

*These are draft Regulations as issued by the Cabinet Office for consultation on 21st August 2015
and should be read in conjunction with the Consultation Document of that date.*

S T A T U T O R Y I N S T R U M E N T S

2016 No.

PUBLIC PROCUREMENT

The Utilities Contracts Regulations 2016

<i>Made</i>	- - - -	2016
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SCHEDULE 1 — ACTIVITIES CONSTITUTING WORKS
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The Minister for the Cabinet Office makes these Regulations in exercise of the powers conferred by that section 2(2) of, as read with paragraph 1A(a) 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.

(a) 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]

PART 1
GENERAL
CHAPTER 1

CITATION, COMMENCEMENT, EXTENT, DEFINITIONS AND SUBJECT-MATTER

Citation, commencement and extent

1.—(1) These Regulations may be cited as the Utilities Contracts Regulations 2016.

Commencement

(2) Except for the provisions mentioned in paragraphs (3) and (4), these Regulations come into force on 18 April 2016.

(3) Paragraphs (1) to (7) of regulation 40 come into force—

- (a) for the purposes of regulations 45(6), 52(13), 54(4), 73(4) and *[to be inserted from Part 6]* on 18 April 2016
- (b) for the purposes of regulation 55(7), on 18th April 2017;
- (c) for all other purposes, on 18th October 2018.

(4) Regulation 55(7) comes into force on 18th April 2017.

Extent

(5) *[Note: These Regulations are intended to extend to and apply in Scotland in relation to implementation which is for the UK Government. Drafting to be adjusted to give effect to that intention]*

Definitions

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

“accelerated open procedure” means an open procedure in which the utility has exercised the power conferred by regulation 45(5) to fix a time limit for the receipt of tenders which is shorter than the minimum specified in regulation 45(2).

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

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

“call for competition” means a call for competition made in a manner permitted by regulation 44(4) or, where relevant, one of the notices referred to in regulation 91(1) or a contest notice;

“candidate” means an economic operator that has sought an invitation or has been invited to take part in a restricted or negotiated procedure, a competitive dialogue or an innovation partnership;

“central purchasing body” means a utility, within the meaning of regulation 5, or a contracting authority, within the meaning of regulation 2(1) of the Public Contracts Regulations, which provide centralised purchasing activities and which may also provide ancillary purchasing activities;

“centralised purchasing activities” has the meaning given by regulation 55(10);

“the Commission” means the European Commission;

“contest notice” means the notice referred to in regulation 95(1);

“contract notice” means the notice referred to in regulation 69 or, where relevant, 91(1)(a);

“contracting authorities” has the meaning given to it by regulation 4;

“CPV” means the Common Procurement Vocabulary as adopted by Regulation (EC) No. 2195/2002 of the European Parliament and of the Council(a);

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

“design contests” means those procedures which enable a utility to acquire, mainly in the fields of town and country planning, architecture, 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;

“disabled”, in relation to a person, means a disabled person within the meaning of the Equality Act 2010(c) and, in relation to a worker, means a disabled person who is a worker;

“dynamic purchasing system” means the system referred to in regulation 52;

“economic operator” means any person, or a utility, or a group of such persons or utilities or both, including any temporary associations of undertakings, which offers the execution of works 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 other electromagnetic means;

“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;

“framework agreement” has the meaning given by regulation 51(2);

“GPA” means the Agreement on Government Procurement between certain parties to the World Trade Organisation signed in Marrakesh on 15th April 1994 as amended(d);

“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 including with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy(e) 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, except in regulation 49(18) and (19), an invitation which a utility sends in order to comply with regulation 74(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 question in order to obtain the label concerned;

“legal person” means a person, whether governed by private law or public law, other than a natural person;

“life cycle” means all stages which are consecutive or interlinked, 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

(a) OJ No L 340, 16.12.2002, p. 1.

(b) [S.I. 2011/1848]

(c) 2010 c.15

(d) All the substantive provisions of the Agreement were substituted by the Protocol which was approved, on behalf of the EU, by Council Decision 2014/115/EU (OJ No L 68, 7.3.2014, p1), to which the text of the Protocol is attached (at OJ No L 68, 7.3.2014, p2). In accordance with Article 3 of the Protocol, the Protocol has entered into force in the EU.

(e) to be inserted [see recital 4]

service, from raw material acquisition or generation of resources to disposal, clearance and end of service or utilisation;

“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 European Union;

“periodic indicative notice” means the notice referred to in regulation 67, or where relevant, 91(1)(b);

“procurement” means the acquisition by means of a works, supply or service contract of works, supplies or services by one or more utilities from economic operators chosen by those utilities, provided that the works, supplies or services are intended for the pursuit of one of the activities referred to in regulations 9 to 15;

“procurement document” means any document produced or referred to by the utility to describe or determine elements of the procurement or the procedure, including the contract notice, the periodic indicative notice or the notices on the existence of a qualification system where they are 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;

“Public Contracts Regulations” means the Public Contracts Regulations 2015(a);

“selection criteria”, means, except in regulation 96, selection criteria set out by the utility in accordance with regulations 78 or 80, or both;

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

“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;

“supply contracts” means 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;

“supply, works and service contracts” means contracts for pecuniary interest concluded in writing between one or more utilities and one or more economic operators and having as their object the execution of works, the supply of products or the provision of services.

“technical specifications” has the meaning given by regulation 60(3);

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

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

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

“Utilities Contracts Directive” means Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014(d);

“utilities” has the meaning given to it by regulation 5;

“VAT” means value added tax;

“a work” 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; but “works” is to be interpreted in accordance with paragraph (2);

“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(e);

(a) S.I. 2015/102, as amended by S.I. 2016/***

(b) OJ No C 115, 9.5.2008, p47.

(c)

(d) [insert when ref available]

(e) 1971 c.80

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

- (a) the execution, or both the design and execution, of works related to one of the activities specified in Schedule 1;
- (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 utility exercising decisive influence on the type or design of the work; 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) Except in Part 5 and unless the context otherwise requires, any expression used both in these regulations and in the Utilities Contracts Directive has the meaning that it bears in that Directive.

(3) In these Regulations (except regulation 72(4)), any reference to a period of time, however expressed, is to be interpreted subject to the following requirements:—

- (a) the period must include at least 2 working days; and
- (b) where the period is to be calculated from the moment at which an action takes place or other event occurs, the day during which that action takes place or that event occurs is not be counted in the calculation of that period.

(4) In these Regulations, any reference to a period of time which is expressed otherwise than in hours is to be interpreted subject to the requirement that where the period—

- (a) is to be calculated by counting forwards in time from a given date or event, and
- (b) would (but for this paragraph) have ended on a day which is not a working day,

the period is to end at the end of the next working day.

Subject-matter and scope

3.—(1) Parts 1 to 4 establish rules on the procedures for procurement by utilities with respect to contracts and design contests, which—

- (a) have a value estimated to be not less than the threshold mentioned in regulation 16, and
- (b) are not excluded from the scope of Parts 1 to 4 by any other provision in Chapters 2 and 3 of this Part.

(2) Parts 1 to 4 are subject to Article 346 of TFEU.

(3) The scope of Parts 1 to 4 does not include non-economic services of general interest.

Contracting authorities

4.—(1) In these Regulations, “contracting authorities” means State, regional or local authorities (including the Crown, but not including Her Majesty in her private capacity), bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law.

(2) “Bodies governed by public law” means any 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:—
 - (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.

Utilities

5.—(1) For the purpose of these Regulations, utilities are entities which:—

- (a) are contracting authorities or public undertakings and which pursue one of the activities referred to in regulations 9 to 15;
- (b) are not contracting authorities or public undertakings, but whose activities include an activity referred to in regulations 9 to 15 and operate on the basis of special or exclusive rights granted by a competent authority.

Public undertaking

(2) In this regulation, “public undertaking” means any undertaking over which contracting authorities may exercise directly or indirectly a dominant influence by virtue of:—

- (a) their ownership of that undertaking;
- (b) their financial participation in that undertaking; or
- (c) the rules which govern that undertaking.

(3) For the purposes of paragraph (2), a dominant influence on the part of contracting authorities shall be presumed in any of the following cases in which those authorities, directly or indirectly:—

- (a) hold the majority of the undertaking’s subscribed capital;
- (b) control the majority of the votes attaching to shares issued by the undertaking;
- (c) can appoint more than half of the undertaking’s administrative, management or supervisory body.

Special or exclusive rights

(4) In this regulation, “special or exclusive rights” mean rights granted by a competent authority by way of any legislative, regulatory or administrative provision, the effect of which is to limit the exercise of activities referred to in regulations 9 to 15 to one or more utilities, and which substantially affects the ability of other entities to carry out such activity.

(5) For the purposes of paragraph (4), rights which have been granted by means of a procedure in which:—

- (a) adequate publicity has been ensured; and
- (b) where the granting of those rights was based on objective criteria

shall not constitute “special or exclusive rights”.

(6) The procedures referred to in paragraph (5) include:—

- (a) procurement procedures with a prior call for competition in accordance with:—
 - (i) these Regulations;
 - (ii) the Public Contracts Regulations;
 - (iii) the Concessions Contracts Regulations 2016(a); or
 - (iv) the Defence and Security Regulations;
- (b) procedures pursuant to other legal acts of the EU listed in Annex II of the Utilities Contracts Directive as amended from time to time, ensuring adequate prior transparency for granting authorisations on the basis of objective criteria.

(a) S.I. 2016/***

Mixed procurement covering the same activity

6.—(1) In the case of mixed contracts which have as their subject-matter different types of procurement all of which are covered by these Regulations—

- (a) 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; and
- (b) in the case of—
 - (i) mixed contracts consisting partly of services to which Chapter 1 of Part 3 applies and partly of other services, or
 - (ii) mixed contracts consisting partly of services and partly of supplies,

the main subject-matter shall be determined according to which of the estimated values of the respective services or supplies is the highest.

(2) In the case of contracts which have as their subject-matter procurement covered by these Regulations and procurement not covered by these Regulations—

- (a) where the different parts of a given contract are objectively separable—
 - (i) utilities may choose to award separate contracts for the separate parts or to award a single contract;
 - (ii) where utilities choose to award separate contracts for the 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; and
 - (iii) Where utilities choose to award a single contract, these Regulations apply to the ensuing mixed contract, irrespective of—
 - (aa) the value of the parts that would otherwise fall under a different legal regime, and
 - (bb) which legal regime those parts would otherwise have been subject to;
- (b) 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;
- (c) where the decision is taken to award a single contract then that mixed contract will, where it contains elements of supply, works and service contracts and of concessions, be awarded in accordance with these Regulations, provided that the estimated value of the part of the contract which constitutes a contract covered by these Regulations, calculated in accordance with regulation 17, is equal to or greater than the relevant threshold mentioned in regulation 16.

(3) But where part of a given contract is covered by Article 346 of TFEU or the Defence and Security Regulations, regulation 25 applies instead of paragraph (1) or (2).

Procurement covering several activities

7.—(1) In the case of contracts intended to cover several activities, utilities may choose to award separate contracts for the purposes of each separate activity or to award a single contract.

(2) Where utilities choose to award separate contracts, the decision as to which rules apply to any one of such separate contracts shall be taken on the basis of the characteristics of the separate activity concerned.

(3) Despite regulation 6 and subject to paragraph (5), where utilities choose to award a single contract paragraphs (6) and (7) apply.

(4) But where one of the activities concerned is covered by the Defence and Security Regulations or Article 346 of TFEU, regulation 26 applies instead of paragraphs (6) and (7).

(5) The choice between awarding a single contract or awarding a number of separate contracts shall not be made with the objective of excluding the contract or contracts from the scope of these

Regulations or, where applicable, the Public Contracts Regulations or the Concession Contracts Regulations 2016.

(6) A contract which is intended to cover several activities shall be subject to the rules applicable to the activity for which it is principally intended.

(7) In the case of contracts where it is objectively impossible to determine for which activity the contract is principally intended, the applicable rules shall be determined in accordance with the following—

- (a) the contract shall be awarded in accordance with the Public Contracts Regulations, if one of the activities for which the contract is intended is subject to these Regulations and the other to the Public Contracts Regulations;
- (b) the contract shall be awarded in accordance with these Regulations, if one of the activities for which the contract is intended is subject to these Regulations and the other to the Concessions Contracts Regulations 2016;
- (c) the contract shall be awarded in accordance with these Regulations, if one of the activities for which the contract is intended is subject to these Regulations and the other is not subject to either these Regulations, the Public Contracts Regulations or the Concessions Contracts Regulations 2016.

CHAPTER 2 ACTIVITIES

Common Provisions

8.—(1) For the purposes of regulations 9, 10 and 11, “supply” includes generation, production, wholesale or retail sale.

(2) But, production of gas in the form of extraction falls within the scope of regulation 15.

Gas and heat

9.—(1) In the case of gas and heat, these Regulations apply to the following activities:—

- (a) 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;
- (b) the supply of gas or heat to such networks.

(2) The supply, by a utility which is not a contracting authority, of gas or heat to fixed networks which provide a service to the public shall not be considered a relevant activity within the meaning of paragraph (1) where both of the following conditions are met:—

- (a) the production of gas or heat by that utility is the unavoidable consequence of carrying out an activity other than one referred to in paragraph (1) or in regulations 10 to 12;
- (b) the supply to the public network is aimed only at the economic exploitation of such production and amount to not more than 20% of the utility’s turnover, on the basis of the average for the preceding 3 years, including the current year.

Electricity

10.—(1) In the case of electricity, these Regulations apply to the following activities:—

- (a) 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;
- (b) the supply of electricity to such networks.

