



MINISTRY OF DEFENCE

MOD Consultation Document

on the approach to implementation of:
Directive 2009/81/EC of the European Parliament
and of the Council of July 2009



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MOD CONSULTATION DOCUMENT ON THE IMPLEMENTATION OF:
DIRECTIVE 2009/81/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 13 July 2009

on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC

EXECUTIVE SUMMARY

This consultation document concerns the implementation of the new European Directive on defence and security procurement¹ (the “New Directive”). It commences the second stage of a two stage consultation process that involves seeking feedback from stakeholders on draft regulations and other implementation issues.

The New Directive sets out new procurement rules for contracting authorities/entities which purchase military equipment, sensitive equipment, and related goods, works or services. It also provides rules where contracting authorities/entities purchase works and services for specifically military purposes or works or services for security purposes which involve, require or contain classified information. These rules have been specifically adapted to meet the concerns of European Member States about procuring defence and security goods, works and services under Directive 2004/18/EC (the “Classic Directive”). As the New Directive primarily affects defence contracting, the Ministry of Defence (MOD) has lead responsibility for coordinating transposition.

The New Directive provides Member States with common defence and sensitive security procurement rules, such as security of information and security of supply, which take account of the special features of those markets. The expectation is that this will enable defence and security procurement business to be conducted more efficiently and that, in particular, the European defence and security markets will be made more open and transparent.

The New Directive has already been adopted by the European Parliament and its effect cannot be changed in the implementation process. However, some aspects of the transposition can be influenced, for example, where the New Directive requires Member States to make a choice between two or more optional elements, or where the New Directive is silent on a policy issue. MOD is using two public consultations to gather stakeholders' views on these and various other implementation issues.

The first consultation earlier this year, elicited stakeholders' views on a number of the optional elements in the New Directive and MOD is grateful to stakeholders for their valuable input. Those views were carefully considered during the analysis and decision-making process. The results are contained in this Second Consultation Document, along with draft regulations (on which MOD

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:216:0076:0136:EN:PDF>

Directive 2009/81/EC
MOD Consultation on the Implementation

welcomes further comments) and some further questions for stakeholders on some important implementation issues.

Respondents are urged to consider and comment where necessary on both the draft regulations and the implementation questions raised. MOD will analyse the responses carefully and any decisions will take account of the evidence provided. Feedback is sought on all the topics highlighted in this document.

This consultation document contains three main sections:

Part 1 sets out the background to the New Directive, MOD's approach to implementation and the scope of this consultation.

Part 2 summarises the results of the first consultation.

Part 3 draws stakeholders' attention to some important technical issues and key questions, on which feedback is sought so as to inform further implementation decisions.

MOD welcomes input by 07 March 2011. Please direct responses, or any questions on the consultation, to: EUDirective-Responses@mod.uk

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PART 1

BACKGROUND AND TRANSPOSITION PLANS

Purpose

1. This Second Consultation Document summarises the outcome of the first consultation, and invites views from stakeholders on MOD's draft implementing regulations, and other implementation issues, for the transposition of 2009/81/EC (the "New Directive") of the European Parliament and of the Council, amending Council Directives 2004/17/EC (the "Utilities Directive") and 2004/18/EC (the "Classic Directive").

Background

2. The New Directive was adopted by the EU Council of Ministers and the European Commission on 13 July 2009. It was published in the Official Journal of the European Union (OJEU) on 20 August 2009 and must be implemented by 21 August 2011.

3. The New Directive establishes new procurement rules specifically adapted to meet the concerns of Member States about the sensitive nature of procurements in the defence and security sectors and was adopted following a successful proposal by the EU Commission to address concerns by Member States that the existing Classic and Utilities Directives do not always permit the acquisition of military or sensitive security capability as effectively as they could, or deal explicitly with key requirements for acquisitions such as security of information.

4. The New Directive is largely based on the Classic Directive. Its scope also extends to contracting entities to which the Utilities Directive applies if they procure equipment, works or services which are for security purposes and involve, require or contain classified information.

5. The New Directive also introduces a number of provisions concerning the award of public contracts in the defence and security fields which are either new, or are adaptations of the provisions which exist in the Classic Directive, in particular:

- a. The default procedures are the negotiated with prior publication of contract notice and the restricted procedure. The competitive dialogue procedure can be used for particularly complex contracts where the default procedures are not sufficient;
- b. Specific provisions on security of information are included which ensure that sensitive information will remain protected against unauthorised access;
- c. Special clauses on security of supply will provide contracting authorities/entities with greater certainty that equipment, works or services can be delivered, in particular in times of crisis or armed conflict;
- d. Special rules on sub-contracting make it possible for contracting authorities/entities to require competitive procurements for sub-contractors on an EU-wide basis, potentially improving market access for small and medium-sized enterprises (SMEs) and thus complementing the Small Business Act for Europe objectives.

6. The New Directive contains a number of choices for Member States, and MOD ran a 12 week public consultation, from December 2009 to March 2010, to ascertain stakeholders' views on those optional aspects. The results of that consultation informed the decision-making process that followed; Part 2 of this document contains a summary of stakeholders' views and subsequent policy outcomes.

Scope

7. MOD has responsibility for coordinating the transposition of the New Directive in the jurisdictions of England, Wales, Scotland and Northern Ireland, so this consultation exercise is primarily aimed at consultees in those jurisdictions. MOD is also supporting personnel responsible for transposition work in Gibraltar.

Approach

8. Implementation of the New Directive is mandatory. However, there is a measure of flexibility in implementation, as some elements of the New Directive are optional, and some issues on which the New Directive is silent, so there are a number of decisions for Member States to make.

9. MOD's overall approach, as described in the First Consultation Document, aims to capture stakeholder views using two public consultations. The first consultation introduced MOD's proposed approach to implementation; highlighted the main new provisions; and sought stakeholder feedback on the optional elements of the New Directive. The latter enabled MOD to gauge preferences and inform decisions on the preferred options.

10. This Second Consultation Document is issued directly to a number of stakeholders and is also made publicly available on MOD and Office of Government Commerce (OGC)² websites. The document summarises the outcomes of the first consultation; includes draft implementing regulations, a draft Transposition Note; and poses some further technical implementation questions. Stakeholders' attention is drawn to the Government awareness Guide, prepared by MOD and available on MOD's consultation website, as well as the useful guidance³ on key topics of the New Directive, issued by the European Commission. However, it should be noted that the UK does not agree with all of the legal interpretation contained in the Commission's guidance and has therefore reserved its position on some key issues.

11. This second consultation runs for 12 weeks, from 13 December 2010 to 07 March 2011, after which the results of the consultation will be published and the draft regulations finalised and made and laid before Parliament before the summer 2011 recess.

12. The new Defence and Security Public Contracts Regulations 2011 (the "New Regulations") will take effect on 21 August 2011. The implementing regulations will amend the existing Public Contracts Regulations 2006 (PCR 2006), Public Contracts (Scotland) Regulations 2006 (PCSR

² It is recognised that following the announcement on 15 June 2010 the OGC is part of the new Efficiency and Reform Group (ERG) within the Cabinet Office. References to OGC in this document and the accompanying draft regulations should be read in this context.

³ http://ec.europa.eu/internal_market/publicprocurement/dpp_en.htm#guide

2006), Utilities Contracts Regulations 2006 (UCR 2006) and Utilities Contracts (Scotland) Regulations 2006 (UCSR 2006), to remove those procurements covered by the New Directive.

References

13. In this consultation document we use the term “New Directive” to refer to Directive 2009/81/EC, “Classic Directive” for Directive 2004/18/EC⁴, the “Utilities Directive” for 2004/17/EC⁵ and the “Remedies Directives” for 89/665/EEC and 92/13/EEC, as amended by 2007/66/EC⁶.

14. For convenience, we also use the term “UK Regulations” to mean the PCR 2006 the Public Contracts (Scotland) Regulations 2006 (PCSR 2006) the Utilities Contracts Regulations 2006 (UCR 2006) and the Utilities Contracts (Scotland) Regulations 2006 (UCSR 2006); and the term “New Regulations” to refer to the implementing regulations for the New Directive.

⁴ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:134:0114:0240:EN:PDF>

⁵ DIRECTIVE 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:134:0001:0113:EN:PDF>

⁶ DIRECTIVE 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:335:0031:0046:EN:PDF>

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PART 2

SUMMARY OF RESULTS FROM FIRST CONSULTATION

Purpose

15. This section of the document summarises the results of the first consultation exercise on the transposition of the Defence and Security Directive. It describes the overall results of the consultation, summarises key points raised by stakeholders and where appropriate indicates the conclusions reached by MOD.

Overview

16. The First Public Consultation ran for 12 weeks, between December 2009 and March 2010. With over 30 stakeholders consulted, including representative groups of much wider groups of stakeholders. Though the volume of responses was lower than anticipated, this can be explained by the action taken to capture the views of Other Government Departments (OGDs) before the First Public Consultation commenced and by the helpful consolidation of comments from industrial stakeholders. Additionally, certain stakeholders responded in some detail.

17. MOD is grateful to all those stakeholders who participated in the exercise; the feedback was used extensively in further consideration of the choices and provided a valuable evidence base from which to assist further conclusions.

18. Feedback was analysed in spring/summer 2010. MOD made a number of recommendations based on the choices available in October 2010, which were subsequently endorsed at ministerial level by Min DEST and at Cabinet Office level by the National Security Council and the Reducing Regulation Committee. The decisions on the choices available in the New Directive have therefore been made – this consultation exercise does not re-open choices, rather it opens up the opportunity for comments on the next tranche of implementation issues (as described in Part 3 of this document).

19. The text that follows here in the remainder of Part 2 runs through the outcomes from the first consultation.

Policy Outcomes and Supporting Evidence

20. Identical/Similar provisions of the New Directive

20.1. Policy Outcome: The implementing regulations generally implement the New Directive provisions which are substantively the same to corresponding provisions in the Classic Directives and the Remedies Directives, both in respect of mandatory and discretionary provisions, in the same way as the PCR 2006.

20.2. The New Directive is based on the Classic Directive and the provisions of the Remedies Directive are largely replicated in the articles of the New Directive. Consequently MOD proposes to implement identical/similar provisions, both in respect of mandatory and discretionary provisions, in the same way as the PCR 2006. There were no objections from stakeholders to this approach.

However, some stakeholders noted that the implementing regulations needed to reflect the emergence of case law; and the OGC indicated a desire to work jointly with MOD on implementation of consequential amendments to the UK Regulations. There was also a suggestion that incorporating relevant Directive Recitals into the implementing regulations would help to bring clarity.

20.3. For reasons of legal certainty and ease of use by contracting authorities/entities, MOD proposes to implement identical/similar provisions in substantively the same way as the PCR 2006, both in respect of mandatory and discretionary provisions, reflecting emerging case law and taking into account Scots law, where necessary. The only instance where MOD has diverted substantively from this approach is in relation to Article 55(5). Article 55(5) relates to the requirement of economic operators to notify contracting authorities/entities of an intention to bring proceedings (for which see further below at paragraph 42.15). It may also be noted that the proposed transposition of Article 56(5) (which relates to the test to be applied by the courts when deciding whether to grant interim measures in interlocutory hearings) is different from the treatment in the PCR 2006, because of what MOD consider to be material differences in the wording of the underlying directives (for which see further at paragraphs 42.11 and 42.12 below).

20.4. The MOD is working jointly with the OGC and the Scottish Government on consequential amendments to the UK Regulations, arising from transposition and has agreed arrangements with OGC and the Scottish Government for updating the implementing regulations and existing UK Regulations, in the light of emerging case law.

20.5. Generally, incorporation of Directive Recital text into the implementing regulations would not be appropriate as it does not have the same status as a substantive provision. However, MOD will use the Directive Recital text where appropriate to inform development of policy guidance.

20.6. In its first Public Consultation Document, MOD provided cross-reference tables to the provisions in the Classic, Utilities and Remedies Directives to assist stakeholders in their review of the document. No stakeholders offered a view on the accuracy of the cross-reference tables. Therefore, the cross-reference tables will not be transposed and having served their purpose will be subject to no further action.

21. Scope – Article 2

Definition of Military Equipment

21.1. Policy Outcome: Transpose definition of military equipment using the definition in the New Directive coupled with provision that the definition includes equipment on the EU Common Military List and within scope of the 1958 list.

21.2. Article 1 defines “Military Equipment” is defined as “equipment specifically designed or adapted for military purposes and intended for use as an arm, munitions or war material”. The words “arm, munitions or war material” are derived from Article 346 Treaty on the Functioning of the European Union (TFEU), where these words are defined by a reference to a list adopted by the European Council in a Decision in 1958, known as the “1958 List”. The New Directive requires broad interpretation of the “1958 List”. MOD proposed a definition of “military equipment” that includes but is not limited to the equipment listed in the “1958 List” and the EU Common Military

List.

21.3. Although there were no objections to MOD's intended approach and broad agreement from one sector, stakeholders did emphasise the importance of ensuring that the definition of Military Equipment was broadly drawn to reflect the intention of Recital 10, which refers to the "generic" nature of the "1958 List" and indicates a requirement to interpret "in a broad way in the light of the evolving nature character of technology, procurement policies and military requirements which lead to the development of new types of equipment, for instance on the basis of the Common Military List of the Union. One sector also suggested preparation and publication of an official English version of the "1958 List".

21.4. MOD intends to repeat the definition of "military equipment" at Article 1(6) of the Directive to define the scope for military equipment. This has the benefit of implementing the Article as written, is legally compliant, and ensures there are no unintended limitations on the scope of the New Directive. It is also the most helpful for procurement staff.

21.5. It is proposed that the definition shall also be expressed as including equipment within the product types (i.e. the sub-headings such as ground vehicles and components, vessels of war) set out in the 1958 list. MOD will ensure the product types are clearly set out in the policy guidance. In addition equipment listed in the Common Military List shall also be included. This accords with Article 12 of Common Position 2008/944/CFSP which stipulates that the EU Common Military List shall act as a reference point for Member States' national military technology and equipment lists, but shall not directly replace them.

21.6. As the UK was not a Member State of the EU when the 1958 List was agreed, an English version was not produced and is therefore not available. It is EU practice to publish documents in the language originally used and as a consequence the initial list was only subsequently translated into English.

The effect of the inclusion of sensitive equipment, sensitive works and sensitive services within scope

21.7. Policy outcome: Transpose definition of sensitive equipment, sensitive works and sensitive services using the definition in the New Directive.

21.8. "Sensitive equipment", "sensitive works" and "sensitive services" are defined in Article 1 (7) of the New Directive as "equipment, works and services for security purposes, involving, requiring and/or containing classified information".

21.9. There were no objections to MOD's proposal to transpose the definitions of "sensitive equipment", "sensitive works" and "sensitive services". One group of stakeholders did raise concerns about consistent application of the Directive, given the spread of responsibility for security across Government departments, agencies and devolved authorities, as well as the fragmentation of the security industrial stakeholders. Another sector also highlighted the anomaly created by the absence in the New Directive of an equivalent to the Article 30 (Utilities Directive) exemption, whereby a small part of the utilities sector, which is otherwise unregulated, will fall within the scope and thus be regulated by the New Directive.

21.10. The definitions at Article 1(7) and that of "classified information" at Article 1(8) work well together. Their transposition is not optional and thus the implementing regulations must provide for

procurements of this nature to be within scope. The definitions in the Directive appear to be sufficient for this purpose.

21.11. The MOD recognises a potential anomaly created by the absence of an equivalent Article 30 exemption (Utilities Directive) in the New Directive. This means that some private sector utility companies will fall within the scope of the Directive and they will be obliged to compete sensitive contracts (if they have any) unless such contracts are capable of benefiting from an exemption under the provisions of the Directive.

21.12. Although the absence of an equivalent Article 30 appears to place an unwarranted burden on utility companies, it fits with the Commission's desire to seek to open the security market to competition to the fullest extent possible. MOD intends to implement the Directive 'as is' but is seeking further views from the utilities sector in relation to the potential impact of the non-replication of the Article 30 exemption (please refer to Box 2, Part 3: Technical Issues and Key Questions).

Definition of Classified information

21.13. Policy Outcome: Transpose the definition of “classified information” based on the definition in the New Directive, noting that this will apply to information or material classified “RESTRICTED” or above in the UK.

21.14. “Classified information” is defined in Article 1 as “any information or material, regardless of form, nature or mode of transmission thereof, to which a certain level of security classification or protection has been attributed, and which, in the interests of national security and in accordance with the laws, regulations or administrative provisions in force in the Member State concerned, requires protection against any misappropriation, destruction, removal, disclosure, loss or access by any unauthorised individual, or any other type of compromise”. MOD proposed that the New Directive would apply to information or material that had a protective marking of “RESTRICTED” and above.

21.15. One stakeholder group suggested that the level of classification to which the Directive would apply was a discretionary matter for the UK and suggested limiting the scope of the New Directive to “CONFIDENTIAL” and above, to allow some procurements to continue to fall within the scope of the Classic Directive, leaving exclusions under Article 14 of said Directive open to contracting authorities/entities. Conversely, a second stakeholder group suggested broadening the scope of the New Directive to include classifications below “RESTRICTED”. A third stakeholder group agreed with MOD's proposal, but, along with the first stakeholder group, emphasised that classification was only one element of the definition i.e. it must also be demonstrable that the information requires protection “in the interests of national security and in accordance with the laws, regulations or administrative provisions in force in the Member State concerns.... against any misappropriation, destruction, removal, disclosure, loss or access by any unauthorised individual, or any other type of compromise;”.

21.16. It is proposed to define classified information as “any information or material, regardless of its form, nature or mode of transmission, to which the contracting authority is satisfied that a protective marking has been or should have been attributed and which in the interests of national security and in accordance with the law or administrative provisions of any part of the United Kingdom requires protection against misappropriation, destruction, removal, disclosure, loss or access by any unauthorised individual, or any other type of compromise”. “Protective marking” is defined as “a marking under the United Kingdom Government Protective Marking System”. The

GPMS comprises five marking systems, which in descending order of sensitivity are “TOP SECRET”, “SECRET”, “CONFIDENTIAL”, “RESTRICTED” and “PROTECT”.

21.17. Classified information is internationally recognised as information that has been assigned a national or international organisation classification from “RESTRICTED” to “TOP SECRET”. It is these classification levels that are identified in relevant bi-lateral Security Agreements/Arrangements as the levels of information to be afforded protection in accordance with their terms.

21.18. The UK marking “PROTECT” is a sub-national security related marking that may be applied to information. However, it is not identified or recognised in bi-lateral Security Agreements/Arrangements. Moreover, Article 1(8) of the New Directive and the draft regulations set out the proviso that classified information must require protection in the interests of national security. Although the draft regulations do not explicitly refer to any specific level of GPMS marking, it is considered appropriate to interpret classified information as information to which a protected marking of “RESTRICTED” and above has been attributed.

22. Mixed Contracts – Article 3

22.1. Policy outcome: No definition of “justified for objective reasons” required.

22.2. Article 3 provides that where a single contract covers works, supplies or services, which fall within the scope of the New Directive, and partly within the scope of either the Classic or Utilities directive, the rules of the New Directive should govern the procurement, provided that a single contract is “objectively justifiable”. Article 3 also provides that where a contract is partly covered by the scope of the New Directive but the other part does not fall within the scope of the New Directive or the Classic or Utilities Directive, the contract is excluded from all of the Directives, again provided that the award of a single contract is objectively justifiable. MOD proposed that “objectively justifiable” should not be further defined.

22.3. Although one stakeholder thought that definition by reference to a non-exhaustive list of criteria would be a possibility, the remaining stakeholders agreed with MOD’s proposal, emphasising the need for case by case consideration, as what is objectively justifiable in one situation may not be so in another. The only other practical issue raised by stakeholders was the question of consistent application of such a test across contracting authorities/entities.

22.4. MOD confirms that it will not define what is meant by “justified for objective reasons” and that contracting authorities/entities will rely on a case by case assessment. Determination of what is justified for objective reasons will be different from one situation to another and it will be for contracting authorities/entities to ensure consistency in approach, both internally and within their own contracting environment.

22.5. It is recognised however that Article 3 also makes it clear that a single contract cannot be awarded with the sole intention of excluding the application of the procurement Directives. In addition a decision to award a single contract must also be proportionate in the circumstances.

23. Protection of Classified information – Article 7

23.1. Policy Outcome: The provisions of Article 7 will be imported into the implementing regulations in substantively the same form.

23.2. This new provision permits contracting authorities/entities to impose requirements on economic operators to protect classified information they communicate throughout the tendering and contracting procedure. Contracting authorities/entities may also request sub-contractor compliance with such requirements. MOD proposed to permit contracting authorities/entities to impose such requirements.

23.3. Though one stakeholder group raised many questions concerning the practical working of bi-lateral and multi-lateral Security Agreements/Arrangements, there were no objections to MOD's intention to permit contracting authorities/entities to impose on economic operators and their sub-contractors requirements aimed at protecting classified information.

23.4. The UK proposes to transpose this Article by providing that contracting authorities/entities may impose on economic operators requirements aimed at protecting classified information which the contracting authority/entity communicates to the economic operator throughout the tendering and contracting procedure and that contracting authorities/entities may require the economic operators provide for compliance by their sub-contractors with such requirements. It is proposed that guidance will state that where applicable the provisions in relevant bi-lateral Security Agreements/Arrangements will allow contracting authorities/entities to recognise the ability of an economic operator situated in another Member State to comply with the contracting authority's/entity's security requirements to protect classified information to the equivalent standard.

24. Thresholds - Article 8

24.1. Policy Outcome: Transpose mandatory provision.

24.2. The thresholds above which the New Directive shall apply are aligned to the Utilities Directive. This represents an increase from the thresholds contained within the Classic Directive.

24.3. MOD did not seek or receive comments on this mandatory provision.

25. Public contracts and framework agreements awarded by central purchasing bodies – Article 10

25.1. Policy Outcome: Central purchasing bodies are relevant to defence and security procurement though no need to define European Public Body.

25.2. Article 10 is a slight adaptation from its equivalent Article 11 of the Classic Directive. The definition of a central purchasing body now includes “a European public body, which acquires supplies and/or services intended for contracting authorities/entities, or awards contracts or concludes framework agreements for works, supplies or services intended for contracting authorities/entities”.

25.3. There is consensus amongst stakeholders that central purchasing bodies, as defined in the New Directive, have relevance in the Defence sector at least.

25.4. MOD recognises that the role of central purchasing bodies in the consolidation of UK government procurement requirements is well-established and useful. Whilst the need for central purchasing bodies at a European level is currently minimal, the nature of defence and security procurement and the application of the directive to such procurements may provide scope for European public bodies, such as the EDA, to take on a role in the future. No recognised definition for European Public Body exists and MOD considers there is no need to seek to define further.

26. Use of exclusions – Article 11

26.1. Policy Outcome: Transposition is unnecessary.

26.2. MOD did not seek or receive comments on this mandatory provision which provides that contracts excluded by Articles 12 and 13 of the New Directive cannot be used simply to avoid the requirements of the New Directive.

26.3. MOD considers that this Article does not need transposing. Article 11 states that none of the rules, procedures, programmes, agreements, arrangements or contracts referred to in section 3 (exclusions) may be used to circumvent the Directive. However, given that the purpose of the exclusions is quite properly to take procurements out of the regime imposed by the Directive, we would need to elaborate significantly for this provision to be understood in the context of the implementing regulations and thereby risk gold-plating.

27. Contracts awarded pursuant to international rules – Article 12

27.1. Policy outcome: No policy outcome required.

27.2. This provision is similar to Article 15 of the Classic Directive. However, Article 12 (a) is broader in that it can apply to any international agreement between one or more Member States and one or more third countries where there are specific rules of procedure. Articles 12 (a) and (b) clarify that international arrangements such as Memoranda of Understanding are also covered. Article 12 (c) is also adapted slightly from its equivalent in Article 15 of the Classic Directive, to align with the way in which international organisations such as NATO's NAMSA carry out procurements and exclude contracts which must be awarded by Member States in accordance with the rules of such organisations.

27.3. Though MOD did not seek feedback on this mandatory provision, one stakeholder observed that Article 12 could be taken to cover all forms of procedure e.g. a joint management board and offered an interpretation of "for its purposes".

27.4. MOD proposes to review and, where appropriate, change existing policy to take into account the slightly different approach taken in Article 12.

27.5. To address the specific issues raised in consultation, MOD intends to interpret this provision and provide guidance to the effect that "specific procedural rules" shall refer to a set of distinct rules pursuant to such international agreement or arrangement specifically concerning the award of

contracts and providing a minimum of details setting out the principles and steps to be followed in awarding a contract. The concept of a joint management board is not sufficient for these purposes.

27.6. Secondly, MOD interprets “for its purposes” to refer to the purposes for which the specific international organisation was established.

28. Specific exclusions - Article 13

28.1. Policy Outcome: No policy outcome required.

28.2. Many of the exemptions in the Classic Directive have been reproduced in Article 13 of the New Directive and new exemptions have been created to address the specific needs of the defence and security sectors. Though Article 13 (a) prevents Member States from being obliged to supply information contrary to the essential interests of its national security, the provision is more narrowly drawn than its equivalent Article 14 provision in the Classic Directive.

28.3. Though MOD did not seek feedback on this mandatory provision, one stakeholder group commented on the absence of explicit mention of a Member State’s potential requirement for industrial capacity retention, while another utility sector stakeholder had mistakenly assumed that a procurement that did not fall within the scope of the New Directive would lead to automatic exclusion from the Utilities Directive.

28.4. There is no explicit mention of any exemption for industrial capacity retention. The New Directive provides for the contracting authority/entity to set out its security of supply requirements. However, where those requirements cannot be satisfied by the provisions of the New Directive, the contracting authority/entity may be able to rely on Article 346 depending on the circumstances. Where there is a requirement for national industrial capacity retention to protect the essential security interests of the UK, Article 346 can be used to derogate from its EU treaty obligations and award outside the provisions of the New Directive. That capacity retention must not exceed what is strictly required to protect that security interest.

28.5. If a contract falls partly within the scope of the New Directive and partly within the scope of the Utilities Directive or Classic Directive, then it falls to be awarded in accordance with the terms of the New Directive provided that the award of a single contract is justified for objective reasons. If it is then exempted from the New Directive, it is exempted as a whole.

29. Service contracts listed in Annexes 1 and 11 – Articles 15 and 16

29.1. Policy Outcome: No policy outcome required.

29.2. Articles 15 and 16 are substantively the same as their equivalent Articles 20 and 21 of the Classic Directive. However, many of the services listed in Annex IIB of the Classic Directive have been reclassified under Annex I of the New Directive, making contracts for these re-classified services fully subject to the New Directive.

