determine the life-cycle costs on the basis of those data.

(5) [Whenever a common method for the calculation of life-cycle costs has been made mandatory by a legislative act of the EU, that common method shall be applied for the assessment of life-cycle costs.

(6) A list of such legislative acts, and where necessary the delegated acts supplementing them, is set out in Annex XIII of the Public Contracts Directive as amended from time to time.]

### **Abnormally low tenders**

**69.**—(1) Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.

(2) The explanations [given in accordance with] paragraph (1) may in particular relate to:—

- (a) the economics of the manufacturing process, of the services provided or of the construction method;
- (b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work;
- (c) the originality of the work, supplies or services proposed by the tenderer;
- (d) compliance with obligations referred to in regulation 56(2);
- (e) compliance with obligations referred to in regulation 71;
- (f) the possibility of the tenderer obtaining State aid.

(3) [The contracting authority] shall assess the information provided [by consulting the tenderer].

(4) [The contracting authority] may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph (2).

(5) [Contracting authorities] shall reject the tender where [they have] established that the tender is abnormally low because it does not comply with applicable obligations referred to in regulation 56(2).

(6) Where [a contracting authority] establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only—

- (a) after consultation with the tenderer, and
- (b) where the tenderer is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 of TFEU.

(7) Where [the contracting authority] rejects a tender in the circumstances referred to in paragraph (6), it shall inform the Commission.

## SECTION 6

### *Contract Performance*

#### **Conditions for performance of contracts**

**70.**—(1) Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are—

- (a) linked to the subject-matter of the contract [within the meaning of] regulation 67(5), and
- (b) indicated in the call for competition or in the procurement documents.

(2) Such conditions may include economic, innovation-related, environmental, social or employment-related considerations.

#### **Subcontracting**

##### *Giving information to contracting authorities*

**71.**—(1) In the procurement documents, the contracting authority may ask the tenderer to indicate in its tender any share of the 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 main contractor's liability.

(3) In the case of works contracts and in respect of services to be provided at a facility under the direct oversight of the contracting authority, after the award of the contract and at the latest when the performance of the contract commences, the contracting authority shall require the main contractor to notify to the contracting authority 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 shall require the main contractor to notify the contracting authority of any changes to that information during the course of the contract as well as of the required information for any new subcontractors which it subsequently involves in such works or services.

(5) Where necessary for the purposes of paragraph (8), the required information shall be accompanied by ESPDs in respect of the subcontractors.

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

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

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

*Excluding subcontractors*

(8) Contracting authorities may, in accordance with regulations 59, 60 and 61, verify whether there are grounds for exclusion of subcontractors [pursuant to] regulation 57.

(9) In such cases, the contracting authority shall require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion.

(10) The contracting authority 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 contracts during their term**

**72.—**(1) Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Part in any of the following cases:—

- (a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price 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 contract or the framework agreement;
- (b) for additional works, services or supplies by the original contractor that have become necessary and were not included in the initial procurement, where a change of contractor—
  - (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 procurement; and
  - (ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority,

Provided that any increase in price does not exceed 50% of the value of the original 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 could not have foreseen;
    - (ii) the modification does not alter the overall nature of the contract;
    - (iii) any increase in price does not exceed 50 % of the value of the original contract or framework agreement.
  - (d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of:—
    - (i) an unequivocal review clause or option [in conformity with] sub-paragraph (a); or
    - (ii) complete or partial succession into the position of the initial contractor, 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 this Part;
  - (e) where the modifications, irrespective of their value, are not substantial (as defined in paragraph (8)); or
  - (f) where paragraph (5) applies.
- (2) Where several successive modifications are made:—

(a) the limitation[s] imposed by the proviso at the end of paragraph (1)(b) and by paragraph (c)(iii) shall apply to the value of each modification; and

(b) such successive modifications shall not be aimed at circumventing this Part.

(3) Contracting authorities which have modified a contract in either of the cases described in paragraph (1)(b) and (c) shall send a notice to that effect, in accordance with regulation 51, for publication.

(4) Such a notice shall contain the information set out in [Part G of Schedule 5].

(5) This paragraph applies where the value of the modification is below both of the following values:—

(a) the relevant threshold mentioned in regulation 5; and

(b) 10 % of the initial contract value for service and supply contracts and 15% of the initial contract value for works contracts

Provided that the modification does not alter the overall nature of the contract or framework agreement.

(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—

(a) the price mentioned in paragraph (1)(b) and (c), and

(b) the values mentioned in paragraph (5)(b),

the updated [figure] shall be the reference [figure] when the contract includes an indexation clause.

(8) A modification of a contract or a framework agreement 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 contract or the framework agreement materially different in character from the one initially concluded;

(b) the modification introduces conditions which, had they been part of the initial procurement procedure, would have—

(i) allowed for the admission of other candidates than those initially selected;

(ii) allowed for the acceptance of a tender other than that originally accepted; or

(iii) attracted additional participants in the procurement procedure;

(c) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;

(d) the modification extends the scope of the contract or framework agreement considerably;

(e) a new contractor replaces the one to which the contracting authority had initially awarded the contract in cases other than those provided for in paragraph (1)(d).

(9) A new procurement procedure in accordance with this Part shall be required for modifications of the provisions of a public contract or a framework agreement during its term other than those provided for in this regulation.

### **Termination of contracts**

**73.**—(1) Contracting authorities shall ensure that every public contract which they award contains provisions enabling the contracting authority to terminate the contract where:—

(a) the contract has been subject to a substantial modification which would have required a new procurement procedure [pursuant to] regulation 72;

- (b) the contractor has, at the time of contract award, been in one of the situations referred to in regulation 57(1) [to (3)] and should therefore have been excluded from the procurement procedure; [or]
- (c) the contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and the Public Contracts Directive that has been declared by the Court of Justice of the EU in a procedure pursuant to Article 258 of TFEU.

(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 public contract does not contain provisions enabling the contracting authority to terminate the contract on any of the grounds mentioned in paragraph (1), a power for the contracting authority to do so on giving notice to the contractor shall be an implied term of that contract.

CHAPTER 3  
PARTICULAR PROCUREMENT REGIMES  
SECTION 7

*Social and Other Specific Services*

**Award of contracts for social and other specific services**

**74.** Public contracts for social and other specific services [listed] in Schedule 3 shall be awarded in accordance with this Section, [where the value of the contracts is equal to or greater than the threshold indicated in regulation 5(1)(d).]

**Publication of notices**

**75.—**(1) Contracting authorities intending to award a public contract for the services referred to in regulation 74 shall make known their intention by any of the following means:—

- (a) by means of a contract notice, which shall contain the information referred to in [Part H of Schedule 5]; or
- (b) by means of a prior information notice, which shall—
  - (i) be published continuously,
  - (ii) contain the information set out [Part I of Schedule 5],
  - (iii) refer specifically to the types of services that will be the subject of the contracts to be awarded, and
  - (iv) indicate that the contracts will be awarded without further publication and invite interested economic operators to express their interest in writing.

(2) Paragraph (1) shall not apply where a negotiated procedure without prior publication could have been used in [conformity] with regulation 32 for the award of a public service contract.

(3) Contracting authorities that have awarded a public contract for the services referred to in regulation 74 shall make known the results of the procurement procedure by means of a contract award notice, which shall contain the information referred to in [Part J of Schedule 5].

(4) They may, however, group such notices on a quarterly basis, in which case they shall send the grouped notices within 30 days of the end of each quarter.

(5) The notices referred to in this regulation shall be sent for publication in accordance with regulation 51.

## **Principles of awarding contracts**

**76.**—(1) Contracting authorities shall determine the procedures that are to be applied in connection with the award of contracts subject to this Section, and may take into account the specificities of the services in question.

(2) Those procedures shall be at least sufficient to [ensure compliance] with the principles of transparency and equal treatment of economic operators.