(2) The supply, by a utility other than one which is a contracting authority, of electricity to fixed networks which provide a service to the public shall not be considered a relevant activity within the meaning of paragraph (1) where both of the following conditions are met:—

- (a) the production of electricity by that utility takes place because its consumption is necessary for carrying out an activity other than one referred to in paragraph (1) or regulations 9, 11 and 12;
- (b) the supply to the public network depends only on that utility's own consumption and has not exceeded 30% of that utility's total production of energy, on the basis of the average for the preceding 3 years, including the current year.

Water

11.—(1) In the case of water, these Regulations apply to the following activities:—

- (a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water;
- (b) the supply of drinking water to such networks.

(2) These Regulations also apply to contracts or design contests awarded or organised by utilities which pursue an activity referred to in paragraph (1) and which are connected with one of the following:—

- (a) hydraulic engineering projects, irrigation or land drainage, provided that the volume of water to be used for the supply of drinking water represents more than 20% of the total volume of water made available by such projects or irrigation or drainage installations;
- (b) the disposal of treatment sewage.

(3) The supply, by a utility other than one which is a contracting authority, of drinking water to fixed networks which provide a service to the public shall not be considered a relevant activity within the meaning of paragraph (1) where both of the following conditions are met:—

- (a) the production of drinking water by that utility takes place because its consumption is necessary for carrying out an activity other than one referred to in paragraph (1) and regulations 9 to 12;
- (b) the supply to the public network depends only on that utility's own consumption and has not exceeded 30% of that utility's total production of drinking water, on the basis of the average for the preceding three years, including the current year.

Transport services

12.—(1) These Regulations apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by:—

- (a) railway;
- (b) automated systems;
- (c) tramway;
- (d) trolley bus;
- (e) bus; or
- (f) cable

(2) For the purposes of paragraph (1), a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority, such as:—

- (a) conditions on the routes to be served;
- (b) the capacity to be made available; or
- (c) the frequency of the service.

Ports and airports

13. These Regulations apply to activities relating to the exploitation of a geographical area for the purpose of the provision of airports or maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway.

Postal services

14.—(1) These Regulations apply to activities relating to the provision of:—

- (a) postal services;
- (b) services other than postal services, on condition that such services are provided by an entity which also provides postal services and provided that postal services are not directly exposed to competition within the meaning of regulation 34(2).

(2) In this regulation:—

“postal item” means an item addressed in the final form in which it is to be carried, irrespective of weight, which includes:—

- (a) correspondence;
- (b) books;
- (c) catalogues;
- (d) newspapers;
- (e) periodicals, and
- (f) postal packages containing merchandise with or without commercial value;

“postal services” means services consisting of the clearance, sorting, routing and delivery of postal items, including both services falling within as well as services falling outside the scope of the universal service set up in accordance with the Postal Services Act 2011(a);

“services other than postal services” means services provided in the following areas:-

- (a) mail service management services (services both preceding and subsequent to despatch, including mailroom management services);
- (b) services concerning postal items not included in the definition of “postal item” in this paragraph, such as direct mail bearing no address.

Extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels

15. These Regulations apply to activities relating to the exploitation of a geographical area for the purpose of:—

- (a) extracting oil or gas;
- (b) exploring for or extracting coal or other solid fuels.

CHAPTER 3

MATERIAL SCOPE

SECTION 1

Thresholds

Threshold amounts

16.—(1) These Regulations apply to procurements with a value net of VAT estimated to be equal to or greater than the following thresholds:—

- (a) for supply and service contracts and design contests, the sum specified in Article 15(a) of the Utilities Contracts Directive;
- (b) for works contracts, the sum specified in Article 15(b) of the Utilities Contracts Directive;
- (c) for contracts for social and other specific services listed in Schedule 2, the sum specified in Article 15(c) of the Utilities Contracts Directive.

(a)

(2) The thresholds referred to in paragraph (1) do not apply to procurements excluded by regulations 18 to 23 or regulation 34.

(3) References in paragraph (1) to the Utilities 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 Utilities Contracts Directive mentioned in paragraph (1) 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 17 of the Utilities Contracts Directive.

Methods for calculating the estimated value of the procurement

General rules

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

(2) Where the utility 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 utility 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 the unit in question.

(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 these Regulations.

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

(7) The estimated value shall be calculated as at the moment at which the call for competition is sent or, in cases where such call for competition is not foreseen, at the moment at which the utility commences the procurement procedure (for example, where appropriate, by contacting economic operators in relation to the procurement).

(8) In the case 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, utilities shall include in the estimated value of a works contract both the cost of the works and the total estimated value of any supplies or services that are made available to the contractor by the utilities provided that they are necessary for the execution of 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 16(1)(b) and (c).

(13) For the purposes of paragraphs (11) and (12), where the aggregate value of the lots is equal to or greater than the relevant threshold mentioned in regulation 16, these Regulations apply to the awarding of each lot.

(14) Despite paragraphs (11) to (13), utilities may, subject to paragraph (15), award contracts for individual lots without applying the procedures provided for in these Regulations, 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 in reliance on 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 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 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 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 contracts without a fixed term or contracts the term of which cannot be defined, the monthly value multiplied by 48.

(18) In the case of service contracts, the basis for calculating the estimated contract value shall, where appropriate, 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, fees, commissions payable, interest and other forms of remuneration.

(19) In the case of 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.

SECTION 2

Excluded contracts and design contests; special provisions for procurement involving defence and security aspects

SUB-SECTION 1

Exclusions applicable to all utilities and special exclusions for the water and energy sectors

Contracts awarded for the purpose of resale or lease to third parties

18.—(1) Subject to paragraph (3), these Regulations do not apply to contracts awarded for purposes of resale or lease to third parties, provided that the utility enjoys no special or exclusive

right to sell or lease the subject of such contracts, and other entities are free to sell or lease it under the same conditions as the utility.

(2) Utilities shall notify the Commission, if so requested, of all the categories of products or activities which they regard as excluded under paragraph (1).

(3) Paragraph (1) does not apply to procurement carried out by a central purchasing body in order to perform centralised purchasing activities.

Contracts and design contests awarded or organised for purposes other than the pursuit of a covered activity or for the pursuit of such an activity in a third country

19.—(1) These Regulations do not apply to contracts awarded or design contests organised by utilities:—

- (a) for purposes other than the pursuit of their activities as described in regulations 9 to 15; or
- (b) for the pursuit of such activities in a third country, in conditions involving the physical use of a network or geographical area within the EU.

(2) Utilities shall notify the Commission, if so requested, of any activities which they regard as excluded under paragraph (1).

Contracts awarded and design contests organised pursuant to international rules

20.—(1) These Regulations do not apply to contracts or design contests which the utility is obliged to award or organise in accordance with procurement procedures which are different from those laid down in these Regulations and are established by any of the following:—

- (a) a legal instrument creating international law obligations, such as an international agreement, concluded in accordance 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) These Regulations do not apply to contracts, or design contests, which the utility awards or organises in accordance with procurement rules provided by an international organisation or international financing institution where the contracts or design contests concerned are fully financed by that organisation or institution.

(3) In the case of 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 the case of contracts and design contests involving defence or security aspects which are awarded or organised pursuant to international rules, regulation 27 applies instead of paragraphs (1) to (3) of this Regulation.

Specific exclusions for service contracts

21.—(1) These Regulations do not apply to service contracts:—

- (a) for the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or which concern interests in or rights over any of them;
- (b) for arbitration or conciliation services;
- (c) for any of the following legal services:—
 - (i) legal representation of a client by a lawyer within the meaning of Article 1 of Directive 77/249/EEC(a), as amended from time to time, in:—

(a) OJ No. L 78, 26.3.1977, p. 17

- (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—
 - (aa) in preparation of any of the proceedings referred to in paragraph (i), or
 - (bb) 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 as amended from time to time;
 - (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;
 - (v) other legal services which in the member State concerned are connected, even occasionally, with the exercise of official authority;
 - (d) for—
 - (i) 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 the European Parliament and of the Council^(a) as amended from time to time, or
 - (ii) operations conducted with the European Financial Stability Facility and the European Stability Mechanism;
 - (e) for loans, whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments;
 - (f) which are employment contracts;
 - (g) for public passenger transport services by rail or metro;
 - (h) for civil defence, civil protection, and danger prevention 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; or
 - (i) for broadcasting time or programme provision that are awarded to audiovisual or radio media service providers.
- (2) In this regulation—
- (a) “media service providers” has the meaning given by Article 1(1)(d) of Directive 2010/13/EU^(b) as amended from time to time;
 - (b) “programme” has the meaning given by Article 1(1)(b) of that Directive as amended from time to time, but also includes radio programmes and radio programme materials; and
 - (c) “programme material” has the same meaning as “programme”.

Service contracts awarded on the basis of an exclusive right

22. These Regulations do not apply to service contracts awarded to a contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy

(a) OJ No. L 145, 30.04.2004, p. 1

(b) OJ No. L 95, 15.4.2010, p. 1

pursuant to a law, regulation or published administrative provision which is compatible with TFEU.

Contracts awarded by certain utilities for the purchase of water and for the supply of energy or of fuels for the production of energy

23. These Regulations does not apply to contracts:—

- (a) for the purchase of water if awarded by utilities engaged in one or both of the activities relating to drinking water referred to in regulation 11(1);
- (b) awarded by utilities which are active in the energy sector by engaging in an activity referred to in regulation 9(1), regulation 10(1) or regulation 15 for the supply of:—
 - (i) energy; or
 - (ii) fuels for the production of energy.

SUB-SECTION 2

Procurement involving defence and security aspects

Defence and security

24.—(1) These Regulations do not apply to:—

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

(2) These Regulations do not apply to contracts and design contests not otherwise exempted by paragraph (1) to the extent that:—

- (a) 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 utility makes available in a contract award procedure as provided for in these Regulations; or
- (b) the application of these Regulations 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 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, these Regulations do not apply provided that the United Kingdom has determined that the essential interests concerned cannot be guaranteed by less intrusive measures, such as those referred to in paragraph (2)(a).

Mixed procurement covering the same activity and involving defence and security aspects

25.—(1) This regulation applies in the case of mixed contracts covering the same activity, which have as their subject-matter procurement covered by these Regulations and procurement or other elements covered by Article 346 of TFEU or the Defence and Security Regulations.

(2) Where the different parts of a given contract are objectively separable, utilities 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 these Regulations or the Defence and Security Regulations.

(4) Where utilities 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 utilities choose to award a single contract, the following criteria 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 these Regulations, 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 for 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 paragraphs 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 these Regulations where it includes elements to which Article 346 of TFEU applies; otherwise it may be awarded in accordance with the Defence and Security Regulations.

Procurement covering several activities and involving defence or security aspects

26.—(1) This regulation applies in the case of contracts intended to cover several activities where one of those activities involves defence or security aspects.

(2) Utilities may choose to award separate contracts for the purposes of each separate activity or to award a single contract.

(3) Where utilities choose to award separate contracts for separate activities, 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 activity concerned.

(4) The choice between awarding a single contract and awarding a number of separate contracts shall not be made with the objective of excluding the contract or contracts from the scope of these Regulations or the Defence and Security Regulations.

(5) Where utilities choose to award a single contract, the following shall apply:—

- (a) in the case of a contract intended to cover an activity which is covered by these Regulations and another which is covered by the Defence and Security Regulations, the utility may award the contract in accordance with the Defence and Security Regulations.
- (b) in the case of a contracts intended to cover an activity which is covered by these Regulations and another which is covered by Article 346 of TFEU, the utility may award the contract without applying these Regulations.

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

(7) Contracts referred to in paragraph (5)(a), which also includes procurement or other elements which are covered by Article 346 of TFEU may be awarded without applying these Regulations.

(8) Paragraphs (5) to (7) apply provided that the award of a single contract is justified by objective reasons and the decision to award a single contract is not taken for the purpose of excluding contracts from the application of these Regulations.

Contracts and design contests involving defence and security aspects which are awarded or organised pursuant to international rules

27.—(1) These Regulations do not apply to contracts or design contests involving defence or security aspects which the utility is obliged to award or organise in accordance with procurement procedures which are different from those laid down in these Regulations and are established by any of the following:—

- (a) an international agreement or arrangement, concluded in accordance 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) These Regulations do not apply to contracts or design contests involving defence or security aspects which the utility awards or organises in accordance with procurement rules provided by an international organisation or international financing institution where the contracts or design contests concerned are fully financed by that organisation or institution.

(3) In the case of 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.

SUB-SECTION 3

Special relations (cooperation, affiliated undertakings and joint ventures)

Contracts between contracting authorities

Award of contracts to controlled persons

28.—(1) A contract awarded by a utility that is a contracting authority to a legal person falls outside the scope of these Regulations 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 contract also falls outside the scope of these Regulations where a controlled legal person which is a contracting authority awards a 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 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 legal person being awarded the contract.

(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) shall be interpreted accordingly.

Award of contracts where there is joint control

(4) A contracting authority which does not exercise over a legal person control within the meaning of paragraph (3) may nevertheless award a contract to that legal person without applying these Regulations 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 shall be deemed to 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 these Regulations 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 cooperation.

Determination of percentages

(8) For the determination of the percentage of activities referred to in paragraph 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 3 years preceding the contract award shall be taken into consideration.

(9) Where, because of—

- (a) the date on which the relevant legal person 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.

Contracts awarded to an affiliated undertaking

29.—(1) These Regulations do not apply to contracts awarded:—

- (a) by a utility to an affiliated undertaking; or
- (b) by a joint venture, formed exclusively by a number of utilities for the purpose of carrying out activities described in regulations 9 to 15, to an affiliated undertaking of one of its members,

provided that the conditions in paragraph (2) are met.