29.3. MOD did not seek or receive comments on this mandatory provision.

29.4. MOD proposes to review and, where appropriate, change existing policy, to take into account the re-classification of certain services as referred to above.

30. Technical Specification – Article 18

30.1. Policy Outcome: No policy outcome required.

30.2. Article 18 is slightly adapted from its equivalent provision in Article 23 of the Classic Directive. However, the New Directive removes the requirement for technical specifications to take into account accessibility criteria for people with disabilities; makes specific reference to technical requirements under international standardisation agreements to guarantee interoperability; and includes in the list of standards “civil technical specifications stemming from industrial stakeholders and widely recognised by it” and national “defence standards” defined in point 3 of Annex III and defence materiel specifications similar to those standards.

30.3. MOD did not seek or receive comments on this mandatory provision and has transposed using the additional wording where appropriate.

31. Sub-contracting and Rules applicable to sub-contracting – Articles 21 and 50-54

Article 21(3) and (4) - Imposed sub-contracting

31.1. Policy Outcome: Transpose as an option for contracting authorities/entities to oblige successful tenderers to compete all or a certain portion of proposed sub-contracts to third parties. UK opts not to transpose Article 21(4).

31.2. Article 21 of the New Directive is substantially different to its equivalent Article 25 of the Classic Directive. The New Directive permits Member States to ask tenderers to indicate the subject matter of any proposed sub-contracts and to indicate changes of sub-contractors during the life of the contract and optionally, allows Member States to oblige successful tenderers to compete on an EU-wide basis all or a certain portion of its proposed sub-contracts; and/or mandate a level of sub-contracting to third parties, up to a maximum of 30% of the contract value. MOD proposed to implement these provisions as options for contracting authorities/entities.

31.3. One stakeholder group supported the implementation of Article 21(3) and 21(4) as options for contracting authorities/entities, indicating alignment with the general aims of the Government's Access for All programme. However, another stakeholder group objected in the strongest terms, emphasising that such an implementation would offend the basic principles of prime contractor responsibility for its supply chain, increase risk caused by entering into contracts with uncertainty for up to 30% of the supply chain and degrade the economic efficiency of the contract and the contractor's ability to deliver value for money in a defence market that is both mature and concentrated.

31.4. Article 21 (3) must be transposed. MOD intends to transpose Article 21(3) as an option for contracting authorities. This will allow each contracting authority/ entity to decide on a case by case basis whether such measures will deliver value for money and create opportunities for SMEs across the EU. It will avoid nugatory bureaucracy for the authority and industrial stakeholders where such measures are inappropriate.

31.5. After considering stakeholders' comments, the MOD intends not to transpose Article 21(4) into the implementing regulations. If used, it is likely to affect each tenderer differently, as they are

likely to have different in-house and supply chain arrangements. This might result in difficulties for the contracting authorities/entities to comply with the legal duty to ensure equal treatment and non-discrimination for all tenderers. Some suppliers might find it difficult to sub-contract 30% of contracts if they do not have significant procurement departments. Other suppliers might find it difficult to maintain the critical mass necessary to sustain their business operations if they have to sub-contract 30% of contracts. Article 21(4) would also have a disproportionate effect on certain sectors, in some cases obliging SMEs to sub-contract to third parties up to 30% of the work which they would otherwise have won. SMEs may also struggle to cope with the bureaucracy required to use this Article 21(4).

Rejection of Sub-contractors - Article 21(5)

31.6. Policy outcome: Implement ability for contracting authorities/entities to reject sub-contractors on the basis of the selection criteria used for the main contract.

31.7. Article 21(5) states that where a Member States provides that contracting authorities/entities may reject sub-contractors selected by the tenderer either at the award stage or during the performance of the main contract, such rejection can only be done on the basis of the criteria used for the selection of tenderers in the main contract.

31.8. With regards to the rejection of sub-contractors one stakeholder group focused on the potential for adverse consequences for rejection of sub-contractors (collapse of supply chain, increased risk with knock on effect to price, inability to fulfil contract obligations if IPR is owned by the sub-contractor), cited difficulties in circumstances where export control restrictions may prevent the sub-contract from being transferred to a different sub-contractor and highlighted the issue of treatment of costs arising from such a rejection. A second stakeholder group commented that sub-contractors change frequently. And a third stakeholder group recognised the issue of liability, but agreed with the second stakeholder group that this issue should be addressed within contract terms and conditions and was not a matter for the implementing regulations.

31.9. The MOD recognises that rejecting a sub-contractor during the tendering phase or during performance of the contract may cause the supplier's supply chain to collapse. It is therefore important that any selection criteria used to reject a sub-contractor are stated in the contract notice so the prime contractor is aware of any constraints. The implementing regulations deal with this issue at regulation 36(6). The MOD agrees that liability is an issue but it is not a matter for the implementing regulations.

Application of rules applicable to sub-contracting

31.10. Policy outcome: No policy outcome required.

31.11. The first consultation document stated that if implemented, Article 21 (3) would require successful tenderers to apply the provisions set out in Title III of the New Directive. This would require successful tenderers to apply the EC Treaty principles of transparency, equal treatment and non-discrimination, which in practice requires successful tenderers to advertise, by notice, sub-contracts that are above the thresholds set out in Article 8 of the New Directive, as amended from time to time.

31.12. Industrial stakeholders indicated increased administrative burden (training, guidance, increased numbers of staff to run competition), leading to increased cost and risk.

31.13. The measures give contracting authorities/entities the choice, in individual procurements, of specifying sub-contracting requirements. This will increase the ability of the contracting authority/entity to maximise value for money. This will also assist in allowing contracting authorities to maximise sub-contract competition for non-competitive contracts if the value and nature of the contract justifies such measures. However, if the sub-contracting provisions are used unwisely, they may very well have unintended consequences for competitive procurement.

31.14. Contracting authorities/entities will have to consider the need to justify their sub-contracting requirements by the value and nature of the contract and the structure of the market. Otherwise, the measures can only add costs and introduce delays into defence procurement without providing commensurate benefits to either contracting authority/entity or the supplier.

31.15. The MOD agrees that these measures are likely to place an administrative burden on suppliers. Whilst the measures will create further opportunities for SMEs, if the measures are used for a contract awarded to an SME then implementing the sub-contracting obligations will represent a real challenge. Unlike large suppliers, SMEs will not have large quality assurance teams to verify the capabilities of potential sub-contractors or large purchasing departments to run these competitions. Moreover, they may not have the resources to handle the technical, financial or commercial risks arising from these rules.

32. Security of information – Article 22

32.1. Policy Outcome: To be transposed as non-exhaustive series of options to be used on a case by case basis.

32.2. This is a new provision, which is specifically designed to meet Member States' concerns about the protection of classified information, during the tendering and contract award process. Article 22 permits contracting authorities/entities to specify, in the contract documentation, the measures and requirements necessary to ensure the security of any classified information.

32.3. Member States have the option of requiring tenderers to comply with any national provisions on security clearance. There is also a requirement on Member States to recognise security clearances that they consider to be of equivalent rigour. MOD proposed to provide contracting authorities/entities with the option to require tenderers to comply with the UK's national provisions on security clearance, in accordance with existing government-to-government bilateral arrangements.

32.4. Stakeholders raised a large number of questions concerning the definition of "security clearance", visibility of the national security provisions on security clearance, the safeguarding of data collected for the purposes of security clearance and the potential disclosure of that data to other Member States under Security Arrangements. One government department commented that it operates a different system to that adopted by MOD and described in the First Public Consultation Document. Though one stakeholder group questioned the alternative options under consideration, no stakeholders objected to MOD's proposed approach.

32.5. The UK proposes to transpose the discretionary element of this Article by providing that the measures and requirements specified by the contracting authority/entity necessary to ensure the security of classified information shall comply with the security clearance provisions of the UK appropriate to the relevant protective marking or to any other security clearance considered by the

Secretary of State to be equivalent.

32.6. Under existing bilateral Security Agreements/Arrangements the provision of an assurance by one Member State to the UK that a contractor facility has been granted a Facility Security Clearance (FSC) or an individual has been granted a Personal Security Clearance (PSC) implies equivalence. It should be added that the granting of an FSC/PSC is a national decision of the Member State concerned in accordance with its national laws, rules and regulations. The outcome of the FSC/PSC process is passed onto other Member States and no details revealed or collected during the FSC/PSC process are passed between Member States.

32.7. In respect of the UK, national security regulations require Industrial stakeholders to seek the approval of the contracting authority/entity where work is to be sub-contracted (whether pursuant to the specific provisions of the directive on sub-contracting or otherwise) at the level of "CONFIDENTIAL" or above to overseas sub-contractors. Approval is likely to be granted where the proposed sub-contractor has been granted an appropriate FSC/PSC by its own National/Designated Security Authority and an assurance of this should be obtained by the contracting authority/entity. Again no details revealed or collected during the FSC/PSC process are passed between Member States.

32.8. These are issues which will be set out in accompanying guidance.

The application of Article 22

32.9. Stakeholders were asked if they could foresee any difficulties with the application of this provision through the contracting process, which may need to be addressed in implementation. In response to this question Industrial stakeholders indicated that the creation of security of information commitments as part of the tendering phase is problematic – a preference was expressed for containment in the contract terms; suggested full disclosure of security of information requirements in the contract notice; and commented that the absence of a Security Agreement/Arrangement with a Member State could limit potential candidates or sub-contractors.

32.10. Article 22 contains provisions which refer to the security of information measures and requirements which may be imposed by the contracting authority/entity in respect of the performance of a contract and following the termination or conclusion of the contract. The UK proposes to transpose Article 22 without any embellishment save that the UK proposes to transpose the discretionary element of this Article by providing that the measures and requirements specified by the contracting authority/entity necessary to ensure that the security of classified information shall comply with the security clearance provisions of the UK appropriate to the relevant protective marking, or to any other security clearance considered by the Secretary of State to be equivalent.

32.11. Thus the non-exclusive measures and requirements set out in Article 22 may be required to be set out as commitments from the economic operator in their tender. However such commitments will inevitably form part of the requirements contained as obligations within the final contract terms.

32.12. As far as sub-contractors are concerned, where an FSC or PSC has been granted by that sub-contractor's own National/Designated Security Authority the contracting authority/entity may provide that the appropriate commitments in the tender documentation and contract obligations are flowed down by the successful tenderer to commit and oblige the sub-contractor to comply with the

relevant national security laws, rules and regulations of the country where it is located for the protection of the classified information.

32.13. Full disclosure of security of information requirements in the contract notice is not necessary as the Directive does not require this. Those requirements may be set out in the contract notice or the contract documents or both. It is likely that in most cases the contract notice will contain an outline of the requirements with any further necessary detail contained in the contract documents.

32.14. The absence of a bi-lateral Security Agreement/Arrangement with a Member State may limit the ability of economic operators or sub-contractors established in that Member State to show that they can comply with the contracting authority's/entity's security of information requirements.

Likely impact of security of information measures

32.15. In addition stakeholders were asked of the likely impact of such measures on suppliers in the defence and security sectors and how the mutual recognition of equivalent security clearances should be implemented. Apart from a comment concerning the potential burden on small businesses who have not previously engaged with work of a classified nature, one stakeholder group indicated a need to better understand how the Directive's provisions would be implemented before it could comment on impact. One security stakeholder raised a number of practical questions and suggested the formation of a working group to address these.

32.16. As far as UK Industrial stakeholders is concerned it is concluded that, in respect of those economic operators with a FSC, the existing UK national provisions on security clearance are set out in the UK Government National Security Regulations - the Security Policy Framework – and are well-known. Overseas economic operators are required to comply with their respective national laws and regulations which may be different. The recognition of security clearances of a foreign economic operator as equivalent where there is a relevant bilateral Agreement/Arrangement in place is unlikely to place extra burden on such foreign economic operators.

32.17. It is not therefore anticipated that these measures will place an undue burden on contractors.

32.18. In addition to the suggestion to form a working group, Industrial stakeholders raised issues around the transfer of personal data between Member States, suggesting that the existence of a Security Agreements/Arrangements negated the need for transfer of such data, called for a Union-wide regime to ensure transparency and consistency across Member States and questioned whether HMG planned to maintain and publish a list of approved contractors for the purposes of handling classified information.

32.19. In the absence of harmonisation at EU level of national security clearance systems, bi-lateral Security Agreements/Arrangements establish, on a government-to-government basis a mutual recognition of the Participants' national security laws, rules and regulations including the standard and process for the granting of FSCs and PSCs. On that basis, an assurance that an individual or corporate economic operator has been awarded an appropriate clearance is all that is required, subject to necessary release approvals, to permit the disclosure/release of classified information to that economic operator. In this process no details revealed or collected during the FSC/PSC process are transferred. The granting of UK national FSCs and PCSs for the disclosure of UK classified information to national industrial stakeholders is a responsibility of the relevant

contracting authority/entity's Security Authority. Relevant decisions are communicated to industrial stakeholders. It is not considered necessary to form a working group to discuss this measure.

Potential additional measures

32.20. Finally, stakeholders were asked if there were any additional measures that stakeholders would wish to adopt e.g. audit rights, dual key approach, process observation etc. One stakeholder group indicated that additional measures may be needed, but did not provide details of what those measures might be.

32.21. From a Government perspective it is considered that the measures proposed, and indeed those already applied in accordance with existing bi-lateral Security Agreements/Arrangements, are sufficient for the protection of classified information.

33. Security of supply – Article 23

Transposition of Article 23

33.1. Policy Outcome: to be transposed as non-exhaustive series of options to be used on a case by case basis.

33.2. This is a new provision to address Member States' wishes to be assured that when placing a defence or security contract with a supplier from another Member State, the contract would/could be fully performed. To that end, Article 23 permits contracting authorities/entities to require tenderers to provide certain documentation and/or commitments that provide assurance that there will be security of supply. MOD proposed to implement the provisions of this article in full, as a series of options for contracting authorities/entities to be used on a case by case basis.

33.3. MOD's proposed approach was supported by other government departments and though other stakeholders did not raise any objections, they did underline the importance of training in this area, request a clear definition of "crisis" and comment that economic operators must not be obliged to breach the terms of contracts with other customers when fulfilling security of supply requirements.

33.4. MOD confirms that it will implement the provisions of this article in full, as a non-exhaustive series of options for contracting authorities/entities to be used on a case by case basis. This will allow each contracting authority/entity to draw up appropriate security of supply requirements which are tailored to specific procurements.

33.5. MOD recognises the importance of training in this area. However, different contracting authorities/entities will have different types of security of supply requirements. Contracting authorities/entities and suppliers will need to decide for themselves the adequacy or otherwise of their training in light of their requirements.

33.6. The implementing regulations include a definition of "crisis", which is based on the definition at Article 1.10 of the New Directive. In addition to minimising the risk of challenge for failure to fully implement, the MOD considers that a definition based on the Directive wording allows sufficient flexibility to encapsulate a wide range of potential crises as appropriate.

33.7. There is nothing in the implementing regulations that would require a supplier to breach contractual obligations to other customers. However, if a crisis arises, there may be, for example, a request from a contracting authority/entity to accelerate delivery of goods, which may have a resulting effect on other contracts. In the event that such an obligation is triggered, the impact of complying is a commercial issue which we expect would be the subject of commercial negotiations between the contracting /entity and the contractor.

Application of security of supply requirements through the contracting process

33.8. Policy outcome: No need to address commercial process issues through regulation.

33.9. Stakeholders were asked if they could foresee any difficulties with the application of these proposals through the contracting process which may need to be addressed in implementation. Though HMG stakeholders did not foresee any difficulties with the application of these proposals, industrial stakeholders raised a number of concerns including: the need to ensure that security of supply commitments required at the tender stage do not lead to or imply obligations established outside of contract; the costs associated with ensuring security of supply; circumstances or dependencies that might prevent an economic operator from fulfilling its obligations; a recognition that security of supply requirements are often defined in the initial contract, rather than at a time of crisis; the obsolescence risk associated with Commercial Off-the-Shelf (COTS)/Military Off-the-Shelf (MOTS); and the potential for misuse of Article 39 (2) (d) (ability to exclude suppliers on the basis of breaches of obligations regarding security of supply during a previous contract).

33.10. The tender documents will set out the proposed security of supply requirements. The contract performance conditions outlined in the tender documents, including those specifically relating to security of supply, will subsequently be incorporated in the contract.

33.11. The risk of obsolescence is acknowledged and should be dealt with through the customary project management tools most appropriate to the circumstances.

33.12. Regarding Article 39 (2) (d), there is little difference in the wording of the implementing regulations from the PCR 2006, aside from providing the example set out in the Directive which clarifies that professional misconduct, in the context of defence and security procurements, may include previous breaches of obligations regarding security of information or security of supply.

Impact of security of supply requirements on Defence and Security suppliers

33.13. Policy outcome: no need to address impact through regulation.

33.14. In addition we asked stakeholders about the likely impact of such measures on suppliers in the defence and security sectors and if there were any additional measures that stakeholders would wish to adopt.

33.15. Stakeholders indicated increased time, cost and risk. Time and cost were not quantified, but risk was asserted to have the potential to impact on company risk registers and affect financial arrangements. Industrial stakeholders also suggested that smaller companies, particularly those in the security sector, might consider security of supply commitments too onerous or complicated to negotiate and manage and thus may choose to decline proposals. Similarly, it was suggested that obtaining back-to-back agreements through the supply chain would be difficult, with those further down the supply chain unlikely to view the work as sufficiently important to take on the risks

associated with security of supply obligations.

33.16. Stakeholders commented on the need to protect the commercial interests and IPR of economic operators in circumstances where the means necessary for the production of spare parts etc. are provided to contracting authorities/entities and indicated a desire for policy guidance to address the sense of the points raised in relation to the implementation of Article 23.

33.17. MOD recognises that the inclusion of security of supply requirements has the potential to increase time, cost and risk of procurement. That is why security of supply requirements will be considered and tailored for specific procurements. However, we are aware that some security of supply requirements, by their nature, may be onerous or complicated for smaller suppliers. In practice, the expense of such obligations means that they will only be used where operational requirements render them necessary.

33.18. Any security of supply requirements will be specified early in the procurement process, thereby allowing economic operators to be aware of what is required of them and cost their proposals appropriately.

33.19. MOD recognises the need for policy guidance to ensure legal compliance.

34. Procedures to be applied – Article 25

34.1. Policy outcome: No policy outcome required.

34.2. The New Directive does not provide for the open procedure. Contracting authorities/entities have a free choice between the use of the negotiated procedure (with prior publication) and the restricted procedure. Competitive dialogue can be used in the same circumstances as for the Classic Directive. The negotiated procedure (without prior publication of a contract notice) can be used, but only in limited circumstances.

34.3. MOD did not seek or receive comments on this mandatory provision.

34.4. MOD shall introduce guidance on the application of procedures for procurements within the scope of the implementing regulations.

35. Cases justifying use of negotiated procedure without publication of a contract notice – Article 28

35.1. Policy outcome: Definition of “crisis” introduced using the definition in the New Directive with the addition that the Secretary of State to deem when crisis is impending.

35.2. This provision is broadly similar to its equivalent in the Classic Directive. However, there are a couple of notable changes. Firstly, the use of the negotiated procedure (without prior publication) in times of crisis. The New Directive’s definition of crisis is broadly drawn - MOD proposed to simply repeat this definition. Secondly, the length of contracts that can be awarded for additional deliveries is increased from three years to five years – MOD proposed to implement this increase.

35.3. Whilst there were no objections to MOD’s proposal to repeat the definition of crisis set out in the New Directive, two stakeholder groups made the point that this definition includes the phrase “if

the occurrence of such a harmful event is deemed to be impending” which raises the question of who or what does the deeming, and to what effect. All stakeholders welcomed the extension of contracts for additional deliveries and repetition of small works and services, but emphasised the need for the implementing regulations to include the “except in exceptional circumstances” provision which would allow the length of contracts to be longer than five years when justified by the expected service life of any delivered items, installations or systems, or the technical difficulties which a change of supplier would cause.

35.4. In addition, some stakeholders requested that a clear understanding of what is meant by “technical reasons” and “exclusive rights” (Recitals 51 and 52) be reflected in policy guidance and question how contracting authorities/entities would recognise IPR for jointly-funded R&D.

35.5. MOD confirms that the definition of “crisis” will simply repeat the corresponding definition in the New Directive and the length of contracts that can be awarded for additional deliveries will increase from three years to five years. However, the definition provides for the Secretary of State to deem a harmful event which meets the definition of crisis to be impending. Of course the usual principles of delegated authority under the Carltona principle will effectively mean that such decision will not need to be taken by the Secretary of State. See New Regulations, regulation 2(1).

35.6. The issue of “exceptional circumstances” has been addressed in the implementing regulations, by regulations 15(3) and 15(4).

35.7. The current policy guidance sets out what is meant by “technical reasons” and “exclusive rights” consistent with case law. However, it will be reviewed to see whether any amendments are necessary in light of Recitals 51 and 52 of the New Directive. In practice for “exclusive rights”, it will be a question of consideration on a case by case basis to determine whether the contractor has any rights that means the contracting authority/ entity is obliged to contract with that contractor.

35.8. As far as joint-funded IPR goes, the MOD has no fixed policy except that the ownership and user rights in IPR developed under such contracts would be negotiated and agreed on a case by case basis. In each case it would be a question of considering whether it is proposed that the contractor retains any benefits or rights of use in the IPR. If they do, then the exemption provided by the Directive and transposed in the implementing regulations by regulation 6(1)(l) could be applied. If they don’t, then unless the proposed R&D contract is to be jointly funded, it could not be applied.

36. Framework agreements – Article 29

36.1. Policy outcome: MOD intends to increase the duration of framework agreements to a maximum seven years, except in exceptional circumstances.

36.2. The provisions of this Article are substantially the same as for its equivalent in the Classic Directive save that the permitted maximum duration for framework agreements has been increased from four years to seven years. There is also further clarification on what constitutes the exceptional circumstances that would justify a framework agreement duration of longer than seven years. MOD proposed to make the maximum duration of framework agreements seven years.

36.3. All stakeholders welcomed the extension of framework agreements to seven years, with one stakeholder group emphasising “up to seven years”. As for Article 28, stakeholders emphasised the need for the implementing regulations to include the “except in exceptional circumstances”

provision which would allow the duration to be longer than seven years when justified by the expected service life of any delivered items, installations or systems, or the technical difficulties which a change of supplier would cause. In addition, stakeholders emphasised that seven year duration may be too short for in-service support and sought clarification of MOD's interpretation of "exceptional circumstances".

36.4. The issue of "exceptional circumstances" has been addressed in the implementing regulations at Regulation 19(10).

37. Verification of the suitability and choice of participants and award of contracts – Article 38

37.1. Policy outcome: Minimum number of candidates reduced from 5 to 3 for the Restricted Procedure.

37.2. This Article is substantially the same as its equivalent Article 14 in the Classic Directive. However, the minimum number of participants invited to tender in relation to the restricted procedure has been reduced from 5 to 3 – MOD proposed to implement this minimum. Article 38 (c) also provides that where the contracting authority/entity considers the number of candidates requesting to participate is too low, it may re-advertise the requirement and invite candidates selected from either of the two advertisements to tender, negotiate or participate in dialogue.

37.3. All stakeholders agreed MOD's proposed approach. However, some stakeholders indicated a couple of provisos: that the reduced number of participants will have a greater chance of selection at the tender stage and fewer participants will have to bear the costs of preparing a tender; and that in cases where a requirement is re-advertised, the second notice is in all material respects identical to the initial notice and the pre-qualification process is run along the same lines, to avoid the risk of a materially different competition.

37.4. Stakeholders' comments are noted. The reduction in the minimum number of participants invited to tender in relation to the restricted procedure has been implemented in the implementing regulations at regulation 16(9)(b). The ability to re-advertise a requirement where the contracting authority/entity considers the number of candidates selected to participate too low to ensure genuine competition and the limitations to that ability have been implemented in the implementing regulations for each separate procedure at regulations 16 (13) – (14), 17 (15) – (16) and 18 (16) – (17).

38. Personal Situation of the candidate or tenderer – Article 39

Implementation of new grounds for rejection or exclusion of candidates or tenderers

38.1. Policy outcome: Dependent on any amendments OGC and the Scottish Government might propose to the UK Regulations.

38.2. This Article is largely the same as its equivalent Article 45 in the Classic Directive. However, Article 39 provided for additional circumstances under which an economic operator may be excluded from participation in a contract. MOD proposed to implement the additional exclusions as set out in the New Directive.

38.3. Stakeholders expressed broad contentment at MOD's proposed approach, stressing the need to transpose the Article such that it provides discretionary, not mandatory means to exclude economic operators from contract opportunities. Stakeholders re-iterated their point about the potential for misuse of Article 39 (2) (d).

38.4. The first consultation referred to the circumstances in the New Directive which are additional to the equivalent provisions in the Classic Directive under which an economic operator:

- a. shall be excluded from participation in a contract award procedure under article 39(1) (mandatory exclusion);
- b. may be excluded from participation in a contract award procedure under article 39(2) (discretionary exclusion).

38.5. New regulation 22 transposes Article 39 (Criteria for the rejection of economic operators) and closely follows regulation 23 of the PCR 2006. Both the OGC and the Scottish Government are considering what updating amendments will need to be made to the UK Regulations following the Bribery Act 2010. MOD proposes to wait to see what amendments are made in this respect and in respect of any other necessary updating of the domestic offences referred to before deciding upon the best way in which to implement. MOD also recognises that account will need to be taken of Scottish offences referenced in the PCSR 2006 and UCSR 2006.

38.6. MOD has included in the implementing regulations provision for the addition of the mandatory exclusion of economic operators convicted of terrorist offences or offences linked to terrorist activities as defined in Articles 1 and 3 of Framework decision 2002/475/JHA . It also intends to maintain the general discretionary disregard where overriding requirements in the general interest justify doing so.

38.7. Similarly MOD has included the additional elements introduced by article 39(2). Subject to alignment with any amendments introduced by the OGC process, it is intended to implement each of the additional elements thus:

38.8. Article 39(2)(c): MOD proposes not to transpose the additional wording at Article 39(2)(c) on the basis that any conviction concerning the professional misconduct of the economic operator will by definition include the additional categories set out in the Directive. The additional wording will be expanded upon in guidance as relevant in the defence and security context.