(3) In particular, where, in accordance with regulation 75, a contract notice or prior information notice has been published in relation to a [given] procurement, the contracting authority shall, except in the circumstances mentioned in paragraph (4), conduct the procurement, and award any resulting contract, in conformity with the information contained in the notice about—

- (a) conditions for participation,
- (b) time limits for contacting the contracting authority, and
- (c) the award procedure to be applied.

(4) The contracting authority may, however, conduct the procurement, and award any resulting contract, in a way which is not in conformity with that information, but only if all the following conditions are met:—

- (a) the failure to conform does not, in the particular circumstances, amount to a breach of the principles of transparency and equal treatment of economic operators;
- (b) the contracting authority has, before proceeding in reliance on sub-paragraph (a)—
  - (i) given due consideration to the matter;
  - (ii) concluded that sub-paragraph (a) is applicable; and
  - (iii) documented that conclusion and the reasons for it in accordance with regulation 84(7) and (8).

(5) All time limits imposed on economic operators for the purposes of this regulation, whether for responding to a contract notice or taking any other steps in the relevant procedure, shall be reasonable and proportionate.

(6) Without prejudice to the generality of paragraph (1), and subject to the other requirements of this Chapter, contracting authorities may apply procedures for the purposes of this regulation which correspond (with or without variations) to procedures, techniques or other features provided for in Section 2, as well as procedures which do not.

(7) [In relation to the award of contracts subject to this Section], contracting authorities may take into account—

- (a) the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services;
- (b) the specific needs of different categories of users, including disadvantaged and vulnerable groups;
- (c) the involvement and empowerment of users;
- (d) innovation; and
- (e) any other relevant consideration.

## **Reserved contracts for certain services**

**77.**—(1) Contracting authorities may reserve the right for organisations to participate in procedures for the award of public contracts exclusively for those health, social and cultural services referred to in regulation 74 which are covered by CPV codes 75121000-0, 75122000-7, 75123000-4, 79622000-0, 79624000-4, 79625000-1, 80110000-8, 80300000-7, 80420000-4, 80430000-7, 80511000-9, 80520000-5, 80590000-6, from 85000000-9 to 85323000-9, 92500000-6, 92600000-7, 98133000-4, 98133110-8.

(2) [An organisation referred to in paragraph (1) shall] fulfil all of the following conditions:—

- (a) its objective is the pursuit of a public service mission linked to the delivery of [the] services referred to in paragraph (1);
  - (b) profits are—
    - (i) reinvested with a view to achieving the organisation’s objective, and
    - (ii) where profits are distributed [or redistributed], this should be based on participatory considerations;
  - (c) the structures of management or ownership of the organisation are [or will be, if and when it performs the contract] —
    - (i) based on employee ownership or participatory principles, or
    - (ii) require the active participation of employees, users or stakeholders; and
  - (d) the organisation has not been awarded a contract for the services concerned by the contracting authority concerned [pursuant to this regulation] within the [preceding] three years.
- (3) The maximum duration of the contract shall not be longer than three years.
- (4) The call for competition shall make reference to Article 77 of the Public Contracts Directive.
- (5) This regulation does not apply in relation to the procurement of health care services for the purposes of the NHS within the meaning and scope of the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013(a).

## SECTION 8

### *Rules Governing Design Contests*

#### **Scope of Section 8**

**78.**—(1) This Section applies to:—

- (a) design contests organised as part of a procedure leading to the award of a public service contract;
- (b) design contests with prizes or payments to participants.

(2) In the cases referred to in paragraph (1)(a), the threshold referred to in regulation 5 [is] calculated on the basis of the estimated value net of VAT of the public service contract, including any possible prizes or payments to participants.

(3) In the cases referred to in paragraph (1)(b), the threshold referred to in regulation 5 [is] calculated on the basis of the total amount of the prizes and payments, including the estimated value net of VAT of the public services contract which might subsequently be concluded following a negotiated procedure without prior publication in accordance with regulation 32(7) and (8) if the contracting authority has announced its intention to award such a contract in the contest notice.

#### **Notices**

**79.**—(1) Contracting authorities that intend to carry out a design contest shall make known their intention by means of a contest notice.

(2) Where [they] intend to award a subsequent service contract [pursuant to] regulation 32(7), this shall be indicated in the contest notice.

(3) Contracting authorities that have held a design contest shall send a notice of the results of the contest in accordance with regulation 51 and must be able to prove the date of dispatch.

(4) Where the release of information on the outcome of the contest—

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(a) S.I. 2013/500.

- (a) would impede law enforcement,
  - (b) would be contrary to the public interest or would prejudice the legitimate commercial interests of a particular enterprise, whether public or private, or
  - (c) might prejudice fair competition between service providers,
- such information may be withheld from publication.

(5) The notices referred to in this regulation shall be sent for publication in accordance with regulation 51 and—

- (a) a contest notice shall include the information set out in [Part E of Schedule 5], and
- (b) a notice of the results of the contest shall include the information set out in [Part F of Schedule 5].

### **Rules on the organisation of design contests and the selection of participants**

**80.**—(1) When organising design contests, contracting authorities shall apply procedures which are adapted to the provisions of Chapter 1 and this Section.

(2) The admission of participants to design contests shall not be limited—

- (a) by reference to the territory or part of the territory of a member State;
- (b) [on the grounds that, under the law of the member State in which the contest is organised, they would be required to be either natural or legal persons].

(3) Where design contests are restricted to a limited number of participants, the contracting authorities shall lay down clear and non-discriminatory selection criteria.

(4) In any event, the number of candidates invited to participate shall be sufficient to ensure genuine competition.

### **Composition of the jury**

**81.**—(1) The jury shall be composed exclusively of natural persons who are independent of participants in the contest.

(2) Where a particular professional qualification is required from participants in a contest, at least a third of the members of the jury shall have that qualification or an equivalent qualification.

### **Decisions of the jury**

**82.**—(1) The jury shall be autonomous in its decisions [or] opinions.

(2) The jury shall examine the plans and projects submitted by the candidates anonymously and solely on the basis of the criteria indicated in the contest notice.

(3) The jury shall record its ranking of projects in a report, signed by its members, made according to the merits of each project, together with its remarks and any points that may need clarification.

(4) Anonymity shall be observed until the jury has reached its opinion or decision.

(5) Candidates may be invited, if need be, to answer questions that the jury has recorded in the minutes to clarify any aspect of the projects.

(6) Complete minutes shall be drawn up of the dialogue between jury members and candidates.

## **CHAPTER 4**

### **RECORDS AND REPORTS**

#### **Retention of contract copies**

**83.**—(1) Contracting authorities shall, at least for the duration of the contract, keep copies of all concluded contracts with a value equal to or greater than:—

- (a) 1 000 000 EUR in the case of public supply contracts or public service contracts;
- (b) 10 000 000 EUR in the case of public works contracts.

(2) Contracting authorities shall grant access to those contracts, but access to specific documents or items of information may be denied to the extent and on the conditions provided for [in the applicable EU or national rules on access to documents and data protection].

## **Reporting and documentation requirements**

### *Individual reports*

**84.**—(1) For every contract or framework agreement [covered by] this Part, and every time a dynamic purchasing system is established, contracting authorities shall draw up a written report which shall include at least the following:—

- (a) the name and address of the contracting authority, the subject-matter and value of the contract, framework agreement or dynamic purchasing system;
- (b) where applicable, the results of the qualitative selection and/or reduction of numbers pursuant to regulations 65 and 66, namely:—
  - (i) the names of the selected candidates or tenderers and the reasons for their selection;
  - (ii) the names of the candidates or tenderers rejected and the reasons for their rejection;
- (c) the reasons for the rejection of tenders found to be abnormally low;
- (d) the name of the successful tenderer and the reasons why its tender was selected and, where known—
  - (i) the share (if any) of the contract or framework agreement which the successful tenderer intends to subcontract to third parties and,
  - (ii) the names of the main contractor's subcontractors (if any);
- (e) for competitive procedures with negotiation and competitive dialogues, the circumstances as [laid down in] regulation 26 which justify the use of those procedures;
- (f) for negotiated procedures without prior publication, the circumstances referred to in regulation 32 which justify the use of this procedure;
- (g) where applicable, the reasons why the contracting authority has decided not to award a contract or framework agreement or to establish a dynamic purchasing system;
- (h) where applicable, the reasons why means of communication other than electronic means have been used for the submission of tenders;
- (i) where applicable, conflicts of interests detected and subsequent measures taken.