(2) The conditions are that:—

- (a) in respect of service contracts, at least 80% of the average total turnover of the affiliated undertaking over the preceding 3 years, taking into account all services provided by that undertaking, derives from the provision of services to the utility or one or more of its affiliated undertakings;
- (b) in respect of supply contracts, at least 80% of the average total turnover of the affiliated undertaking over the preceding 3 years, taking into account all supplies provided by that undertaking, derives from the provision of supplies to the utility or one or more of its affiliated undertakings;
- (c) in respect of works contracts, at least 80% of the average total turnover of the affiliated undertaking over the preceding 3 years, taking into account all works provided by that undertaking, derives from the provision of works to the utility or one or more of its affiliated undertakings.

(3) Where, because of the date on which an affiliated undertaking was created or commenced activities, the turnover referred to in paragraph 2 is not available for the preceding 3 years, it shall be sufficient for that undertaking to show that the turnover is credible, in particular by means of business projections.

(4) Where more than one affiliated undertaking provides the same or similar services, supplies or works to the utility with which they form an economic group, the percentages referred to in paragraph (2) shall be calculated taking into account the total turnover deriving respectively from the provision of services, supplies or works by those affiliated undertakings.

(5) In this regulation, “affiliated undertaking” means:—

- (a) any undertaking the annual accounts of which are consolidated with those of the utility in accordance with the requirements of Directive 2013/34/EU of the European Parliament and of the Council^(a); and
- (b) in the case of an undertaking which is not subject to that Directive, any undertaking that:—
 - (i) may be, directly or indirectly, subject to a dominant influence by the utility;
 - (ii) may exercise a dominant influence over the utility; or
 - (iii) in common with the utility, is subject to the dominant influence or another undertaking by virtue of ownership, financial participation, or the rules which govern it.

(6) For the purposes of paragraph (5)(b), “dominant influence” has the same meaning as in regulation 5(3).

(7) This regulation applies despite the provisions of regulation 28.

Contracts awarded to a joint venture or to a utility forming part of a joint venture

30.—(1) These Regulations do not apply to contracts awarded—

- (a) by a joint venture, formed exclusively by a number of utilities for the purpose of carrying out activities within the meaning of regulations 9 to 15, to one of those utilities; or
- (b) by a utility to such a joint venture of which it forms part,

provided that the joint venture has been set up in order to carry out the activity concerned over a period of at least 3 years and the instrument setting up the joint venture stipulates that the utilities which form it will be part of the joint venture for at least the same period.

(2) This regulation applies despite the provisions of regulation 28.

Notification of information

31. Utilities shall notify to the Commission, if it so requests, the following information:—

(a)

- (a) the names of the undertakings or joint ventures referred to in regulation 29 or 30;
- (b) the nature and value of the contracts referred to in those regulations;
- (c) proof, as considered necessary by the Commission, that the relationship between the undertaking or joint venture, to which the contracts are awarded, and the utility complies with the requirements of those regulations.

SUB-SECTION 4
Specific situations

Research and development services

32. These Regulations apply to 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 utility for its use in the conduct of its own affairs; and
- (b) the service provided is wholly remunerated by the utility.

Contracts subject to special arrangements

33. Without prejudice to regulation 34, a utility carrying out one or more of the activities referred to in Commission Decision 97/367/EEC(a) relating to the exploitation of geographical areas for the purpose of extracting oil or gas in Northern Ireland shall:—

- (a) observe the principles of non-discrimination and competitive procurement in respect of the award of supplies, works and service contracts, in particular as regards the information which the utility makes available to economic operators concerning its procurement intentions;
- (b) in respect of a contract it awards whose value (determined in accordance with Regulations 17) exceeds 5,000,000 euro, send the following information to the Commission within 48 days of the award:—
 - (i) the name and address of the utility;
 - (ii) the nature of the contract, namely whether it is a supply contract, a service contract or a works contract and whether it is a framework agreement;
 - (iii) a clear indication of the nature (for example, by using the Classification of Products by Activity(b) of the product, work or service provided;
 - (iv) whether the contract was advertised and, if so, in which newspaper or trade journal and if not, the tendering procedure used;
 - (v) the number of tenders received;
 - (vi) the date of the award of the contract;
 - (vii) the name and address of the successful supplier or contractor;
 - (viii) the value of the contract;
 - (ix) the expected duration of the contract;
 - (x) any share of the contract which has been, or may be, sub-contracted, to which over 10% of the value of the consideration to be given under the contract is attributable;
 - (xi) the country of origin of the product or service;
 - (xii) the main award criteria chosen for identifying the most economically advantageous tender;

(a) OJ No. L 156, 13.06.1997, p. 55

(b) The Classification of Products by Activity is the official product classification by activity which is used by the EU for statistical purposes.

- (xiii) whether the contract was awarded to a bidder which submitted a variant from the utility's initial specifications; and
- (c) in respect of a contract it awards whose value (calculated in accordance with Regulation 17) equals or exceeds 400,000 euro but does not exceed 5,000,000 euro:—
 - (i) retain in respect of each contract the information referred to in sub-paragraphs (b)(i) to (ix) for not less than 4 years from the date on which the contract is awarded; and
 - (ii) supply this information, either immediately upon request by the Commission, or not later than 48 days after the end of the period of 3 months ending on the last day of March, June, September or December in which the contract was awarded.

SUB-SECTION 5

Activities directly exposed to competition and related procedural provisions

Activities directly exposed to competition

34.—(1) These Regulations do not apply to contracts or design contests intended to enable an activity mentioned in regulations 9 to 15 to be carried out where that activity is directly exposed to competition on markets to which access is not restricted.

(2) For the purposes of paragraph (1), the activity is directly exposed to competition on markets to which access is not restricted only if:—

- (a) the activity is covered by the following Commission decisions:—
 - (i) Commission Decision 2006/211/EC(a) (electricity generation in England, Scotland and Wales);
 - (ii) Commission Decision 2007/141/EC(b) (supply of electricity and gas in England, Scotland and Wales); and
 - (iii) Commission Decision 2010/192/EU(c) (exploration for and exploitation of oil and gas in England, Scotland and Wales); or
- (b) the procedure specified in regulation 35 is followed and regulation 35(2) applies.

(3) The activity referred to in paragraph (1) may form a part of a larger sector or be exercised only in certain parts of the United Kingdom.

Procedure for establishing whether Regulation 34(1)(b) is applicable

35.—(1) The procedure referred to in regulation 34(1)(b) is as follows:—

- (a) the Cabinet Office or a utility submits a request to the Commission, where appropriate together with the position adopted by an independent national authority that is competent in relation to the activity concerned, demonstrating that the activity in question is directly exposed to competition on markets to which access is not restricted on the basis of criteria that are in conformity with the provisions on competition of TFEU which may include:—
 - (i) the characteristics of the products or services concerned;
 - (ii) the existence of alternative products or services considered to be substitutable on the supply side or demand side;
 - (iii) the prices; and
 - (iv) the actual or potential presence of more than one supplier of the products or provider of the services in question;
- (b) the request specifies:—

(a) [insert footnote]
 (b) [insert footnote]
 (c) [insert footnote]

- (i) all the relevant facts and in particular, any law, regulation, administrative provision or agreement concerning compliance with the condition that the activity is not directly exposed to competition on markets to which access is not restricted;
 - (ii) whether the activity concerned is—
 - (aa) subject to the EU legislation listed in Annex III to the Utilities Contracts Directive and where it is, the relevant implementing legislation applied in the United Kingdom, or
 - (bb) if free access to a given market cannot be presumed on the basis of subparagraph (aa), it must be demonstrated that access to the market in question is free as a matter of fact and of law;
- (2) This paragraph applies if the Commission has:—
- (i) adopted an implementing act establishing that the activity is directly exposed to competition on markets to which access is not restricted within the periods specified in Annex IV to the Utilities Contracts Directive; or
 - (ii) subject to paragraph (5), not adopted the implementing act within the period provided for in Annex IV to the Utilities Contracts Directive
- (3) The request referred to in paragraphs (1)(a) and (b) may concern activities which are part of a larger sector or which are exercised in certain parts of the United Kingdom.
- (4) After the submission of a request, the Cabinet Office or the utility may, with the Commission's agreement, substantially modify its request, in particular as regards the activities or the geographical area concerned.
- (5) Where a request has been modified, a new period for the adoption of the implementing act shall be calculated in accordance with paragraph 1 of Annex IV to the Utilities Contracts Directive unless a shorter period is agreed on by the Commission and the Cabinet Office or the utility which has submitted the request.

CHAPTER 4

General Principles

Principles of procurement

36.—(1) Utilities 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 these Regulations 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

37.—(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) service contracts,
- (b) works contracts, and
- (c) 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 utilities to have a specific legal form in order to submit a tender or a request to participate.

(4) Where necessary, utilities may clarify in the procurement documents how groups of economic operators are to meet the criteria and requirements for qualification and qualitative selection referred to in regulations 77 to 81 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) Utilities may 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

38.—(1) Utilities may—

- (a) reserve the right to participate in 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 workshop programmes

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

(2) In such cases, the call for competition shall make reference to Article 38 of the Utilities Contracts Directive.

Confidentiality

39.—(1) A utility shall not disclose information which has been forwarded to it by an economic operator and designated by that economic operator 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 these Regulations, such as the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in regulations 70 and 75 respectively;
- (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) Utilities may impose on economic operators requirements aimed at protecting the confidential nature of information which the utilities make available throughout the procurement procedure, including information made available in connection with the operation of a qualification system, whether or not this has been the subject of a notice on the existence of a qualification system used as a means of calling for competition.

(a) [insert footnote]

Rules applicable to communication

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

40.—(1) Subject to paragraphs (3), (5), (8) and (10), all communication and information exchange under these Regulations, 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) Utilities 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 utility;
- (c) the use of electronic means of communication would require specialised office equipment that is not generally available to utilities; or
- (d) the procurement documents require the submission of physical or scale models which cannot be transmitted using electronic means.

(4) Where, in accordance with paragraph (3), electronic means of communication are not used, communication shall be carried out—

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

(5) Utilities 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) Where utilities require, in accordance with paragraph (3), means of communication other than electronic means in the submission process, they shall indicate in the documentation referred to in regulation 99 the reasons for this requirement.

(7) Where applicable, utilities shall indicate in that documentation the reasons why use of means of communication other than electronic means has been considered necessary in accordance with paragraph (5).

(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 the 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, utilities shall ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved.

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

Use of tools and devices not generally available

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

(14) Utilities 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 from the date of publication of the call for competition or from the date on which 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 call for competition” 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 71, or
 - (ii) its publication on a buyer profile in accordance with regulation 72; and
- (b) the text of the call for competition notice or the invitation to confirm interest shall specify the internet address at which those 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, applications for qualification and, in design contests, plans and projects, 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, applications for qualification and the submission of plans and projects can be determined precisely;
- (b) it may be reasonably ensured that, before the time referred to in paragraph (12), 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 various stages of the qualification procedure, the procurement procedure or 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 time referred to in paragraph (12);
- (f) data received and opened in accordance with the requirements in sub-paragraphs (a) to (e) must remain accessible only to persons authorised to acquaint themselves with the data;
- (g) it may 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) utilities shall, acting in accordance with paragraphs (18) and (19), specify the level of security required for the electronic means of communication to be used in various stages of the specific procurement procedure, and that level shall be proportionate to the risks attached;
- (c) where utilities conclude that the level of risk, 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) as amended from time to time are required, utilities shall accept advanced electronic signatures supported by a qualified certificate, taking into account whether those certificates are provided by a certificate services provider, which is on a trusted list as provided for in Commission Decision 2009/767/EC^(b) as amended from time to time, created with or without a secure signature creation device, subject to compliance with the following conditions:—
 - (i) (aa) the utilities shall establish the required advanced signature format on the basis of formats established in Commission Decision 2011/130/EU^(c) as amended from time to time and put in place necessary measures to be able to process those 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 utility 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, the utility shall 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, utilities 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, utilities shall, in particular, have regard to such of the following matters as are relevant:—

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

(a) OJ No. L 13, 19.1.2000, p.12.

(b) OJ No. L 274, 20.10.2009, p.36

(c) OJ No. L 53, 26.2.2011, p.66

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) Paragraph (21) applies where—

- (a) a competent authority of the United Kingdom located in England and Wales or Northern Ireland,
- (b) another issuing entity so located,

signs and issues a document for use in a procurement procedure within the scope of the Utilities Contracts Directive, whether the procedure is under these Regulations or under the law of any member State.

(21) The competent authority or issuing 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, where it does so—

- (a) it 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; and
- (b) the document 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

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

Conflicts of interest

42.—(1) Utilities that are 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; and

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

PART 2
RULES APPLICABLE TO CONTRACTS
CHAPTER 1
Procedures

Conditions relating to the GPA and other international agreements

43. In so far as they are covered by Annexes 3 to 7 to the EU's Appendix I to the GPA and by the other international agreements by which the EU is bound, utilities within the meaning of regulation 5(1)(a) shall accord to the works, supplies, services and economic operators of 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

44.—(1) When awarding supply, works or service contracts, utilities shall apply procedures that conform to these Regulations.

(2) Such contracts may be awarded only if a call for competition has been published in accordance with these Regulations and the Utilities Contracts Directive, except where regulation 50 permits utilities to apply a negotiated procedure without prior call for competition.

(3) Utilities may apply:—

- (a) open or restricted procedures or negotiated procedures with prior call for competition as regulated by these Regulations;
- (b) competitive dialogues and innovation partnerships as regulated by these Regulations.