38.9. Article 39(2)(d): The term "grave professional misconduct" has not been transposed into the implementing regulations. Instead, the term "grave misconduct" is included (as per the PCR 2006) along with a similar qualifying statement, that such grave misconduct is in the course of a business or profession. Additional wording explains that "grave misconduct" includes a breach of obligations regarding the security of supply and security of information required by a contracting authority/entity, during a previous contract. This incorporates the additional wording at article 39(2)(d). Guidance will be introduced and/or revised accordingly.

38.10. Article 39(2)(e): it is intended to transpose this article without amendment. Guidance will be provided to explain that any decision to exclude on this ground does not give the contracting authority/ entity unlimited discretion to exclude but must be based on risks to the security of the UK and a contracting authority/entity must be able to demonstrate that there are objective and verifiable elements indicating a lack of reliability and such a discretion should only be exercised where a decision not to exclude would not be in the essential security interests of the UK.

Practical consequences of application of new grounds for rejection or exclusion

38.11. Policy outcome: No need to address impact through regulation.

38.12. Stakeholders did not raise any specific difficulties regarding the application of the proposals however, they did indicate a number of practical issues that need to be addressed in implementation: the need to specify, in the implementing regulations, the export legislation covered by Article 39 (2) (c); the need for a recognised objective process by which the circumstances giving grounds for exclusion can be purged or extinguished that does not rely on a judgement by a contracting authority/entity; the means by which the fact that a tenderer poses a risk to national security would be communicated; and the OGC's review of its guidance on mandatory exclusion under Article 45 of the Classic Directive.

38.13. The implementing regulations (as were PCR 2006) at regulation 22 (4)(d) are non-specific about the type of convictions which will lead to exclusion. Consequently, there is no need to specify export legislation.

38.14. MOD has a standard process for considering the exclusion of suppliers under regulation 23 of PCR 2006. Those processes and accompanying guidance will be introduced/reviewed as part of transposition, particularly in the light of any proposed amendments to regulation 23 of PCR 2006, including but not limited to consideration of the treatment of self-cleansing measures and the possible introduction of spent convictions and the reinstatement of convicted economic operators. MOD and OGC are liaising on these issues.

39. Impact on potential suppliers of new grounds for rejection or exclusion

39.1. Policy outcome: No need to address impact through regulation.

39.2. When asked on the likely impact of such measures on potential suppliers, stakeholders requested explicit policy guidance on what would suffice as "evidence" in relation to Article 39 (2) (d) & (e). In addition, Industrial stakeholders would expect to be advised of instances of "grave professional misconduct" at the time the incident occurred rather than during the bidding process.

39.3. MOD concludes that such measures will have little or no impact on potential suppliers. The rationale is that there is little difference between the wording of the Classic Directive and the New Directive, aside from providing particular examples in the New Directive. Thus there is little difference between the wording of the implementing regulations and PCR 2006. The question of evidence appears to be the same, so current MOD guidance about evidence should suffice subject to consideration of any amended guidance emanating from OGC.

39.4. Evidence from protected data sources should remain protected and the guidance will reflect this.

39.5. Suppliers should be aware if they have committed acts of grave professional misconduct. Incidents of misconduct are notified by potential suppliers at an early stage in the procurement process.

40. Technical and/or professional ability – Article 42

Additional rules for provision of evidence/additional categories of evidence

40.1. Policy outcome: Transpose additional provisions at Articles 42(1)(a)(ii), 42(1)(d), 42(1)(h), 42(1)(j) and 42(6).

40.2. This Article is adapted from Article 48 of the Classic Directive. However, there are some differences: the required list of principal deliveries or services provided can go back seven years; checks on production capacities may be carried out as a matter of course; the description of tools, materials, technical equipment has been specifically adapted for defence and security procurements and so includes requirements to demonstrate the ability to cope with additional requirements resulting from a crisis; and evidence may be required to demonstrate the ability to process, store and transmit classified information. MOD proposed to implement these changes.

40.3. Article 42 (1) (j) also permits Member States to require that the evidence provided must comply with their national laws on security clearances. MOD proposed to implement this provision in the same way as for Article 22 of the New Directive.

40.4. There is also an option for contracting authorities/entities to grant additional time, where appropriate, to determine the necessary security clearances and liaise with national/designated security authorities in another Member State(s). MOD proposed to provide this option for contracting authorities/entities.

40.5. There is also a mandatory provision at Article 42 (6) concerning the provision of alternative documentation where required references cannot otherwise be provided.

40.6. MOD's proposed approach gained support from stakeholders with comments: that MOD would refer to government-to-government bilateral arrangements in the policy guidance, rather than the implementing regulations; that the required list of deliveries or services provided would cover a period appropriate to the requirements of the contract; and that there may be circumstances where obligations of confidence apply that may legitimately restrict or preclude disclosure of certain or all information. One government department commented that it operates different security arrangements to that adopted by MOD and described in the First Public Consultation Document.

40.7. Article 42(1)(a)(ii) – The implementing regulations provide at regulation 24(2)(c) that in assessing technical or professional ability the contracting authority/entity may have regard to a statement of the principal goods sold or services provided by the supplier or services provider in the past five years or during a shorter period if necessary. MOD will therefore adopt the five year time limit but accept a shorter period where the circumstances do not allow it. The guidance will direct that if a shorter period of time is unavoidable then this should be applied.

40.8. Article 42 (1) (d) – MOD will adopt the option to carry out a check on the production and other capabilities of the suppliers along the lines set out in the New Directive, see regulation 24(2)(f).

40.9. Article 42 (1) (h) – MOD will adopt the option to require the supplier to provide details of the tools, plant or technical equipment along the lines set out in the New Directive, see regulation 24(2)(j).

40.10. Article 42(1)(j) – The implementing regulations will provide that the evidence of the ability to process, store and transmit classified information at the level of protection required by the authority may include evidence of holding a security clearance recognised by the UK appropriate to the relevant protective marking. Guidance will explain that Personal and Facility Security Assurances provided in accordance with the terms of a Bilateral Security Agreement/Arrangement convey an assurance that individuals and contractors will be sufficient for these purposes as these comply with provisions equivalent to UK national regulations for the protection of classified information.

40.11. Article 42(6) - has been addressed in the implementing regulations at regulation 24(7) to provide that other information as the contracting authority/entity considers appropriate shall be accepted where that information is unavailable for a valid reason.

Application of the new rules and additional categories

40.12. When asked if they foresaw any difficulty in the application of these proposals certain stakeholders sought confirmation as to the identity of the “competent official body” referred to in Article 42 (1) (d), noted that the requirement for any checks at the pre-qualification stage under Article 42 (1) (h) must be proportionate; indicated that the standard of evidence required under Article (1) (j) must be stated; commented that a likely outcome of the additional requirements would be a reduced tender field.

40.13. MOD does not see the need to define “competent official body”. There are likely to be different authorities depending on the subject matter of the contract and where the economic operator is located.

40.14. Article 42 (1) (h) – MOD has noted stakeholder's comments. We recognise that any evidence required would have to be proportionate to the subject matter of the contract.

40.15. Article 42 (1) (j) - Contractors undertaking contracts involving classified information must hold an appropriate FSC. Bilateral Security Agreements/Arrangements allow for FSC assurances to be obtained by Member States and, where a contractor is not already cleared, for FSC clearance action to be requested to enable companies to be invited to tender for a classified contract.

40.16. Stakeholder's comments about the burden of additional security requirements discouraging potential tenderers are noted.

41. Quality assurance standards – Article 43

41.1. Policy outcome: Both European and equivalent International Standard are acceptable.

41.2. This Article is substantially the same as its equivalent Article 49 of the Classic Directive. However, Article 43 makes reference to independent accredited bodies. Accreditation is referenced to European accreditation standards. MOD proposed to transpose “European standards concerning accreditation and certification” as “European standards, or where these do not exist, International standards, concerning accreditation and certification”.

41.3. The New Directive also states that the contracting authority/entity “shall also accept other evidence of equivalent quality management systems from economic operators”. MOD proposed to

clarify, in the implementing regulations, that the decision as to what evidence is equivalent is a matter for the contracting authority/entity.

41.4. Though stakeholders welcomed MOD's proposals as a strengthening of this provision, there were a few questions concerning the appointment and accreditation of such bodies. Potential linkage to the European Commission's e-Certis initiative was also highlighted.

41.5. Stakeholders were split on the MOD intention to use International standards for accreditation and certification, where European standards do not exist. One stakeholder group considered MOD's proposal sensible, but questioned whether it is wide enough, whereas another stakeholder group considered that MOD's proposal exceed the provisions of the New Directive and commented that the provision in Article 43 that reads "They shall also accept other evidence of equivalent quality management systems from economic operators" appears to provide sufficient implicit coverage. Other stakeholders viewed MOD's proposal as an improvement.

41.6. Stakeholders expressed many views on the need for objectivity on the MOD's intention to clarify, in the implementing regulations, that the decision as to what evidence is equivalent is a matter for the contracting authority/entity. However, the OGC indicated that MOD's proposal was inconsistent with the way in which the equivalent Article 49 of the Classic Directive had been transposed.

41.7. MOD intends to transpose Article 43 as New Regulation 24 (2) (n) and (o). In assessing whether an economic operator meets minimum standards of technical or professional ability regarding quality management a contracting authority/entity may have regard to:

"(n) a certificate —

- i attesting conformity to quality management systems standards based on the relevant European standard; and
- ii from an independent accredited body established in any relevant State conforming to the European standards concerning accreditation and certification; or

(o) any other evidence of conformity to quality management systems standards which are equivalent to the standards referred to in sub-paragraph (n)(i)."

41.8. The MOD's proposed approach is that the evidence that an economic operator may provide under regulation 24(2)(n) is: a certificate from an independent accredited body (IAB) (otherwise known as a certification body or conformance assessment body), accredited by a European Accreditation Multi-Lateral Arrangement signatory.

41.9. Accreditation and certification standards are usually referred to with their ISO prefix. However, the equivalent European Euro Norm (EN) standards are identical, so that where the IAB or economic operator meets the ISO standard it meets the European equivalent.

41.10. In the European Union an IAB obtains its accreditation for doing so from a National Accreditation Body (NAB), in accordance with Directive 2008/765/EC on the requirements for accreditation and market surveillance relating to the marketing of products. In essence, though the NAB will provide an accreditation if it is satisfied that the IAB correctly uses ISO 17021 in deciding whether the quality management systems of the economic operator meets the appropriate

ISO9001/EN standard. Outside of the European Union an IAB obtains its accreditation from an Accreditation Body which is a signatory of the International Accreditation Forum Multi-Lateral Agreement.

42. Rules to be applied to reviews – Articles 55-64

42.1. Policy outcome: Transpose remedies provisions in a similar way to that taken for the amendments to the PCR 2006 save for Articles 55(5) and 56(5). Specific regulatory provisions are not considered necessary to implement Article 56(10) but the MOD intends to continue further consultation in order to ensure that no amendments are needed to existing rules and procedures in order to comply with the requirements of Article 56(10).

42.2. The New Directive sets out national review procedures that allow suppliers to challenge procurement decisions and provide remedies to protect the right of suppliers taking part in procurement procedures, which are substantially the same as the provisions in the Remedies Directive. There are a few options however highlighted in the first consultation document the implementing policy, on which views were sought. These were:

- a. the provision for payment of a particular sum at Article 56(1);
- b. the test applicable for the granting of interim measures at Article 56(5);
- c. the option to provide for specific review bodies and consequential security measures; and
- d. specific derogations from a finding of ineffectiveness for defence and security interests.

42.3. All of these are discussed below. MOD proposed to consult with Ministry of Justice (MOJ) and sought stakeholder feedback on the provisions of these Articles.

42.4. One stakeholder group expressed concern that the provisions would be likely to lead to increased costs and delays in the bidding and procurement cycle. There was some interest in the general interest exception referred to in recital 73 and how this is to be interpreted.

42.5. Several stakeholders agreed that the High Court would be an appropriate forum to deal with challenges under the implementing regulations, although one stakeholder group thought that judges dealing with sensitive issues would need to be suitably trained and cleared.

42.6. One stakeholder group was concerned that there could be a transfer of risk vis-à-vis breach of the implementing regulations by contracting authorities/entities through insistence upon open-ended or very long tender validity periods.

42.7. Several stakeholder groups expressed an interest in how the MOD intends to deal with the issue of time limits in the light of the judgment of the Court of Justice in Uniplex v NHS Business Services Authority c-406/08 and one group suggested that the implementing regulations should mirror the amendments which will need to be made for the PCR 2006.

42.8. Stakeholder groups were divided over the approach to deal with Article 56(1)(b), with one group expressing support for fines where infringements of the implementing regulations are not put right, another expressing concern regarding the possibility that both unquantifiable fines and

damages could be levied and yet another highlighting that there is a great deal of uncertainty as to what this provision actually anticipates.

42.9. In general MOD proposes to implement provisions which are identical or similar to the remedies provisions contained in the PCR 2006 in the same way and having regard to the PCSR 2006. Given that the remedies provisions were incorporated into the PCR 2006 and were the subject of consultation at that stage, it is felt that this approach is appropriate and will assist in providing certainty and ease the use of the provisions in the implementing regulations.

42.10. MOD proposes to implement the option set out in Article 56(1)(a) rather than the alternative Article 56(1)(b). Thus the issue of how to transpose the provision for an order for payment of a particular sum falls away. This is in keeping with the approach taken during the transposition of the Remedies Directives. Article 56 makes it clear that, no matter which option is transposed, the powers shall include a power to award damages to persons injured by an infringement.

42.11. MOD proposes to transpose Article 56(5) on the basis that, if an interim order is sought, the Courts must take into account the probable consequences of interim measures for all interests likely to be harmed as well as the public interest and in particular defence or security interests.

42.12. The approach set out above differs from the approach taken in transposition of the Remedies Directive. However, although MOD has sought to transpose the remedies-related aspects of the New Directive in a similar way to the Remedies Directive where possible in order to provide legal certainty and consistency, the provisions of Article 56(5) of the New Directive specifically provide that defence and security interests may be taken into account..

42.13. Draft paragraphs (2) and (3) of New Regulation 52 have been left intentionally blank as it is intended that these paragraphs will closely follow PCR 2006 regulation 47D paragraphs (2) and (3). In the light of the Uniplex judgment, the OGC is consulting⁷ on proposed amendments to regulation 47D this year, with a view making the amendment in early 2011. MOD proposes to wait for the outcome of the consultation before deciding on the best way in which to implement.

42.14. MOD is continuing to consult with MOJ, Treasury Solicitors (TSOL) and other interested parties regarding the measures which are considered necessary in order to fully implement Article 56(10) and continues to welcome comments on what additional measures stakeholders believe will be necessary in order to ensure that classified information may be protected.

42.15. MOD intends to implement Article 55(5). This provides that the UK may require a claimant to notify the contracting authority/entity of the alleged breach and of his intention to commence proceedings provided this does not affect the standstill period or any other time limits for commencing proceedings. This approach does not coincide with the approach taken by those transposing the Remedies Directives. MOD considers that such a provision may prove useful in certain circumstances. Notification of an intention to issue proceedings before the expense of court proceedings and necessary preparation are committed to may result in such costs being avoided for both parties if the potential issues in dispute can be dealt with swiftly prior to issue of proceedings. This may be the case for examples where proceedings have to be issued to obtain an automatic stay under New Regulation 55 but could have been avoided through simple dialogue

⁷ Consultation on taking account of the Uniplex Case (C-406/08)
http://www.ogc.gov.uk/whats_new_notification_of_consultation.asp

between the parties. It is proposed that transposition will revert to similar wording in the unamended version of the PCR 2006 and simply state that any proceedings which may be commenced in accordance with the implementing regulations for breach of duty owed under the implementing regulations must not be brought unless the economic operator bringing the proceedings has informed the contracting authority/entity of the breach or apprehended breach of the duty owed and of its intention to bring proceedings in respect of it.

42.16. By way of background, we understand that the OGC took the view, based on responses to their open consultation on this specific point, that the related change in the PCR 2006 to an approach under which proceedings are only deemed to be started (in particular, for limitation purposes) when they are served (rather than, as formerly, when issued) deprived the pre-litigation notice of its practical utility as a safeguard against claimants issuing a claim form shortly before the limitation period expired and sitting on it for months without telling the defendant or serving it. Since the implementation of the relevant amendments to the PCR 2006 in 2009, the OGC has become aware that there is a case for reconsidering this decision, particularly given the extent to which it seems that claim forms (even when served) often contain much less specific information about the alleged breach than the former obligation to send a pre-litigation notice had been interpreted to require.

42.17. The MOD proposes to exercise the option set out in Article 60(3) and implement on the basis that the court must not make a declaration of ineffectiveness where a general interest ground is raised and the court is satisfied that there are overriding reasons relating to a general interest, in particular defence and/or security interests, which require that the contract should not be declared ineffective.

42.18. Due to the nature of the implementing regulations, one of the express reasons which may justify a decision not to declare a contract ineffective is where the consequence of such a finding could endanger the very existence of a defence or security programme which is essential for security interests. The Commission has clarified that the interests of Member States referred to in recital 73 means the particular contracting Member State. The MOD does not propose to define the term "general interest" in the implementing regulations and it will ultimately be a matter for the courts to interpret.

42.19. Although concern was expressed by stakeholders regarding the additional costs and delays that these provisions will incur, the costs and delays were not quantified. Such risks are operational commercial matters which will arise as part of the procurement process but it is not appropriate to deal with this in transposition.

43. Amendments – Articles 70-71

43.1. Policy Outcome: Transpose mandatory provision.

43.2. These Articles simply remove those procurements covered by the New Directive from the scope of the Classic and Utilities Directives.

43.3. MOD did not seek or receive comments on this mandatory provision.

43.4. Schedule 5 of the implementing regulations provides for the appropriate consequential amendments to be made to the UK Regulations. Minor consequential amendments to the Quality

Contracts Schemes (Tendering Requirements) (England) Regulations 2009 have also been provided for.

44. Transitional policy

44.1. Policy Outcome: New Regulations to apply only to procedures commenced after 20 August 2011.

44.2. The New Directive requires the new rules to be implemented by 20 August 2011, but it does not explicitly address transitional issues. MOD proposed to apply the new rules only to new procurement processes beginning after 20 August 2011.

44.3. All stakeholders agreed with MOD's proposals to apply the new rules only to new procurement processes beginning after 20 August 2011. One sector emphasised the importance of clarity, to avoid the potential for increased costs arising from claims against contracting authorities/entities and suggested that there may be a requirement for contracting authorities/entities to retain clear and objective evidence for new procurements. Another stakeholder indicated the need to clear MOD's approach with the European Commission.

44.4. For clarity purposes the transitional provisions of the implementing regulations provide that they will not affect any contract award procedures commenced before 21 August 2011. This approach is consistent with the approach adopted in the transitional provisions of the Public Contracts (Amendment) Regulations 2009 which transposed the Remedies Directive 2007/66. It is also consistent with the approach taken by the European Court of Justice in case C-337/98 (Commission v France) to the interpretation of Directive 93/38/EEC (the former Utilities Procurement Directive which similarly did not address explicitly whether it was intended to apply to procurement processes that had already begun before the time by which the Directive was required to be transposed).

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PART 3

Technical issues and key questions

Introduction

45. This section of the consultation document introduces a number of key issues and questions that need to be addressed to enable a clear and successful transposition. In particular, it introduces:

- a. The draft Regulations at Annex B - general feedback is welcome on any aspect of the draft;
- b. Key issues in the draft Regulations or policy outcomes to which stakeholders' attention is drawn and feedback is specifically requested;
- c. An updated Impact Assessment (IA) on which stakeholders are asked to comment.

46. Stakeholders' feedback is important on all of the issues raised. Although most policy outcomes have been decided, there is still a need to elicit stakeholder feedback on the issues raised in Part 3 of this document, to ensure a smooth transition to the new regime on 21 August 2011 and minimise the scope for possible problems and unexpected anomalies.

47. MOD therefore urges stakeholders to consider the issues and questions raised and respond accordingly. As with the first consultation, stakeholders are invited not only to offer their views, but also their reasons for coming to that view, as these viewpoints are helpful in getting to grips with the fundamental issues at stake. In the text that follows below, each relevant implementation issue is introduced, each with a text box that encapsulates our specific question or request for feedback relating to that issue.

Draft Regulations

48. The New Directive is based substantially on the Classic Directive and the Remedies Directives, albeit the thresholds are aligned with those under the Utilities Directive, and the provisions of the Remedies Directives are largely replicated in the Articles of the New Directive. Therefore, unless there were specific and valid reasons to the contrary, for consistency with PCR 2006, and for reasons of legal certainty, the MOD has implemented these provisions in the same way as in the PCR 2006 having regard to the PCSR 2006.

Box 1 : The MOD would welcome stakeholders' general comments on any aspect of the draft Regulations.

Scope

49. Responses to the First Public Consultation referred to the fact that, although the New Directive will apply to bodies which fall within the ambit of the Utilities Directive the exemption provided under Article 30 of the Utilities Directive has not been repeated in the New Directive. This means that bodies which benefit from the Article 30 exemption, and are not currently regulated by the Utilities regime, will fall within the scope of the New Directive and will be obliged to follow the

procedures set out in the New Directive in so far as they are dealing with sensitive contracts which involve, require or contain classified information. This means that some private sector utility companies will fall within the scope of the New Directive and will be obliged to compete their sensitive contracts (if they have any) unless such contracts are capable of benefiting from an exemption under the provisions of the New Directive.

Box 2 : The MOD would welcome views from stakeholders with regards to the potential impact of the absence of an Article 30 (Utilities Directive)⁸ equivalent.

Sub-contracting – Article 21 (4)

50. The MOD received many helpful comments from stakeholders on the approach to implementing Article 21(4). These were taken into account in reaching the final decision, which after careful consideration, was to not transpose Article 21(4) as this would result in a number of difficulties for both contracting authorities/entities and suppliers as outlined at paragraph 31.5 above. However, the MOD felt that all stakeholders should be given a final opportunity to express their views on this decision.

Box 3: The MOD would welcome stakeholders' views on the intention not to transpose Article 21(4).

Thresholds and rules on advertising (Sub-contracting) – Article 52 (4)

51. To assist suppliers in meeting the requirements of Article 52(4) that deals with the award of a sub-contract where there is no requirement to publish a sub-contract notice, the draft Regulation 42 clarifies exactly what are the principles of Article 28 in the context of sub-contracting. Stakeholders are asked to consider this approach, and the usefulness and clarity of the rules in regulation 42.

Box 4 : The MOD would welcome stakeholders' views on the approach taken at draft regulation 42.

Scope and availability of review procedures – Article 55 (5)

52. The MOD intends to transpose Article 55(5) as new regulation 51(3) as the provisions of Article 55(5) may prove useful to contracting authorities/entities and suppliers alike in preventing proceedings being commenced and costs being incurred, especially in light of the automatic stay provisions under Article 56(3). MOD is aware that this approach differs from that taken in the transposition of the most recent Remedies Directive. Consultees are urged to comment on the

⁸ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:134:0001:0113:EN:PDF>

practical usefulness of the requirement, not only in the context of the attached draft regulations, but in the wider context of procurement proceedings, as this will assist the Cabinet Office in considering whether to restore the requirement in the PCR 2006 and UCR 2006.

Box 5 : The MOD would welcome stakeholders' views on the decision to transpose Article 55(5) and proposed approach in draft regulation 51(3) (and whether a similar approach should be taken in the PCR 2006 and UCR 2006).

Requirements for review procedures - Article 56(5)

53. MOD proposes to implement the provisions set out by requiring the Courts expressly to take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and in particular defence or security interests when deciding whether to make an interim order. This differs from the approach taken in transposition of the Remedies Directive due to the additional wording in the New Directive which specifically provides that defence and security interests may be taken into account.

Box 6: The MOD would welcome stakeholder's views on the proposed transposition of Article 56(5) as set out in draft regulation 56(2)

Impact assessment

54. A further, more detailed impact assessment is appended to this consultation document.

55. The New Directive is intended to enable the more efficient acquisition of military or security requirements. This will be achieved through subjecting a greater range of requirements to competition in open EU markets, drawing on a wider supply base for procurement solutions and by extending the application of the remedies regime should a Member State fail to meet its obligations.

56. The business impacts are uncertain for a number of reasons, and the outcomes cannot therefore be estimated, quantified or monetised. Contracting authorities /entities should benefit overall and there should be net positive effects on the UK economy as a whole. The reasons for this assessment are detailed below:

- a. The New Directive introduces a regime which is tailored to procurement in the defence and security sectors. Additional regulated competition across the EU should benefit contracting authorities/entities in terms of them being offered more competitive prices, better availability of superior products and greater innovation (whether in terms of production processes or product capabilities). Due to the number of variables (including equipment scope and volume procurements) it is not possible, with any certainty, to forecast the precise benefits.
- b. Greater competition will benefit the more competitive and innovative economic operators, as they will be able seek opportunities in wider EU markets. These achievements will enable

them to expand their sales and market shares, thereby increasing their output, which will reduce their costs and/or improve their products and efficient members of their supply chain increasing their overall profitability. For economic operators who are less agile or more accustomed to operating under less competitive market conditions the New Directive will present more of a challenge which could result in a negative cost impact. Again, due to the range of variables, it is not possible to accurately quantify the consequences of increased competition.

- c. The nature of competition is that outcomes are dynamic and unpredictable in terms of specific beneficiaries. We can say that the best-suited firms are most likely to gain, but we cannot necessarily identify them in advance.
- d. Predictive data is not available on the potential frequency of legal challenge arising purely because of the new rules, or the value of the remedies sought in those cases, or how the courts might rule when the facts of cases are as yet unknown. The European Commission's impact assessment for the Remedies Directive similarly could not estimate these figures and there is insufficient data on the impact of new remedies regime applied to the UK regulations as this has only been in place since December 2009.

57. The measure is not being enacted to benefit all businesses, but to increase competition and business efficiency by reducing some of the barriers to entry. Whilst a qualitative response has been received from Industrial stakeholders, they too are unable to quantify the effect of implementing the New Directive. They have quoted uncertainty in the goods and services being procured and a lack of resources available to undertake such an assessment as reasons why the Impact Assessment cannot be quantified.

58. In these circumstances, we are unable to foretell the impacts with any precision and no suitable data is therefore available. Consequently, impacts cannot be forecast or monetised.

Box 7 : The MOD would welcome stakeholders' views on the more detailed Impact Assessment, appended to this consultation document and in particular, MOD's inability to monetise the impact.

59. The consultation can be found at:

<http://www.mod.uk/DefenceInternet/AboutDefence/CorporatePublications/ConsultationsandCommunications/PublicConsultations/200981ECSecondConsultation>

For ease of reference, many of the documents referenced in the Consultation Document have been placed on MOD's consultation website:

We look forward to receiving your comments.