(2) But such a report is not required in respect of contracts based on framework agreements where these are concluded in accordance with regulation 33(7) or (8)(a).

(3) To the extent that the contract award notice [drawn up pursuant to] regulation 50 or 75(3) contains the information required in this paragraph, contracting authorities may refer to that notice.

(4) The report, or its main elements, shall be communicated to the Commission, where it so requests.

(5) Where the Cabinet Office so requests, the report, or its main elements, shall be communicated to the Cabinet Office or to such other body as the Cabinet Office may direct in connection with any functions which that body exercises for the purposes of Article 83 of the Public Contracts Directive.

### *Reporting other information required by the Cabinet Office*

(6) Contracting authorities shall send to the Cabinet Office a report containing such other information as the Cabinet Office may from time to time request in respect of procurements—

- (a) within the scope of this Part, or

- (b) which would have been within the scope of this Part if their value had exceeded the relevant threshold mentioned in regulation 5

for the purpose of enabling the Cabinet Office to provide the Commission with information.

*Documentation of progress and decisions*

(7) Contracting authorities shall document the progress of all procurement procedures, whether or not those are conducted by electronic means.

(8) To that end, contracting authorities shall ensure that they keep sufficient documentation to justify decisions taken in all stages of the procurement procedure, such as documentation on —

- (a) communications with economic operators and internal deliberations,
- (b) preparation of the procurement documents,
- (c) dialogue or negotiation if any,
- (d) selection and award of the contract.

(9) The documentation shall be kept for a period of at least three years from the date of award of the contract.

## PART 3

### REMEDIES

#### CHAPTER 5

#### FACILITATION OF REMEDIES

##### **Scope of Chapter 5**

**85.** This Chapter applies to contracts and framework agreements falling within the scope of Part 2.

##### **Notices of decisions to award a contract or conclude a framework agreement**

**86.—**(1) Subject to paragraphs (5) and (6), a contracting authority shall send to each candidate and tenderer a notice communicating its decision to award the contract or conclude the framework agreement.

*Content of notices*

(2) Where it is to be sent to a tenderer, the notice referred to in paragraph (1) shall include—

- (a) the criteria for the award of the contract;
- (b) the reasons for the decision, including the characteristics and relative advantages of the successful tender, the score (if any) obtained by—
  - (i) the tenderer which is to receive the notice; and
  - (ii) the tenderer—
    - (aa) to be awarded the contract; or
    - (bb) to become a party to the framework agreement,and anything required by paragraph (3);
- (c) the name of the tenderer—
  - (i) to be awarded the contract; or
  - (ii) to become a party to the framework agreement; and
- (d) a precise statement of either—
  - (i) when, in accordance with regulation 87, the standstill period is expected to end and, if relevant, how the timing of its ending might be affected by any and, if so what, contingencies; or

(ii) the date before which the contracting authority will not, in conformity with regulation 87 enter into the contract or conclude the framework agreement.

(3) The reasons referred to in paragraph (2)(b) shall include the reason for any decision by the contracting authority that the economic operator did not meet the technical specifications—

- (a) in an equivalent manner as mentioned in regulation 42(14); or
- (b) because compliance with a [specification] mentioned in regulation 42(15) does not address the performance or functional requirements laid down by the contracting authority.

(4) Where it is to be sent to a candidate, the notice referred to in paragraph (1) shall include—

- (a) the reasons why the candidate was unsuccessful; and
- (b) the information mentioned in paragraph (2), but as if the words “and relative advantages” were omitted from sub-paragraph (b).

#### *Exemptions*

(5) A contracting authority need not comply with paragraph (1) in any of the following cases:—

- (a) where the contract or framework agreement is permitted by Part 2 to be awarded or concluded without prior publication of a contract notice;
- (b) where the only tenderer is the one who is to be awarded the contract or who is to become a party to the framework agreement, and there are no candidates;
- (c) where the contracting authority awards a contract under a framework agreement or a dynamic purchasing system.

(6) A contracting authority may withhold any information to be provided in accordance with the preceding requirements of this regulation where the release of such information—

- (a) would impede law enforcement or would otherwise be contrary to the public interest;
- (b) would prejudice the legitimate commercial interests of a particular economic operator, whether public or private; or
- (c) might prejudice fair competition between economic operators.

#### *Meaning of “candidate” and “tenderer”*

(7) In this regulation,—

- (a) “candidate” means a candidate, as defined in regulation 2(1), which—
  - (i) is not a tenderer, and
  - (ii) has not been informed of the rejection of its application and the reasons for it;
- (b) “tenderer” means a tenderer, as defined in regulation 2(1), which has not been definitively excluded.

(8) For the purposes of paragraph (7)(b), an exclusion is definitive if, and only if, the tenderer has been notified of the exclusion and either—

- (a) the exclusion has been held to be lawful in proceedings under Chapter 6; or
- (b) the time limit for starting such proceedings has expired even on the assumption that the Court would have granted the maximum extension permitted by regulation 92(4) and (5).

#### **Standstill period**

**87.—**(1) Where regulation 86(1) applies, the contracting authority must not enter into the contract or conclude the framework agreement before the end of the standstill period.

(2) Subject to paragraph (6), where the contracting authority sends a regulation 86 notice to all the relevant economic operators by facsimile or electronic means, the standstill period ends at midnight at the end of the 10th day after the relevant sending date.

(3) Subject to paragraph (6), where the contracting authority sends a regulation 86 notice to all the relevant economic operators only by other means, the standstill period ends at whichever of the following occurs first—

- (a) midnight at the end of the 15th day after the relevant sending date;
- (b) midnight at the end of 10th day after the date on which the last of the economic operators to receive such a notice receives it.

(4) In paragraphs (2) and (3), “the relevant sending date” means the date on which the regulation 86 notice is sent to the relevant economic operators, and if the notices are sent to different relevant economic operators on different dates, the relevant sending date is the date on which the last of the notices is sent.

(5) Subject to paragraph (6), where the contracting authority sends the regulation 86 notice to one or more of the relevant economic operators by facsimile or electronic means and to the others by other means, the standstill period ends at whichever of the following two times occurs latest—

- (a) midnight at the end of the 10th day after the date on which the last notice is sent by facsimile or electronic means;
- (b) the time when whichever of the following occurs first:—
  - (i) midnight at the end of the 15th day after the date on which the last notice is sent by other means;
  - (ii) midnight at the end of the 10th day after the date on which the last of the economic operators to receive a notice sent by any such other means receives it.

(6) Where the last day of the standstill period reckoned in accordance with paragraphs (2) to (5) is not a working day, the standstill period is extended to midnight at the end of the next working day.

(7) In this regulation—

“regulation 86 notice” means a notice given in accordance with regulation 86; and

“relevant economic operators” means economic operators to which regulation 86 requires a notice to be sent.

## CHAPTER 6

### APPLICATIONS TO THE COURT

#### Interpretation of Chapter 6

**88.**—(1) In this Chapter, [except where the context otherwise requires]—

“claim form” includes, in Northern Ireland, the originating process by which the proceedings are commenced;

“contract”, except in regulation 103, means a public contract or a framework agreement;

“declaration of ineffectiveness” means a declaration made under regulation 98(2)(a) or 103(3);

“economic operator” has the meanings given by paragraph (2);

“grounds for ineffectiveness” has the meaning given to it by regulation 99;

“proceedings” means court proceedings taken for the purposes of regulation 91; and

“standstill period”, and references to its end, have the same meaning as in regulation 87.

(2) In regulations 89 and 90, “economic operator” has its usual meaning (in accordance with regulation 2(1)), but in the other provisions of this Part “economic operator” has the narrower meaning of an economic operator (as defined by regulation 2(1)) to which a duty is owed in accordance with regulation 89 or 90

(3) In this Part any reference to a period of time, however expressed, is to be interpreted subject to the requirement that, if the period would otherwise have ended on a day which is not a working day, the period is to end at the end of the next working day.