(4) The call for competition may be made by one of the following means:—

- (a) a periodic indicative notice in accordance with regulation 67 where the contract is awarded by restricted or negotiated procedure;
- (b) a notice on the existence of a qualification system in accordance with regulation 68 where the contract is awarded by restricted or negotiated procedure or by a competitive dialogue or an innovation partnership;
- (c) a contract notice in accordance with regulation 69.

(5) For the purposes of paragraph (3)(a), economic operators which have expressed their interest following the publication of the periodic indicative notice shall subsequently be invited to confirm their interest in writing by means of an invitation to confirm interest in accordance with regulation 74.

Open Procedure

45.—(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, subject to paragraphs (4) to (6), be 35 days from the date on which the contract notice is sent.

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

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

- (a) the periodic indicative notice included all the information required by Section I and II of Part A of Annex VI to the Utilities Contracts Directive, insofar as the information in Section II was available at the time the periodic indicative notice was published;

(b) the periodic indicative 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 utility renders impracticable the time limit laid 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 is sent.

(6) The utility may reduce by 5 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 40.

Restricted Procedure

46.—(1) In restricted procedures, any economic operator may submit a request to participate in response to a call for competition by providing the information for qualitative selection that is requested by the utility.

(2) The minimum time limit for the receipt of the requests to participate shall, in general, be fixed at no less than 30 days—

(a) from the date on which the contract notice is sent, or

(b) where a periodic indicative notice is used as a means of calling for competition, from the date on which the invitation to confirm interest is sent

and shall in any event not be less than 15 days.

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

(4) Utilities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 78(2) and (3).

(5) The time limit for the receipt of tenders may be set by mutual agreement between the utility and the selected candidates, provided that all selected candidates have the same time to prepare and submit their tenders.

(6) In the absence of such an agreement on the time limit for receipt of tenders, the time limit shall be at least 10 days from the date on which the invitation to tender is sent.

Negotiated procedure with prior call for competition

47.—(1) In negotiated procedures with prior call for competition, any economic operator may submit a request to participate in response to a call for competition by providing the information for qualitative selection that is requested by the utility.

(2) The minimum time limit for the receipt of requests to participate shall, in general, be fixed at no less than 30 days—

(a) from the date on which the contract notice is sent, or

(b) where a periodic indicative notice is used as a means of calling for competition, from the date on which the invitation to confirm interest is sent

and shall in any event not be less than 15 days.

(3) Only those economic operators invited by the utility following its assessment of the information provided may participate in the negotiations.

(4) Utilities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 78(2) and (3).

(5) The time limit for the receipt of tenders may be set by mutual agreement between the utility and the selected candidates, provided that they all have the same time to prepare and submit their tenders.

(6) In the absence of such an agreement on the time limit for the receipt of tenders, the time limit shall be at least 10 days from the date on which the invitation to tender is sent.

Competitive dialogue

General and selection of participants

48.—(1) In competitive dialogues, any economic operator may submit a request to participate in response to a call for competition in accordance with regulation 44(4)(b) and (c) by providing the information for qualitative selection that is requested by the utility.

(2) The minimum time limit for receipt of requests to participate shall, in general, be fixed at no less than 30 days—

- (a) from the date on which the contract notice is sent, or
- (b) where a periodic indicative notice is used as a means of calling for competition, the date on which the invitation to confirm interest is sent

and shall in any event not be less than 15 days.

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

(4) Utilities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 78(2) and (3).

(5) The contract shall be awarded on the sole basis of the award criterion of the tender presenting the best price-quality ratio in accordance with regulation 82(1) to (4).

(6) Utilities shall set out and define their needs and requirements in the call for competition, in a descriptive document or in both.

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

Conduct of the dialogue

(8) Utilities—

- (a) shall open, with the participants selected in accordance with the relevant provisions of regulations 76 to 81, 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, utilities 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 39, utilities shall not reveal to the other participants solutions proposed or other confidential information communicated by a participating candidate or tenderer 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 call for competition or in the descriptive document.

(13) In the call for competition or the descriptive document, the utility shall indicate whether it will use the option described in paragraph (12).

(14) The utility 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, utilities shall ask them to submit their final tenders 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 utility.

(18) But such clarification, specification or optimisation or any additional information, may not involve changes to the essential aspects of the tender or of the procurement, including the needs and requirements set out in the call for competition or in the descriptive document, where variations to those aspects, needs and requirements are likely to distort competition or have a discriminatory effect.

(19) Utilities shall assess the tenders received on the basis of the award criteria laid down in the call for competition or in the descriptive document.

(20) At the request of the utility, negotiations with the tenderer identified as having submitted the tender presenting the best price-quality ratio in accordance with regulation 82(1) to (4) may be carried out to confirm financial commitments or other terms contained in the tender by finalising the terms of the contract, provided such negotiations—

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

Prizes and payments

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

Innovation partnership

49.—(1) In innovation partnerships, any economic operator may submit a request to participate in response to a call for competition in accordance with regulation 44(4)(b) and (c) by providing the information for qualitative selection that is requested by the utility.

(2) In the procurement documents, the utility 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) indicate which elements of this description define the minimum requirements to be met by all tenders.

(3) The information provided under paragraph (2) 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 utility 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, in general, be fixed at no less than 30 days from the date on which the contract notice is sent and shall in any event not be less than 15 days.

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

(7) Utilities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 78(2) and (3).

(8) The contracts shall be awarded on the sole basis of the award criterion of the tender presenting the best price-quality ratio in accordance with regulation 82(1) to (4).

(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 utility 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 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 utility may decide after each phase to—

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

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

(13) Subject to the following provisions of this regulation, utilities shall negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve their content.

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

(15) During the negotiations, utilities shall ensure the 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 under paragraph (18) in writing, of any changes to the technical specifications or other procurement documents, other than those setting out the minimum requirements; and
- (c) following any such changes, utilities shall provide sufficient time for tenderers to modify and re-submit amended tenders, as appropriate.

(16) In accordance with regulation 39, utilities 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 call for competition, in the invitation to confirm interest or in another procurement document.

(19) In the call for competition, the invitation to confirm interest or in another procurement document, the utility shall indicate whether it will use the option described in paragraph (18).

(20) In selecting candidates, utilities 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 utility following its assessment of the requested information may submit research and innovation projects aimed at meeting the needs identified by the utility that cannot be met by existing solutions.

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

(23) In the case of an innovation partnership with several partners, the utility shall not, in accordance with regulation 39, 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 utility 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 purchased shall not be disproportionate in relation to the investment for their development.

Use of the negotiated procedure without prior call for competition

50.—(1) Utilities may use the negotiated procedure without prior call for competition in 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 a procedure with a prior call for competition, provided that the initial conditions of the contract are not substantially altered;
- (b) where a contract is purely for the purpose of research, experiment, study or development and not for the purpose of securing a profit or of recovering research and development costs, and insofar as the award of such contract does not prejudice the competitive award of subsequent contracts which do seek, in particular, those ends;
- (c) 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;
- (d) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the utility, the time limits laid down for open procedures, restricted procedures and negotiated procedures with prior call for competition cannot be complied with;
- (e) in the case of supply contracts 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 utility to acquire supplies having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance;
- (f) for new works or services consisting in the repetition of similar works or services assigned to the contractor to which the same utility awarded an earlier contract, provided that such works or services conform to a basic project for which a first contract was awarded following a procedure in accordance with regulation 44(1) and (2);
- (g) for supplies quoted and purchased on a commodity market;
- (h) for bargain purchases, where it is possible to procure supplies by taking advantage of a particularly advantageous opportunity available for a very short time at a price considerably lower than normal market prices;
- (i) for purchases of supplies or services under particularly advantageous conditions 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;
- (j) where the service contract concerned—
 - (i) follows a design contest organised in accordance with these Regulations, and
 - (ii) is to be awarded, under the rules provided for in the design contest, to the winner or to one of the winners of that contest, provided that all the winners are invited to participate in the negotiations.

(2) For the purposes of paragraph 1(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 utility'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 in accordance with regulations 78(1) or 80(1), or
 - (ii) does not meet the selection criteria.
- (3) For the purposes of paragraph 1(d), the circumstances invoked to justify extreme urgency must not in any event be attributable to the utility.
- (4) For the purposes of paragraph 1(f):—
- (a) the basic project shall indicate the extent of the possible additional works or services and the conditions under which they will be awarded;
 - (b) as soon as the first contract is put up for tender, the possible use of the procedure shall be disclosed and the total estimated cost of subsequent works or services shall be taken into consideration by the utilities when they apply regulations 16 and 17.

CHAPTER 2

Techniques and instruments for electronic and aggregated procurement

Framework agreements

51.—(1) Utilities may conclude framework agreements, provided that they apply the procedures provided for in these Regulations.

(2) In these Regulations “framework agreement” means an agreement between one or more utilities 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 quantities envisaged.

(3) The term of a framework agreement shall not exceed 8 years, save in exceptional cases duly justified, in particular, by the subject-matter of the framework agreement.

(4) Contracts based on a framework agreement shall be awarded on the basis of objective rules and criteria, which may include reopening the competition among those economic operators party to the framework agreement as concluded.

(5) For the purposes of paragraph (4):—

- (a) the objective rules and criteria shall:-
 - (i) be set out in the procurement documents for the framework agreement;
 - (ii) ensure equal treatment of the economic operators who are parties to the framework agreement;
- (b) where a reopening of competition is included, utilities shall:-
 - (i) set a time limit which is sufficiently long to allow tenders for each specific contract to be submitted; and
 - (ii) award each contract to the tenderer that has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.

(6) Utilities shall not use framework agreements improperly or in such a way as to prevent, restrict or distort competition.

Dynamic purchasing systems

General features

52.—(1) Utilities 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, utilities shall follow the rules of the restricted procedure, subject to the following provisions of this regulation.

(6) All the candidates who satisfy 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 regulations 46(4) and 78(2) and (3).

(7) Where utilities 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) The following provisions about time limits shall apply instead of those provided for in regulation 46(2), (5) and (6).

(9) The minimum time limit for receipt of requests to participate shall, in general, be fixed at no less than 30 days from the date on which—

- (a) the contract notice is sent, or
- (b) where a periodic indicative notice is used as a means for calling for competition, the date on which the invitation to confirm interest is sent,

and shall in any event not be less than 15 days.

(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, subject to paragraph (12), be at least 10 days from the date on which the invitation to tender is sent.

(12) The time limit for the receipt of tenders may be set by mutual agreement between the utility and the selected candidates, provided that all selected candidates have the same time to prepare and submit their tenders.

Requirement to use electronic communication

(13) All communications in the context of a dynamic purchasing system shall only be made by electronic means in accordance with regulation 40(1) to (7) and (11) to (20).

The call for competition etc.

(14) For the purposes of awarding contracts under a dynamic purchasing system, utilities 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 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 accordance with regulation 73.

Requests to participate and their evaluation

(15) Utilities 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 (12).

(16) Utilities shall finalise their evaluation of such requests in accordance with the selection criteria within 10 working days following their receipt.

(17) That period 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.

(18) Despite paragraphs (16) and (17), as long as the invitation to tender for the first specific procurement under the dynamic purchasing system has not been sent, utilities may extend the evaluation period provided that no invitation to tender is issued during the extended evaluation period.

(19) Where utilities intend to extend the evaluation period in accordance with paragraph (18), they shall indicate in the procurement documents the length of the extended period that they intend to apply.

(20) Utilities 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

(21) Utilities shall invite all admitted participants to submit a tender for each specific procurement under the dynamic purchasing system, in accordance with regulation 74.

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

(23) Utilities shall award the contract to the tenderer that submitted the best tender on the basis of the award criteria set out in:—

- (a) the contract notice for the dynamic purchasing system;
- (b) the invitation to confirm interest; or
- (c) where the means of calling for competition is a notice on the existence of a qualification system, in the invitation to tender.

(24) Where those criteria are set out in accordance with paragraph (23)(a) and (b) they may, where appropriate, be formulated more precisely in the invitation to tender.

Means of proof

(25) Utilities who, in accordance with regulation 80, apply exclusion grounds and selection criteria provided for under the Public Contracts Regulations, may, at any time during the period of validity of the dynamic purchasing system, require admitted participants to submit a renewed and updated self-declaration as provided for in regulation 59(1) to (7) of those Regulations, within 5 working days from the date on which that request is transmitted.

(26) Regulation 59(8) to (11) of the Public Contracts Regulations shall apply throughout the entire period of validity of the dynamic purchasing system.

(27) For the purposes of paragraphs (25) and (26) any reference to a contracting authority in regulation 59 shall be deemed to be a reference to a utility.

Period of validity of the system

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

(29) Utilities 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 under regulation 70.

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

53.—(1) Utilities may use electronic auctions in which—

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

or both, are presented.

(2) Utilities 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) Service contracts and works contracts which have as their subject-matter intellectual performances (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 negotiated procedures with a prior call for competition, utilities may decide that the award of a 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 procurements where the content of procurement documents, in particular the technical specifications, can be established with precision, an electronic auction may be held—

- (a) on the reopening of competition among the parties to a framework agreement as provided for in regulation 51(4) to (6), and
- (b) on the opening for competition of contracts to be awarded under a dynamic purchasing system.

(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 or on the new values of the features of the tenders indicated in the procurement documents, or on both, 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) Utilities which decide to hold an electronic auction shall state that fact in the contract notice, in the invitation to confirm interest or, where a notice on the existence of a qualification system is used as a means of calling for competition, in the invitation to tender.

(8) Where utilities 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-matter 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 the electronic auction, utilities shall make a full initial evaluation of the tenders in accordance with the award criteria and with the weighting fixed for them.