MOD Defence Equipment & Support
Commercial Systems
December 2010

CONSULTATION CODE OF PRACTICE

1. This consultation complies with the Better Regulation Executive's *Code of Practice on Consultation*. The six consultation criteria, as outlined in the code of practice, are applicable to this consultation.

The criteria

- a. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
- b. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
- c. Ensure that your consultation is clear, concise and widely accessible.
- d. Give feedback regarding the responses received and how the consultation process influenced the policy.
- e. Monitor your department's effectiveness at consultation, including through the use of a designated consultation coordinator.
- f. Ensure your consultation follows better regulation best practice, including carrying out an Impact Assessment if appropriate.

2. The complete code is available on the <http://www.berr.gov.uk/whatwedo/bre/consultation-guidance/page44420.html>

Comments or complaints

3. If you wish to comment on the conduct of this consultation or make a complaint about the way it has been conducted, please write to:

Sandra Eaton
Deputy Head Commercial Systems
Ministry of Defence
Oak 2E, #6228
Abbey Wood (North)
Bristol
BS34 8JH
Email: EUDirective-Responses@mod.uk

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CONSULTATION RESPONSE FORM

1. The closing date for this consultation is 07 March 2011.
2. Please set out your responses to this consultation using this response form.

Name: _____

Organisation's name _____

Remit (if applicable) _____

Address _____

Email _____

Return completed forms (preferably by email) to:

Neil Smith
Commercial Systems 3a
Ministry of Defence
Oak
Abbey Wood North
Bristol BS34 8JH
Email: EUDirective-Responses@mod.uk

Please tick one box from the following list of options that best describes you;

<input type="checkbox"/>	Individual
<input type="checkbox"/>	Central Government
<input type="checkbox"/>	Government Agency
<input type="checkbox"/>	Devolved Administration
<input type="checkbox"/>	Local Government
<input type="checkbox"/>	Third Sector
<input type="checkbox"/>	Private Sector
<input type="checkbox"/>	Small/Medium Enterprise
<input type="checkbox"/>	Professional Body
<input type="checkbox"/>	Trade Union

QUESTIONS

Box 1: Draft Regulations

The MOD would welcome comments on any aspect of the draft Regulations.

Box 1: Response

Box 2: Scope

The MOD would welcome views from stakeholders with regards to the potential impact of the absence of Article 30 (Utilities Directive) equivalent.

Box 2: Response

Box 3: Sub-contracting – Article 21 (4)

The MOD would welcome stakeholders' views on the intention not to transpose Article 21(4).

Box 3: Response

Box 4: Thresholds and rules on advertising (sub-contracting) – Article 52(4).

The MOD would welcome stakeholders' views on the approach taken at draft regulation 42.

Box 4: Response

Box 5: Scope and availability of review procedures – Article 55 (5)

The MOD would welcome stakeholders' views on the decision to transpose Article 55(5) and proposed approach in regulation 51(3) (and whether a similar approach should be taken in the PCR 2006 and UCR 2006).

Box 5: Response

Box 6: Requirements for review procedures - Article 56 (5)

The MOD would welcome stakeholder's views on the proposed transposition of Article 56(5) as set out in draft regulation 56(2)

Box 6: Response

Box 7: Impact Assessment

The MOD would welcome stakeholders views on the more detailed impact assessment appended to this consultation document and in particular, MOD's inability to monetise the impact.

Box 7: Response

Title: ANNEX C Impact Assessment of the transposition of the EU Defence and Security Directive into UK Regulations Lead department or agency: Ministry Of Defence Other departments or agencies:	Impact Assessment (IA)
	IA No:
	Date: 04/11/2010
	Stage: Consultation
	Source of intervention: EU
	Type of measure: Secondary legislation
	Contact for enquiries: Deputy Head Commercial Systems MOD Email: EUDirective-Responses@mod.uk

Summary: Intervention and Options

What is the problem under consideration? Why is government intervention necessary?

On 20 August 2009, the EU published a Directive (Council Directive 2009/81/EC – the “New Directive”) that creates new public procurement rules specifically adapted to the defence and security sectors. The problem being addressed by the EU in formulating the New Directive was to provide a more effective set of rules for public procurement in those sectors, with the aim of enabling more efficient acquisition of military or security capability under the framework of EU procurement rules and opening up the European defence market. Government intervention is necessary to transpose the New Directive by the EU’s deadline of 21 August 2011.

What are the policy objectives and the intended effects?

The policy objectives are to:

- transpose the New Directive and thereby adhere to the UK’s EU Treaty obligations;
- implement procurement rules specifically adapted to the defence and security sectors;
- open the majority of defence and sensitive security procurements to open competition in Europe;
- encourage some Member States away from inappropriate use of Article 346 TFEU and the other derogations of the Treaty; and
- reduce reliance on exemptions.

What policy options have been considered? Please justify preferred option (further details in Evidence Base)

The policy options are: a) implement; b) not implement; or c) implement late.

Not implementing or implementing late would breach UK obligations as members of the European Union, and would trigger the start of the European Commission’s infraction process and could also attract non transposition claims from aggrieved bidders. There is therefore very little real choice – the UK is obliged to implement the New Directive, otherwise it will be in breach of its treaty obligations.

The majority of the provisions in the New Directive are mandatory. Those provisions over which European Member States have discretion were explained in the First Public Consultation, where MOD consulted stakeholders on the impact of its proposals; consultation feedback was used to develop this IA.

Consideration of the possible impacts of each of the policy choices on each article in the New Directive are given in more detail in the attached evidence base.

When will the policy be reviewed to establish its impact and the extent to which the policy objectives have been achieved? It will be reviewed 08/2016

Are there arrangements in place that will allow a systematic collection of monitoring information for future policy review? Yes

SELECT SIGNATORY Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible SELECT SIGNATORY: Date:

Summary: Analysis and Evidence Policy Option 1

Description:

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low			
High			
Best Estimate			

Description and scale of key monetised costs by 'main affected groups'
Not monetisable, for the reasons explained in the evidence base.

Other key non-monetised costs by 'main affected groups'
Additional training and support costs for contracting authorities/entities; increased administration costs for contract competitions.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low			
High			
Best Estimate			

Description and scale of key monetised benefits by 'main affected groups'
Not monetisable, for the reasons explained in the evidence base.

Other key non-monetised benefits by 'main affected groups'
"Defence and Security Public Contracts Regulations 2011(DSPCR 2011)" are better suited to defence and sensitive security procurement than existing PCR 2006, Public Contracts (Scotland) Regulations 2006, Utilities Contracts Regulations 2006 and Utilities Contracts (Scotland) Regulations 2006.

Key assumptions/sensitivities/risks	Discount rate (%)
<p>The key risks associated with the implementation are:</p> <ul style="list-style-type: none"> • a more complicated procurement process, as some acquisition teams will be required to use both the New & Classic Directives; • additional training and support costs for contracting authorities/entities; • increased administration costs for contract competitions. 	

Impact on admin burden (AB) (£m):	Impact on policy cost savings (£m):	In scope
New AB:	Policy cost savings:	No
AB savings:	Net:	

Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?			United Kingdom		
From what date will the policy be implemented?			21/08/2011		
Which organisation(s) will enforce the policy?			The High Court & equivalent Scottish Court		
What is the annual change in enforcement cost (£m)?			Not known		
Does enforcement comply with Hampton principles?			Yes		
Does implementation go beyond minimum EU requirements?			No		
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded: N/A		Non-traded: N/A
Does the proposal have an impact on competition?			Yes		
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?			Costs: N/A		Benefits: N/A
Annual cost (£m) per organisation (excl. Transition) (Constant Price)	Micro N/K	< 20 N/K	Small N/K	Medium N/K	Large N/K
Are any of these organisations exempt?	No	No	No	No	No

Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with. Does your policy option/proposal have an impact on...?	Impact	Page ref within IA
Statutory equality duties ⁹ Statutory Equality Duties Impact Test guidance	Yes	61
Economic impacts		
Competition Competition Assessment Impact Test guidance	Yes	60
Small firms Small Firms Impact Test guidance	Yes	60
Environmental impacts		
Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance	No	61
Wider environmental issues Wider Environmental Issues Impact Test guidance	No	60
Social impacts		
Health and well-being Health and Well-being Impact Test guidance	No	61
Human rights Human Rights Impact Test guidance	No	61
Justice system Justice Impact Test guidance	No	60
Rural proofing Rural Proofing Impact Test guidance	No	62
Sustainable development Sustainable Development Impact Test guidance	No	60

⁹ Race, disability and gender Impact assessments are statutory requirements for relevant policies. Equality statutory requirements will be expanded 2011, once the Equality Bill comes into force. Statutory equality duties part of the Equality Bill apply to GB only. The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

Evidence Base (for summary sheets) – Notes

Use this space to set out the relevant references, evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Please fill in **References** section.

References

Include the links to relevant legislation and publications, such as public impact assessment of earlier stages (e.g. Consultation, Final, Enactment).

No. Legislation or publication

1 Directive 2009/81/EC First Public Consultation

<http://www.mod.uk/DefenceInternet/AboutDefence/CorporatePublications/ConsultationsandCommunications/PublicConsultations/200981EcFirstConsultation.htm>

Evidence Base

Ensure that the information in this section provides clear evidence of the information provided in the summary pages of this form (recommended maximum of 30 pages). Complete the **Annual profile of monetised costs and benefits** (transition and recurring) below over the life of the preferred policy (use the spreadsheet attached if the period is longer than 10 years).

The spreadsheet also contains an emission changes table that you will need to fill in if your measure has an impact on greenhouse gas emissions.

Annual profile of monetised costs and benefits* - (£m) constant prices

	Y ₀	Y ₁	Y ₂	Y ₃	Y ₄	Y ₅	Y ₆	Y ₇	Y ₈	Y ₉
Transition costs										
Annual recurring cost										
Total annual costs										
Transition benefits										
Annual recurring benefits										
Total annual benefits										

* For non-monetised benefits please see summary pages and main evidence base section

Evidence Base (for summary sheets)

Part 2 - Key Background Information

1. This Impact Assessment (IA) supports the proposed draft regulations that will implement the New Directive) in the UK.

Background

2. There are extant EU public procurement rules already in force within the UK, which seek to ensure that public sector bodies contracting authorities/entities award contracts in an efficient and non-discriminatory manner and include remedies that are available through the courts for breaches of the rules, such as the suspension of contract award procedures and the award of damages. These rules are implemented by PCR 2006, Public Contracts Scotland Regulations 2006, Utilities Contracts Regulations 2006 and Utilities Contract Regulations Scotland 2006, referred to in this document as “UK Regulations”.

3. Directive 2009/81/EC (New Directive) was adopted by the European Parliament in July 2009 and published in the Official Journal of the European Union in August 2009. It sets out new procurement rules for contracting authorities/entities that are more suitable for procurements involving military equipment, sensitive equipment, and related goods, works or services. The New Directive also includes remedies rules that are substantially the same as those set out in Council Directive 2007/66/EC (the Remedies Directive), which was implemented by amendments to the existing UK Regulations.

4. Within the New Directive, there are a number of different types of rules as follows:

- a. Mandatory new provisions for all Member States, where there is no choice over implementation;
- b. Mandatory new provisions but with optional elements on how the provision is implemented; and
- c. Permissive provisions, where Member States can choose whether to implement or not.

5. MOD's approach to implementation involves two consultation exercises. The first consultation, which ran from December 2009 to March 2010, consulted stakeholders on MOD's approach to implementation. The First Consultation Document described the main provisions of the New Directive and sought feedback from stakeholders on the optional elements. The analysis that followed during spring 2010 informed decisions on MOD's implementation policy.

6. Comments were also sought on an initial draft Impact Assessment (IA). Though many stakeholders anticipated an increase in time, cost, risk and administrative burden, none were able to provide a financial quantification of the impact of the New Directive.

7. The second consultation, which this more detailed IA accompanies, summarises the outcomes of the first consultation, confirms the implementation policy, and seeks comments on the draft implementing regulations. A draft Transposition Note is included as an annex to the consultation, to aid stakeholders' understanding of the MOD's approach.

Impact Assessment Requirements

8. IAs are generally required for transposition of EU Directives. The department for Business Innovation and Skills (BIS) guidance on impact assessment clarifies that an assessment should be carried out for any government proposal that:

- a. Imposes or reduces costs on businesses or the third sector;
- b. Similarly affects costs in the public sector, unless those costs fall below a threshold of £5M, in which case only a developmental/option stage assessment is required;
- c. Would not yield an overall net change but some kind of redistribution of costs or benefits from one group to another occurs; and
- d. Changes the administrative costs

9. Though MOD has not been able to monetise the impact of the New Directive's transposition, an IA has nevertheless been prepared for the Second Public Consultation, as MOD is seeking stakeholders' views on its inability to monetise the New Directive's impact.

MOD's Approach to Impact Assessment

Overview

10. Generally, the consultative approach taken by MOD is consistent with the recommended approach to impact assessment. Specifically, MOD has:

- a. Consulted stakeholders about the various options available to them, including a draft IA;
- b. Considered and documented the possible impacts of those options in its analysis of the responses;
- c. Used the IA to aid decision-making in formulating the implementation policy;
- d. Published the revised IA to support the second consultation document.

Analysis of comments on the initial draft IA

11. MOD's initial view in the First Consultation Document was that there was unlikely to be a significant cost impact of the New Directive on either cost to businesses, the third sector or to the public sector. Any changes would affect public sector processes to some extent, but these were anticipated to be under the £5M threshold. However, MOD used the first consultation to test this thinking, and issued a draft developmental/option stage IA for comments.

12. The responses on the IA were mixed. One respondent suggested that if a significant proportion of procurements that had previously been subject to the current EU public procurement rules, or were exempt from those rules, were now to be subject to the New Directive, then significant costs are likely to arise and that these could feasibly exceed the £5M threshold. The creation of new procedures, particularly those for sub-contracting, training and training time in both the contracting authority/entity and supplier communities, plus the constraint placed on some procurements in terms of time and scope leading to a greater number of procurement actions than may have been necessary in the past, were identified as

cost drivers. Another respondent suggested that the contracting authority/entity and supplier sides of the security market were fragmented and immature, thus inhibiting its ability to absorb a complete set of procurement rules without significant extra cost.

13. A further respondent focussed on the remedies rules and recalled the conclusion reached by the OGC, in the IA for the Remedies Directive, that no-one can feasibly predict the volume by which the courts' caseload may increase as a consequence of those new rules. However, it is clear that one of the stated aims of that Directive is to encourage greater use of review procedures and the respondent suggested it would be appropriate for MOD to test, in the light of experience, whether the new remedies rules were having an effect in cost terms which exceed the £5M threshold.

14. The other respondents either did not comment or did not express a clear opinion either way.

15. Although MOD found the differing views of respondents helpful in decision-making, it is important to note that the New Directive is not materially different from the Classic Directive. Rather, the New Directive brings more procurements into a regulated regime. The key Articles in this respect are:

- a. Scope – This covers military and security requirements, some of which are currently met under the Classic Directive, some of which are currently exempt from the Classic Directive. In the future, in general, the vast majority of military and security requirements met under the Classic Directive will fall under the New Directive. Some will remain under the Classic, particularly for works. Many of the requirements that are currently exempt will now be met by the New Directive. Contracting authorities/entities will therefore have to use both Directives in addition to having procurement procedures for exempt and below threshold requirements.
- b. Thresholds – The threshold has increased from £101,323 in the Classic Directive to £313,694 in the Defence Directive. In FY 09/10, contracts valued between £101,323 and £313,694 roughly equated to 10% of all MOD contracts. Many of these types of requirements will continue to be placed under the Classic Directive and many more will be exempt from either Directive.
- c. Exclusions – Roughly 55% of MOD contracts are exempt from the Classic Directive. The New Directive will reduce the number of exempt contract in two ways. First, its provisions on security of supply and security of information may provide adequate protection for requirements, meaning that there will be less reliance on Article 346TFEU. Second, the general exclusions in the New Directive at regulation 6 are more tightly drawn. This means it will be harder to justify using these exemptions. Although it is difficult to quantify the effect but there is likely to be a significant reduction in the number of exempt contracts.
- d. Sub-contracting – The extent to which these provisions will be used is uncertain. Many defence procurements are too complex for these provisions to be used without undue risk. Their use may be limited to straightforward service and works contracts.
- e. Review Procedures – The review procedures are very similar to the provisions of the existing Remedies Directives. However, because requirements that would previously have been exempt from the UK Regulations will fall under the

implementing regulations and its remedies regime, it is likely that there will be a greater number of legal challenges.

16. The net effect is likely to be an increase in the amount of procurements carried out under the auspices of either the Classic Directive or the New Directive.

Constraints on Monetisation

17. The New Directive is intended to enable the more efficient acquisition of military or security requirements. This will be achieved through subjecting a greater range of requirements to competition in open EU markets, drawing on a wider supply base for procurement solutions and by extending the application of the remedies regime should a Member State fail to meet its obligations.

18. The business impacts are uncertain for a number of reasons, and the outcomes cannot therefore be estimated, quantified or monetised. Contracting authorities/entities should benefit overall and there should be net positive effects on the UK economy as a whole. The reasons for this assessment are detailed below:

- a. The New Directive introduces a regime which is tailored to procurement in the defence and security sectors. Additional regulated competition across the EU should benefit contracting authorities /entities in terms of them being offered more competitive prices, better availability of superior products and greater innovation (whether in terms of production processes or product capabilities). Due to the number of variables (including equipment scope and volume procurements) it is not possible, with any certainty, to forecast the precise benefits.
- b. Greater competition will benefit the more competitive and innovative economic operators, as they will be able seek opportunities in wider EU markets. These achievements will enable them to expand their sales and market shares, thereby increasing their output, which will reduce their costs and/or improve their products and efficient members of their supply chain increasing their overall profitability). For economic operators who are less agile or more accustomed to operating under less competitive market conditions the New Directive will present more of a challenge which could result in a negative cost impact. Again, due to the range of variables, it is not possible to accurately quantify the consequences of increased competition.
- c. The nature of competition is that outcomes are dynamic and unpredictable in terms of specific beneficiaries. We can say that the best-suited firms are most likely to gain, but we cannot necessarily identify them in advance.
- d. Predictive data is not available on the potential frequency of legal challenge arising purely because of the new rules, or the value of the remedies sought in those cases, or how the courts might rule when the facts of cases are as yet unknown. The European Commission's impact assessment for the Remedies Directive similarly could not estimate these figures and there is insufficient data on the impact of new remedies regime applied to the UK regulations as this has only been in place since December 2009.

19. The measure is not being enacted to benefit all businesses, but to increase competition and business efficiency by reducing some of the barriers to entry. Whilst a qualitative response

has been received from Industrial stakeholders they too are unable to quantify the effect of implementing the New Directive. They have quoted uncertainty in the goods and services being procured and a lack of resources available to undertake such an assessment as reasons why the Impact Assessment cannot be quantified.

20. In these circumstances, we are unable to foretell the impacts with any precision and no suitable data is therefore available. Consequently, impacts cannot be forecast or monetised.

Options

21. Strategically, there are only three options available:

a. Option 1 – Do nothing

Non-implementation of the New Directive would breach EU Treaty obligations, trigger infraction proceedings, resulting in the UK being liable for substantial penalties and risk claims for damages for non-implementation from aggrieved parties. This option is therefore not feasible; we intend to implement the New Directive. Consequently, the “do nothing” option is not considered within the detailed assessment of each article in Part 3 of this document, unless the New Directive specifically permits an option for not implementing the article.

b. Option 2 – Implement Late

As for Option 1, late implementation of the New Directive would breach EU Treaty obligations, trigger the start of the European Commission’s infraction process and could also attract non transposition damages claims from aggrieved parties. Following the introduction of the Lisbon Treaty, the EU Commission implemented a new computer system that is capable of triggering an infraction the day after the transposition deadline is missed, so this option is no more feasible than Option 1.

c. Option 3 – Implement Directive into UK law by the imposed deadline

This is the only feasible option – the UK is obliged to implement the New Directive by 21 August 2011.

22. The New Directive largely replicates the provisions of the Classic Directive. Though implementation of the New Directive is mandatory, there is a measure of flexibility in implementation, as some elements of the New Directive are optional. MOD’s First Consultation Document highlighted the new provisions introduced by the New Directive and sought feedback on optional elements; Part 3 of this document provides a brief assessment of the impact of each of these provisions, on an Article by Article basis.

23. For each Article, we believe we have selected the best policy option to limit the possible negative consequences including, where it is permitted by the New Directive, not implementing provisions that are entirely optional for Member States.

Impact Assessment Part 3 – Potential Impact of Articles

24. This section of the IA considers the potential impact of each of the key articles within the New Directive. It does not attempt to repeat the detailed justification for MOD's policy decisions contained within the consultation document and which have been endorsed by the Minister for International Security Strategy. Where helpful it recaps on the policy decision, whilst majoring on the possible impacts of each option.

Key Provisions

Article 2 – Scope

25. The scope of the New Directive as set out in this Article covers contracts for the procurement of the following supplies, works and services:

- a. Military equipment, including any parts, components or sub-assemblies;
- b. Sensitive equipment, sensitive works and sensitive services;
- c. Works, supplies and services directly related to military equipment and sensitive equipment;
- d. Works and services for specifically military purposes or sensitive works and sensitive services.

26. The MOD's analysis of the key impact of these provisions is as follows:

Military Equipment

27. Although MOD will retain its right to use the derogation under Article 346 TFEU to exempt certain procurements, its use will be limited to exceptional cases where the decision not to apply the New Directive is taken for the protection of the essential interests of national security. In other words, there will be a strong presumption that equipment on the "1958 List" should be procured under the New Directive. It is likely that the use of Article 346 TFEU (and other exemptions) will come under closer scrutiny by the ECJ. However, where the protective measures in the New Directive fully protect our essential national security interests, we plan to use the New Directive instead of the exemption. The likely impacts are:

- a. a wider range of suppliers participating in our procurements that should lead to better value for money although it is not possible to quantify the benefits in monetary terms;
- b. a larger proportion of our procurements being conducted under the New Directive this means more contracts will be subject to remedies regimes and judicial review of procurement decisions.

Sensitive Security Contracts

28. As this is a mandatory provision, it has to be transposed. The net effect of the scope of the New Directive is that more procurement will take place under the implementing regulations. The likely impacts are similar to those for military equipment. With the exemption for sensitive contracts being more tightly drawn than the equivalent in the UK Regulations, more sensitive

security contracts will be subject to regulated competition.

29. Although the absence of an equivalent Article 30 appears to place an unwarranted burden on utility companies, it fits with the Commission's desire to seek to open the security market to competition to the fullest extent possible.

Security Classification

30. This section considers the potential impact of the implementing Security Agreements/Arrangements in order to manage "Classified information" as defined in Article 1 of the New Directive.

31. The negotiation of Security Agreements/Arrangements is an important activity that is undertaken by nations in order to provide assurances that classified information exchanged bi-laterally will be protected. This is a normal activity which is undertaken as required where classified information needs to be exchanged and there is no agreement in place, or where existing agreements need to be reviewed. It is not therefore anticipated that there will be any direct impact in respect of security of information as a consequence of implementing the New Directive.

Article 3 – Mixed contracts

32. The IA for Article 3 considers the impact of implications of implementing the New Directive's rules on mixed contracts, in particular single contracts that cover requirements that are within the scope of the New Directive and the Classic/Utilities Directives or the New Directive and exemptions/derogations.

33. As this is a mandatory provision, it has to be transposed. Its impact is difficult to gauge, but it should be beneficial to practitioners as it prevents single requirements having to be procured under different regimes.

Article 7 – Protection of Classified Information

34. This new provision allows confidentiality obligations to be imposed on suppliers to protect classified information communicated to them throughout the tendering and contracting procedure.

35. Currently, where classified material is to be included in tenders, potential tenderers must protect the information in accordance with the relevant security requirements. The New Directive recognises and formalises this approach in procurement law. The net impact is likely to be minimal, as potential tenderers already have to protect classified information adequately.

Article 8 – Thresholds

36. The thresholds above which the New Directive shall apply are aligned to Directive the Utilities Directive. This represents an increase from the thresholds contained within the Classic Directive.

37. However, in practice, Union Law requires that the principles of the internal market also apply below these thresholds. Therefore the imposition has no discernable financial impact.

Article 10 – Public contracts and framework agreements awarded by central purchasing bodies

38. This provision addresses the use of central purchasing bodies. It differs slightly from Article 11 of the Classic Directive containing a revised definition of central purchasing bodies.

39. As this is a mandatory provision, it has to be transposed. The impact will be minimal. Contracting authorities/entities in the UK already use central purchasing bodies where they deliver value for money. This provision will not change the present situation.

Article 11 - Use of exclusions

40. MOD did not seek or receive comments on this mandatory provision which provides that contracts excluded by Articles 12 and 13 of the New Directive cannot be used simply to avoid the requirements of the New Directive.

41. MOD has not transposed this Article so there is no impact.

Article 12 - Contracts awarded pursuant to international rules

42. This provision helps to clarify the ability to use international treaty organisations, such as NATO and OCCAR, to place contracts for the benefit of Member States. The European Defence Agency can also place contracts on behalf of the participating Member States. International arrangements can also be taken forward on a bilateral or multi-lateral basis through Memoranda of Understandings, which can establish contracting arrangements. On this basis, the new arrangements will facilitate international cooperation, so their impact is positive.

Article 13 – Specific exclusions

43. This provision contains many of the exemptions present in the Classic Directive. Article 13 of the New Directive and new exemptions have been created to address the specific needs of the defence and security sectors.

44. As this is a mandatory provision, it has to be transposed. In general, the exclusions at Article 13 are more tightly drawn than the exclusions in the current UK Regulations. Whilst they are sufficient to protect key areas of business such as support to military operations and R&D, the net effect of the scope of, and specific exclusions in, the New Directive is that more procurements will be subject to regulation.

Articles 15 and 16 – Service contracts listed in Annexes I and II

45. This provision details contracts which have as their object services covered by the New Directive. Whilst substantively the same as the equivalent Articles in the Classic Directive a number of services are reclassified making them requirements subject to the New Directive.

46. As this is a mandatory provision, it has to be transposed. The likely impact is that services re-classified under Annex I of the New Directive will benefit from regulated competition amongst suppliers from the EU. It will also open up opportunities for service providers in the UK to participate in the Single Market for these services.