#### Duty owed to economic operators from EEA states

**89.**—(1) This regulation applies to the obligation on a contracting authority to comply with—

- (a) the provisions of Part 2; and
  - (b) any enforceable EU obligation in the field of public procurement in respect of a contract or design contest falling within the scope of Part 2.
- (2) That obligation is a duty owed to an economic operator from an EEA state.

**Duty owed to economic operators from certain other states**

- 90.**—(1) The duty owed in accordance with regulation 89 is a duty owed also to—
- (a) an economic operator from a GPA state, but only where the GPA applies to the procurement [concerned]; and
  - (b) an economic operator which is not from an EEA state or a GPA state, but only in the circumstances specified in paragraphs (4) to ().

*GPA economic operators*

- (2) For the purposes of paragraph (1)(a), the GPA applies to a procurement if—
- (a) the procurement may result in the award of a contract of any description; and
  - (b) at the relevant time—
    - (i) a GPA State has agreed with the EU that the GPA shall apply to a contract of that description; and
    - (ii) the economic operator is from that GPA state.

- (3) In this regulation—
- “GPA state” means any country, other than an EEA state, which at the relevant time is a signatory to the GPA; and
- “relevant time” means the date on which the contracting authority sent [a contract notice] in respect of the contract to the EU Publications Office or would have done so if it had been required by Part 2 to do so.

*Other economic operators*

- (4) [Marker for paragraphs to be included here to take account of ad hoc bilateral treaties with states that are not party to the GPA].

**Enforcement of duties through the Court**

- 91.**—(1) A breach of the duty owed in accordance with regulation 88 or 89 is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage.
- (2) Proceedings for that purpose must be started in the High Court, and regulations 92 to 104 apply to such proceedings.

**General time limits for starting proceedings**

- 92.**—(1) This regulation limits the time within which proceedings may be started where the proceedings do not seek a declaration of ineffectiveness.
- (2) Subject to paragraphs (3) to (5), such proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.
- (3) Paragraph (2) does not require proceedings to be started before the end of any of the following periods—
- (a) where the proceedings relate to a decision which is sent to the economic operator by facsimile or electronic means, 10 days beginning with—
    - (i) the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;

- (ii) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;
  - (b) where the proceedings relate to a decision which is sent to the economic operator by other means, whichever of the following periods ends first—
    - (i) 15 days beginning with the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;
    - (ii) 10 days beginning with—
      - (aa) the day after the date on which the decision is received, if the decision is accompanied by a summary of the reasons for the decision; or
      - (bb) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;
  - (c) where sub-paragraphs (a) and (b) do not apply but the decision is published, 10 days beginning with the day on which the decision is published.
- (4) Subject to paragraph (5), the Court may extend the time limits imposed by this regulation (but not any of the limits imposed by regulation 93) where the Court considers that there is a good reason for doing so.
- (5) The Court must not exercise its power under paragraph (4) so as to permit proceedings to be started more than 3 months after the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.
- (6) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is issued.

#### **Special time limits for seeking a declaration of ineffectiveness**

**93.**—(1) This regulation limits the time within which proceedings may be started where the proceedings seek a declaration of ineffectiveness.

- (2) Such proceedings must be started—
  - (a) where paragraph (3) or (5) applies, within 30 days beginning with the relevant date mentioned in that paragraph;
  - (b) in any event, within 6 months beginning with the day after the date on which the contract was entered into.
- (3) This paragraph applies where a relevant contract award notice has been published in the Official Journal, in which case the relevant date is the day after the date on which the notice was published.
- (4) For that purpose, a contract award notice is relevant if, and only if—
  - (a) the contract was awarded without prior publication of a contract notice; and
  - (b) the contract award notice includes justification of the decision of the contracting authority to award the contract without prior publication of a contract notice.
- (5) This paragraph applies where the contracting authority has informed the economic operator of—
  - (a) the conclusion of the contract; and
  - (b) a summary of the relevant reasons,

in which case the relevant date is the day after the date on which the economic operator was informed of the conclusion or, if later, was informed of a summary of the relevant reasons.

(6) In paragraph (5), “the relevant reasons” means the reasons which the economic operator would have been entitled to receive in response to a request under regulation 55(2).

(7) In this regulation, “contract award notice” means a notice in accordance with regulation 50(1).

(8) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is issued.

### **Starting proceedings**

**94.**—(1) Where proceedings are started, the economic operator must serve the claim form on the contracting authority within 7 days after the date of issue.

(2) Paragraph (3) applies where proceedings are started—

- (a) seeking a declaration of ineffectiveness; or
- (b) alleging a breach of regulation 87, 95 or 96(1)(b) where the contract has not been fully performed.

(3) In those circumstances, the economic operator must, as soon as practicable, send a copy of the claim form to each person, other than the contracting authority, who is a party to the contract in question.

(4) The contracting authority must, as soon as practicable, comply with any request from the economic operator for any information that the economic operator may reasonably require for the purpose of complying with paragraph (3).

(5) In this regulation, “serve” means serve in accordance with rules of court, and for the purposes of this regulation a claim form is deemed to be served on the day on which it is deemed by rules of court to be served.

### **Contract-making suspended by challenge to award decision**

**95.**—(1) Where—

- (a) a claim form has been issued in respect of a contracting authority’s decision to award the contract;
- (b) the contracting authority has become aware that the claim form has been issued and that it relates to that decision; and
- (c) the contract has not been entered into,

the contracting authority is required to refrain from entering into the contract.

(2) The requirement continues until any of the following occurs—

- (a) the Court brings the requirement to an end by interim order under regulation 96(1)(a);
- (b) the proceedings at first instance are determined, discontinued or otherwise disposed of and no order has been made continuing the requirement (for example in connection with an appeal or the possibility of an appeal).

(3) This regulation does not affect the obligations imposed by regulation 87.

### **Interim orders**

**96.**—(1) In proceedings, the Court may, where relevant, make an interim order—

- (a) bringing to an end the requirement imposed by regulation 95(1);
- (b) restoring or modifying that requirement;
- (c) suspending the procedure leading to—
  - (i) the award of the contract; or
  - (ii) the determination of the design contest,in relation to which the breach of the duty owed in accordance with regulation 89 or 90 is alleged;
- (d) suspending the implementation of any decision or action taken by the contracting authority in the course of following such a procedure.

(2) When deciding whether to make an order under paragraph (1)(a)—

- (a) the Court must consider whether, if regulation 95(1) were not applicable, it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract; and

(b) only if the Court considers that it would not be appropriate to make such an interim order may it make an order under paragraph (1)(a).

(3) If the Court considers that it would not be appropriate to make an interim order of the kind mentioned in paragraph (2)(a) in the absence of undertakings or conditions, it may require or impose such undertakings or conditions in relation to the requirement in regulation 95(1).

(4) The Court may not make an order under paragraph (1)(a) or (b) or (3) before the end of the standstill period.

(5) This regulation does not prejudice any other powers of the Court.

### **Remedies where the contract has not been entered into**

**97.**—(1) Paragraph (2) applies where—

- (a) the Court is satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with regulation 89 or 90; and
- (b) the contract has not yet been entered into.

(2) In those circumstances, the Court may do one or more of the following—

- (a) order the setting aside of the decision or action concerned;
- (b) order the contracting authority to amend any document;
- (c) award damages to an economic operator which has suffered loss or damage as a consequence of the breach.

(3) This regulation does not prejudice any other powers of the Court.

### **Remedies where the contract has been entered into**

**98.**—(1) Paragraph (2) applies if—

- (a) the Court is satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with regulation 89 or 90; and
- (b) the contract has already been entered into.