(10) A tender shall be considered admissible where—

- (a) it has been submitted by a tenderer which has not been excluded under regulations 78(1) or 80(1), and which 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 utility to be abnormally low,

shall be considered irregular for the purposes of paragraph (10)(b).

(12) In particular—

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

shall be considered as 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 utility's needs and requirements as specified in the procurement documents; and
- (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 under regulation 78(1) or 80(1), or
 - (ii) does not meet the selection criteria.

Commencement and structure of the action

(14) All tenderers that have submitted admissible tenders shall be invited simultaneously by electronic means to participate in the electronic auction using, as of the date and time specified in the invitations, 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 2 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 82(8).

The formula to be used

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

(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 the purposes of paragraph (19), any ranges shall, however, be reduced beforehand to a specified value.

(21) Where variants are authorised in accordance with regulation 64, a separate formula shall be provided for each variant.

Communication of information

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

(23) Utilities may also communicate other information concerning other prices or values submitted, provided that this is stated in the specifications.

(24) Utilities may also at any time announce the number of participants in the current phase of the auction.

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

Closing the auction and awarding the contract

(26) Utilities 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 utilities intend to close an electronic auction in accordance with paragraph (26)(c), whether or not in combination with 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, the utility shall award the contract in accordance with regulation 82 on the basis of the results of the electronic auction.

Electronic catalogues

Generally

54.—(1) Where the use of electronic means of communication is required, utilities 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 utility.

(4) Electronic catalogues shall also comply with the requirements for electronic communication tools set out in regulation 40 as well as with any additional requirements set by the utility in accordance with that regulation.

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

- (a) state so in the contract notice, in the invitation to confirm interest, or, where the means of calling for competition is a notice on the existence of a qualification system, in the invitation to tender or negotiate; and
- (b) indicate in the procurement documents all the necessary information relating to the matters covered by regulation 40(16) to (20) so far as they concern 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, utilities 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, utilities 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 indicated in the procurement documents for the framework agreement.

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

- (a) notify the 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) Utilities shall allow for an adequate period between the notification and the actual collection of information.

(10) Before awarding the contract, utilities 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) Utilities 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) Utilities may also award contracts based on a dynamic purchasing system in accordance with paragraphs (7)(b) and (8) to (10) provided that the request to participate in the dynamic purchasing system is accompanied by an electronic catalogue in accordance with the technical specifications and format established by the utility.

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

Centralised purchasing activities and central purchasing bodies

55.—(1) Utilities may acquire works, supplies and services, or any one or more of them, from a central purchasing body offering the centralised purchasing activity referred to in paragraph (10)(a).

(2) Utilities may acquire works, supplies and services, or any one or more of them, by using—

- (a) contracts awarded by a central purchasing body,
- (b) dynamic purchasing systems operated by a central purchasing body or,
- (c) 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 utilities, this shall be mentioned in the call for competition setting up that dynamic purchasing system.

(4) A utility fulfils its obligations under these Regulations when it acquires supplies or services from a central purchasing body offering the centralised purchasing activity referred to in paragraph 10(a).

(5) A utility also fulfils its obligations under these Regulations where it acquires works, supplies or services by using:—

- (a) contracts awarded by the central purchasing body;
- (b) dynamic purchasing systems operated by the central purchasing body or;
- (c) a framework agreement concluded by the central purchasing body offering the centralised purchasing activity referred to in paragraph 10(b).

(6) However, the utility concerned shall be responsible for fulfilling the obligations imposed by these Regulations 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; or
- (b) conducting a reopening of competition 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 40.

(8) Utilities may, without applying the procedures provided for in these Regulations, award a service contract for the provision of centralised purchasing activities to a central purchasing body.

(9) Such 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 or services, or both, intended for utilities;
- (b) the award of contracts or the conclusion of framework agreements for works, supplies or services intended for utilities.

(11) Procurement carried out by a central purchasing body in order to perform centralised purchasing activities shall be deemed to be procurement for the pursuit of an activity referred to in regulations 9 to 15.

Occasional joint procurement

56.—(1) Two or more utilities may agree to perform certain specific procurements jointly.

(2) Where the conduct of the procurement procedure in its entirety is carried out jointly in the name and on behalf of all the utilities concerned, they shall be jointly responsible for fulfilling their obligations under these Regulations.

(3) Such joint responsibility applies also in cases where one utility manages the procurement procedure, acting on its own behalf and on the behalf of the other utilities concerned.

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

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

Procurement involving utilities from different member States

57.—(1) Without prejudice to regulations 28 to 31, utilities may act jointly with utilities from other member States in the award of contracts by using one of the means provided for in this regulation.

(2) Utilities shall not use the means provided for in this regulation for the purpose of avoiding the application of mandatory public law provisions in the law of the jurisdiction to which they are subject, where those provisions are in conformity with EU law.

Centralised purchasing

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

(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.

Joint procurement

(6) In the circumstances set out in paragraph (7), utilities may—

- (a) award a contract, conclude a framework agreement or operate a dynamic purchasing system jointly with utilities from other member States; and
- (b) award contracts based on the framework agreement or on the dynamic purchasing system.

(7) The circumstances are that—

- (a) there is an agreement that determines—
 - (i) the responsibilities of the parties and the relevant applicable national provisions, and
 - (ii) 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; and
- (b) the allocation of responsibilities and the applicable national law were referred to in the procurement documents.

(8) For the purposes of paragraph 7(a)—

- (a) the agreement may be—
 - (i) an agreement made between the participating utilities, or
 - (ii) an international agreement concluded between the member States concerned; and
- (b) the agreement may have allocated specific responsibilities among the participating utilities and determined the applicable provisions of the national laws of any of their respective member States.

(9) In procurements under paragraph (6)—

- (a) the other provisions of these Regulations apply only where they are the applicable national provisions determined by an agreement referred to in paragraph (7)(a); and
- (b) where the provisions of these Regulations do apply, a utility fulfils its obligations under these Regulations when it purchases works, supplies or services from a utility which is responsible for the procurement procedure

Joint entities

(10) Utilities may, with utilities from other member States, set up joint entities for the purposes of paragraph (1), subject to compliance with paragraph (11).

(11) This paragraph is complied with if, before undertaking any given procurement, the participating utilities, by a decision of the competent body of the joint entity, have agreed on the applicable national procurement rules of one of the following member States:—

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

(12) The agreement 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.

(13) The other provisions of these Regulations apply to procurement by the joint entity only where they are the national provisions applicable in accordance with paragraphs (11) and (12).

(14) In this regulation, “joint entity”, includes European Groupings of territorial cooperation under Regulation (EC) no. 1082/2006 of the European Parliament and the Council^(a) and other entities established under EU law.

Meaning of certain expressions in relation to other member States

(15) In this regulation—

“central purchasing body located in another member State” means any person which is a central purchasing body for the purpose of the Utilities Contracts Directive in the member State in which it is located;

“utilities from another member State” means any person which is a utility for the purposes of the Utilities Contracts Directive in a member State other than the United Kingdom; and references to “participating utilities” shall, to the extent that they are from another member State, be interpreted accordingly.

CHAPTER 3

Conduct of the procedure

SECTION 1

Preparation

Preliminary market consultations

58.—(1) Before commencing a procurement procedure, utilities 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, utilities 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 such advice 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

59.—(1) Where a candidate or tenderer, or an undertaking related to a candidate or tenderer—

(a) has advised the utility, whether in the context of regulation 58 or not, or

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

the utility 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 36(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.

(a) OJ No. L 210, 31.7.2006, p.19

(5) The measures taken under this regulation shall be documented in accordance with regulation 99.

Technical specifications

60.—(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 works, services or supplies.

(3) In these Regulations, “technical specification” means:—

- (a) in the case of works contracts, the totality of the technical prescriptions contained in the procurement documents, defining the characteristics required of a material, product or a supply, which permits a material, a product or a supply to be described in a manner such that it fulfils the use for which it is intended by the utility;
- (b) in the case of service or supply contracts, a specification in a document defining the required characteristics of a product or a service, such as 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.

(4) The characteristics referred to in paragraph (3)(a) 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 utility 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) For the purposes of paragraph (3), 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 to
- (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.

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

Formulating the technical specifications

(7) For all procurement which is intended for use by natural persons, whether the general public or staff of the utility, 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.

(8) 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.

(9) 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.

(10) 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 utilities 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 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.

(11) Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or to 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.

(12) But such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract in accordance with paragraph (10) is not possible, in which case the reference shall be accompanied by the words “or equivalent”.

Applying the technical specifications

(13) Where a utility uses the option of referring to the technical specifications referred to in paragraph (10)(b), it shall not reject a tender on the ground 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 62, that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications.

(14) Where a utility uses the option provided for in paragraph 10(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 address the performance or functional requirements which it has laid down.

(15) In its tender, the tenderer shall prove by any appropriate means including those referred to in regulation 62, that the work, supply or service in compliance with the standard meets the performance or functional requirements of the utility.

(16) In this regulation—

“common technical specification” means a technical specification in the field of information and communication technology laid down in accordance with Article 13 and 14 of Regulation (EU) 1025/2012 of the European Parliament and of the Council(a) as amended from time to time

“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 the Council(b) as amended from time to time;

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

Labels

61.—(1) Where utilities 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, supplies or services 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 the 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 utilities do not require the works, supplies or services to meet all of the label requirements, they shall indicate which label requirements are required.

(3) Utilities 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 utility, or an equivalent label, within the relevant time limits for reasons that are not attributable to that economic operator, the utility shall accept other appropriate means of proof, which may include a technical dossier of 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 utility.

(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, utilities 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, certification and other means of proof

62.—(1) Utilities 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.

(a)
(b)

(2) Where utilities 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 utilities.

(3) In paragraphs (1) and (2), a “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 the Council^(a).

(4) Utilities 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 meet the requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

Communication of technical specifications

63.—(1) On request from economic operators interested in obtaining a contract, utilities shall make available—

- (a) the technical specifications regularly referred to in their supply, works or service contracts, or
- (b) the technical specifications which they intend to apply to contracts for which the call for competition is a periodic indicative notice.

(2) Subject to paragraph (3), the technical specifications referred to in paragraph (1) shall be made available by electronic means of communication through unrestricted and full direct access free of charge.

(3) Technical specifications shall be transmitted by means other than electronic means where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered—

- (a) for one of the reasons set out in regulations 40(3), or
- (b) because the utilities intend to apply regulation 39(3).

(4) Where the technical specifications are based on documents available by electronic means through unrestricted and full direct access free of charge to interested economic operators, the inclusion of a reference to those documents shall be sufficient.

Variants

64.—(1) Utilities may authorise or require tenderers to submit variants which meet the minimum requirements specified by those utilities.

(2) Utilities shall indicate in the procurement documents whether or not they authorise or require variants.

(3) Utilities authorising or requiring variants shall indicate 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.

(4) Utilities 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.

(a) OJ No. L 218, 13.8.2008, p.30

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

Division of contracts into lots

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

(2) Utilities shall indicate—

- (a) in the contract notice,
- (b) in the invitation to confirm interest, or
- (c) where the means of calling for competition is a notice on the existence of a qualification system, in the invitation to tender or to negotiate,

whether tenders may be submitted for one, for several or for all of the lots.

(3) Utilities 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—

- (a) the contract notice or
- (b) the invitation to confirm interest, to tender or to negotiate.

(4) Utilities 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.

(5) Where more than one lot may be awarded to the same tenderer, utilities may award a contract combining several or all lots where they have specified in the—

- (a) contract notice or
- (b) in the invitation to confirm interest, to tender or to negotiate,

that they reserve the possibility of doing so and indicate the lots or groups of lots that may be combined.

Setting time limits

66.—(1) When fixing the time limits for requests to participate and the receipt of tenders, utilities shall take particular 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 45 to 49.

(2) Where tenders can be made only after a visit to the site or after on-the-spot inspection of 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 45 to 49, shall be fixed so that all economic operators concerned may be aware of all the information needed to produce tenders.

(3) Utilities 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 6 days before the time limit fixed for receipt of tenders;
- (b) where significant changes are made to the procurement documents.

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

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

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

SECTION 2

Publication and transparency

Periodic indicative notices

67.—(1) Utilities may make known their intentions of planned procurements through the publication of a periodic indicative notice.

(2) Such notices shall contain the information set out in part A, section I of Annex VI to the Utilities Contracts Directive.

(3) A utility wishing to publish a periodic indicative notice shall—

- (a) send it for publication in accordance with regulation 71; or
- (b) publish it on the utility's buyer profile in accordance with regulation 72.

(4) Where the periodic indicative notice is published by the utility on its buyer profile—

- (a) the utility shall send for publication, in accordance with regulation 71, a notice of the publication on its buyer profile, and
- (b) such a notice shall contain the information set out in Part B of Annex VI to the Utilities Contracts Directive.

(5) When a call for competition is made by means of a periodic indicative notice in respect of restricted procedures and negotiated procedures with prior call for competition, the notice shall meet all the following requirements:—

- (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 or negotiated procedure 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 I of Part A of Annex VI to the Utilities Contracts Directive, the information set out section II of part A;
- (d) it has been sent for publication between 35 days and 12 months prior to the date on which the invitation to confirm interest is sent for the purposes of regulation 74(1) or (2).

(6) Where paragraph (5) applies, paragraph (3)(b) shall not apply to the notice, but additional publication at national level under regulation 52, if any, may be made on a buyer profile.

(7) The period covered by the periodic indicative notice shall be a maximum of 12 months from the date on which the notice is transmitted for publication.