Article 18 - Technical specifications

47. Article 18 is slightly different from the equivalent provision in Article 23 of the Classic Directive. Article 18: removes the requirement for technical specifications to take into account accessibility criteria for people with disabilities; makes specific reference to technical requirements under international standardisation agreements to guarantee interoperability; and includes in the list of standards “civil technical specification” and national “defence standards”. The impact of implementing these standards is minimal and there is no anticipated impact on procurement costs.

Articles 21 and 50 to 54 and Annex V - Sub-contracting and Rules applicable to Sub-contracting

48. MOD intends to transpose Article 21 (3) as an option for contracting authorities/entities. The application of the optional provisions provided for Article 21(3) will, if targeted at appropriate contracts, provide an open and fair process for contracting authorities/entities and suppliers to diversify the supply chain that may lead to better value for money for the taxpayer and suppliers alike. However, there are likely to be increased staff and overhead costs for suppliers. There may also be the risk of legal challenge for the contracting authority/entity or supplier due to difficulties in ensuring equality of treatment and proportionality. Transposing these articles as options rather than mandating them reduces the risks as they can be applied to suitable procurements. Therefore, Article 21(3) should improve value for money for the taxpayer.

49. Although there are possible adverse consequences to the transposition of Article 21(5), such as those outlined by stakeholders, their impact is uncertain and thus difficult to gauge. The MOD believes that contracting authorities/entities will only use this provision with great caution. However, future guidance will seek to address the risks to minimise their impact.

50. Article 21 (4) is optional. MOD's intention not to transpose this provision has no financial impact.

Article 22 - Security of Information

51. This is a new provision designed to meet Member States' concerns about the protection of classified information, during the tendering and contract award process.

52. The negotiation of Security Agreements/Arrangements is an important activity that is undertaken by nations in order to provide assurances that classified information exchanged bi-laterally will be protected. This is a normal activity which is undertaken as required where classified information needs to be exchanged and there is no agreement in place, or where existing agreements need to be reviewed. It is not therefore anticipated that there will be any direct impact in respect of security of information as a consequence of implementing the New Directive.

Article 23 - Security of Supply

53. This Article will deliver operational benefits, as it allows for security of supply requirements to be identified and captured in the contract. The benefit of this should be a reduction in the risk of delay when purchasing from foreign export control regimes and provide a more secure supply chain leading to potentially better UK crisis management. Contracting authorities/entities will therefore have to carefully scrutinise their security of supply requirements to ensure they strike the right balance between cost and operational risk.

Article 25 – Procedures to be applied

54. The New Directive does not include the open procedure or the use of dynamic purchasing systems to award contracts, both of which are covered by the Classic Directive. However, since these procedures are rarely, if ever, used in defence and security procurements, their removal has very little impact.

55. The New Directive provides contracting authorities/entities a free choice between use of the negotiated procedure with prior publication of a contract notice and the restricted procedure. This positive change in process should be absorbed easily with limited cost impact.

Article 28 - Cases justifying use of negotiated procedure without publication of a contract notice

56. The New Directive replicates the relevant justifications for use of this procedure. In addition, this Article can be used in a crisis where the minimum time periods to be complied with under the other procedures are not compatible with the urgent need to act that the crisis has caused. This reduces the burden on contracting authorities/entities that will no longer be required to run a call for competition in all cases whilst seeking to respond to the crisis in the most effective way possible.

57. Moreover, the length of contracts which can be awarded for additional deliveries and repetition of similar works and services is increased from the three years to five years. This change adapts the procurement rules to the specific needs of the defence sector in particular, where equipment generally remains in service use for much longer than other kinds of equipment. The increase in the permitted length of contracts will ease the burden on contracting authorities/entities because calls for competition for additional deliveries or repetition of services will not be required as often.

Article 29 - Framework Agreements

58. This Article increases the maximum permitted duration for framework agreements from four years to seven years. This is another change that adapts the procurement rules to the specific needs of the defence sector in particular, where the extended period of in service use leads to framework agreements that have longer durations than normal. The increase in the permitted duration will thus ease rather than increase the burden on contracting authorities/entities and suppliers alike. Contracting authorities/entities will not be required to run competitions for the award of framework agreements as often, delivering savings and other

benefits in the use of resources. Equally, suppliers will not have to bid for framework agreements so frequently, delivering savings in bid costs.

Article 38 - Verification of the suitability and choice of participants and award of contracts

59. This Article reduces the minimum number of participants to be invited to tender under the restricted procedure from five to three. It also allows contracting authorities/entities to re-advertise the requirement and invite candidates selected from either of the two adverts to tender, negotiate or participate in dialogue, where the number of candidates requesting to participate is too low. The reduction in the minimum number of participants, in particular, eases the burden on contracting authorities/entities and suppliers. For contracting authorities/entities, there will not be as many tenders to evaluate which should enable a shortening of the time taken to reach contract award. For some suppliers, there will be savings in bid costs because they will be tendering for fewer contract opportunities but will also have an increased chance of success in those competitions where they are invited to tender.

Article 39 - Personal Situation of the candidate or tenderer

60. This Article requires contracting authorities/entities to exclude candidates or tenderers who have been convicted of terrorist offences or offences linked to terrorist activities. In addition, the grounds for discretionary exclusion have been expanded to include breaches of previous contractual requirements relating to security of information or security of supply, or cases where a candidate or tenderer is known to lack reliability to the extent they pose a risk to national security. These requirements do not impact on the procurement procedures of contracting authorities/entities.

Article 42 - Technical and/or professional ability

61. This Article introduces the following changes concerning the evidence of technical and professional ability:

- a. The required list of principal deliveries or services provided can go back five years rather than three years;
- b. Checks on production capacities may be carried out as a matter of course rather than just where products or services to be provided are complex;
- c. The description of tools, materials and technical equipment is specifically adapted for defence and security procurements and so includes requirements to demonstrate the ability to cope with additional requirements resulting from a crisis;
- d. Evidence may be required to demonstrate the ability to process, store and transmit classified information at the level of protection required by the contracting authority/entity. Member States are permitted to require that the evidence provided must comply with their national laws on security clearances;
- e. Economic operators may be required to supply evidence of their technical or professional ability by other documents considered appropriate by a contracting authority/entity where, for valid reasons, the required references cannot otherwise be provided.

62. These adaptations and changes require minimal changes to selection procedures e.g. Pre-Qualification Questionnaires (PQQ) and will therefore result in little or no cost impact.

Article 43 – Quality assurance standards

63. This makes reference to independent accredited bodies. However, since its implementation will not require MoD to change its Appropriate Certification Policy, it will have no effect in terms of Certification requirements on MoD suppliers. This change is therefore considered neutral in terms of impact and cost for MOD. Other stakeholders have been silent on this point.

Articles 55 – 64 Rules to be applied to reviews

64. These Articles largely replicate the new remedies regime implemented by the Remedies Directive in December 2009. Since this regime is already implemented in UK Regulations, no additional impact is anticipated over and above our general view that the increase in the scope of contracts covered by regulation could potentially increase the level of legal challenge. However since predictive data is not available on the potential frequency of legal challenge, the value of the remedies that may be sought, or the likely judicial outcome, the impact of these Articles and their provisions cannot be quantified in financial terms.

Articles 70 and 71 – Amendments

65. The purpose of these mandatory Articles is to remove those procurements covered by the New Directive from the scope of the Classic and Utilities Directives.

66. Save to the extent already discussed under Scope above, there is no anticipated cost impact associated with this change.

Conclusion

67. The mandatory nature of the New Directive imposes some significant additions and amendments to be made to the UK procurement regime. In some cases, there are choices in implementing, and MOD's role has been to identify, consult and then decide on those choices which represent the best policy options for the UK.

68. BIS guidance encourages systematic assessment of impacts over a suggested £5M threshold, avoidance of "gold-plating" and taking a minimalist approach to implementation. MOD has adhered to BIS guidance and selected the options that represent the least cost and greatest benefit within the confines of the mandate laid down in the New Directive. However, it has not been possible to monetise the impact of the New Directive, as we are unable to foretell the impacts with any precision and no suitable data is therefore available.

Impact Assessment Part 4 – Checklist of Specific Impact Tests

Economic Tests

Competitive assessment

69. The New Directive, as with other EU procurement Directives, is intended to facilitate greater competition by opening markets and specifically by providing deterrents against and sanctions for breaches of the rules. Indeed, one of the key aims of the New Directive is to open the majority of defence procurements to competition, enabling more efficient acquisition of military or security capability.

Small firms impact test

70. In common with prime contractors, small firms will benefit from greater visibility of advertised opportunities within the European defence and security market. Though the UK has chosen not to transpose the permissive sub-contracting provisions, for the reasons stated in the main text of the consultation document, it has transposed the least burdensome option under Article 21 (3), which gives contracting authorities/entities the option of requiring award to third parties, thus creating potential opportunities for SMEs, where it is appropriate to do so.

Legal aid impact test

71. As the New Defence Directive primarily affects companies, there is no anticipated impact on Legal Aid.

Other economic issues

72. There is a possibility that the new rules could generate receipts for Government, as a result of civil financial penalties on contracting authorities/entities. In one sense, this is not new money, but rather public money changing hands from one public body to another. However, the number of civil financial penalties and the corresponding number of receipts is expected to be very low (i.e. isolated instances and possibly few or none). The value of receipts is entirely unpredictable.

Sustainability Tests

Sustainable development

- 73 The New Directive replicates many of the provisions in the Classic Directive, including:
- a. The definition of “technical specifications” includes environmental performance levels;
 - b. Technical specifications may be drawn by the contracting authority/entity in terms of performance or functional requirements which may include environmental characteristics;
 - c. Selection criteria for works and service contracts may include minimum standards for environmental management measures that the economic operator is able to

apply when performing the contract, but only where it is necessary for the performance of that contract; and

- d. Conditions for performance of contracts may take environmental considerations into account provided they are compatible with EU law.

74. The impacts of the New Directive cannot be monetised, as discussed in the IA, due to the unpredictability of facts and data on potential future remedies cases. The impacts, if any, are more likely to be economic than social or environmental. However, the tools in the New Directive should allow contracting authorities/entities to comply with the five Sustainable Development principles:

- a. Living within environmental limits;
- b. Ensuring a strong, healthy and just society;
- c. Achieving a sustainable economy;
- d. Promoting good governance; and
- e. Using sound science responsibly.

Carbon assessment/other environment

75. There are no environmental characteristics to this policy proposal and therefore these tests are not relevant.

Social Tests

Health impact assessment

76. The proposal should have no impact on health, well-being or health inequalities.

Race equality, disability equality, gender equality, human rights

77. The New Directive replicates many of the provisions in the Classic Directive, including:

- a. The definition of “technical specifications” includes accessibility for disabled persons;
- b. There is also a special provision for reserved contracts that allows us to “reserve” the contract for “supported factories or businesses” where more than 50% of the workers are disabled persons who by reason of the nature or severity of their disability are unable to take up work in the open labour market; and
- c. Conditions for performance of contracts may take social considerations into account provided they are compatible with EU law.

78. The policy is derived from EU law, via the European Commission, and so should be compliant with other EU laws on race, disability, equality and human rights. An extensive public consultation has not produced any evidence that suggests the proposed policy has any bearing on race equality, disability equality, gender equality or human rights. The policy improves the rights of all businesses in tendering for public contracts, and is not skewed in favour of or against any particular group.

Rural proofing

79. The proposal should have no impact in different rural areas.

Annexes

Annex 1 should be used to set out the Post Implementation Review Plan as detailed below. Further annexes may be added where the Specific Impact Tests yield information relevant to an overall understanding of policy options.

Annex 1: Post Implementation Review (PIR) Plan

A PIR should be undertaken, usually three to five years after implementation of the policy, but exceptionally a longer period may be more appropriate. A PIR should examine the extent to which the implemented regulations have achieved their objectives, assess their costs and benefits and identify whether they are having any unintended consequences. Please set out the PIR Plan as detailed below. If there is no plan to do a PIR please provide reasons below.

Basis of the review: [The basis of the review could be statutory (forming part of the legislation), it could be to review existing policy or there could be a political commitment to review];

Review objective: [Is it intended as a proportionate check that regulation is operating as expected to tackle the problem of concern?; or as a wider exploration of the policy approach taken?; or as a link from policy objective to outcome?]

Review approach and rationale: [e.g. describe here the review approach (in-depth evaluation, scope review of monitoring data, scan of stakeholder views, etc.) and the rationale that made choosing such an approach]

Baseline: [The current (baseline) position against which the change introduced by the legislation can be measured]

Success criteria: [Criteria showing achievement of the policy objectives as set out in the final impact assessment; criteria for modifying or replacing the policy if it does not achieve its objectives]

Monitoring information arrangements: [Provide further details of the planned/existing arrangements in place that will allow a systematic collection of monitoring information for future policy review]

Reasons for not planning a PIR: [If there is no plan to do a PIR please provide reasons here]

The Commission is committed to a review of the implementation of the Defence & Security Directive by 21 August 2016, to evaluate the extent to which the objectives have been achieved. The UK will be a full participant in the review, using MOD's established statistical reporting regime and its engagement with key Government and industrial stakeholders to inform the UK's contribution. In common with OGC's approach to previous directives the MOD does not therefore plan to run a separate PIR.

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ANNEX D

**TRANSPOSITION NOTE
CONTRACTS AWARDED BY CONTRACTING AUTHORITIES OR ENTITIES IN
THE FIELDS OF DEFENCE AND SECURITY
DIRECTIVE 2009/81/EC OF THE EUROPEAN PARLIAMENT AND
OF THE COUNCIL OF 13TH JULY 2009
DRAFT DEFENCE AND SECURITY PUBLIC CONTRACTS REGULATIONS 2011**

Directive Article	Implementation
Article 1 – Definitions	Regulation 2 – Interpretation Regulation 3 – Contracting authorities
Article 2 – Scope	Regulation 5 – Application
Article 3- Mixed Contracts	Regulation 5 – Application
Article 4 – Procurement Principles	Regulation 4 – Economic Operators
Article 5 – Economic Operators	Regulation 27 – Consortia Regulation 28 – Corporations
Article 6 – Confidentiality obligations of contracting authorities/entities	Regulation 9 – Confidential information
Article 7 – Protection of classified information	Regulation 10 – Classified information
Article 8 – Threshold amounts for contracts	Regulation 8 – Thresholds
Article 9 – Methods for calculating the estimated value of contracts and of framework agreements	Regulation 8 - Thresholds

Directive 2009/81/EC
MOD Consultation on the Approach to Implementation

Directive Article	Implementation
Article 10 – Central purchasing bodies	Regulation 21 – Central purchasing bodies
Article 11 – Use of exclusions	Implementation not required
Article 12 – Contracts awarded pursuant to international rules	Regulation 6 – General Exclusions
Article 13 – Specific exclusions	Regulation 6 – General Exclusions
Article 14 – Reserved contracts	Regulation 7 – Reserved Contracts
Article 15 – Service contracts listed in Annex I	Regulation 5 – Application
Article 16 – Service contracts listed in Annex II	Regulation 5 – Application
Article 17 – Mixed contracts including services listed in Annexes I and II	Regulation 5 – Application Regulation 2 - Interpretation
Article 18 – Technical specifications	Regulation 11 – Technical specifications in the contract documents
Article 19 – Variants	Regulations 12 – Variants
Article 20 – Conditions for performance of contracts	Regulation 35 – Conditions for performance of contracts
Article 21 – Subcontracting	Regulation 36 – Sub-contracting

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Directive Article	Implementation
Article 22 – Security of information	Regulation 37 – Security of Information
Article 23 – Security of supply	Regulation 39 – Security of Supply
Article 24 – Obligations relating to taxes, environmental protection, employment protection provisions and working conditions	Regulation 34 – Obligations relating to taxes, environmental protection, employment protection and working conditions.
Article 25 – Procedures to be applied	Regulation 14 – Selection of contract award procedures
Article 26 – Negotiated procedure with publication of a contract notice	Regulation 17 – The negotiated procedure
Article 27 – Competitive dialogue	Regulation 18 – The competitive dialogue procedure
Article 28 – Cases justifying the use of the negotiated procedures without publication of a contract notice	Regulation 15 – Use of the negotiated procedure without prior publication of a contract notice
Article 29 – Framework agreements	Regulation 19 – Framework Agreements
Article 30 – Notices	Regulation 13 – Prior information notices Regulation 16 – The restricted procedure Regulation 17 – The negotiated procedure Regulation 18 – The competitive dialogue procedure Regulation 31 – Contract award notice

Directive 2009/81/EC
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Directive Article	Implementation
Article 31 – Non-mandatory publication	Regulation 47 – Publication of notices
Article 32 – Form and manner of publication of notices	Regulation 47 – Publication of notices
Article 33 – Time-limits for receipt of requests to participate and for receipt of tenders	Regulation 16 – The restricted procedure Regulation 17 – The negotiated procedure Regulation 18 – The competitive dialogue procedure
Article 34 – Invitations to tender, negotiate or participate in dialogue	Regulation 16 – The restricted procedure Regulation 17 – The negotiated procedure Regulation 18 – The competitive dialogue procedure
Article 35 – Information for candidates and tenderers	Regulation 29 – Notification Regulation 32 – Information about contract award procedures
Article 36 – Rules applying to communication	Regulation 48 – Means of communication
Article 37 – Content of reports	Regulation 32 – Information about contract award procedures
Article 38 – Verification of the suitability and choice of participants and award of contracts	Regulation 16 – The restricted procedure Regulation 17 – The negotiated procedure Regulation 18 – The competitive dialogue procedure

Directive 2009/81/EC
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Directive Article	Implementation
Article 39 – Personal situation of the candidate or tenderer	Regulation 22 – Criteria for the rejection of economic operators
Article 40 – Suitability to pursue the professional activity	Regulation 22 – Criteria for the rejection of economic operators
Article 41 – Economic and financial standing	Regulation 23 – Information as to economic and financial standing
Article 42 – Technical and/or professional ability	Regulation 24 – Information as to technical or professional ability
Article 43 – Quality management system standards	Regulation 24 – Information as to technical or professional ability
Article 44 – Environmental management standards	Regulation 24 – Information as to technical or professional ability
Article 45 – Additional documentation and information	Regulation 25 – Supplementary information
Article 46 – Official lists of approved economic operators and certification by bodies established under public or private law	Regulation 26 – Official lists of approved economic operators
Article 47 – Contract award criteria	Regulation 30 – Criteria for the award of a contract
Article 48 – Use of electronic auctions	Regulation 20 – Electronic auctions
Article 49 – Abnormally low tenders	Regulation 30 – Criteria for the award of contract

Directive 2009/81/EC
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Directive Article	Implementation
Article 50 – Scope	Regulation 39 – Scope
Article 51 – Principles	Regulation 40 – Principles
Article 52 – Thresholds and rules on advertising	Regulation 41 – Thresholds and rules on advertising Regulation 42 – Award of a sub-contract without publication of a sub-contract notice
Article 53 – Criteria for qualitative selection of subcontractors	Regulation 43 – Criteria for qualitative selection of sub-contractors
Article 54 – Rules to be applied	Regulation 44 – Sub-contracts awarded by economic operators which are contracting authorities
Article 55 – Scope and availability of review procedures	Regulation 50 – Duty owed to economic operators Regulation 51 – Enforcement of duties through the court Regulation 54 – Starting proceedings Regulation 55 – Contract-making suspended by challenge to award decision
Article 56 – Requirements for review procedures	Regulation 55 – Contract-making suspended by challenge to award decision Regulation 56 – Interim orders Regulation 57 – Remedies where the contract has not been entered into
Article 57 – Standstill period	Regulation 32 - Information about contract award procedures Regulation 33 – Standstill period

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Directive Article	Implementation
Article 58 – Derogations from the standstill period	Regulation 32 – Information about contract award procedures Regulation 59 – Grounds for ineffectiveness
Article 59 – Time-limits for applying for review	Regulation 52 – General time limits for starting procedures
Article 60 – Ineffectiveness	Regulations 59 – Grounds for ineffectiveness Regulation 60 – General interest grounds for not making a declaration of ineffectiveness Regulation 61 – The consequences of ineffectiveness Regulation 62 – Penalties in addition to, or instead of, ineffectiveness
Article 61 – Infringement of this Title and alternative penalties	Regulation 62 – Penalties in addition to, or instead of, ineffectiveness
Article 62 – Time-limits	Regulation 53 – Special time limits for seeking a declaration of ineffectiveness
Article 63 – Corrective mechanism	Implementation not required
Article 64 – Content of a notice for voluntary ex ante transparency	Regulation 59 – Grounds for ineffectiveness
Article 65 – Statistical obligations	Regulation 45 – Statistical and other reports Regulation 46 – Provision of reports
Article 66 – Content of the statistical report	Regulation 45 – Statistical and other reports

Directive 2009/81/EC
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Directive Article	Implementation
Article 67 – Committee procedure	Implementation is not required
Article 68 – Revision of thresholds	Implementation is not required
Article 69 – Amendments	Implementation is not required
Article 70 – Amendment to Directive 2004/17/EC	Regulation 65 – Consequential amendments, repeals and revocations Schedule 5 – Consequential amendments, repeals and revocations
Article 71 – Amendment to Directive 2004/18/EC	Regulation 65 – Consequential amendments, repeals and revocations Schedule 5 – Consequential amendments, repeals and revocations
Article 72 – Transposition	Implementation is not required
Article 73 – Review and reporting	Implementation is not required
Article 74 – Entry into force	Implementation is not required
Article 75 – Addressees	Implementation is not required

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Directive Annex	Implementation
Annex 1 – Services referred to in Articles 2 and 15	Schedule 2 Categories of Services Part A
Annex II – Services referred to in Articles 2 and 16	Schedule 2 Categories of Services Part B
Annex III – Definition of certain technical specifications referred to in Article 18	Regulation 11 – Technical specifications in the contract documents
Annex IV – Information to be included in the notices referred to in Article 30	Commission Regulation awaited
Annex V – Information to be included in the subcontract notices referred to in Article 52	Commission Regulation awaited
Annex VI – Features concerning publication	Regulation 2 - Interpretation Regulation 13 – Prior information notices Regulation 47 – Publication of notices
Directive Annex	Implementation
Annex VII – Registers	Schedule 4 – Professional or trade registers
Annex VIII – Requirements relating to devices for the electronic receipt of requests to participate and tenders	Regulation 48 – Means of communication

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STATUTORY INSTRUMENTS

2011 No.

PUBLIC PROCUREMENT

The Defence and Security Public Contracts Regulations 2011

Made - - - - - ***

Laid before Parliament ***

Coming into force - - - *21st August 2011*

The Secretary of State is designated⁽¹⁰⁾ for the purposes of section 2(2) of the European Communities Act 1972⁽¹¹⁾ in relation to public procurement.

The Secretary of State makes these Regulations in exercise of the powers conferred by section 2(2) of, as read with paragraph 1A⁽¹²⁾ 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 Secretary of State that it is expedient for certain references to provisions of EU instruments to be construed as references to those provisions as amended from time to time.

PART 1

GENERAL

Citation, commencement and extent

1. These Regulations may be cited as the Defence and Security Public Contracts Regulations 2011 and shall come into force on 21st August 2011.

Interpretation

2.—(1) In these Regulations—

“aircraft” means any machine capable of flight (whether or not propelled by mechanical means), including any description of balloon;

“applied research” means original work undertaken with a view to acquiring new knowledge and directed primarily towards a particular end or objective;

⁽¹⁰⁾ S.I. 2009/2743.

⁽¹¹⁾ 1972 c. 68. There are amendments to this Act which are not relevant to these Regulations.

⁽¹²⁾ Paragraph 1A was inserted by the Legislative and Regulatory Reform Act 2006 (c. 51), section 28.

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“to award” means to accept an offer made in relation to a proposed contract;

“buyer profile” means a page on the internet set up by a contracting authority containing one or more of the following: prior information notices, information on ongoing invitations to tender, prospective and concluded contracts, cancelled procedures and useful general information, such as a contact point, a telephone number, a facsimile number, a postal address or an e-mail address;

“carrying out” in relation to a work or works means the construction or the design and construction of that work or those works;

“central purchasing body” means a contracting authority within the meaning given to that term by regulation 3 of the Public Contracts Regulations 2006⁽¹³⁾ and regulation 3 of the Public Contracts (Scotland) Regulations 2006⁽¹⁴⁾, or a European public body, which—

- (a) acquires goods or services intended for one or more contracting authorities;
- (b) awards contracts intended for one or more contracting authorities; or
- (c) concludes framework agreements for work, works, goods or services intended for one or more contracting authorities;

“classified information” means any information or material, regardless of its form, nature or mode of transmission, to which the contracting authority is satisfied that a protective marking has been, or should have been, attributed and which in the interests of national security and in accordance with the law or administrative provisions of any part of the United Kingdom requires protection against misappropriation, destruction, removal, disclosure, loss or access by any unauthorised individual, or any other type of compromise;

“the Commission” means the European Commission;

“Common Procurement Vocabulary” means the reference nomenclature applicable to contracts as adopted by Regulation (EC) No 2195/2002 of 5th November 2002 of the European Parliament and of the Council on the Common Procurement Vocabulary⁽¹⁵⁾ as amended by Regulation (EC) No 213/2008 of the Commission of the European Communities⁽¹⁶⁾;

“competitive dialogue procedure” means a procedure—

- (a) in which any economic operator may make a request to participate; and
- (b) whereby a contracting authority conducts a dialogue with the economic operators admitted to that procedure with the aim of developing one or more suitable alternative solutions capable of meeting its requirements and on the basis of which the economic operators chosen by the contracting authority are invited to tender;

“contract documents” means the invitation to tender for or to negotiate a contract, the descriptive document (if any), the proposed conditions of contract, the specifications or descriptions of the goods, services, work or works required by the contracting authority and of the materials or goods to be used in or for such work or works, and all documents supplementary thereto;

“contract” means, except in regulation 66, a services contract, a supply contract or a works contract;

“contract notice” means, except in regulation 66, a notice sent to the Official Journal in accordance with these Regulations;

“contracting authority” has the meaning given to it by regulation 3;

“contractor” means a person who offers on the market work or works and—

- (c) who sought, who seeks, or would have wished, to be the person to whom a works contract is awarded; and

⁽¹³⁾ S.I. 2006/5.

⁽¹⁴⁾ S.S.I. 2006/1. Regulation 3 is amended by regulation 2(1) and (2) of S.S.I. 2008/94.

⁽¹⁵⁾ OJ L 340, 16.12.2002, p.1.

⁽¹⁶⁾ OJ L 74, 15.3.2008, p.1.