(2) In those circumstances, the Court—

- (a) must, if it is satisfied that any of the grounds for ineffectiveness applies, make a declaration of ineffectiveness in respect of the contract unless regulation 100 requires the Court not to do so;
- (b) must, where required by regulation 102, impose penalties in accordance with that regulation;
- (c) may award damages to an economic operator which has suffered loss or damage as a consequence of the breach, regardless of whether the Court also acts as described in subparagraphs (a) and (b);
- (d) must not order any other remedies.

(3) Paragraph (2)(d) is subject to regulation 103(3) and (9) (additional relief in respect of specific contracts where a framework agreement is ineffective) and does not prejudice any power of the Court under regulation 101(3) or 102(12) (orders which supplement a declaration of ineffectiveness or a contract-shortening order).

### **Grounds for ineffectiveness**

**99.**—(1) There are three grounds for ineffectiveness.

#### *The first ground*

(2) Subject to paragraph (3), the first ground applies where the contract has been awarded without prior publication of a contract notice in any case in which Part 2 required the prior publication of a contract notice.

- (3) The first ground does not apply if all the following apply—
- (a) the contracting authority considered the award of the contract without prior publication of a contract notice to be permitted by Part 2;
  - (b) the contracting authority has had published in the Official Journal a voluntary transparency notice expressing its intention to enter into the contract; and
  - (c) the contract has not been entered into before the end of a period of at least 10 days beginning with the day after the date on which the voluntary transparency notice was published in the Official Journal.

(4) In paragraph (3), “voluntary transparency notice” means a notice which contains the following information—

- (a) the name and contact details of the contracting authority;
- (b) a description of the object of the contract;
- (c) a justification of the decision of the contracting authority to award the contract without prior publication of a contract notice;
- (d) the name and contact details of the economic operator to be awarded the contract; and
- (e) where appropriate, any other information which the contracting authority considers it useful to include.

*The second ground*

(5) The second ground applies where all the following apply—

- (a) the contract has been entered into in breach of any requirement imposed by—
  - (i) regulation 87 (the standstill period);
  - (ii) regulation 95 (contract-making suspended by challenge to award); or
  - (iii) regulation 96(1)(b) (interim order restoring or modifying a suspension originally imposed by regulation 95);
- (b) there has also been a breach of the duty owed to the economic operator in accordance with regulation 89 or 90 in respect of obligations other than those imposed by regulation 87 (the standstill period) and this Chapter;
- (c) the breach mentioned in sub-paragraph (a) has deprived the economic operator of the possibility of starting proceedings in respect of the breach mentioned in sub-paragraph (b), or pursuing them to a proper conclusion, before the contract was entered into; and
- (d) the breach mentioned in sub-paragraph (b) has affected the chances of the economic operator obtaining the contract.

*The third ground*

(6) Subject to paragraph (7), the third ground applies where all the following apply—

- (a) the contract is based on a framework agreement or was awarded under a dynamic purchasing system;
- (b) the contract was awarded in breach of any requirement imposed by—
  - (i) regulation 33(11) (award of contracts based on framework agreements through re-opening of competition); or
  - (ii) regulation 34(22) to (25) (award of contracts under dynamic purchasing systems); and
- (c) the estimated value of the contract is equal to or exceeds the relevant threshold mentioned in regulation 5.

(7) The third ground does not apply if all the following apply—

- (a) the contracting authority considered the award of the contract to be in accordance with the provisions mentioned in paragraph (6)(b)(i) or (ii);
- (b) the contracting authority has, despite regulation 86(5)(c), voluntarily complied with the requirements set out in regulation 86(1) to (4); and

- (c) the contract has not been entered into before the end of the standstill period.

### **General interest grounds for not making a declaration of ineffectiveness**

**100.**—(1) Where the Court is satisfied that any of the grounds for ineffectiveness applies, the Court must not make a declaration of ineffectiveness if—

- (a) the contracting authority or another party to the proceedings raises an issue under this regulation; and
- (b) the Court is satisfied that overriding reasons relating to a general interest require that the effects of the contract should be maintained.

(2) For that purpose, economic interests in the effectiveness of the contract may be considered as overriding reasons only if in exceptional circumstances ineffectiveness would lead to disproportionate consequences.

(3) However, economic interests directly linked to the contract cannot constitute overriding reasons relating to a general interest.

(4) For that purpose, economic interests directly linked to the contract include—

- (a) the costs resulting from the delay in the execution of the contract;
- (b) the costs resulting from the commencement of a new procurement procedure;
- (c) the costs resulting from change of the economic operator performing the contract; and
- (d) the costs of legal obligations resulting from the ineffectiveness.

(5) For the purposes of paragraph (1)(b), overriding reasons may be taken to require that the effects of the contract should be maintained even if they do not require the Court to refrain from shortening the duration of the contract by an order under regulation 102(3)(a).

### **The consequences of ineffectiveness**

**101.**—(1) Where a declaration of ineffectiveness is made, the contract is to be considered to be prospectively, but not retrospectively, ineffective as from the time when the declaration is made and, accordingly, those obligations under the contract which at that time have yet to be performed are not to be performed.

(2) Paragraph (1) does not prevent the exercise of any power under which the orders or decisions of the Court may be stayed, but at the end of any period during which a declaration of ineffectiveness is stayed, the contract is then to be considered to have been ineffective as from the time when the declaration had been made.

(3) When making a declaration of ineffectiveness, or at any time after doing so, the Court may make any order that it thinks appropriate for addressing—

- (a) the implications of paragraph (1) or (2) for the particular circumstances of the case;
- (b) any consequential matters arising from the ineffectiveness.

(4) Such an order may, for example, address issues of restitution and compensation as between those parties to the contract who are parties to the proceedings so as to achieve an outcome which the Court considers to be just in all the circumstances.

(5) Paragraph (6) applies where the parties to the contract have, at any time before the declaration of ineffectiveness is made, agreed by contract any provisions for the purpose of regulating their mutual rights and obligations in the event of such a declaration being made.

(6) In those circumstances, the Court must not exercise its power to make an order under paragraph (3) in any way which is inconsistent with those provisions, unless and to the extent that the Court considers that those provisions are incompatible with the requirement in paragraph (1) or (2).

## **Penalties in addition to, or instead of, ineffectiveness**

**102.**—(1) Where the Court makes a declaration of ineffectiveness, it must also order that the contracting authority pay a civil financial penalty of the amount specified in the order.

(2) Paragraph (3) applies where—

- (a) in proceedings for a declaration of ineffectiveness, the Court is satisfied that any of the grounds for ineffectiveness applies but does not make a declaration of ineffectiveness because regulation 100 requires it not to do so; or
- (b) in any proceedings, the Court is satisfied that the contract has been entered into in breach of any requirement imposed by regulation 87, 95 or 96(1)(b), and does not make a declaration of ineffectiveness (whether because none was sought or because the Court is not satisfied that any of the grounds for ineffectiveness applies).

(3) In those circumstances, the Court must order at least one, and may order both, of the following penalties—

- (a) that the duration of the contract be shortened to the extent specified in the order;
- (b) that the contracting authority pay a civil financial penalty of the amount specified in the order.

(4) When the Court is considering what order to make under paragraph (1) or (3), the overriding consideration is that the penalties must be effective, proportionate and dissuasive.

(5) In determining the appropriate order, the Court must take account of all the relevant factors, including—

- (a) the seriousness of the relevant breach of the duty owed in accordance with regulation 89 or 90;
- (b) the behaviour of the contracting authority;
- (c) where the order is to be made under paragraph (3), the extent to which the contract remains in force.

(6) Where more than one economic operator starts proceedings in relation to the same contract, paragraph (4) applies to the totality of penalties imposed in respect of the contract.

### *Civil financial penalties*

(7) Subject to paragraph (8), where a contracting authority is ordered by the High Court of England and Wales to pay a civil financial penalty under this regulation—

- (a) the Court's order must state that the penalty is payable to the Minister for the Cabinet Office;
- (b) the Court must send a copy of the order to the Minister;
- (c) the contracting authority must pay the penalty to the Minister; and
- (d) the Minister must, on receipt of the penalty, pay it into the Consolidated Fund.