(8) In the case of contracts for social and other specific services, the periodic indicative notice referred to in regulation 91(1)(b) may cover a period which is longer than 12 months.

Notices on the existence of a qualification system

68.—(1) Where utilities choose to set up a qualification system in accordance with regulation 77, the system shall be the subject of a notice which shall include the information set out in Annex X to the Utilities Contracts Directive, indicating the purpose of the qualification system and how to have access to the rules concerning its operation.

(2) Utilities shall indicate the period of validity of the qualification system in the notice on the existence of the system.

(3) Utilities shall notify the EU Publications Office 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 for notices on the existence of qualification systems;

- (b) where the system is terminated, a contract award notice referred to in regulation 70.

Contract notices

69. Contract notices shall contain the information set out in the relevant part of Annex XI to the Utilities Contracts Directive and shall be sent for publication in accordance with regulation 71.

Contract award notices

70.—(1) Not later than 30 days after the award of a contract or the conclusion of a framework agreement, following the decision to award or conclude it, utilities 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 Annex XII to the Utilities Contracts Directive and shall be sent for publication in accordance with regulation 71.

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

(4) In the case of framework agreements, utilities shall not be bound to send a notice of the results of the procurement procedure for each contract based on such an agreement.

(5) In the case of dynamic purchasing systems, utilities shall either—

- (a) send a contract award notice within 30 days after the award of each contract based on a dynamic purchasing system, or
- (b) 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.

(6) 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 prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or
- (c) might prejudice fair competition between economic operators.

(7) In the case of contracts for research and development services, the information concerning the nature and quantity of the services may be limited to:—

- (a) the indication ‘R & D services’ where the contract has been awarded by a negotiated procedure without a call for competition in accordance regulation 50(1)(b);
- (b) information as least as detailed as was indicated in the notice that was used as a means of calling for competition.

Form and manner of sending notices for publication at EU level

71.—(1) The notices required by regulations 67-70, 88, 91 and 95 to be sent for publication in accordance with this regulation shall be sent by electronic means to the EU Publications Office for publication.

(2) Utilities 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 utility 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) Utilities may send notices in respect of works, supply or service contracts to the EU Publications Office for publication even where they are not required by these Regulations to do so, provided that the notices are sent by electronic means.

Publication at national level

Publication on buyer profiles

72.—(1) In addition to the publication of the notices referred to in regulations 67-70, 91 and [95] by the EU Publications Office, utilities may publish the information contained in them on the internet on a buyer profile.

(2) A buyer profile may also include (in addition to the periodic indicative notices referred to in regulation 67(3)(b)):

- (a) information on ongoing invitations to tender, scheduled purchases, contracts concluded, procedures cancelled; and
- (b) 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 67-70, 91 and [95], 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 the national level where utilities have not been notified of the publication by the EU publications office within 48 hours after confirmation of the receipt of the notice in accordance with Article 71(5) of the Utilities 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 periodic indicative notice is to be published on a buyer profile for the purposes of regulation 67(3)(b):

- (a) the periodic indicative notice may not be so published before the notice referred to in regulation 67(4)(a) is sent to the EU Publications Office; and
- (b) the periodic indicative notice shall indicate the date of that sending.

Electronic availability of procurement documents

73.—(1) Utilities shall, by means of the internet, offer unrestricted and full direct access free of charge to the procurement documents from the date of publication in the Official Journal of a notice in accordance with regulation 71 or the date on which an invitation to confirm interest is sent.

(2) But where the means of calling for competition is a notice on the existence of a qualification system, the access referred to in paragraph (1) shall be offered as soon as possible and at the latest when the invitation to tender or to negotiate is sent.

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

(4) Where unrestricted and full direct access free of charge to certain procurement documents cannot be offered by means of the internet for one of the reasons set out in regulation 40(3), utilities may indicate in the notice or the invitation to confirm interest that the procurement documents concerned will be transmitted by means other than the internet in accordance with paragraphs (7) and (8).

(5) Where unrestricted and full direct access free of charge to certain procurement documents cannot be offered by means of the internet because utilities intend to apply regulation 39(3), utilities shall indicate in—

- (a) the notice;
- (b) the invitation to confirm interest; or,
- (c) where the means of calling for competition is a notice on the existence of a qualification system, the procurement documents,

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 the cases referred to in paragraphs (4) and (5), the time limit for the submission of tenders shall be prolonged by 5 days, except—

- (a) in the cases of duly substantiated urgency referred to in regulation 45(5), and
- (b) where the time limit is set by mutual agreements in accordance with regulations 46(5) or 47(5).

(7) Provided that it has been requested in good time, utilities shall supply to all tenderers taking part in the procurement procedure additional information relating to the specifications and any supporting documents no later than 6 days before the time limit fixed for the receipt of tenders.

(8) In the case of an accelerated open procedure, the period mentioned in paragraph (7) shall be 4 days.

Invitations to candidates

74.—(1) In restricted procedures, competitive dialogue procedures, innovation partnerships and negotiated procedures with prior call for competition, utilities shall simultaneously and in writing invite the selected candidates to submit their tenders, to take part in the dialogue or to negotiate.

(2) Where a periodic indicative notice is used as a call for competition in accordance with regulation 44(4)(a), utilities 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 73(4) or (5) and have not been made otherwise available.

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

- (a) the final date for receipt of tenders, the address to which they are to be sent and the language or languages in which they are to be drawn up;
- (b) 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;
- (c) a reference to any published call for competition;
- (d) an indication of any documents to be attached;
- (e) the criteria for the award of the contract, where they are not indicated in the notice on the existence of a qualification system used as a means of calling for competition;
- (f) the relative weighting of the contract award criteria or, where appropriate, the order of importance of such criteria, if this information is not given in the contract notice, the notice on the existence of a qualification system or the specifications.

(5) But in the case of contracts awarded through a competitive dialogue or an innovation partnership, the information referred to in paragraph 4(a) shall not appear in the invitation 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) nature and quantity, including all options concerning complementary contracts and, where possible, the estimated time available for exercising those 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) type of procedure, namely restricted procedure or negotiated procedure;

- (c) where applicable, 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 utility;
- (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 those; 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 indicative notice or the specifications or in the invitation to tender or to negotiate.

Informing applicants for qualification, candidates and tenderers

75.—(1) Utilities 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, a utility shall, as soon 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 60(14) and (15), the reasons for its decision of non-equivalence or their 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) Utilities may decide to withhold certain information referred to in paragraphs (1) and (2) where the release of such information:—

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

Qualification systems

(4) Utilities which establish and operate a system of qualification shall inform applicants of their decision as to qualification within a period of 6 months.

(5) If the decision will take longer than 4 months from the presentation of an application, the utility shall inform the applicant, within 2 months of the application, of the reasons justifying the longer period and of the date by which his application will be accepted or refused.

(6) Applicants whose qualification is refused shall be informed of the refusal decision and the reasons for that decision as soon as possible and no more than 15 days later than the date of the refusal decision.

(7) The reasons shall be based on the criteria for qualification referred to in regulation 77(3) to (6).

(8) Utilities which establish and operate a system of qualification may bring the qualification of an economic operator to an end only for reasons based on the criteria for qualification referred to in regulation 77(3) to (6).

(9) Any intention to bring the qualification to an end shall be notified in writing to the economic operator at least 15 days before the date on which the qualification is due to end, together with the reason or reasons justifying the proposed action.

SECTION 3

Choice of participants and award of contracts

General principles

76.—(1) For the purpose of selecting participants in their procurement procedures, the following rules shall apply:—

- (a) utilities which have provided rules and criteria for the exclusion of tenderers or candidates in accordance with regulations 78(1) or 80(1), shall exclude economic operators identified in accordance with such rules and fulfilling such criteria;
- (b) utilities shall select tenderers and candidates in accordance with the objective rules and criteria mentioned in regulations 78 and 80;
- (c) utilities shall, where appropriate and in accordance with regulation 78(2) and (3), reduce the number of candidates selected in accordance with paragraphs (a) and (b) in:—
 - (i) restricted procedures;
 - (ii) negotiated procedures with a call for competition;
 - (iii) competitive dialogues; and
 - (iv) innovation partnerships.

(2) When a call for competition is made by means of a notice on the existence of a qualification system and for the purpose of selecting participants in procurement procedures for the specific contracts which are the subject of the call for competition, utilities shall:—

- (a) qualify economic operators in accordance with regulation 77;
- (b) apply to such qualified economic operators those provisions of paragraph (1) that are relevant to restricted or negotiated procedures, to competitive dialogues or to innovation partnerships.

(3) When selecting participants for a restricted or negotiated procedure, a competitive dialogue or an innovation partnership, in reaching their decision as to qualification or when the criteria and rules are being updated, utilities shall not:—

- (a) impose administrative, technical or financial conditions on certain economic operators which would not be imposed on others;
- (b) require tests or evidence which would duplicate objective evidence already available.

(4) Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous, or where specific documents are missing, utilities 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.

(5) Utilities shall verify that the tenders submitted by the selected tenderers comply with the rules and requirements applicable to tenders and award the contract on the basis of the criteria laid down in regulations 82 and 84, taking into account regulation 64.

(6) Utilities may decide not to award a contract to the tenderer submitting the best 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 XIV to the Utilities Contracts Directive as amended from time to time.

(7) In open procedures, utilities may decide to examine tenders before verifying the suitability of tenderers, provided that the relevant provisions of regulations 76 to 84 are observed.

SUB-SECTION 1

Qualification and qualitative selection

Qualification systems

77.—(1) Utilities may establish and operate a system of qualification of economic operators.

(2) Utilities which establish or operate a system of qualification shall ensure that economic operators are at all times able to request qualification.

(3) The system under paragraph (1) may involve different qualification stages.

(4) Utilities shall establish objective rules and criteria for—

- (a) the exclusion and selection of economic operators requesting qualification, and
- (b) the operation of the qualification system, covering matters such as:—
 - (i) inscription in the system;
 - (ii) periodic updating of the qualifications, if any; and
 - (iii) the duration of the system.

(5) Where the rules and criteria referred to in paragraph (4) include technical specifications, regulations 60 to 62 shall apply.

(6) The rules and criteria referred to in paragraph (4):—

- (a) shall be made available to economic operators upon request;
- (b) may be updated as required and if so, shall be communicated to interested economic operators

(7) Where a utility considers that the qualification system of certain other utilities or other bodies meets its requirements, it shall communicate the names of those utilities and bodies to interested economic operators.

(8) A written record of qualified economic operators shall be kept and may be divided into categories according to type of contract for which the qualification is valid.

(9) When a call for competition is made by means of a notice on the existence of a qualification system, specific contracts for the works, supplies or services covered by the qualification system shall be awarded by restricted procedures or negotiated procedures, in which all tenderers and participants are selected among the candidates already qualified in accordance with such a system.

(10) Any charges that are billed in connection with requests for qualification or with updating or conserving an already obtained qualification in accordance with the system shall be proportionate to the generated costs.

Criteria for qualitative selection

78.—(1) Utilities may establish objective rules and criteria for the exclusion and selection of tenderers or candidates.

(2) Those rules and criteria shall be available to interested economic operators.

(3) Where utilities need to ensure an appropriate balance between the particular characteristics of the procurement procedure and the resources required to conduct it, they may, in restricted and negotiated procedures, in competitive dialogues or in innovation partnerships, establish objective rules and criteria that reflect that need and enable utilities to reduce the number of candidates that will be invited to tender or to negotiate.

(4) Utilities shall take account of the need to ensure adequate competition when selecting the number of candidates.

Reliance on the capacities of other entities

79.—(1) Where the objective rules and criteria for the exclusion and selection of:—

- (a) economic operators requesting qualification in a qualification system; or
- (b) candidates and tenderers in open, restricted or negotiated procedures,

include requirements relating to the economic and financial capacity of the economic operator, or its technical and professional abilities, the economic operator may, where necessary, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them, subject to the following provisions of this regulation.

(2) With regard to criteria relating to the educational and professional qualifications of the service provider or contractor or those of the undertaking's managerial staff 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 utility that the necessary resources will be available to it, for example by producing a commitment by those entities to that effect.

(4) For the purposes of paragraph (3), an economic operator requesting qualification in a qualification system shall prove that the necessary resources will be available to it throughout the period of validity of the qualification system.

(5) Where, in accordance with regulation 80, utilities have referred to exclusion or selection criteria provided for under the Public Contract Regulations 2015, utilities shall verify, in accordance with regulation 80(4), whether the other entities on whose capacity the economic operator intends to rely fulfil the relevant selection criteria or whether there are grounds for exclusion, to which the utilities have referred, under regulation 57 of the Public Contracts Regulations, and,

- (a) the utility shall require that the economic operator replaces an entity in respect of which there are compulsory grounds for exclusion to which the utility has referred; and
- (b) the utility may require that the economic operator replaces an entity in respect of which there are non-compulsory grounds for exclusion to which the utility has referred.

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

(7) A group of economic operators within the meaning of regulation 37(3) may rely on the capacities of participants in the group or of other entities, and paragraphs (1) to (6) apply in relation to such a group in the same way that they apply in relation to an economic operator.

(8) In the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, utilities 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 within the meaning of regulation 37(3), by a participant in that group.

Use of exclusion grounds and selection criteria provided for under the Public Contracts Regulations

80.—(1) The objective rules and criteria for the exclusion and selection of—

- (a) economic operators requesting qualification in a qualification system, and
- (b) candidates and tenderers in open, restricted or negotiated procedures, in competitive dialogues or in innovations partnerships

may include the exclusion grounds listed in regulation 57 of the Public Contracts Regulations on the terms and conditions set out in those Regulations.