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(d) who is a national of and established in a relevant State;

“CPV” means Common Procurement Vocabulary;

“crisis” means any situation—

(e) in which a harmful event has occurred which clearly exceeds the dimensions of harmful events in everyday life and which substantially endangers or restricts the life and health of people, or has a substantial impact on property values, or requires measures in order to supply the population with necessities, or

(f) in which such a harmful event is deemed by the Secretary of State to be impending,
and shall include armed conflicts and wars;

“Defence and Security Procurement Directive” means Directive 2009/81/EC of the European Parliament and of the Council of 13th July 2009⁽¹⁷⁾;

“disabled person” means any person recognised as disabled within the meaning of the Disability Discrimination Act 1995⁽¹⁸⁾ and “disabled persons” shall be interpreted accordingly;

“disability” has the same meaning as in that Act;

“economic operator” has the meaning given to it by regulation 4;

“electronic auction” means a repetitive electronic process for the presentation of prices to be revised downwards or of new and improved values of quantifiable elements of tenders, including price, which—

(g) takes place after the initial evaluation of tenders; and

(h) enables tenders to be ranked using automatic evaluation methods;

“electronic means” means using 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;

“established”, unless the context otherwise requires, has the same meaning as in the EU Treaties;

“European standard” has the meaning given to it in regulation 11(1);

“experimental development” means work based on existing knowledge obtained from research or practical experience, or both, with a view to initiating the manufacture of new materials, products or devices, establishing new processes, systems and services or considerably improving those that already exist and includes the realisation of technological demonstrators;

“financial year” means, unless the context otherwise requires, the period of 12 months ending on the date in any year in respect of which the accounts of any person are prepared;

“framework agreement” means, except in regulation 66, an agreement or other arrangement between one or more contracting authorities and one or more economic operators which establishes the terms (in particular the terms as to price and, where appropriate, quantity) under which the economic operator will enter into one or more contracts with a contracting authority in the period during which the framework agreement applies;

“fundamental research” means experimental or theoretical work undertaken mainly with a view to acquiring new knowledge regarding the underlying foundation of phenomena and observable facts without any particular application or use in view;

“goods” includes electricity, substances, growing crops and things attached to or forming part of the land which are agreed to be severed before the purchase or hire under a supply contract, and any ship, aircraft or vehicle;

“government department” includes a Northern Ireland department or the head of that department;

“international standard” has the meaning given to it in regulation 11(1);

⁽¹⁷⁾ OJ L 216, 20.8.2009, p.76-136.

⁽¹⁸⁾ 1995 c. 50. Section 1 is amended by S.I. 2005/1117 in relation to Northern Ireland. Sections 2 and 3 are amended by sections 18 and 19(1) of, and Schedule 1 to, the Disability Discrimination Act 2005 (c. 13). There are other amendments which are not relevant to these Regulations.

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“life cycle” means all the possible successive stages of a product, including research and development, industrial development, production, repair, modernisation, modification, maintenance, logistics, training, testing, withdrawal and disposal;

“military equipment” means equipment specifically designed or adapted for military purposes and intended for use as arms, munitions or war material, including, but not limited to, equipment—

- (i) listed in the Common Military List of the European Union⁽¹⁹⁾ as amended from time to time; or
- (j) within the product types included in the list of arms, munitions and war material adopted by the Council in its decision 255/58 of 15th April 1958;

“Minister of the Crown” means the holder of an office in Her Majesty’s Government in the United Kingdom and includes the Treasury;

“national of a relevant State” means, in the case of a person who is not an individual, a person formed in accordance with the laws of a relevant State and which has its registered office, central administration or principal place of business in a relevant State;

“negotiated procedure” means a procedure leading to the award of a contract whereby the contracting authority negotiates the terms of the contract with one or more economic operators selected by it;

“Office of Government Commerce” means the office of the Treasury having that title;

“Official Journal” means the Official Journal of the European Union;

“prior information notice” means a notice sent to the Official Journal in accordance with regulation 13;

“protective marking” means a marking under the United Kingdom Government Protective Marking System⁽²⁰⁾;

“relevant State” has the meaning given to it by paragraph (4);

“research and development” means all activities comprising fundamental research, applied research and experimental development but does not include the making and qualification of pre-production prototypes, tools and industrial engineering, industrial design or manufacture;

“restricted procedure” means a procedure leading to the award of a contract whereby only economic operators selected by the contracting authority may submit tenders for the contract;

“sensitive equipment”, “sensitive works” and “sensitive services” means equipment, work or works and services for security purposes, involving, requiring or containing classified information;

“services contract” means a contract, in writing, for consideration (whatever the nature of the consideration) under which a contracting authority engages a person to provide services but does not include—

(k) a works contract, or

(l) a supply contract,

but a contract for both goods and services shall be considered to be a services contract if the value of the consideration attributable to those services exceeds that of the goods covered by the contract and a contract for services which includes activities specified in Schedule 1 that are only incidental to the principal object of the contract shall be considered to be a services contract;

“services provider” means a person who offers on the market services and—

(m) who sought, who seeks, or who would have wished to be the person to whom a services contract is awarded; and

(n) who is a national of and established in a relevant State;

“ship” includes any boat, hovercraft and other description of a vessel used in navigation;

“substance” means any natural or artificial substance, whether in solid, liquid or gaseous form or in the form of vapour;

⁽¹⁹⁾ OJ C 69, 18.3.2010, p.19.

⁽²⁰⁾ A description of the Government Protective Marking System can be found in the Cabinet Office’s HMG Security Policy Framework (http://www.cabinetoffice.gov.uk/media/207318/hmg_security_policy.pdf).

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“supplier” means a person who offers on the market goods for purchase or hire and—

- (o) who sought, who seeks, or who would have wished, to be the person to whom a supply contract is awarded; and
- (p) who is a national of and established in a relevant State;

“supply contract” means a contract, in writing, for consideration (whatever the nature of the consideration)—

- (q) for the purchase of goods by a contracting authority (whether or not the consideration is given in instalments and whether or not the purchase is conditional upon the occurrence of a particular event), or
- (r) for the hire of goods by a contracting authority (both where the contracting authority becomes the owner of the goods after the end of the period of hire and where it does not),

and for any siting or installation of those goods, but where under such a contract services are also to be provided, the contract shall only be a supply contract where the value of the consideration attributable to the goods and any siting or installation of the goods is equal to or greater than the value attributable to the services;

“technological demonstrator” means a device demonstrating the performance of a new concept or a new technology in a relevant or representative environment;

“the TEU” means the Treaty on European Union⁽²¹⁾;

“the TFEU” means the Treaty on the Functioning of the European Union⁽²²⁾;

“work”, unless the context otherwise requires, means the outcome of any works which is sufficient of itself to fulfil an economic and technical function;

“working day” means a day other than a Saturday, Sunday, Christmas Day, Good Friday or Bank Holiday within the meaning of the Banking and Financial Dealings Act 1971⁽²³⁾;

“works” means any of the activities specified in Schedule 1;

“works contract” means a contract, in writing, for consideration (whatever the nature of the consideration)—

- (s) for the carrying out of a work or works for a contracting authority; or
- (t) under which a contracting authority engages a person to procure by any means the carrying out for the contracting authority of a work corresponding to specified requirements;

“written” or “in writing” means any expression consisting of words or figures that can be read, reproduced and subsequently communicated and it may include information transmitted and stored by electronic means; and

“year” means a calendar year.

(2) Subject to paragraph (3), in these Regulations—

- (a) “a Part A services contract” is a contract under which services specified in Part A of Schedule 2 are to be provided;
- (b) “a Part B services contract” is a contract under which services specified in Part B of Schedule 2 are to be provided.

(3) Where services specified in both Parts A and B of Schedule 2 are to be provided under a single contract, then the contract shall be treated as—

- (a) a Part A services contract if the value of the consideration attributable to the services specified in Part A is greater than that attributable to those specified in Part B; and
- (b) a Part B services contract if the value of the consideration attributable to the services specified in Part B is equal to or greater than that attributable to those specified in Part A.

⁽²¹⁾ OJ C 115, 9.5.2008, p.13.

⁽²²⁾ OJ C 115, 9.5.2008, p.47.

⁽²³⁾ 1971 c. 80. There are amendments to this Act which are not relevant to these Regulations.

Directive 2009/81/EC
MOD Consultation on the Approach to Implementation

(4) In these Regulations a relevant State is a member State or a State listed in column 1 of Schedule []; the agreements with the EU by which the provisions in relation to public procurement are extended to those States are specified in column 2 of that Schedule and the statutory provision designating them as European Treaties under section 1(3) of the European Communities Act 1972⁽²⁴⁾ is specified in column 3 of that Schedule.

(5) Except in Part 9, where a thing is required to be done under these Regulations—

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

Contracting authorities

3. For the purposes of these Regulations unless specified otherwise “contracting authority” has the meaning given to it by regulation 3 of the Public Contracts Regulations 2006⁽²⁵⁾ and regulation 3 of the Public Contracts (Scotland) Regulations 2006⁽²⁶⁾ and shall also include a “utility” within the meaning given to it by regulation 3 of the Utilities Contracts Regulations 2006⁽²⁷⁾ and regulation 3 of the Utilities Contracts (Scotland) Regulations 2006⁽²⁸⁾.

Economic operators

4.—(1) In these Regulations, an “economic operator” means a contractor, a supplier or a services provider.

(2) A contracting authority shall (in accordance with Article 4 of the Defence and Security Procurement Directive)—

- (a) treat economic operators equally and in a non-discriminatory way; and
- (b) act in a transparent way.

Application

5.—(1) Subject to Article 4(2) of the TEU and Articles 36, 51, 52, 62 and 346 of the TFEU, these Regulations apply whenever a contracting authority seeks offers in relation to a proposed supply contract, works contract, Part A services contract or, subject to paragraph (2), a framework agreement, other than a contract or framework agreement excluded from the application of these Regulations by regulation 6 or 8, for—

- (a) the supply of military equipment, including any parts, components or subassemblies of military equipment;
- (b) the supply of sensitive equipment, including any parts, components or subassemblies of sensitive equipment;
- (c) work, works, goods and services directly related to the equipment referred to in sub-paragraphs (a) and (b) for any and all elements of its life cycle;
- (d) work, works and services for specifically military purposes or sensitive works and sensitive services.

(2) Paragraph (1) does not apply whenever a contracting authority seeks offers in relation to a proposed framework agreement in respect of which only Part B services contracts can be based or awarded.

⁽²⁴⁾ 1972 c.68.

⁽²⁵⁾ S.I. 2006/5.

⁽²⁶⁾ S.S.I. 2006/1. Regulation 3 is amended by regulation 2(1) and (2) of S.S.I. 2008/94.

⁽²⁷⁾ S.I. 2006/6.

⁽²⁸⁾ S.S.I. 2006/2.

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(3) Subject to Article 4(2) of the TEU and Articles 36, 51, 52, 62 and 346 of the TFEU, whenever a contracting authority seeks offers in relation to a proposed Part B services contract or a framework agreement in respect of which only Part B services contracts can be based or awarded, other than one excluded by virtue of regulation 6 or 8, for any services referred to in sub-paragraphs (c) or (d) of paragraph (1)—

- (a) Parts 1, 9 and 10 apply; and
- (b) the following provisions in Parts 2 to 8 apply—
 - (i) regulation 11 (technical specifications in the contract documents);
 - (ii) regulation 31 (contract award notice);
 - (iii) regulation 45(2) (statistical and other reports);
 - (iv) regulation 46 (provision of reports); and
 - (v) regulation 47 (publication of notices).

(4) A contracting authority shall not enter into separate contracts or conclude separate framework agreements with the intention of avoiding the application of these Regulations, the Public Contracts Regulations 2006⁽²⁹⁾, the Utilities Contracts Regulations 2006⁽³⁰⁾, the Public Contracts (Scotland) Regulations 2006⁽³¹⁾ or the Utilities Contracts (Scotland) Regulations 2006⁽³²⁾ where applicable.

(5) Where a contract or framework agreement has as its object work, works, goods or services falling partly within the application of these Regulations and partly within the application of the Public Contracts Regulations 2006, the Utilities Contracts Regulations 2006, the Public Contracts (Scotland) Regulations 2006 or the Utilities Contracts (Scotland) Regulations 2006 and the award of a single contract or the conclusion of a single framework agreement is justified for objective reasons, the contracting authority shall award the contract or conclude the framework agreement in accordance with these Regulations.

(6) Where a contract or framework agreement has as its object work, works, goods or services falling partly within the application of these Regulations but with the other part not being within the application of either these Regulations, the Public Contracts Regulations 2006, the Utilities Contracts Regulations 2006 the Public Contracts (Scotland) Regulations 2006 or the Utilities Contracts (Scotland) Regulations 2006 and the award of a single contract or the conclusion of a single framework agreement is justified for objective reasons, the award of the contract or the conclusion of the framework agreement shall not be subject to these Regulations.

General exclusions

6.—(1) These Regulations do not apply to the seeking of offers in relation to a proposed contract or framework agreement—

- (a) where 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;
- (b) for the purposes of intelligence activities;
- (c) where the contract is to be awarded or the framework agreement is to be concluded in the framework of a cooperative programme based on research and development, conducted jointly by at least two member States for the development of a new product and, where applicable, the later phases of all or part of the life cycle of the product;
- (d) where the contract is to be awarded or the framework agreement is to be concluded in a State which is not a relevant State, including for civil purchases, carried out when forces are deployed outside the territory of the EU where operational needs require them to be concluded with economic operators located in the area of operations;
- (e) which is governed by specific procedural rules—

⁽²⁹⁾ S.I. 2006/5, amended by S.I. 2007/2157, 2007/3542, 2008/2256, 2008/2683, 2008/2848, 2009/1307 and 2009/2992.

⁽³⁰⁾ S.I. 2006/6, amended by S.I. 2007/2157, 2007/3542, 2008/2256, 2008/2848 and 2009/3100.

⁽³¹⁾ S.S.I. 2006/1, amended by S.I. 2007/2157 and S.S.I. 2007/565, 2008/94, 2008/291, 2008/376, 2009/428 and 2009/439.

⁽³²⁾ S.S.I. 2006/2, amended by S.I. 2007/2157 and S.S.I. 2007/565, 2008/94, 2008/291, 2008/376, 2009/428 and 2009/439.

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- (i) pursuant to an international agreement or arrangement concluded between the United Kingdom and a State which is not a relevant State;
 - (ii) pursuant to a concluded international agreement or arrangement relating to the stationing of troops and concerning the undertakings of a relevant State or a State which is not a relevant State; or
 - (iii) of an organisation, of which only States are members (an “international organisation”) or of which only States or international organisations are members, purchasing for its purposes;
- (f) which must be awarded by a relevant State in accordance with specific procedural rules of an organisation referred to in sub-paragraph (e)(iii);
- (g) for the acquisition of land, including existing buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land;
- (h) where the contract is to be awarded or the framework agreement is to be concluded by a government to another government relating to—
- (i) the supply of military equipment or sensitive equipment;
 - (ii) work, works and services directly linked to such equipment; or
 - (iii) work, works and services specifically for military purposes, or sensitive works and sensitive services;
- (i) for arbitration or conciliation services;
- (j) for financial services, with the exception of insurance services;
- (k) for employment and other contracts of service; or
- (l) for research and development services unless—
- (i) the benefits are to accrue exclusively to the contracting authority for its use in the conduct of its own affairs; and
 - (ii) the services are to be wholly paid for by the contracting authority.

(2) For the purposes of paragraph (1)(h) “government” means the State, regional or local government of a member State or a State which is not a member State.

Reserved contracts

7.—(1) In this regulation—

“supported business” means a service where more than 50% of the workers are disabled persons who by reason of the nature or severity of their disability are unable to take up work in the open labour market and “supported businesses” shall be interpreted accordingly;

“supported employment programme” means a scheme under which work is provided for disabled persons and where more than 50% of the workers so supported are disabled persons who by reason of the nature or severity of their disability are unable to take up work in the open labour market and “supported employment programmes” shall be interpreted accordingly; and

“supported factory” means an establishment where more than 50% of the workers are disabled persons who by reason of the nature or severity of their disability are unable to take up work in the open labour market and “supported factories” shall be interpreted accordingly.

(2) A contracting authority may reserve the right to participate in a contract award procedure or framework agreement to economic operators which operate supported factories, supported businesses or supported employment programmes.

(3) Where a contracting authority has reserved the right to participate in a contract or framework agreement in accordance with paragraph (2), it shall follow the contract award procedures set out in these Regulations.

(4) When seeking offers in relation to a contract or a framework agreement, a contracting authority shall specify in the contract notice if it is using the approach referred to in paragraph (2).

Thresholds

8.—(1) These Regulations do not apply to the seeking of offers in relation to a proposed contract or framework agreement where the estimated value of the contract or framework agreement (net of value added tax) at the relevant time is less than the relevant threshold.

(2) For the purposes of paragraph (1) the relevant threshold is the sum mentioned in—

- (a) Article 8(a) of the Defence and Security Procurement Directive in the case of a supply contract or a services contract; and
- (b) Article 8(b) of the Defence and Security Procurement Directive in the case of a works contract.

(3) The reference in paragraph (2) to the Defence and Security Procurement Directive is a reference to that Directive as amended from time to time.

(4) The value in pounds sterling of any amount expressed in these Regulations in euro shall be calculated by reference to the rate for the time being applying for the purposes of the Defence and Security Procurement Directive as published from time to time in the Official Journal.

(5) For the purposes of paragraph (1) the estimated value of a contract shall be the value of the total consideration payable, net of value added tax (calculated in accordance with this regulation), which the contracting authority expects to be payable under the contract.

(6) In determining the value of the total consideration which the contracting authority expects to be payable under a contract it shall, where appropriate, take account of—

- (a) any form of option;
- (b) any renewal of the contract;
- (c) any prize or payment awarded by the contracting authority to the economic operator;
- (d) the premium payable and other forms of remuneration for insurance services; and
- (e) fees, commission or other forms of remuneration payable for design services.

(7) For the purposes of paragraph (1) the estimated value of a supply contract for the hire of goods is—

- (a) the value of the consideration which the contracting authority expects to be payable under the contract if the term of the contract is fixed for 12 months or less;
- (b) the value of the consideration which the contracting authority expects to be payable under the contract if the term of the contract is fixed for more than 12 months; or
- (c) the value of the monthly consideration payable under the contract multiplied by 48 if the term of the contract is indefinite or uncertain at the time the contract is entered into.

(8) For the purposes of paragraph (1) the estimated value of a services contract which does not indicate a total price is—

- (a) the aggregate of the value of the consideration which the contracting authority expects to be payable under the contract if the term of the contract is fixed for 48 months or less; or
- (b) the value of the consideration which the contracting authority expects to be payable in respect of each month of the period multiplied by 48 if the term of the contract is fixed for more than 48 months, or over an indefinite period.

(9) Subject to paragraphs (10) and (13), where a contracting authority has a single requirement for goods or services or for the carrying out of a work or works and a number of contracts have been entered into or are to be entered into to fulfil that requirement, the estimated value for the purposes of paragraph (1) of each of those contracts is the aggregate of the value of the consideration which the contracting authority expects to be payable under each of those contracts.

(10) Paragraph (9) does not apply to any contract (unless the contracting authority chooses to apply that paragraph to a contract) if the contract has an estimated value of less than—

- (a) 80,000 euro for a services contract or a supply contract, or
- (b) 1,000,000 euro for a works contract,

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and the aggregate value of that contract and any other such contract is less than 20% of the aggregate value of the consideration which the contracting authority has given or expects to be payable under all the contracts entered into or to be entered into to fulfil the single requirement for goods, services or for the carrying out of work or works.

(11) Subject to paragraph (13), where a contracting authority has a requirement over a period for goods or services and for that purpose enters into—

- (a) a series of contracts, or
- (b) a contract which under its terms is renewable,

the estimated value for the purposes of paragraph (1) of the contract shall be the amount calculated under paragraph (12).

(12) The contracting authority shall calculate the amount referred to in paragraph (11) either—

- (a) by taking the aggregate of the value of the consideration payable under the contracts which—
 - (i) have similar characteristics, and
 - (ii) are for the same type of goods or services,

during the last financial year of the contracting authority ending before, or the period of 12 months ending immediately before, the relevant time, and by adjusting that amount to take account of any expected changes in quantity and cost of the goods to be purchased or hired or services to be provided in the period of 12 months commencing with the relevant time; or

- (b) by estimating the aggregate of the value of the consideration which the contracting authority expects to be payable under contracts which have similar characteristics, and which are for the same type of goods or services during—
 - (i) in the case of supply contracts, the period of 12 months from the first date of the delivery of the goods to be purchased or hired, or in the case of services contracts, from the first date on which the services will be performed; or
 - (ii) the financial year if that is longer than 12 months.

(13) Notwithstanding paragraphs (9) and (11), in relation to a supply contract or a services contract, when the goods or services are required for the sole purposes of a discrete operational unit within the organisation of a contracting authority and—

- (a) the decision whether to procure those goods or services has been devolved to such a unit, and
- (b) that decision is taken independently of any other part of the contracting authority,

the valuation methods described in paragraphs (9) and (12) shall be adapted by aggregating only the value of the consideration which was payable or the contracting authority expects to be payable, as the case may be, under a supply contract or a services contract which was or is required for the sole purpose of that unit.

(14) Where a contracting authority intends to provide any goods to the economic operator awarded a works contract for the purpose of carrying out that contract, the value of the consideration of the works contract for the purposes of paragraphs (5) and (9) shall be taken to include the estimated value at the relevant time of those goods.

(15) The relevant threshold for the purposes of paragraph (1) for a framework agreement is the threshold for—

- (a) a works contract, where the framework agreement relates to the carrying out of work or works;
- (b) a services contract, where the framework agreement relates to the provision of services; or
- (c) a supply contract, where the framework agreement relates to the purchase or hire of goods.

(16) The estimated value of a framework agreement is the aggregate of the values estimated in accordance with this regulation of all the contracts which could be entered into under the framework agreement.

(17) A contracting authority shall not enter into separate contracts nor exercise a choice under a valuation method with the intention of avoiding the application of these Regulations to those contracts.

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(18) The relevant time for the purposes of paragraphs (1), (12) and (14) means the date on which a contract notice would be sent to the Official Journal if the requirement to send such a notice applied to that contract in accordance with these Regulations.

Confidential information

9.—(1) Subject to the provisions of these Regulations and to the law of any part of the United Kingdom, a contracting authority shall not disclose information forwarded to it by an economic operator which the economic operator has reasonably designated as confidential.

(2) In this regulation, confidential information includes technical or trade secrets and the confidential aspects of tenders.

Classified information

10.—(1) A contracting authority may impose on an economic operator requirements aimed at protecting classified information which the contracting authority communicates to the economic operator throughout the tendering and contracting procedure.

(2) A contracting authority may require that an economic operator provides for the compliance by its sub-contractors with requirements imposed upon the economic operator under paragraph (1).

PART 2

TECHNICAL SPECIFICATIONS

Technical specifications in the contract documents

11.—(1) In this regulation—

“common technical specification” means a civil technical specification drawn up in accordance with a procedure recognised by the member States with a view to uniform application in all member States and which has been published in the Official Journal;

“defence materiel specifications” means a specification adopted by the Ministry of Defence in relation to a specific item of defence materiel, setting out all the technical requirements for that item together with the procedures necessary to determine whether those requirements have been met and which is not a defence standard;

“defence standard” means a technical specification the observance of which is not compulsory and which is approved by a standardisation body specialising in the production of technical specifications for repeated or continuous application in the field of defence;

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

“European technical approval” means an approval of the fitness for use of a product, issued by an approval body designated for the purpose by a member State, following a technical assessment of whether the product fulfils the essential requirements for building works, having regard to the inherent characteristics of the product and the defined conditions of application and use;

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

“British standard” means a civil standard adopted by a British standards organisation and made available to the general public;

“recognised bodies” means test and calibration laboratories and certification and inspection bodies which comply with applicable European standards and “recognised body” shall be interpreted accordingly;

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

“technical reference” means any product produced by European standardisation bodies, other than official standards, according to procedures adopted for the development of market needs; and

“technical specifications” means—

- (a) in the case of a services contract or a supply contract, a specification in a document defining the required characteristics of materials, goods or services, such as quality levels, environmental performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of a 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 methods and procedures and conformity assessment procedures; and
- (b) in the case of a works contract, the totality of the technical prescriptions contained, in particular, in the contract documents, defining the characteristics required of the work, works, materials or goods, which permits the work, works, materials or goods to be described in a manner such that it fulfils the use for which it is intended by the contracting authority and these characteristics shall include—
 - (i) levels of environmental 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;
 - (ii) rules relating to design and costing, the test, inspection and acceptance conditions for work or works and methods or techniques of construction; and
 - (iii) all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished work or works and to the materials or parts which they involve.

(2) Where a contracting authority wishes to lay down technical specifications which must be met by—

- (a) the services to be provided under a services contract and the materials and goods used in or for it,
- (b) the goods to be purchased or hired under a supply contract, or
- (c) the work or works to be carried out under a works contract and the materials and goods used in or for it,

it shall specify those technical specifications in the contract notice or contract documents, or both.

(3) A contracting authority shall ensure that technical specifications afford equal access to economic operators and do not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

(4) Subject to—

- (a) technical requirements (including those related to product safety) which are compulsory in the United Kingdom, or
- (b) technical requirements to be met by the United Kingdom under international standardisation agreements in order to guarantee the interoperability required by those agreements,

and to the extent that those requirements are compatible with EU obligations, a contracting authority shall define the technical specifications required for a contract in accordance with paragraph (5), (6), (7) or (8).

(5) A contracting authority may define the technical specifications referred to in paragraph (4) by reference to technical specifications in the following order of preference—

- (a) British standards transposing European standards,
- (b) European technical approvals,
- (c) common technical specifications,
- (d) British standards transposing international standards,

- (e) international standards,
- (f) other technical reference systems established by the European standardisation bodies, or, in the absence of such systems, by reference to the following technical specifications—
 - (i) British standards;
 - (ii) British technical approvals; or
 - (iii) British technical specifications relating to the design, calculation and execution of the work or works and use of the products,
- (g) civil technical specifications stemming from industry and widely recognised by it, or
- (h) British defence standards and defence materiel specifications similar to those standards,

and each reference to a technical specification made in accordance with this paragraph shall be accompanied by the words “or equivalent”.

(6) A contracting authority may define the technical specifications referred to in paragraph (4) in terms of performance or functional requirements (which may include environmental characteristics) provided that the requirements are sufficiently precise to allow an economic operator to determine the subject of the contract and the contracting authority to award the contract.