(8) Where the Minister for the Cabinet Office, or the Cabinet Office, is ordered to pay a civil financial penalty under this Chapter—

- (a) paragraph (7) does not apply; and
- (b) the Minister for the Cabinet Office must pay the penalty into the Consolidated Fund.

(9) Subject to paragraph (10), where a contracting authority is ordered by the High Court of Northern Ireland to pay a civil financial penalty under this regulation—

- (a) the Court's order must state that the penalty is payable to the Department of Finance and Personnel;
- (b) the Court must send a copy of the order to the Department;
- (c) the contracting authority must pay the penalty to the Department; and
- (d) the Department must, when it receives the penalty, pay it into the Consolidated Fund of Northern Ireland.

(10) Where the Department of Finance and Personnel is ordered to pay a civil financial penalty under this Chapter—

- (a) paragraph (9) does not apply; and
- (b) the Department must pay the penalty into the Consolidated Fund of Northern Ireland.

(11) Where a contracting authority is a non-Crown body—

- (a) any payment due under paragraph (7) may be enforced by the Minister for the Cabinet Office as a judgment debt due to the Minister; and
- (b) any payment due under paragraph (9) may be enforced by the Department of Finance and Personnel as a judgment debt due to it.

#### *Contract shortening*

(12) When making an order under paragraph (3)(a), or at any time after doing so, the Court may make any order that it thinks appropriate for addressing the consequences of the shortening of the duration of the contract.

(13) Such an order may, for example, address issues of restitution and compensation as between those parties to the contract who are parties to the proceedings so as to achieve an outcome which the Court considers to be just in all the circumstances.

(14) Paragraph (15) applies where the parties to the contract have, at any time before the order under paragraph 3(a) is made, agreed by contract any provisions for the purpose of regulating their mutual rights and obligations in the event of such an order being made.

(15) In those circumstances, the Court must not exercise its power to make an order under paragraph (12) in any way which is inconsistent with those provisions, unless and to the extent that the Court considers that those provisions are incompatible with the primary order that is being made, or has been made, under paragraph (3)(a).

(16) In paragraph (3)(a), “duration of the contract” refers only to its prospective duration as from the time when the Court makes the order.

#### **Ineffectiveness etc. in relation to specific contracts based on a framework agreement**

**103.**—(1) In this regulation, “specific contract” means a contract which—

- (a) is based on the terms of a framework agreement; and
- (b) was entered into before a declaration of ineffectiveness (if any) was made in respect of the framework agreement.

(2) A specific contract is not to be considered to be ineffective merely because a declaration of ineffectiveness has been made in respect of the framework agreement.

(3) Where a declaration of ineffectiveness has been made in respect of the framework agreement, the Court must, subject to paragraph (5), make a separate declaration of ineffectiveness in respect of each relevant specific contract.

(4) For that purpose, a specific contract is relevant only if a claim for a declaration of ineffectiveness in respect of that specific contract has been made—

- (a) within the time limits mentioned in regulation 93 as applicable to the circumstances of the specific contract;
- (b) regardless of whether the claim was made at the same time as any claim for a declaration of ineffectiveness in respect of the framework agreement.

(5) Regulation 100 (general interest grounds for not making a declaration of ineffectiveness) applies for the purposes of paragraph (3), insofar as the overriding reasons relate specifically to the circumstances of the specific contract.

(6) This regulation does not prejudice the making of a declaration of ineffectiveness in relation to a specific contract in accordance with other provisions of this Part on the basis of—

- (a) the third ground of ineffectiveness set out in regulation 99(6) and (7); or
- (b) the second ground of ineffectiveness set out in regulation 99(5), where—

- (i) the relevant breach of the kind mentioned in regulation 99(5)(a) is entering into the specific contract in breach of regulation 95 or 96(1)(b); and
- (ii) the relevant breach of the kind mentioned in regulation 99(5)(b) relates specifically to the award of the specific contract and the procedure relating to that award, rather than to the award of the framework agreement and the procedure relating to it.

(7) A declaration of ineffectiveness must not be made in respect of a specific contract otherwise than in accordance with paragraph (3) or on a basis mentioned in paragraph (6).

(8) Where a declaration of ineffectiveness is made in respect of a specific contract in accordance with paragraph (3)—

- (a) regulation 101 (the consequences of ineffectiveness) applies;
- (b) regulation 102(1) (requirement to impose a civil financial penalty) does not apply.

(9) Where the Court refrains, by virtue of paragraph (5), from making a declaration of ineffectiveness which would otherwise have been required by paragraph (3), the Court must, subject to paragraph (10), order that the duration of the contract be shortened to the extent specified in the order.

(10) The extent by which the duration of the contract is to be shortened under paragraph (9) is the maximum extent, if any, which the Court considers to be possible having regard to what is required by the overriding reasons mentioned in paragraph (5).

(11) In paragraphs (9) and (10), “duration of the contract” refers only to its prospective duration as from the time when the Court makes the order.

### **Injunctions against the Crown**

**104.** In proceedings against the Crown, the Court has power to grant an injunction despite section 21 of the Crown Proceedings Act 1947(a).

## **PART 4**

### **BELOW-THRESHOLD PROCUREMENTS**

#### **Scope of Part 4**

**105.**—(1) This Part applies to procurements by contracting authorities with respect to public contracts where Part 2 does not apply because the estimated value of the procurement falls below the relevant threshold mentioned in regulation 5.

(2) This Part does not apply in any of the following cases:—

- (a) where Part 2 would not have applied even if the estimated value of the procurement had been above the relevant threshold mentioned in regulation 5;
- (b) where the contracting authority is a central government authority and the procurement has a value net of VAT estimated to be less than £10,000;
- (c) where the contracting authority is a sub-central contracting authority and the procurement has a value net of VAT estimated to be less than £25,000;
- (d) the procurement of health care services for the purposes of the NHS within the meaning and scope of the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013(b).

(3) For the purposes of paragraph (2)(b) and (c) and regulation 107(2)(b), the estimated value of the procurement shall be calculated on the basis set out in regulation 6(1) to (5), (7) to (10) and

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(a) 1947 c.44  
(b) S.I. 2013/500.

(16) to (19), but as if the reference to a call for competition in regulation 6(7) were a reference to the publication of information on Contracts Finder in accordance with regulation 106.

(4) A procurement shall not be subdivided with the effect of preventing it from falling within the scope of this Part, unless justified by objective reasons.

### **Publication of contract opportunities**

**106.**—(1) Before awarding a public contract [to which this Part applies], a contracting authority shall advertise the opportunity by publishing information on Contracts Finder.

(2) Paragraph (1) does not apply where—

- (a) the contracting authority awards the contract without having advertised the opportunity in any other way; or
- (b) the contracting authority is a maintained school or an Academy.

(3) For the purposes of paragraph (2)(a) and (4)—

- (a) a contracting authority advertises an opportunity if it does anything to put the opportunity in the public domain or bring the opportunity to the attention of economic operators generally or to any class or description of economic operators which is potentially open-ended, with a view to receiving responses from economic operators who wish to be considered for the award of the contract; and
- (b) accordingly, a contracting authority does not advertise an opportunity where it makes the opportunity available only to a number of particular economic operators who have been selected for that purpose (whether ad hoc or by virtue of their membership of some closed category such as a framework agreement), regardless of how it draws the opportunity to the attention of those economic operators.

(4) Where, in the overall process leading to the award of a contract, an opportunity is advertised at one stage but not another (for example, where the opportunity to become a member of a framework agreement is advertised, but the subsequent opportunities to be awarded particular contracts under such a framework are not advertised), then paragraph (1) applies to the opportunity that is advertised.

(5) The information to be published on Contracts Finder shall include at least the following:—

- (a) the time by which any interested economic operator must respond if it wishes to be considered;
- (b) how and to whom such an economic operator is to respond; and
- (c) any other requirements for participating in the procurement.

(6) The contracting authority shall ensure that the information remains published on Contracts Finder for a sufficient period of time for interested economic operators to become aware of it.

(7) For the purposes of paragraphs (5)(a) and (6), the time shall be reasonable [and proportionate] [in all the circumstances].