(2) Where the utility is a contracting authority, the criteria and rules referred to in paragraph (1) shall include the exclusion grounds listed in regulation 57(1) to (5) of the Public Contracts Regulations on the terms and conditions set out in that regulation.

(3) The criteria and rules referred to in paragraph (1) may include the selection criteria set out in regulation 58 of the Public Contracts Regulations on the terms and conditions set out in that regulation, notably as regards the limits to requirements concerning yearly turnovers, as provided for under that regulation 58(9) of those Regulations.

(4) For the purposes of applying paragraphs (1), (2) and (3), regulations 59 to 61 of the Public Contracts Regulations apply.

(5) For the purposes of paragraph (1), (3) and (4), any reference to a contracting authority in regulations 57 to 59 and 61 of the Public Contracts Regulations shall be deemed to be a reference to a utility.

Quality assurance standards and environmental management standards

81.—(1) Utilities 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) Utilities shall recognise equivalent certificates from bodies established in other member States.

(3) Utilities 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 utilities 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 of the EU,
- (b) other environmental management systems as recognised in accordance with Article 45 of Regulation (EC) No 1221/2009 of the European Parliament and of the Council^(a), 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 the certificates referred to in paragraph (4), or no possibility of obtaining them within the relevant time limits for reasons that are not attributable to that economic operator, the utility 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.

SUB-SECTION 2 *Award of the Contract*

Contract award criteria

82.—(1) Utilities shall base the award of contracts on the most economically advantageous tender assessed from the point of view of the utility.

(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 83, 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 contract in question.

(3) Such criteria may comprise, for example:—

(a) OJ No L 342, 22.12.2009, p.1

- (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, commitments with regard to parts and security of supply.

(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 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 utility.

(7) Award criteria shall:—

- (a) ensure the possibility of effective competition; and
- (b) 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.

(8) In case of doubt, utilities shall verify effectively the accuracy of the information and proof provided by the tenderers.

Weighting

(9) The utility 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.

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

(11) Where weighting is not possible for objective reasons, the utility shall indicate the criteria in descending order of importance.

Life-cycle costing

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

- (a) costs, borne by the utility 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 utilities 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 utility 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 XV to the Utilities Contracts Directive as amended from time to time.

Abnormally low tenders

84.—(1) Utilities 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 the applicable obligations referred to in regulation 76(6);
- (e) compliance with obligations referred to in regulation 87;
- (f) the possibility of the tenderer obtaining State aid.

(3) The utility shall assess the information provided by consulting the tenderer.

(4) The utility 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) The utility shall reject the tender where it has established that the tender is abnormally low because it does not comply with applicable obligations referred to in regulation 76(6).

(6) Where the utility 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 latter is unable to prove, within a sufficient time limit fixed by the utility, that the aid in question was compatible with the internal market within the meaning of Article 107 of TFEU.

(7) Where the utility rejects a tender in the circumstances referred to in paragraph (6), it shall inform the Commission.

SECTION 4

Tenders comprising products originating in third countries and relations with those countries

Tenders comprising products originating in third countries

85.—(1) This regulation applies to tenders covering products originating in third countries with which the EU has not concluded, whether multilaterally or bilaterally, an agreement ensuring comparable and effective access for EU undertakings to the markets of those third countries.

(2) For the purposes of this regulation—

- (a) the origin of products shall be determined in accordance with Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code^(a) as amended from time to time;
- (b) software used in telecommunications network equipment shall be regarded as products; and
- (c) those third countries to which the benefits of the Utilities Contracts Directive has been extended by an EU Council Decision, shall not be taken into account by utilities for determining the proportion, referred to in paragraph (3), of products originating in third countries.

(3) Utilities may reject any tender submitted for the award of a supply contract where the proportion of the products originating in third countries exceeds 50% of the total value of the products constituting the tender.

(4) Where two or more tenders are equivalent in the light of the contract award criteria defined in regulation 82—

- (a) utilities shall give preference to those tenders which may not be rejected in accordance with paragraph (3), unless
- (b) acceptance would oblige the utility to acquire equipment having technical characteristics different from those of existing equipment, resulting in:-
 - (i) incompatibility;
 - (ii) technical difficulties in operation and maintenance; or
 - (iii) disproportionate costs.

(5) For the purposes of paragraph (4), tenders shall be considered equivalent if the price difference between those tenders does not exceed 3%.

CHAPTER 4

Contract performance

Conditions for performance of contracts

86.—(1) Utilities 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 82(5) and
- (b) indicated in the call for competition or in the procurement documents.

(2) Those conditions may include economic, innovation-related, environmental, social or employment-related considerations.

(a) OJ No L 302, 19.10.1992, p.1; Regulation as last amended by Council Regulation (EU) No 517/2013 of 13 May 2013 (OJ No L 158, 10.6.2013, p.1.

Subcontracting

Giving information to utilities

87.—(1) In the procurement documents, the utility 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 utility, after the award of the contract and at the latest when the performance of the contract commences, the utility shall require the main contractor to notify to the utility the name, contact details and legal representatives of its subcontractors, involved in such works or services, insofar as known at the time.

(4) The utility shall require the main contractor to notify the utility of:—

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

(5) Where necessary for the purposes of paragraph (8), the required information shall be accompanied by ESPDs (within the meaning of regulation 59 of the Public Contracts Regulations) in respect of subcontractors.

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

(7) Utilities may extend the obligations provided for in paragraphs (3) and (4) to, for example:—

- (a) supply contracts, service contracts (other than those concerning services to be provided at the facilities under the direct oversight of the utility) or suppliers involved in works or services contracts;
- (b) subcontractors of the main contractor's subcontractors or subcontractors further down the subcontracting chain.

Excluding subcontractors

(8) Utilities that are contracting authorities may, in accordance with regulations 59, 60 and 61 of the Public Contracts Regulations verify whether there are grounds for exclusion of subcontractors under regulation 57 of those Regulations.

(9) In such cases, the utility:—

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

(10) For the purposes of paragraph (5), any reference to a contracting authority in regulation 59 of the Public Contracts Regulations shall be deemed to be a reference to a utility.

Modification of contracts during their term

88.—(1) Contracts and framework agreements may be modified without a new procurement procedure in accordance with these Regulations in any of the following cases:—

- (a) where the modifications, irrespective of their monetary value, have been provided for in the initial 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, irrespective of their value, 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, software, services or installations procured under the initial procurement; or
 - (ii) would cause significant inconvenience or substantial duplication of costs for the utility;
- (c) where all of the following conditions are fulfilled:—
 - (i) the need for modification has been brought about by circumstances which a diligent utility could not have foreseen;
 - (ii) the modification does not alter the overall nature of the contract;
- (d) where a new contractor replaces the one to which the utility 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 these Regulations;
- (e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph (7); or
- (f) where paragraph (4) applies.

(2) Utilities 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 71, for publication.

(3) Such a notice shall contain the information set out in Annex XVI to the Utilities Contracts Directive.

(4) This paragraph applies where the value of the modification is below both of the following values:—

- (a) the relevant threshold mentioned in regulation 16; 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.

(5) For the purposes of paragraph (4), where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications.

(6) For the purpose of the calculation of the values referred to in paragraph (4)(b), the updated figure shall be the reference figure when the contract includes an indexation clause.

(7) A modification of a contract or a framework agreement during its term shall be considered to be substantial within the meaning 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 utility had initially awarded the contract in cases other than those provided for in paragraph (1)(d).

(8) A new procurement procedure in accordance with these Regulations shall be required for modifications of the provisions of a contract or a framework agreement during its term other than those provided for in this regulation.

Termination of contracts

89.—(1) Utilities shall ensure that every contract which they award contains provisions enabling the utility to terminate the contract where:—

- (a) the contract has been subject to a substantial modification which would have required a new procurement procedure in accordance with regulation 88(8).
- (b) the contractor has, at the time of contract award, been in one of the situations referred to in regulation 57(1) of the Public Contracts Regulations and should therefore have been excluded from the procurement procedure in accordance with regulation 80(2) of these Regulations.
- (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 Utilities Contracts Directive that has been declared by the Court of Justice of the EU in a procedure under 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 contract does not contain provisions enabling the utility to terminate the contract on any of the grounds mentioned in paragraph (1), a power for the utility to do so on giving reasonable notice to the contractor shall be an implied term of that contract.

PART 3

PARTICULAR PROCUREMENT REGIMES

CHAPTER 1

Social and other specific services

Award of contracts for social and other specific services

90. Contracts for social and other specific services listed in Schedule 2 shall be awarded in accordance with this Chapter.

Publication of notices

91.—(1) Utilities intending to award a contract for the services referred to in regulation 90 shall make known their intention by any of the following means:—

- (a) by means of a contract notice;
- (b) by means of a periodic indicative notice, which shall:—
 - (i) be published continuously;
 - (ii) refer specifically to the types of services that will be the subject of the contract to be awarded; and

- (iii) indicate that the contracts will be awarded without further publication and invite interested economic operators to express their interest in writing; or
 - (c) by means of a notice on the existence of a qualification system, which shall be published continuously.
- (2) Paragraph (1) shall not apply where a negotiated procedure without prior call for competition could have been used, in accordance with regulation 50, for the award of a service contract.
- (3) Utilities that have awarded a contract for the services referred to in regulation 90 shall make known the results by means of a contract award notice.
- (4) Utilities 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 paragraphs (1), (3) and (4) shall contain the information referred to in the relevant part of Annex XVIII to the Utilities Contracts Directive, in accordance with [*reference to Commission Regulation on standard model notices to be inserted*].
- (6) Utilities shall send the notices referred to in this regulation for publication in accordance with regulation 71.

Principles of awarding contracts

92.—(1) Utilities shall determine the procedures that are to be applied in connection with the award of contracts subject to this Chapter, 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 91, a contract notice or periodic indicative notice has been published in relation to a given procurement, the utility 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 utility, and
- (c) the award procedure to be applied.

(4) The utility 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 utility has, before proceeding in reliance on sub-paragraph (a)—
 - (i) given due consideration to the matter,
 - (ii) concluded that sub-paragraph (a) is applicable,
 - (iii) documented that conclusion and the reasons for it in accordance with regulation 99(5) and (6), and
 - (iv) informed the participants of the respects in which the utility intends to proceed in a way which is not in conformity with the information contained in the notice.

(5) In paragraph (4)(b)(iv), “participants” means any economic operators which have responded to the notice and have not been informed by the utility that they are no longer under consideration for the award of a contract within the scope of the procurement concerned.

(6) 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.

(7) Without prejudice to the generality of paragraph (1), and subject to the other requirements of this Part, utilities may apply procedures for the purposes of this regulation which correspond (with

or without variations) to procedures, techniques or other features provided for in Part 2, as well as procedures which do not.

(8) In relation to the award of contracts subject to this Chapter, utilities may take into account any relevant considerations, including:—

- (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; and
- (d) innovation;

Reserved contracts for certain services

93.—(1) Utilities that are contracting authorities may reserve to qualifying organisations the right to participate in procedures for the award of reservable public contracts.

(2) For that purpose, a contract is a reservable public contract only if it is exclusively for one or more of those health, social and cultural services 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 and 98133110-8.

(3) In this regulation, “qualifying organisation” means an organisation which fulfils all of the following conditions:—

- (a) its objective is the pursuit of a public service mission linked to the delivery of services referred to in paragraph (2);
- (b) profits are reinvested with a view to achieving the organisation’s objective, and any distribution of profits is 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, pursuant to this regulation, a contract for the services concerned by the contracting authority concerned within the past 3 years.

(4) The maximum duration of the contract awarded under this regulation shall not be longer than 3 years.

(5) Where a contracting authority exercises the power of reservation conferred by paragraph (1), the call for competition shall make reference to Article 94 of the Utilities Contracts Directive.

CHAPTER 2

Rules governing design contests

Scope of Chapter 2

94. This Chapter applies to:—

- (a) design contests organised as part of a procurement procedure for a service contract, provided that the estimated value of the contract (net of VAT) and including any possible prizes or payments to participants is equal to or greater than the threshold mentioned in regulation 16(1)(a);
- (b) design contests where the total amount of contest prizes and payments to participants including the value (net of VAT) of the service contract, which might subsequently be concluded following a negotiated procedure without prior call for competition in accordance with regulation 50(1)(j) if the utility does not exclude such an award in the contest notice, is equal to or greater than the threshold mentioned in regulation 16(1)(a).

Notices

95.—(1) Utilities that intend to organise a design contest shall call for competition by means of a contest notice.

(2) Contest notices shall—

- (a) include the information set out in Annex XIX to the Utilities Contracts Directive; and
- (b) be sent for publication in accordance with Regulation 71.

(3) Utilities that have held a design contest shall make the results known by means of a notice, which shall be sent for publication—

- (a) in accordance with regulation 71, and
- (b) within 30 days of the closure of the design contest.

(4) A notice of the results of the contest shall include the information set out in Annex XX to the Utilities Contracts Directive.

(5) But where the release of the information on the outcome of the contest—

- (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,

such information may be withheld from publication.

Rules on the organisation of design contests and the selection of participants and the jury

96.—(1) When organising design contests, utilities shall apply procedures which are adapted to the provisions of Part I and this Chapter.

(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, utilities shall establish clear and non-discriminatory selection criteria.

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

(5) The jury shall be composed exclusively of natural persons who are independent of participants in the contest.

(6) Where a particular professional qualification is required of 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

97.—(1) The jury shall be autonomous in its decisions and 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 aspects of the projects.

(6) Complete minutes shall be drawn up of the dialogue between jury members and candidates.