(7) A contracting authority may define the technical specifications referred to in paragraph (4) by defining performance and functional requirements as referred to in paragraph (6) with reference to the technical specifications referred to in paragraph (5) as a means of presuming conformity with such performance or functional requirements.

(8) A contracting authority may define the technical specifications referred to in paragraph (4) by reference to technical specifications referred to in paragraph (5) for certain characteristics and by reference to performance or functional requirements referred to in paragraph (6) for other characteristics.

(9) Where a contracting authority defines technical specifications as referred to in paragraph (5), it shall not reject an offer on the basis that the materials, goods or services offered do not comply with those technical specifications if an economic operator proves to the satisfaction of the contracting authority by any appropriate means that the one or more solutions that economic operator proposes in its tender satisfy the requirements of those technical specifications in an equivalent manner.

(10) Where a contracting authority defines technical specifications in terms of performance or functional requirements as referred to in paragraph (6), it shall not reject an offer for materials, goods, services, work or works which complies with—

- (a) a British standard transposing a European standard,
- (b) a European technical approval,
- (c) a common technical specification,
- (d) an international standard, or
- (e) a technical reference system established by a European standardisation body,

if those technical specifications address the performance or functional requirements referred to by the contracting authority and the economic operator proves in its tender to the satisfaction of the contracting authority by any appropriate means that the work, works, materials, goods or services meet the performance or functional requirements of the contracting authority.

(11) Where a contracting authority lays down environmental characteristics in terms of performance or functional requirements as referred to in paragraph (6), it may use the detailed technical specifications, or if necessary, parts of the technical specifications, as defined by European, national or multi-national eco-labels or by any other eco-label, provided that—

- (a) those technical specifications are appropriate to define the characteristics of the materials, goods or services that are the object of the contract;
- (b) the eco-label requirements are drawn up on the basis of scientific information;

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- (c) the eco label is adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations, are able to participate; and
- (d) the technical specifications are accessible to any party interested.

(12) A contracting authority may indicate in the contract documents that the materials, goods or services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents and shall accept any other appropriate means of proof that the materials, goods or services comply with those technical specifications.

(13) The term “appropriate means” referred to in paragraphs (9), (10) and (12) includes a technical dossier of a manufacturer or a test report from a recognised body.

(14) A contracting authority shall accept certificates from recognised bodies established in other member States when considering whether a tender for a contract conforms with the technical specifications laid down by the contracting authority in accordance with paragraph (2).

(15) Subject to paragraph (16), a contracting authority shall not lay down technical specifications in the contract documents which refer to—

- (a) materials or goods of a specific make or source or to a particular process, or
- (b) trademarks, patents, types, origin or means of production,

which have the effect of favouring or eliminating particular economic operators.

(16) Notwithstanding paragraph (15), exceptionally, a contracting authority may incorporate the references referred to in paragraph (15) into the technical specifications in the contract documents, provided that the references are accompanied by the words “or equivalent”, where—

- (a) the subject of the contract makes the use of such references justifiable; or
- (b) the subject of the contract cannot otherwise be described by reference to technical specifications which are sufficiently precise and intelligible to all economic operators.

Variants

12.—(1) Where a contracting authority intends to award a contract on the basis of the offer which is the most economically advantageous in accordance with regulation 30(1)(a), it shall indicate in the contract notice whether or not it authorises economic operators to submit offers which contain variants on the requirements specified in the contract documents and a contracting authority shall not accept an offer which contains a variant without that indication.

(2) Where a contracting authority authorises a variant in accordance with paragraph (1) it shall state in the contract documents the minimum requirements to be met by the variants and any specific requirements for the presentation of an offer which contains variants.

(3) A contracting authority shall only consider variants which meet its minimum requirements as stated in the contract documents in accordance with paragraph (2).

(4) A contracting authority shall not reject an offer which contains variants on the requirements specified in the contract documents on the ground that—

- (a) where it intends to award a services contract, the offer would lead to the award of a supply contract; or
- (b) where it intends to award a supply contract, the offer would lead to the award of a services contract.

PART 3

PROCEDURES LEADING TO THE AWARD OF A CONTRACT

Prior information notices

13.—(1) Subject to paragraphs (4), (5) and (6), a contracting authority shall send a notice in the form of the prior information notice in Annex IV to the Defence and Security Procurement Directive as amended from time to time and containing the information therein specified to the Commission or publish it on that contracting authority's buyer profile at the earliest opportunity after the decision approving the project for which the contracting authority intends to award contracts or framework agreements.

(2) The notice referred to in paragraph (1) shall contain information in respect of—

- (a) the supply contracts, the services contracts or the framework agreements for the purchase or hire of goods or for the provision of services referred to in paragraph (1) which the contracting authority expects to award or conclude during the period of 12 months beginning with the date of the notice; and
- (b) the works contracts or the framework agreements for the carrying out of work or works referred to in paragraph (1) which the contracting authority expects to award or conclude;

and that notice shall be sub-divided to give that information separately for each product area of goods by reference to the main vocabulary group CPV nomenclature of each product area of goods and for each class of works or category of services as specified in Schedules 1 and 2.

(3) Where a contracting authority publishes a notice on its buyer profile in accordance with paragraph (1), it shall also send a notice in the form of a notice on a buyer profile in Annex IV to the Defence and Security Procurement Directive as amended from time to time informing the Commission by electronic means in accordance with the format and procedure for sending notices specified in paragraph (3) of Annex VI to the Defence and Security Procurement Directive of that publication.

(4) The obligation to publish a prior information notice in accordance with paragraph (1) applies only to proposed contracts or framework agreements which are not excluded from the application of these Regulations by regulation 6 or 8.

(5) The obligation to publish a prior information notice applies only where the contracting authority takes the option of shortening the time limit for the receipt of tenders in accordance with regulation 16(20).

(6) This regulation does not apply to a proposed contract where the procedure for the award of the contract is the negotiated procedure without the prior publication of a contract notice in accordance with regulations 15 and 17(1), (2), (9) and (10).

Selection of contract award procedures

14. For the purpose of seeking offers in relation to a proposed contract, a contracting authority shall use—

- (a) the restricted procedure in accordance with regulation 16, or
- (b) the negotiated procedure with the prior publication of a contract notice in accordance with regulation 17,

in all circumstances, except where it may use—

- (i) the negotiated procedure without the prior publication of a contract notice in accordance with regulations 15 and 17(1), (2), (9) and (10); or
- (ii) the competitive dialogue procedure in accordance with regulation 18.

Use of the negotiated procedure without prior publication of a contract notice

15.—(1) A contracting authority may use the negotiated procedure without the prior publication of a contract notice in accordance with this regulation and regulation 17(1), (2), (9) and (10) in the following circumstances and shall justify the use of this procedure in the contract award notice—

- (a) in the case of a contract—

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- (i) subject to paragraph (2), in the absence of tenders, suitable tenders or applications in response to a restricted procedure, a negotiated procedure with the prior publication of a contract notice or a competitive dialogue procedure but only if the original terms of the proposed contract offered in the discontinued procedure have not been substantially altered in the negotiated procedure;
 - (ii) when, for technical reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator;
 - (iii) when the periods laid down for the restricted procedure and negotiated procedure with the prior publication of a contract notice, including the shortened periods referred to in regulations 16(6), 16(19) and 17(8), are incompatible with the urgency resulting from a crisis;
 - (iv) when (but only if it is strictly necessary) for reasons of extreme urgency brought about by events unforeseeable by, and not attributable to, the contracting authority, the time limits specified in—
 - (aa) regulation 16 for the restricted procedure, or
 - (bb) regulation 17 for the negotiated procedure,cannot be met;
- (b) in the case of a supply contract—
- (i) subject to paragraph (3), when the goods to be purchased or hired under the contract are required by the contracting authority as a partial replacement for, or in addition to, existing goods or an installation and when to obtain the goods from a supplier other than the supplier which supplied the existing goods or the installation would oblige the contracting authority to acquire goods having different technical characteristics which would result in—
 - (aa) incompatibility between the existing goods or the installation and the goods to be purchased or hired under the contract; or
 - (bb) disproportionate technical difficulties in the operation and maintenance of the existing goods or the installation;
 - (ii) for the purchase or hire of goods quoted and purchased on a commodity market;
 - (iii) to take advantage of particularly advantageous terms for the purchase of goods in a closing down sale or in a sale brought about because a supplier is subject to a procedure referred to in regulation 22(4)(a), (b) or (c);
- (c) in the case of a service contract or a supply contract—
- (i) for research and development services other than those referred to in regulation 6(1)(l);
 - (ii) when the goods to be purchased or hired under the contract are to be manufactured solely for the purpose of research or development but not when the goods are to be purchased or hired with the aim of ensuring profitability or to recover research and development costs;
- (d) in the case of a works contract or a services contract—
- (i) subject to paragraph (5), when a contracting authority wants an economic operator which has entered into a works contract or a services contract with the contracting authority to carry out additional work or works or provide additional services which were not included in the project initially considered or in the original works contract or services contract but which through unforeseen circumstances have become necessary, and such work, works or services—
 - (aa) cannot for technical or economic reasons be carried out or provided separately from those under the original contract without major inconvenience to the contracting authority; or
 - (bb) can be carried out or provided separately from those under the original contract but are strictly necessary to the later stages of the performance of that contract; and
 - (ii) subject to paragraph (6), when a contracting authority wants an economic operator which has entered into a works contract or a services contract with that contracting authority to carry out new work or works or provide new services which are a repetition of the work or works carried out or the services provided under the original contract and which are in accordance with the project for the purpose of which the first contract was entered into;

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- (e) in the case of a contract related to the provision of air and maritime transport services for the armed forces or security forces of a member State deployed or to be deployed abroad, when the contracting authority has to procure such services from economic operators that guarantee the validity of their tenders only for such short periods that the time limit for the restricted procedure or the negotiated procedure with the prior publication of a contract notice, including the shortened time limits as referred to in regulations 16(6), 16(19) and 17(8), cannot be complied with;
- (f) in the event that the procedure leading to the award of a contract by the contracting authority using the restricted procedure, the negotiated procedure with the prior publication of a contract notice or the competitive dialogue procedure was discontinued because of—
 - (i) irregular tenders, or
 - (ii) unacceptable tenders following an evaluation made in accordance with regulations 22, 23, 24 and 25, but only if—
 - (aa) the original terms of the proposed contract offered in the discontinued procedure have not been substantially altered; and
 - (bb) the contracting authority invites all of, and only, those economic operators which submitted a tender following an invitation made during the course of the discontinued procedure (not being a tender which was excluded in accordance with regulation 16(7), 17(9) or 18(10)) to negotiate the contract.

(2) A contracting authority using the negotiated procedure in accordance with paragraph (1)(a)(i) shall, if the Commission requests it, submit a report recording the fact that it has used that procedure to the Office of Government Commerce for onward transmission to the Commission, except—

- (a) where the contracting authority is the Secretary of State for Defence, in which case the Ministry of Defence shall transmit the report to the Commission; or
- (b) where the contracting authority is a contracting authority within the meaning of regulation 3(1)(w) of the Public Contracts Regulations 2006⁽³³⁾ or regulation 3(1)(aa) of the Public Contracts (Scotland) Regulations 2006⁽³⁴⁾ and the Secretary of State for Defence is “another contracting authority” within the meaning of those provisions, in which case the contracting authority shall submit the report to the Ministry of Defence for onward transmission to the Commission.

(3) A contracting authority shall not use the negotiated procedure in accordance with paragraph (1)(b)(i) if the term of the proposed contract, or the term of that contract and of any other contract entered into for the same purposes, is more than five years, unless there are exceptional circumstances which require that this period should be exceeded.

(4) For the purposes of paragraphs (3) and (6)(c), exceptional circumstances shall be determined by taking into account the expected service life of any delivered items, installations or systems, and the technical difficulties which a change of services provider or contractor, as appropriate, may cause.

(5) A contracting authority shall not use the negotiated procedure in accordance with paragraph (1)(d)(i), where the aggregate value of the consideration to be given under contracts for the additional work, works or services exceeds 50% of the value of the consideration payable under the original contract.

(6) A contracting authority shall not use the negotiated procedure in accordance with paragraph (1)(d)(ii) unless—

- (a) the contract notice relating to the original contract stated that a works contract or a services contract for new work, works or services which would be a repetition of the work or works carried out or the services provided under the original contract may be awarded using the negotiated procedure in accordance with paragraph (1)(d)(ii);

⁽³³⁾ S.I. 2006/5.

⁽³⁴⁾ S.S.I. 2006/1.

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- (b) in determining the estimated value of the original contract for the purposes of regulation 8, the contracting authority took into account the value of the consideration which it expected to be payable for the new work, works or services; and
- (c) the procedure for the award of the new contract is commenced within five years of the original contract being entered into, unless there are exceptional circumstances which require that the procedure for the award of the new contract be commenced outside this period.

The restricted procedure

16.—(1) A contracting authority using the restricted procedure shall comply with this regulation.

(2) The contracting authority shall publicise its intention to seek offers in relation to the contract by sending to the Official Journal as soon as possible after forming the intention, a notice, in the form of the contract notice in Annex IV to the Defence and Security Procurement Directive as amended from time to time, inviting requests to be selected to tender and containing the information therein specified.

(3) Subject to paragraph (5), the date which the contracting authority fixes as the last date for the receipt by it of requests to be selected to tender shall be specified in the contract notice and shall not be less than 37 days from the date of the despatch of the notice.

(4) Subject to any minimum time limit specified by this regulation, the contracting authority shall take account of all the circumstances, in particular, the complexity of the contract and the time required for drawing up tenders when fixing time limits for the receipt of requests to be selected to tender and for receipt by it of tenders.

(5) Where the contracting authority has transmitted a contract by electronic means in accordance with the format and procedures referred to in paragraph (3) of Annex VI to the Defence and Security Procurement Directive, the time limit referred to in paragraph (3) may be reduced by seven days.

(6) Where compliance with the minimum time limit of 37 days referred to in paragraph (3) is rendered impractical for reasons of urgency, the contracting authority may substitute for that time limit—

- (a) a time limit of not less than 15 days from the date of despatch of the contract notice; or
- (b) where the contracting authority has transmitted the contract notice by electronic means in accordance with paragraph (5), a time limit of not less than 10 days from the date of despatch of the contract notice.

(7) The contracting authority shall make its evaluation in accordance with regulations 22, 23, 24 and 25 and may exclude an economic operator from those economic operators from which it will make the selection of economic operators to be invited to tender only if the economic operator—

- (a) may be treated as ineligible to tender on a ground specified in regulation 22; or
- (b) fails to satisfy the minimum standards required of economic operators by the contracting authority of—
 - (i) economic and financial standing; or
 - (ii) technical or professional ability.

(8) The contracting authority shall make the selection of the economic operators to be invited to tender in accordance with regulations 22, 23, 24 and 25 and shall award the contract in accordance with regulation 30.

(9) Where there is a sufficient number of economic operators suitable to be selected to be invited to tender, the contracting authority may limit the number of economic operators which it intends to invite to tender provided that the contract notice specifies—

- (a) the objective and non-discriminatory criteria to be applied in order to limit the number of economic operators in accordance with this paragraph; and
- (b) the minimum number of economic operators, which shall be not less than three, which the contracting authority intends to invite to tender and, where appropriate, the maximum number.

(10) The contracting authority shall ensure that the number of economic operators invited to tender is—

- (a) sufficient to ensure genuine competition; and
- (b) at least equal to the minimum number specified by the contracting authority in accordance with paragraph (9)(b).

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(11) Subject to paragraph (10)(a), where—

- (a) the contracting authority carries out a selection in accordance with regulations 22, 23, 24 and 25, and
- (b) the number of economic operators selected to be invited to tender is less than the minimum number specified by the contracting authority in the contract notice,

that contracting authority may continue the award procedure with the economic operators which have been selected, provided that any economic operator not selected or which did not request to participate is not included.

(12) The contracting authority may require an economic operator to satisfy minimum levels of—

- (a) economic and financial standing, or
- (b) technical or professional ability,

provided that those minimum levels are specified in the contract notice and are related to and proportionate to the subject matter of the contract.

(13) Notwithstanding the ability of the contracting authority to cancel the ongoing procurement procedure and launch a new procedure, if the contracting authority considers that the number of suitable candidates is too low to ensure genuine competition, it may suspend the procedure and republish the initial contract notice in accordance with paragraph (2) and regulation 47.

(14) Where the contracting authority suspends the procedure and republishes the initial contract notice in accordance with paragraph (13), it shall fix a new deadline for the submission of requests to be selected to tender and the candidates selected upon the first publication and those selected upon the second shall be invited in accordance with paragraph (15).

(15) The contracting authority shall send invitations in writing simultaneously to each economic operator selected to tender for the contract and the invitation shall—

- (a) be accompanied by the contract documents;
- (b) specify the internet address which offers unrestricted and full direct access by electronic means to the contract documents; or
- (c) where the contract documents are held by an entity other than the contracting authority, specify the address to which requests for contract documents should be sent including any final date for making such requests and the amount and any method of payment of any fee which may be charged for supplying that information.

(16) Where the contract documents are held by an entity other than the contracting authority, the contracting authority shall ensure that the contract documents are sent to economic operators by the most rapid means of communication possible.

(17) The contracting authority shall include the following information in the invitation—

- (a) the final date for the receipt by it of tenders, the address to which they must be sent and the one or more languages in which they must be drawn up;
- (b) a reference to the contract notice published in accordance with paragraph (2);
- (c) an indication of the information to be included with the tender which the contracting authority may require to be provided in accordance with regulations 23, 24, and 25; and
- (d) the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance for such criteria, if this information was not specified in the contract notice published in accordance with paragraph (2).

(18) Subject to paragraphs (20) and (21), the date which the contracting authority fixes as the last date for the receipt by it of tenders and which shall be specified in the invitation to tender in accordance with paragraph (17)(a), shall be not less than 40 days from the date of the despatch of the invitation.

(19) Where compliance with the minimum time limit of 40 days referred to in paragraph (18) is rendered impractical for reasons of urgency, the contracting authority may substitute for that time limit, a time limit of not less than 10 days from the date of despatch of the invitation.

(20) Where—

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- (a) the contracting authority has published a prior information notice in accordance with regulation 13,
 - (b) the prior information notice contained as much of the information referred to in the form of a contract notice in Annex IV to the Defence and Security Procurement Directive as amended from time to time as was available at the time of publication, and
 - (c) the prior information notice was sent to the Official Journal at least 52 days and not more than 12 months before the date on which the contract notice provided for in paragraph (2) is despatched,

the contracting authority may substitute for the period of not less than 40 days in paragraph (18), a period of generally not less than 36 days and in any event not less than 22 days.

(21) The contracting authority may reduce the time limits for the receipt by it of tenders referred to in paragraphs (18) and (20) by five days provided that—

- (a) the contracting authority offers unrestricted and full direct access by electronic means to the contract documents from the date of publication of the contract notice; and
- (b) the contract notice specifies the internet address at which the documents referred to in sub-paragraph (a) are available.

(22) The contracting authority or entity referred to in paragraph (15)(c) shall supply such further information relating to the contract documents as may be reasonably requested by an economic operator provided that the request for such information is received in sufficient time to enable the contracting authority to supply it not less than four days before the date specified in the invitation to tender as the final date for the receipt by it of tenders.

(23) The contracting authority shall extend the time limit for receipt by it of tenders in order that all the information necessary for the preparation of a tender is available to all economic operators where—

- (a) an economic operator requests the contract documents in sufficient time to allow the contracting authority to respond in accordance with paragraph (22) and, for whatever reason, the contract documents or further information are not supplied in accordance with that paragraph; or
- (b) it is necessary that the economic operators be given the opportunity to inspect the site or premises or documents relating to the contract documents.

(24) The contracting authority may combine the reductions in the periods of time referred to in paragraphs (5) and (21).

The negotiated procedure

17.—(1) Subject to paragraph (2), a contracting authority using the negotiated procedure shall comply with this regulation.

(2) A contracting authority using the negotiated procedure in accordance with regulation 15 need only comply with paragraphs (9) and (10) of this regulation.

(3) The contracting authority shall publicise its intention to seek offers in relation to the contract by sending to the Official Journal as soon as possible after forming the intention, a notice, in the form of the contract notice in Annex IV to the Defence and Security Procurement Directive as amended from time to time, inviting requests to be selected to negotiate and containing the information therein specified.

(4) The contracting authority shall indicate whether the negotiated procedure will take place in successive stages in accordance with paragraph (24)—

- (a) in the contract notice; or
- (b) in that notice and the contract documents.

(5) Subject to paragraphs (7) and (8), the date which the contracting authority fixes as the last date for the receipt by it of requests to be selected to negotiate shall be specified in the contract notice and shall not be less than 37 days from the date of despatch of the notice.

(6) Subject to any minimum time limit specified by this regulation, the contracting authority shall take account of all the circumstances, in particular, the complexity of the contract when fixing time limits for the receipt by it of requests to be selected to negotiate the contract.

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(7) Where the contracting authority has transmitted a contract notice by electronic means in accordance with the format and procedures referred to in paragraph (3) of Annex VI to the Defence and Security Procurement Directive, the time limit referred to in paragraph (5) may be reduced by seven days.

(8) Where compliance with the minimum time limit of 37 days referred to in paragraph (5) is rendered impractical for reasons of urgency, the contracting authority may substitute for that time limit—

- (a) a time limit of not less than 15 days from the date of the despatch of the contract notice; or
- (b) where the contracting authority has transmitted the contract notice by electronic means in accordance with paragraph (7), a time limit of not less than 10 days from the date of despatch of the contract notice.

(9) The contracting authority shall make its evaluation in accordance with regulations 22, 23, 24 and 25 and may exclude an economic operator from those economic operators from which it will make the selection of economic operators to be invited to negotiate the contract only if the economic operator—

- (a) may be treated as ineligible on a ground specified in regulation 22; or
- (b) fails to satisfy the minimum standards required of economic operators by the contracting authority of—
 - (i) economic and financial standing; or
 - (ii) technical or professional ability.

(10) The contracting authority shall make the selection of the economic operators to be invited to negotiate in accordance with regulations 22, 23, 24 and 25 and shall award the contract in accordance with regulation 30.

(11) Where there is a sufficient number of economic operators suitable to be selected to negotiate, the contracting authority may limit the number of economic operators which it intends to invite to negotiate the contract provided that the contract notice specifies—

- (a) the objective and non-discriminatory criteria to be applied in order to limit the number of economic operators in accordance with this paragraph; and
- (b) the minimum number of economic operators, which shall be not less than three, which the contracting authority intends to invite to negotiate and, where appropriate, the maximum number.

(12) The contracting authority shall ensure that the number of economic operators invited to negotiate is—

- (a) sufficient to ensure genuine competition; and
- (b) at least equal to the minimum number specified by the contracting authority in accordance with paragraph (11)(b).

(13) Subject to paragraph (12)(a), where—

- (a) the contracting authority carries out a selection in accordance with regulations 22, 23, 24 and 25, and
- (b) the number of economic operators selected to be invited to negotiate is less than the minimum number specified by the contracting authority in the contract notice,

that contracting authority may continue the award procedure with the economic operators which have been selected, provided that any economic operator not selected or which did not request to participate is not included.

(14) The contracting authority may require an economic operator to satisfy minimum levels of—

- (a) economic and financial standing, or
- (b) technical or professional ability,

provided that those minimum levels are specified in the contract notice and are related to and proportionate to the subject matter of the contract.

(15) Notwithstanding the ability of the contracting authority to cancel the ongoing procurement procedure and launch a new procedure, if the contracting authority considers that the number of suitable candidates is too low to ensure genuine competition, it may suspend the procedure and republish the initial contract notice in accordance with paragraph (3) and regulation 47.

(16) Where the contracting authority suspends the procedure and republishes the initial contract notice in accordance with paragraph (15), it shall fix a new deadline for the submission of requests to be selected to

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negotiate and the candidates selected upon the first publication and those selected upon the second shall be invited in accordance with paragraph (17).

(17) The contracting authority shall send invitations in writing simultaneously to each economic operator selected to negotiate and the invitation shall—

- (a) be accompanied by the contract documents;
- (b) specify the internet address which offers unrestricted and full direct access by electronic means to the contract documents; or
- (c) where the contract documents are held by an entity other than the contracting authority, specify the address to which requests for contract documents should be sent including any final date for making such requests and the amount and any method of payment of any fee which may be charged for supplying that information.

(18) Where the contract documents are held by an entity other than the contracting authority, the contracting authority shall ensure that the contract documents are sent to economic operators by the most rapid means of communication possible.

(19) The contracting authority shall include in the invitation—

- (a) the final date for the receipt by it of tenders, the address to which they must be sent and the one or more languages in which they must be drawn up;
- (b) a reference to the contract notice published in accordance with paragraph (3);
- (c) an indication of the information to be included with the tender which the contracting authority may require to be provided in accordance with regulations 23, 24 and 25; and
- (d) the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance for such criteria, if this information was not specified in the contract notice published in accordance with paragraph (3).

(20) The contracting authority or entity referred to in paragraph (17)(c) shall supply to an economic operator such further information relating to the contract documents as may be reasonably requested by that economic operator provided that the request for such information is received in sufficient time to enable the contracting authority to supply it—

- (a) not less than six days before the date specified in the invitation to tender as the final date for the receipt by it of tenders; or
- (b) in the case of urgency where paragraph (8) applies, not less than four days before the date specified in the invitation to tender as the final date for the receipt by it of tenders.

(21) The contracting authority shall extend the time limit for receipt by it of tenders in order that all the information necessary for the preparation of a tender is available to all economic operators where—

- (a) an economic operator requests the contract documents in sufficient time to allow a contracting authority to respond in accordance with paragraph (20) and, for whatever reason, the contract documents are not supplied in accordance with that paragraph; or
- (b) it is necessary that the economic operators be given the opportunity to inspect the site or premises or documents relating to the contract documents.

(22) Where the contracting authority needs to identify the best tender in order to award the contract in accordance with regulation 30(1), that contracting authority shall negotiate with economic operators which have submitted tenders with the aim of adapting the tenders to the requirements specified in the contract documents.

(23) During any negotiations which take place in accordance with this regulation, a contracting authority shall ensure equal treatment among all economic operators and in particular, shall not provide information in a discriminatory manner which may give some economic operators an advantage over other economic operators.

(24) The contracting authority may provide for the negotiated procedure to take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria in the contract documents.

(25) Where the contracting authority provides for the negotiated procedure to take place in successive stages in accordance with paragraph (24), it shall ensure that the number of economic operators to be invited to negotiate

the contract at the final stage is sufficient to ensure genuine competition to the extent that there is a sufficient number of economic operators to do so.