(8) Where paragraph (1) applies—

- (a) the contracting authority shall not advertise the opportunity in other ways before it has been published on Contracts Finder; and
- (b) the contracting authority shall ensure that any relevant contract documents are available free of charge on a website to which a link is provided within the information published on Contracts Finder.

(9) For the purposes of paragraph (8)(b), a document is a relevant contract document if—

- (a) it contains information about the opportunity which goes beyond the information published on Contracts Finder, and
- (b) that information is intended by the contracting authority to be taken into account by those responding to the advertisement.

(10) In complying with this regulation, contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office in relation to—

- (a) the form and manner in which information is to be published on Contracts Finder;
- (b) what is—
  - (i) a sufficient period of time for the purposes of paragraph (6);
  - (ii) a reasonable [and proportionate] time for the purposes of paragraph (7).

(11) In this regulation, “Contracts Finder” means a web-based portal provided, under that name, by or on behalf of the Cabinet Office.

### **Assessing suitability etc**

**107.**—(1) A contracting authority shall not include a pre-qualification stage in any procurement [to which this Part applies].

(2) Paragraph (1) does not apply if both the following criteria are met:—

- (a) the relevant threshold for the purposes of regulation 105(1) is that set out in regulation 5(1)(a) or (d); and
- (b) the procurement has a value net of VAT estimated to be equal to or greater than the threshold [set out in]—
  - (i) regulation 5(1)(b) where the contracting authority is a central government authority; or
  - (ii) regulation 5(1)(c) where the contracting authority is a sub-central contracting authority.

(3) In paragraph (1), “pre-qualification stage” means a stage in the procurement process during which the contracting authority assesses the suitability[, or unsuitability], of candidates to perform a contract for the purpose of reducing the number of candidates to a smaller number who are to proceed to a later stage of the process.

(4) In any event, contracting authorities may ask candidates to answer a suitability assessment question only if the question is—

- (a) relevant to the subject-matter of the procurement, and
- (b) proportionate.

(5) In paragraph (4), “suitability assessment question” means a question which relates to information or evidence which the contracting authority requires for [the] purpose of assessing whether candidates meet minimum standards of suitability, capability, legal status or financial standing.

(6) In complying with this regulation, contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office, which may include guidance on how to establish and assess, without using questionnaires which infringe paragraph (4), whether candidates meet requirements or minimum standards relating to suitability, capability, legal status and financial standing.

(7) Where a contracting authority conducts a procurement [to which this Part applies] in a way which represents a reportable deviation from the guidance issued under paragraph (6), the contracting authority shall send to the Cabinet Office a report explaining the deviation.

(8) For that purpose, something is a reportable deviation only if it meets criteria laid down for that purpose in guidance issued under paragraph (6).

(9) In this regulation, “candidate” means an economic operator that wishes to be considered for the award of a contract in [a procurement to which this Part applies].

### **Publication of information about contracts awarded**

**108.**—(1) Where a public contract [to which this Part applies] is awarded, the contracting authority shall publish on Contracts Finder at least the following information:—

- (a) the name of the contractor;
- (b) the date on which the contract was [concluded/entered into];
- (c) the [value] of the contract;
- (d) whether the contractor is a SME or VCSE.

(2) Paragraph (1) does not apply where the contracting authority is a maintained school or an Academy.

(3) In complying with this regulation, contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office on the form and manner in which, and the time within which, the information is to be published on Contracts Finder.

(4) In paragraph (1)(d)—

“SME” means an enterprise falling within the category of micro, small and medium-sized enterprises defined by the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises<sup>(a)</sup>; and

“VCSE” means a non-governmental organisation that is value-driven and which principally reinvests its surpluses to further social, environmental or cultural objectives.

### **Validity of contracts**

**109.** Where a public contract has been entered into, its validity shall not be affected in any way by reason only of any material failure to have complied with any requirement of this Part.

## **PART 5**

### **MISCELLANEOUS OBLIGATIONS**

#### **Qualitative selection in Part 2 procurements**

**110.**—(1) In procurements to which Part 2 applies, contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office in relation to the qualitative selection of economic operators.

(2) In this regulation, “qualitative selection” means the processes by which, in accordance with regulations 57 to 64, contracting authorities—

- (a) select economic operators to participate in procurement procedures, and
- (b) decide whether to exclude economic operators from such participation.

(3) Such guidance may, in particular relate to—

- (a) the use of questionnaires for the purposes of qualitative selection, including the avoidance of burdensome, excessive or disproportionate questions;
- (b) the assessment of information relevant to qualitative assessment.

(4) Where a contracting authority conducts a procurement to which Part 2 applies in a way which represents a reportable deviation from the guidance issued under this regulation, the contracting authority shall send to the Cabinet Office a report explaining the deviation.

(5) For that purpose, something is a reportable deviation only if it meets criteria laid down for that purpose in guidance issued under this regulation.

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(a) OJ No L 124, 20.5.2003, p.36.

## **Publication of information on Contracts Finder about certain contracts awarded under Part 2**

**111.**—(1) This regulation applies where a contracting authority awards a public contract to which Part 2 applies and does not send a contract award notice in respect of that contract to the EU Publications Office for publication pursuant to regulation 50 (read with regulation 51(1)) or regulation 51(5).

(2) In those circumstances, the contracting authority shall comply with regulation 108 [as if the contract were one to which Part 4 applies].

## **Payment of undisputed invoices within 30 days by contracting authorities and subcontractors**

**112.**—(1) Paragraph (2) applies to all public contracts except the following:—

- (a) contracts for the procurement of health care services for the purposes of the NHS within the meaning and scope of the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013(a);
- (b) contracts awarded by a contracting authority which is a maintained school or an Academy.

(2) Contracting authorities shall ensure that every public contract which they award contains suitable provisions to require the following:—

- (a) that any payment due from the contracting authority to the contractor under the contract is to be made no later than the end of a period of 30 days from the date on which the relevant invoice is regarded as valid and undisputed;
- (b) that any invoices for payment submitted by the contractor are considered and verified by the contracting authority in a timely fashion and that undue delay in doing so is not to be regarded as sufficient justification for failing to treat an invoice as valid and undisputed; and
- (c) that any subcontract awarded by the contractor imposes, as between the parties to the subcontract—
  - (i) obligations similar to those which sub-paragraphs (a) and (b) require to be imposed as between the parties to the public contract; and
  - (ii) an obligation requiring the subcontractor to include in any subcontract which it in turn awards provisions imposing, as between the parties to that subcontract, requirements similar to those required by paragraphs (i) and (ii) of this sub-paragraph.

(3) Paragraph (2) is without prejudice to any contractual or statutory provision under which any payment is to be made earlier than the time required by that paragraph.

(4) In complying with paragraph (2), contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office.

(5) Such guidance may, in particular, recommend model provisions, including provisions defining the circumstances in which an invoice is to be regarded as being, or as having become, valid and undisputed (including, for example, provisions deeming them to have become valid and undisputed if not considered and verified in a timely manner and addressing what is to be considered a timely manner in various circumstances).

(6) To the extent that a public contract does not contain express provisions dealing with any of the matters which, in accordance with paragraph (2), should have been contained in that contract or subcontract, it shall be an implied term of the contract that—

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(a) S.I. 2013/500.

- (a) any payment due under it from the contracting authority to the contractor is to be made no later than the end of a period of 30 days from the date on which the contracting authority completes any process of verification that the invoice is valid and undisputed;
- (b) the contracting authority is to consider and verify any invoice submitted by the contractor in a timely manner with a view to ascertaining whether the invoice is valid and undisputed; and
- (c) the contractor will include in any subcontract which it awards provisions—
  - (i) imposing, as between the parties to that subcontract, requirements to the same effect as those which sub-paragraphs (a) and (b) refer to as between the parties to the public contract; and
  - (ii) requiring the subcontractor party to that subcontract to include in any subcontract which it in turn awards provisions imposing, as between the parties to that subcontract, requirements to the same effect as those referred to in paragraphs (i) and (ii) of this sub-paragraph.