PART 4

INFORMATION AND DOCUMENTATION

Retention of contract copies

98.—(1) Utilities that are 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 supply contracts or service contracts;
- (b) 10 000 000 EUR in the case of 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.

Information and documentation requirements

Keeping of information

99.—(1) Utilities shall keep appropriate information on each contract and framework agreement covered by these Regulations and each time a dynamic purchasing system is established.

(2) The information referred to in paragraph (1) shall be sufficient to permit utilities at a later date to justify decisions taken in connection with:—

- (a) the qualification and selection of economic operators and the award of contracts;
- (b) the use of negotiated procedures without a call for competition in accordance with regulation 50;
- (c) the derogations provided for in Chapters 2 and 3 of Part 1 to these Regulations relating to Chapters 2 to 4 of Part 2 to these Regulations;
- (d) where necessary, the reasons why means of communication other than electronic means have been used for the submission of tenders.

(3) To the extent that the contract award notice drawn up in accordance with regulations 70 or 91(3) contains the information required in this paragraph, utilities may refer to that notice.

Documentation of progress and decisions

(4) Utilities shall document the progress of all procurement procedures, whether or not the procedures are conducted by electronic means.

(5) To that end, utilities 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;
- (b) internal deliberations;
- (c) preparation of the procurement documents;
- (d) dialogue or negotiation, if any;
- (e) selection and award of the contract.

(6) The documentation shall be kept for at least 3 years from the date of award of the contract.

Communication of information and documentation

(7) Where the Commission so requests, utilities shall communicate the information and documentation referred to in paragraphs (1) to (6), or its main elements, to the Commission.

(8) Where the Cabinet Office so requests, utilities shall communicate the information and documentation referred to in paragraphs (1) to (6), or its main elements 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 purpose of Article 99 of the Utilities Contracts Directive.

Information required by the Cabinet Office

(9) Utilities shall send to the Cabinet Office such other information and documentation as the Cabinet Office may request from time to time in respect of procurements—

- (a) within the scope of these Regulations, or
- (b) which would have been within the scope of these Regulations if their value had exceeded the relevant threshold set out in regulation 16,

for the purpose of enabling the Cabinet Office to provide the Commission with information.

PART 5

REMEDIES

CHAPTER 1

FACILITATION OF REMEDIES

Scope of Chapter 1

100. This Chapter applies to contracts and framework agreements falling within the scope of Parts 1 to 4.

Notices of decisions to award a contract or conclude a framework agreement

101.—(1) Subject to paragraphs (5) and (6), a utility shall send to each candidate and tenderer a notice communicating its decision to award the contract or conclude a 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 102, 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 utility will not, in conformity with regulation 102, 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 utility that the economic operator did not meet the technical specifications—

- (a) in an equivalent manner as mentioned in regulation 60(13); or
- (b) because compliance with a standard, approval, specification or system mentioned in regulation 60(14) does not address the performance or functional requirements laid down by the utility.

- (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 utility need not comply with paragraph (1) in any of the following cases:—
- (a) where the contract or framework agreement is permitted by these Regulations to be awarded without a call for competition;
 - (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 a utility awards a contract under a framework agreement or a dynamic purchasing system.
- (6) A utility 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 any economic operator; 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 2 of this Part; 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 107(4) and (5).

Standstill period

102.—(1) Where regulation 101(1) applies, the utility must not enter into the contract or conclude the framework agreement before the end of the standstill period.

(2) Where the utility sends a regulation 101 notice to all 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) Where the utility sends a regulation 101 notice to all 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 the 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 101 notices are 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) Where the utility sends a regulation 101 notice to one or more of the relevant economic operators by facsimile or electronic means and to 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) In this regulation—

- (a) “regulation 101 notice” means a notice given in accordance with regulation 101; and
- (b) “relevant economic operators” means economic operators to which regulation 101 requires a notice to be sent.

CHAPTER 2

APPLICATIONS TO THE COURT

Interpretation of Chapter 2

103.—(1) In this Chapter, —

“claim form” includes, in Northern Ireland, the originating process by which the proceedings are commenced;

“contract”, except in regulation 118, includes a framework agreement;

“declaration of effectiveness” means a declaration made under regulation 113(2)(a) or 118(3);

“economic operator” has the meanings given by paragraph (2);

“grounds for ineffectiveness” has the meaning given to it by regulation 114;

“proceedings” means court proceedings taken for the purposes of regulation 106; and

“standstill period”, and references to its end, have the same meaning as in regulation 102.

(2) In regulations 104 and 105, “economic operator” has its usual meaning (in accordance with regulation 2(1)), but in the other provisions of this Chapter “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 104 or 105.

Duty owed to economic operators from EEA States

104.—(1) This regulation applies to the obligation on a utility to comply with:—

- (a) the provisions of these Regulations; and
- (b) any enforceable EU obligation in the field of procurement in respect of a contract or design contest falling within the scope of these Regulations.

(2) That obligation is a duty owed to an economic operator from the United Kingdom or from another EEA State.

Duty owed to economic operators from certain other States

105.—(1) The duty owed in accordance with regulation 104 is a duty also owed 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 if a relevant bilateral agreement applies.
- (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) For the purpose of paragraph 1(b), a relevant bilateral agreement applies if—
- (a) there is an international agreement, other than the GPA, by which the EU is bound; and
 - (b) in accordance with that agreement, the economic operator is, in respect of the procurement concerned, to be accorded remedies no less favourable than those accorded to economic operators from the EU in respect of matters falling within the scope of the duty owed in accordance with regulation 104.
- (4) In this regulation—
- “GPA State” means an country, other than an EEA State, which at the relevant time is a signatory to the GPA; and
- “relevant time” means—
- (a) if the utility selects economic operators to tender for or to negotiate the contract in accordance with a qualification system established in accordance with regulation 77, the date on which the selection commences;
 - (b) if the utility satisfies the requirement that there be a call for competition by indicating the intention to award the contract in a periodic indicative notice in accordance with regulations 67 or 91(1)(b), the date on which the notice is sent to the EU Publications Office; or
 - (c) in any other case, the date on which the utility sent a contract notice (or design contest notice) to the EU Publications Office or would have done so if the requirement that there be a call for competition applied and the utility decided to satisfy that requirement by sending such a notice.

Enforcement of duties through the Court

106.—(1) A breach of the duty owed in accordance with regulation 104 or 105 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 107 to 119 apply to such proceedings.

General time limits for starting proceedings

107.—(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 limit imposed by this regulation (but not any of the limits imposed by regulation 108) where the Court considers that there is 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

108.—(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 notice in the Official Journal; and
 - (b) the contract award notice includes justification of the decision of the utility to award the contract without such prior publication of a notice.
- (5) This paragraph applies where the utility 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 75(2).

(7) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is issued.

Starting proceedings

109.—(1) Where proceedings are started, the economic operator must serve the claim form on the utility 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 regulations 102, 110 or 111(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 utility, who is a party to the contract in question.

(4) The utility 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 service 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

110.—(1) Where—

- (a) a claim form has been issued in respect of a utility’s decision to award the contract;
- (b) the utility 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 utility 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 111(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 102.

Interim orders

111.—(1) In proceedings, the Court may, where relevant, make an interim order:—

- (a) bringing to an end the requirement imposed by regulation 110(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 104 or 105 is alleged;
- (d) suspending the implementation of any decision or action taken by the utility in the course of following such a procedure.

(2) When deciding to make an order under paragraph (1)(a)—

- (a) the Court must consider whether, if regulation 105(1) were not applicable, it would be appropriate to make an interim order requiring the utility 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 110(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

112.—(1) This regulations applies where—

(a) the Court is satisfied that a decision or action taken by a utility was in breach of the duty owed in accordance with regulation 104 or 105; 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 utility to amend any document;

(c) award damages to an economic operator which has suffered loss or damage as a consequence of the breach.

(3) Where the Court is satisfied that an economic operator would have had a real chance of being awarded the contract if that chance had not been affected by the breach mentioned in paragraph (1)(a), the economic operator is entitled to damages amounting to its costs in preparing its tender and in participating in the procedure leading to the award of the contract.

(4) Paragraph (3)—

(a) does not affect a claim by an economic operator that it has suffered other loss or damage or that it is entitled to relief other than damages; and

(b) is without prejudice to the matters on which an economic operator may be required to satisfy the Court in respect of any such other claim.

(5) This regulation does not prejudice any other powers of the Court.

Remedies where the contract has been entered into

113.—(1) Paragraph (2) applies if—

(a) the Court is satisfied that a decision or action taken by a utility was in breach of the duty owed in accordance with regulation 104 or 105; 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 115 requires the Court not to do so;

(b) must, where required by regulation 117, 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 118(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 116(3) or 117(10) (orders which supplement a declaration of ineffectiveness or a contract-shortening order).

(4) Regulation 112(3) and (4) (entitlement to tendering costs etc. as damages for loss of a real chance of being awarded the contract) apply for the purposes of this paragraph.

Grounds for ineffectiveness

114.—(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 notice in the Official Journal in any case in which these Regulations required the prior publication of such a notice.

(3) The first ground does not apply if all of the following apply:—

- (a) the utility considered the award of the contract without prior publication of such a notice to be permitted by these Regulations;
- (b) the utility 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—

- (a) which contains the following information—
 - (i) the name and contact details of the utility;
 - (ii) a description of the object of the contract;
 - (iii) a justification of the decision of the utility to award the contract without prior publication of a notice in the Official Journal;
 - (iv) the name and contact details of the economic operator to be awarded the contract; and
 - (v) where appropriate, any other information which the utility considers it useful to include; and
- (b) which, if [*reference to Commission Regulation on standard model notices to be inserted*] sets out a form to be used for the purposes of paragraph (3), is in that form.

The second ground

(5) The second ground applies where all of the following apply—

- (a) the contract has been entered into in breach of any requirement imposed by—
 - (i) regulation 102 (the standstill period);
 - (ii) regulation 110 (contract-making suspended by challenge to award); or
 - (iii) regulation 111(1)(b) (interim order restoring or modifying a suspension originally imposed by regulation 110);
- (b) there has also been a breach of the duty owed to the economic operator in accordance with regulation 104 or 105 in respect of obligations other than those imposed by regulation 102 (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 of the following apply:-

- (a) the contract was awarded under a dynamic purchasing system;
 - (b) the contract was awarded in breach of any requirement imposed by regulation 52(21) to (24) (award of contracts under dynamic purchasing systems); and
 - (c) the estimated value of the contract is equal to or greater than the relevant threshold mentioned in regulation 16.
- (7) The third ground does not apply if all of the following apply:—
- (a) the utility considered the award of the contract to be in accordance with regulation 52(21) to (24);
 - (b) the utility has, despite regulation 101(5)(c), voluntarily complied with the requirements set out in regulation 101(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

115.—(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 utility 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 117(3)(a).

The consequences of ineffectiveness

116.—(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 decision 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 has 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

117.—(1) Where the Court makes a declaration of ineffectiveness, it must also order that the utility 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 115 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 102, 110 or 111(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 utility 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 duty owed in accordance with regulation 104 or 105;
- (b) the behaviour of the utility;
- (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) Where a utility 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 utility 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 a utility 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 utility 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.

(9) Where a utility 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 (8) may be enforced by the Department of Finance and Personnel as a judgment debt due to it.

Contract shortening

(10) When making an order under paragraph (3)(a), or at any time after doing so, the Court may make an order that it thinks appropriate for addressing the consequences of the shortening of the duration of the contract.

(11) 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.

(12) Paragraph (13) 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.

(13) In those circumstances, the Court must not exercise its power to make an order under paragraph (10) 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).

(14) In paragraph (3)(a), “duration of 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

118.—(1) In this regulation, “specific contract” means a contract which—

(a) is based on 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 108 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 115 (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 these Regulations on the basis of the second ground of ineffectiveness set out in regulation 114(5), where—

(a) the relevant breach of the kind mentioned in regulation 114(5)(a) is entering into the specific contract in breach of regulation 110 or 111(1)(b); and

(b) the relevant breach of the kind mentioned in regulation 114(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 the 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 116 (the consequences of ineffectiveness) applies;

(b) regulation 117 (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 specific contract be shortened to the extent specified in the order.

(10) The extent by which the duration of the specific 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

119. In proceedings against the Crown, the Court has power to grant an injunction despite section 21 of the Crown Proceedings Act 1947(a).

PART 6

REVOCATIONS, CONSEQUENTIAL AMENDMENTS, SAVINGS AND TRANSITIONAL PROVISIONS

[to be inserted]

PART 7

REVIEW

Review of these Regulations

120.—(1) The Minister for the Cabinet Office must from time to time—

(a) carry out a review of these Regulations;

(b) set out the conclusions of the review in a report; and

(c) publish the report.

(2) In carrying out the review, the Minister for the Cabinet Office must, so far as is reasonable, have regard to how the Utilities Contracts Directive is implemented in other member States.

(3) The report must in particular—

(a) set out the objectives intended to be achieved by the regulatory system established by these Regulations;

(b) assess the extent to which those objectives are achieved; and

(a) 1947 c.44

(c) assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.

(4) The first report under this regulation must be published before the end of the period of 5 years beginning on 18th April 2015.

(5) Reports under this regulation are afterwards to be published at intervals not exceeding 5 years.

Signature
Minister for the Cabinet Office

Date of signature

SCHEDULE 1

Regulation 2(1)

ACTIVITIES CONSTITUTING WORKS

This Schedule will reproduce the content of Annex I to the Utilities Contracts Directive

SCHEDULE 2

Regulations 16(1)(c) and 90

SOCIAL AND OTHER SPECIFIC SERVICES

This Schedule will reproduce the content of Annex XVII to the Utilities Contracts Directive