(7) At least once every year, each contracting authority shall publish on the internet statistics showing, for the preceding 12 months, how far it has actually complied with its obligations under this regulation to make payments within 30 days, including—

- (a) the number of invoices that were not paid in accordance with those obligations;
- (b) the total amount of any liability (whether statutory or otherwise) to pay interest which accrued by virtue of circumstances amounting to a breach of those obligations; and
- (c) the total amount of interest actually paid in discharge of any such liability (including any which had accrued before the beginning of the period to which the statistics relate).

(8) In paragraph (7), “the preceding 12 months” means any period of 12 months ending less than three months before the date on which the statistics are published.

(9) In complying with paragraph (7), contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office.

(10) Such guidance may, in particular, recommend model templates for presenting the statistics.

(11) In this regulation—

“public contract” (except in paragraph (1)) means a public contract to which paragraph (2) applies;

“subcontract” means a contract between [two or more] suppliers (at any stage of remoteness from the contracting authority in a subcontracting chain) made wholly for the purpose of performing (or contributing to the performance of) the whole or any part of a public contract; and

“supplier” means a party to a contract or subcontract under which that party is to execute any [works], supply any products or provide any services.

### **Validity of contracts**

**113.** Where a public contract has been entered into, its validity shall not be affected in any way by reason only of any material failure to have complied with any requirement of this Part.

## PART 6

### REVOCATIONS, CONSEQUENTIAL AMENDMENTS, SAVINGS AND TRANSITIONAL PROVISIONS

#### Interpretation of Part 6

**114.** In this Part, “the 2006 Regulations” means the Public Contracts Regulations 2006(a).

#### Revocations and consequential amendments

**115.**—(1) The 2006 Regulations are revoked.

(2) [*Other revocations and consequential amendment of other legislation: yet to be drafted. Likely to be included in a Schedule*]

#### General saving in respect of certain concession contracts

**116.**—(1) Nothing in these Regulations affects—

- (a) public works concession contracts within the meaning of the 2006 Regulations, or
- (b) services concession contracts within the meaning of the 2006 Regulations.

(2) Accordingly, the 2006 Regulations [and other provisions repealed, revoked or amended by regulation 115 which refer to the 2006 Regulations] continue to have effect, where relevant in accordance with their own terms, in relation to such contracts.

#### Transitional provision and saving where procurement procedure commenced before [*date to be copied from regulation 1(2)*]

**117.**—(1) Nothing in these Regulations affects any contract award procedure commenced before [*date to be copied from regulation 1(2)*].

(2) For that purpose, a contract award procedure has been commenced before [*date to be copied from regulation 1(2)*] if, before that date—

- (a) a contract notice has been sent to the Official Journal in accordance with the 2006 Regulations in order to invite offers or requests to be selected to tender for or to negotiate in respect of a proposed public contract, framework agreement or dynamic purchasing system;
- (b) the contracting authority has had published any form of advertisement seeking offers or expressions of interest in a proposed public contract, framework agreement or dynamic purchasing system; or
- (c) the contracting authority has contacted any economic operator in order to—
  - (i) seek expressions of interest or offers in respect of a proposed public 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 public contract, framework agreement or dynamic purchasing system.

(3) Nothing in these Regulations affects the award of a specific contract based on a framework agreement where the framework agreement was concluded—

- (a) before [*date to be copied from regulation 1(2)*]; or
- (b) on or after that date following a contract award procedure which, by virtue of paragraph (1), was not affected by these Regulations.

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(a) S.I. 2006/5 [amendments?]

(4) Nothing in these Regulations affects the award of a specific contract under a dynamic purchasing system where the system was established—

- (a) before [*date to be copied from regulation 1(2)*]; or
- (b) on or after that date following a contract award procedure which, by virtue of paragraph (1), was not affected by these Regulations.

(5) Accordingly, the 2006 Regulations [and other provisions repealed, revoked or amended by regulation 115] continue to have effect, where relevant in accordance with their own terms, in relation to anything which, by virtue of paragraphs (1) to (4), is not affected by these Regulations.

(6) In this regulation, “dynamic purchasing system”, “framework agreement” and “public contract” have the same meanings as in the 2006 Regulations.

### **Temporary exemption and saving for certain NHS procurements**

**118.**—(1) Nothing in these Regulations affects any contract award procedure that—

- (a) relates to the procurement of health care services for the purposes of the NHS within the meaning and scope of the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013(a), and
- (b) is commenced before 18th April 2016.

(2) For that purpose, a contract award procedure has been commenced before 18th April 2016 if, before that date, any of the events mentioned in regulation 117(2)(a) to (c) has occurred.

(3) Accordingly, the 2006 Regulations [and other provisions repealed, revoked or amended by regulation 115] continue to have effect, where relevant in accordance with their own terms, in relation to anything which, by virtue of paragraph (1), is not affected by these Regulations.

### **Transitory provision prior to full commencement of regulation 22(1) to (7)**

**119.**—(1) This regulation applies during the period beginning on the date mentioned in regulation 1(2) and ending immediately before the date mentioned in regulation 1(3)(c).

(2) During that period, contracting authorities may choose between the following means of communication for the purposes mentioned in paragraph (3):—

- (a) electronic means in accordance with regulation 22;
- (b) post or other suitable carrier;
- (c) fax;
- (d) a combination of those means.

(3) That choice is available for all communication and information exchange in respect of which both the following criteria are met:—

- (a) the use of electronic means would, in accordance with regulation 22(1) to (7), have been required if those provisions had been in force;
- (b) the use of electronic means is not required [by any provision of these Regulations other than regulation 22(1)].

### **Complying with regulation 112(7) before 1st April 2016**

**120.**—(1) Contracting authorities shall publish the first statistics required by regulation 112(7) between [*date copied from regulation 1(2)*] and [*date 3 months after that date*].

(2) In relation to any period of 12 months ending before 1st April 2016, a contracting authority may comply with regulation 112(7) as if sub-paragraph (b) referred to the total amount of interest actually paid instead of the total amount of liability accrued.

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(a) S.I. 2013/500.

Date of signature

## SCHEDULE 1

Regulation 2(1)

### CENTRAL GOVERNMENT AUTHORITIES

This Schedule will transpose Annex I to the Directive by listing relevant domestic central government authorities for the purposes of the definition of “central government authorities” in regulation 2(1).

## SCHEDULE 2

Regulations 2(1) and 13(1)(a)(i)

### ACTIVITIES CONSTITUTING WORKS

This Schedule will reproduce in substance the table set out in Annex II to the Directive (which lists activities relevant to the definition of “public works contracts” in regulation 2(1) and to the more specific sub-category of civil engineering works mentioned in regulation 13(1)(a)(i).

## SCHEDULE 3

Regulations 5(1)(d) and 74

### SOCIAL AND OTHER SPECIFIC SERVICES

This Schedule will reproduce Annex XIV to the Directive (which lists the social and other specific services to which the ‘Light Touch regime’ in section 7 of the Regulations will apply).

## SCHEDULE 4

Regulation 5(2)(a)

### LIST OF PRODUCTS RELEVANT TO THRESHOLDS

This Schedule will reproduce Annex III to the Directive (which lists certain products which may affect the relevant threshold – see regulation 5(2)(a)).

## SCHEDULE 5

Regulations 27 to 29, 48  
to 50, 72, 75 and 79

### INFORMATION TO BE INCLUDED IN OJEU NOTICES

This Schedule will reproduce the content of Annex V to the Directive (which specifies the information to be included in OJEU notices, as required by regulations 27(4)(a), 28(1) and (6)(a), 29(1), 48(2), (3) and (6)(c), 49(2), 50(2), 72(4), 75(1)(a) and (b)(ii) and (3), and 79(5)).

## SCHEDULE 6

Regulation 58(5)

### PROFESSIONAL AND TRADE REGISTERS ETC.

This Schedule will reproduce the content of Annex XI to the Directive (which lists the registers and other requirements referred to in regulation 58(5)).