The competitive dialogue procedure

18.—(1) In this regulation—

“particularly complex contract” means a contract where a contracting authority is not objectively able to—

- (a) define the technical means in accordance with regulation 11(6), (7) and (8) capable of satisfying its needs or objectives; or
- (b) specify either the legal or financial make-up of a project, or both; and

“participant” means an economic operator selected by a contracting authority using the procedure referred to in paragraph (2) to participate in the competitive dialogue procedure.

(2) Where a contracting authority wishes to award a particularly complex contract and considers that the use of the negotiated procedure with the prior publication of a contract notice or restricted procedure will not allow the award of that contract, the contracting authority may use the competitive dialogue procedure.

(3) A contracting authority using the competitive dialogue procedure shall comply with the following paragraphs of this regulation.

(4) The contracting authority shall publicise its intention to seek offers in relation to the contract by sending to the Official Journal, as soon as possible after forming the intention, a notice, in the form of a contract notice in Annex IV to the Defence and Security Procurement Directive as amended from time to time, inviting requests to participate and containing the information therein specified.

(5) The contracting authority shall specify its needs and requirements in the contract notice and shall define those needs and requirements—

- (a) in the contract notice;
- (b) in the descriptive document; or
- (c) in both those documents.

(6) The contracting authority shall indicate that it may provide for the competitive dialogue procedure to take place in successive stages in accordance with paragraph (24)—

- (a) in the contract notice; or
- (b) in that notice and the descriptive document.

(7) Subject to paragraph (9), the date which the contracting fixes as the last date for the receipt by it of requests to be selected to participate shall be specified in the contract notice and shall be not less than 37 days from the date of the despatch of the notice.

(8) Subject to any minimum time limit specified by this regulation, the contracting authority shall take account of all the circumstances, in particular, the complexity of the contract when fixing time limits for the receipt by it of requests to be selected to participate in the dialogue.

(9) Where the contracting authority has transmitted a contract notice by electronic means in accordance with the format and procedures referred to in paragraph (3) of Annex VI to the Defence and Security Procurement Directive, the time limit referred to in paragraph (7) may be reduced by seven days.

(10) The contracting authority shall make its evaluation in accordance with regulations 22, 23, 24 and 25 and may exclude an economic operator from those economic operators from which it will make the selection of economic operators to be invited to participate in the dialogue only if the economic operator—

- (a) may be treated as ineligible on a ground specified in regulation 22; or
- (b) fails to satisfy the minimum standards required of economic operators by the contracting authority of—
 - (i) economic and financial standing; or
 - (ii) technical or professional ability.

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(11) The contracting authority shall make the selection of the economic operators to be invited to participate in the dialogue in accordance with regulations 22, 23, 24 and 25.

(12) Where there is a sufficient number of economic operators suitable to be selected to participate in the dialogue, the contracting authority may limit the number of economic operators which it intends to invite to participate in the dialogue provided that the contract notice specifies—

- (a) the objective and non-discriminatory criteria to be applied in order to limit the number of economic operators in accordance with this paragraph; and
- (b) the minimum number of economic operators, which shall be not less than three, which the contracting authority intends to invite to participate in the dialogue and, where appropriate, the maximum number.

(13) The contracting authority shall ensure that the number of economic operators invited to participate in the dialogue is—

- (a) sufficient to ensure genuine competition; and
- (b) at least equal to the minimum number specified by the contracting authority in accordance with paragraph (12)(b).

(14) Subject to paragraph (13)(a), where—

- (a) the contracting authority carries out a selection in accordance with regulations 22, 23, 24 and 25, and
- (b) the number of economic operators selected to be invited to participate in the dialogue is less than the minimum number specified by the contracting authority in the contract notice,

that contracting authority may continue the award procedure with the economic operators which have been selected, provided that any economic operator not selected or which did not request to participate is not included.

(15) The contracting authority may require an economic operator to satisfy minimum levels of—

- (a) economic and financial standing, or
- (b) technical or professional ability,

provided that those minimum levels are specified in the contract notice and are related to and proportionate to the subject matter of the contract.

(16) Notwithstanding the ability of the contracting authority to cancel the ongoing procurement procedure and launch a new procedure, if the contracting authority considers that the number of suitable candidates is too low to ensure genuine competition, it may suspend the procedure and republish the initial contract notice in accordance with paragraph (4) and regulation 47.

(17) Where the contracting authority suspends the procedure and republishes the initial contract notice in accordance with paragraph (16), it shall fix a new deadline for the submission of requests to participate and the candidates selected upon the first publication and those selected upon the second shall be invited in accordance with paragraph (4).

(18) The contracting authority shall send invitations in writing simultaneously to each economic operator selected to participate in the dialogue and the invitation shall—

- (a) be accompanied by the contract documents;
- (b) specify the internet address which offers unrestricted and full direct access by electronic means to the contract documents; or
- (c) where the contract documents are held by an entity other than the contracting authority, specify the address to which requests for contract documents should be sent including any final date for making such requests and the amount and any method of payment of any fee which may be charged for supplying that information.

(19) Where the contract documents are held by an entity other than the contracting authority, the contracting authority shall ensure that the contract documents are sent to economic operators by the most rapid means of communication possible.

(20) The contracting authority shall include the following information in the invitation—

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- (a) the date specified for the commencement of the competitive dialogue, the address to which replies must be sent and the one or more languages in which they must be drawn up;
 - (b) a reference to the contract notice published in accordance with paragraph (4);
 - (c) an indication of the information to be included with the reply which the contracting authority may require to be provided in accordance with regulations 23, 24, and 25; and
 - (d) the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance for such criteria, if this information was not specified in the contract notice published in accordance with paragraph (4).

(21) The contracting authority or entity referred to in paragraph (18)(c) shall supply such further information to the economic operator relating to the contract documents or the descriptive document as may reasonably be requested by that economic operator provided that the request for such information is received in sufficient time to enable the contracting authority to supply it not less than six days before the date specified in the invitation to tender as the final date of the receipt by it of tenders.

(22) The contracting authority shall open with the participants selected in accordance with regulations 22, 23, 24 and 25, a dialogue the aim of which shall be to identify and define the means best suited to satisfying its needs.

(23) During the competitive dialogue procedure, a contracting authority—

- (a) may discuss all aspects of the contract with the participants selected;
- (b) shall ensure equality of treatment among all participants and in particular, shall not provide information in a discriminatory manner which may give some participants an advantage over others; and
- (c) shall not reveal to the other participants solutions proposed or any confidential information communicated by a participant without that participant's agreement.

(24) The contracting authority may provide for the competitive dialogue procedure to 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 in the contract notice or in the descriptive document.

(25) Where the contracting authority provides for the competitive dialogue procedure to take place in successive stages in accordance with paragraph (24), it shall ensure that the number of economic operators to be invited to participate at the final stage is sufficient to ensure genuine competition to the extent that there is a sufficient number of economic operators to do so.

(26) The contracting authority may continue the competitive dialogue procedure until it can identify one or more solutions, if necessary after comparing them, likely to meet its needs.

(27) Where the contracting authority declares that the dialogue is concluded, it shall—

- (a) inform each participant that the dialogue is concluded;
- (b) request each participant to submit a final tender containing all the elements required and necessary for the performance of the project on the basis of any solution presented and specified during the dialogue; and
- (c) specify in the invitation to submit a tender the final date for the receipt by it of tenders, the address to which they must be sent and the language or languages in which they must be drawn up.

(28) The contracting authority may request a participant to clarify, specify or fine-tune a tender referred to in paragraph (27)(b), but such clarification, specification, fine-tuning or additional information shall not involve changes to the basic features of the tender or the call for tender when those variations are likely to distort competition or have a discriminatory effect.

(29) The contracting authority shall assess the tenders received on the basis of the award criteria specified in the contract notice or descriptive document and shall award the contract to the participant which submits the most economically advantageous tender in accordance with regulation 30(1)(a).

(30) The contracting authority may request the participant identified as having submitted the most economically advantageous tender to clarify aspects of that tender or confirm commitments contained in the tender provided that this does not have the effect of modifying substantial aspects of the tender or of the call for tender and does not risk distorting competition or causing discrimination.

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(31) The contracting authority may specify that payments may be made to a participant in respect of the participant's expenses incurred in participating in the competitive dialogue procedure.

Framework agreements

19.—(1) A contracting authority which intends to conclude a framework agreement shall comply with this regulation.

(2) Where the contracting authority intends to conclude a framework agreement, it shall—

- (a) follow one of the procedures set out in regulation 16, 17 or 18 up to (but not including) the beginning of the procedure for the award of any specific contract set out in this regulation; and
- (b) select an economic operator to be party to a framework agreement by applying award criteria set in accordance with regulation 30.

(3) Where the contracting authority awards a specific contract based on a framework agreement, it shall—

- (a) comply with the procedures set out in this regulation; and
- (b) apply those procedures only to the economic operators which are party to the framework agreement.

(4) When awarding a specific contract on the basis of a framework agreement neither the contracting authority nor the economic operator shall include in that contract terms that are substantially amended from the terms laid down in that framework agreement.

(5) Where the contracting authority concludes a framework agreement with one economic operator—

- (a) it shall award any specific contract within the limits of the terms laid down in the framework agreement; and
- (b) in order to award a specific contract, the contracting authority may consult in writing the economic operator which is party to the framework agreement requesting that economic operator to supplement its tender if necessary.

(6) Where the contracting authority concludes a framework agreement with more than one economic operator, the minimum number of economic operators shall be three, insofar as there is a sufficient number of—

- (a) economic operators to satisfy the selection criteria; or
- (b) admissible tenders which meet the award criteria.

(7) Where the contracting authority concludes a framework agreement with more than one economic operator, a specific contract may be awarded—

- (a) by application of the terms laid down in the framework agreement without re-opening competition; or
- (b) where not all the terms of the proposed contract are laid down in the framework agreement, by re-opening competition between the economic operators which are parties to that framework agreement and which are capable of performing the proposed contract in accordance with paragraphs (8) and (9).

(8) Where the contracting authority is following the procedure set out in paragraph (7)(b), it shall re-open the competition on the basis of the same or, if necessary, more precisely formulated terms, and where appropriate other terms referred to in the contract documents based on the framework agreement.

(9) Where the contracting authority is following the procedure set out in paragraph (7)(b), for each specific contract to be awarded it shall—

- (a) consult in writing the economic operators capable of performing the contract and invite them within a specified time limit to submit a tender in writing for each specific contract to be awarded;
- (b) set a time limit for the receipt by it of the tenders which takes into account factors such as the complexity of the subject matter of the contract and the time needed to send in tenders;
- (c) keep each tender confidential until the expiry of the time limit for the receipt by it of tenders; and
- (d) award each contract to the economic operator which has submitted the best tender on the basis of the award criteria specified in the contract documents based on the framework agreement.

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(10) The contracting authority shall not conclude a framework agreement for a period which exceeds seven years except in exceptional circumstances determined by taking into account the expected service life of any delivered items, installations or systems, and the technical difficulties which a change of supplier may cause.

(11) In this regulation, a “specific contract” means a contract based on the terms of a framework agreement.

(12) The contracting authority shall not use a framework agreement improperly or in such a way as to prevent, restrict or distort competition.

Electronic auctions

20.—(1) A contracting authority which holds an electronic auction shall comply with this regulation.

(2) Subject to paragraph (3), the contracting authority may hold an electronic auction when using—

- (a) the restricted procedure;
- (b) the negotiated procedure with the prior publication of a contract notice; or
- (c) the procedure set out in regulation 19(7)(b) on the re-opening of competition among the parties to a framework agreement.

(3) The contracting authority shall not hold an electronic auction to precede the award of a services contract or a works contract having as its subject matter intellectual performance, such as the design of works.

(4) The contracting authority may only hold an electronic auction to precede the award of a contract when the contract specification can be established with precision.

(5) The contracting authority shall base an electronic auction on—

- (a) price alone where the contract is to be awarded on the basis of the lowest price; or
- (b) price or the values of quantifiable elements of tenders indicated in the contract documents, where the contract is to be awarded on the basis of the offer which is the most economically advantageous in accordance with regulation 30(1)(a).

(6) Where the contracting authority intends to hold an electronic auction it shall state this in the contract notice.

(7) Contract documents prepared by the contracting authority in relation to a contract the award of which is to be preceded by an electronic auction shall include—

- (a) the quantifiable elements of tenders capable of expression in figures or percentages which will be the subject of the electronic auction;
- (b) any limitations on the values for the quantifiable elements of tenders (resulting from the contract documents) which may be submitted in the electronic auction;
- (c) the information to be made available to economic operators during the electronic auction and, where appropriate, an indication of when it will be made available to them;
- (d) a description of the electronic auction process;
- (e) the conditions under which the economic operators will be able to bid and, in particular, the minimum differences which may be required when bidding; and
- (f) all relevant information concerning—
 - (i) the electronic system to be used in the electronic auction; and
 - (ii) the arrangements for and technical specifications relevant to connection to the electronic system to be used.

(8) Before proceeding with an electronic auction, the contracting authority shall—

- (a) make an initial evaluation of the tenders in accordance with the award criteria specified and with any weighting fixed for them; and
- (b) by electronic means simultaneously invite all the economic operators which have submitted admissible tenders to submit new prices or new values in the electronic auction.

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(9) Where the contracting authority is to award a contract on the basis of the offer which is the most economically advantageous to it in accordance with regulation 30(1)(a), each invitation referred to in paragraph (8)(b) shall include the outcome of the evaluation of the tender submitted by the economic operator to which the invitation is sent, carried out in accordance with the weighting described in regulation 30(3).

(10) The contracting authority shall include in the invitation referred to in paragraph (8)(b)—

- (a) all relevant information concerning individual connection to the electronic system to be used in the electronic auction;
- (b) the date and time of the start of the electronic auction;
- (c) the number of phases in the electronic auction;
- (d) the mathematical formula to be used in the electronic auction to determine automatic re-ranking of tenders on the basis of the new prices or new values submitted by economic operators and incorporating the weighting of all the criteria set to determine the most economically advantageous tender;
- (e) where variant bids are authorised by the contracting authority, a separate mathematical formula for each variation; and
- (f) the basis on which the electronic auction is to be closed and the appropriate additional information specified in paragraph (16).

(11) In relation to the formula referred to in paragraph (10)(d), any ranges used in the weighting of criteria shall be set at a specified value before the invitation is sent to economic operators.

(12) At least two working days must elapse between the date on which the invitation referred to in paragraph (8)(b) is sent and the date of the electronic auction.

(13) During each phase of an electronic auction, the contracting authority—

- (a) shall instantaneously communicate to all economic operators participating in the auction at least sufficient information to enable them to ascertain their relative rankings in the auction at any time;
- (b) may communicate to each economic operator other information concerning prices or values submitted by other economic operators provided that this has been stated in the contract documents; and
- (c) may disclose the number of economic operators participating in that phase of the auction.

(14) During any phase of an electronic auction, the contracting authority shall not disclose the identity of any economic operator participating in the auction.

(15) The contracting authority shall close an electronic auction—

- (a) at the date and time fixed for closure in the invitation referred to in paragraph (8)(b);
- (b) when it receives no further new prices or new values which meet the requirements concerning minimum differences; or
- (c) when the phases in the electronic auction specified in the invitation referred to in paragraph (8)(b) have been completed.

(16) Where the contracting authority intends to close an electronic auction—

- (a) as described in paragraph (15)(b), it shall state in the invitation referred to in paragraph (8)(b) the period which it intends to allow to elapse before it closes the auction after receiving a submission from an economic operator participating in the auction; or
- (b) as described in paragraph (15)(c), it shall state in the invitation referred to in paragraph (8)(b) the timetable for each phase in the auction.

(17) After closing an electronic auction the contracting authority shall award the contract in accordance with regulation 30 on the basis of the results of the electronic auction.

(18) The contracting authority shall not use an electronic auction improperly or in such a way as to prevent, restrict or distort competition or to change the subject matter of the contract as referred to in the contract notice and defined in the contract documents.

(19) The references to values in paragraphs (5)(b), (8)(b), (10)(d), (13)(b) and (15)(b) shall be interpreted as including price.

Central purchasing bodies

21.—(1) A contracting authority may purchase work, works, goods or services from or through a central purchasing body.

(2) Where a contracting authority makes purchases in accordance with paragraph (1), it shall be deemed to have complied with these Regulations to the extent that—

- (a) the central purchasing body has complied with them; or
- (b) when the central purchasing body is not a contracting authority, the contract award rules applied by it are compliant with these Regulations and the contracts awarded can be subject to efficient remedies comparable to those provided for in Part 9.

PART 4

SELECTION OF ECONOMIC OPERATORS

Criteria for the rejection of economic operators

22.—(1) Subject to paragraph (2), a contracting authority shall treat as ineligible and shall not select an economic operator in accordance with these Regulations if the contracting authority has actual knowledge that the economic operator or its directors or any other person who has powers of representation, decision or control of the economic operator has been convicted of any of the following offences—

- (a) conspiracy within the meaning of section 1 of the Criminal Law Act 1977⁽³⁵⁾ where that conspiracy relates to participation in a criminal organisation as defined in Article 2(1) of the Council Joint Action 98/733/JHA⁽³⁶⁾;
- (b) corruption within the meaning of section 1 of the Public Bodies Corrupt Practices Act 1889⁽³⁷⁾ or section 1 of the Prevention of Corruption Act 1906⁽³⁸⁾;
- (c) the offence of bribery;
- (d) fraud, where the offence relates to fraud affecting the financial interests of the European Communities as defined by Article 1 of the Convention relating to the protection of the financial interests of the European Union⁽³⁹⁾, within the meaning of—
 - (i) the offence of cheating the Revenue;
 - (ii) the offence of conspiracy to defraud;
 - (iii) fraud or theft within the meaning of the Theft Act 1968⁽⁴⁰⁾, the Theft Act 1978⁽⁴¹⁾;

⁽³⁵⁾ 1977 c.45. Section 1 was amended by section 5(1) of the Criminal Attempts Act 1981 (c.47), section 9(1) and (2) of, and paragraph 4 of Part II of Schedule 2 to, the Criminal Justice (Terrorism and Conspiracy) Act 1998 (c.40) and section 300(1) of, and Schedule 1 to, the Trade Union and Labour (Consolidation) Act 1992 (c.52).

⁽³⁶⁾ OJ L 351, 29.12.1998, p.1.

⁽³⁷⁾ 1889 c.69. This Act has been repealed by section 17(3) of, and Schedule 2 to, the Bribery Act 2010 (c.23).

⁽³⁸⁾ 1906 c.34. Section 1 was amended by section 47(2) and (3) of the Criminal Justice Act 1988 (c.33), section 108(2) of the Anti-terrorism, Crime and Security Act 2001 (c.24) and section 68(2) of the Criminal Justice (Scotland) Act 2003 (c.asp7) and has since been repealed by section 17(3) of, and Schedule 2 to, the Bribery Act 2010 (c.23).

⁽³⁹⁾ OJ C 316, 27.11.1995, p.49.

⁽⁴⁰⁾ 1968 c.60. Section 9 was amended by section 26(2) of the Criminal Justice Act 1991 (c.53) and sections 139, 140 of, and Part 17 of Schedule 6 and Schedule 7 to, the Sexual Offences Act 2003 (c.42). Section 14 was amended by S.I. 2003/2908. Sections 15A and 15B were inserted by section 1(1) of the Theft (Amendment) Act 1996 (c.62) and section 15B was amended by S.I. 2001/3649. Section 16 was amended by section 5(5) of the Theft Act 1978 (c.31). Section 24A was inserted by section 2(1) of the Theft (Amendment) Act 1996 (c.62). Section 33 was amended by S.I. 2001/1149. Section 34 was amended by S.I. 2003/2908. Section 36 was amended by section 41(1) of, and Part I of Schedule 6 to, the Northern Ireland Constitution Act 1973 (c.36). Sections 15 to 16 were repealed by the Fraud Act 2006 (c.35). There are other amendments which are not relevant to these Regulations.

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- (iv) fraudulent trading within the meaning of section 458 of the Companies Act 1985⁽⁴²⁾;
 - (v) defrauding the Customs within the meaning of the Customs and Excise Management Act 1979⁽⁴³⁾ and the Value Added Tax Act 1994⁽⁴⁴⁾;
 - (vi) an offence in connection with taxation in the European Community within the meaning of section 71 of the Criminal Justice Act 1993⁽⁴⁵⁾; or
 - (vii) destroying, defacing or concealing of documents or procuring the execution of a valuable security within the meaning of section 20 of the Theft Act 1968⁽⁴⁶⁾;
 - (e) terrorist offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Framework Decision 2002/475/JHA⁽⁴⁷⁾;
 - (f) money laundering within the meaning of the Money Laundering Regulations 2003⁽⁴⁸⁾ or money laundering or terrorist financing within the meaning of the Money Laundering Regulations 2007⁽⁴⁹⁾;
 - (g) any other offence within the meaning of Article 39(1) of the Defence and Security Procurement Directive as defined by the national law of any relevant State.

(2) In any case where an economic operator or its directors or any other person who has powers of representation, decision or control has been convicted of an offence described in paragraph (1), a contracting authority may disregard the prohibition described there if it is satisfied that there are overriding requirements in the general interest which justify doing so in relation to that economic operator.

(3) A contracting authority may apply to the relevant competent authority to obtain further information regarding the economic operator and in particular details of convictions of the offences listed in paragraph (1) if it considers it needs such information to decide on any exclusion referred to in that paragraph.

(4) A contracting authority may treat an economic operator as ineligible or decide not to select an economic operator in accordance with these Regulations on one or more of the following grounds, namely that the economic operator—

- (a) being an individual is bankrupt or has had a receiving order or administration order or bankruptcy restrictions order made against him or her or has made any composition or arrangement with or for the benefit of his or her creditors or has made any conveyance or assignment for the benefit of his or her creditors or appears unable to pay, or to have no reasonable prospect of being able to pay, a debt within the meaning of section 268 of the Insolvency Act 1986⁽⁵⁰⁾, or article 242 of the Insolvency (Northern Ireland) Order 1989⁽⁵¹⁾, or in Scotland has granted a trust deed for creditors or become otherwise apparently insolvent, or is the subject of a petition presented for sequestration of his or her estate, or is the subject of any similar procedure under the law of any other State;

⁽⁴¹⁾ 1978 c.31. Section 1 was amended by section 4(1) of the Theft (Amendment) Act 1996 (c.62). Section 5 was amended by section 37(1) of, and Schedule 2 to, the Extradition Act 1989 (c.33). Sections 1 and 2 were repealed by the Fraud Act 2006 (c.35). There are other amendments which are not relevant to these Regulations.

⁽⁴²⁾ 1985 c.6. Section 458 was repealed by section 1295 of, and Schedule 16 to, the Companies Act 2006 (c.46).

⁽⁴³⁾ 1979 c.2. There are amendments to this Act which are not relevant to these Regulations.

⁽⁴⁴⁾ 1994 c.23. Section 72 was amended by section 17 of the Finance Act 2003 (c.40) and sections 84(4) and 114 of, and Part 2, paragraphs 3 and 8(a) of Schedule 22 and Part 5(1) of Schedule 27 to, the Finance Act 2007 (c.11).

⁽⁴⁵⁾ 1993 c.36. There are amendments to this Act which are not relevant to these Regulations.

⁽⁴⁶⁾ 1968 c.60. Section 20 was amended by section 14(1) and (3) of, and Schedules 1 and 3 to, the Fraud Act 2006 (c.35).

⁽⁴⁷⁾ OJ L 164, 22.6.2002, p.3.

⁽⁴⁸⁾ S.I. 2003/3075. These Regulations were revoked in relation to England, Wales and Scotland by regulation 1(3) of S.I. 2007/2157 and in relation to Northern Ireland by S.I. 2008/1741.

⁽⁴⁹⁾ S.I. 2007/2157. Regulation 2(1) is amended by regulation 1 of S.I. 2009/1912. There are other amendments which are not relevant to these Regulations. There are other amendments which are not relevant to these Regulations.

⁽⁵⁰⁾ 1986 c.45. There are amendments to this Act which are not relevant to these Regulations.

⁽⁵¹⁾ S.I. 1989/2405 (N.I. 19). There are amendments to this Order which are not relevant to these Regulations.

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- (b) being a partnership constituted under Scots law has granted a trust deed or become otherwise apparently insolvent, or is the subject of a petition presented for sequestration of its estate;
 - (c) being a company or any other entity within the meaning of section 255 of the Enterprise Act 2002⁽⁵²⁾ has passed a resolution or is the subject of an order by the court for the company's winding up otherwise than for the purpose of bona fide reconstruction or amalgamation, or has had a receiver, manager or administrator on behalf of a creditor appointed in respect of the company's business or any part of the company's business or is the subject of the above procedures or is the subject of similar procedures under the law of any other State;
 - (d) has been convicted of a criminal offence relating to the conduct of his, her or its business or profession;
 - (e) has committed an act of grave misconduct in the course of his, her or its business or profession, including a breach of obligations regarding security of information or security of supply required by a contracting authority in accordance with regulation 37 or 38 during a previous contract;
 - (f) has been found, on the basis of any evidence, including protected data sources, not to possess the reliability necessary to exclude risks to the security of the United Kingdom;
 - (g) has not fulfilled obligations relating to the payment of social security contributions under the law of any part of the United Kingdom or of the relevant State in which the economic operator is established;
 - (h) has not fulfilled obligations relating to the payment of taxes under the law of any part of the United Kingdom or of the relevant State in which the economic operator is established;
 - (i) is guilty of serious misrepresentation in providing any information required of him, her or it under this regulation;
 - (j) in relation to procedures for the award of a services contract, is not licensed in the relevant State in which he, she or it is established or is not a member of an organisation in that relevant State when the law of that relevant State prohibits the provision of the services to be provided under the contract by a person who is not so licensed or who is not such a member; or
 - (k) subject to paragraphs (7), (8), (9), (10), (11), (12) and (13), is required to be registered on the professional or trade register of the relevant State specified in Schedule 4 from which he, she or it originates or in which he, she or it is established, in order to pursue his, her or its professional activity and is not so registered.

(5) The contracting authority may require an economic operator to provide such information as it considers it needs to make the evaluation in accordance with paragraphs (1) and (4) except that it shall accept as conclusive evidence that an economic operator does not fall within the grounds specified in paragraphs (1) and (4)(a), (b), (c), (d), (g) or (h) if that economic operator provides to the contracting authority—

- (a) in relation to the grounds specified in paragraphs (1) and (4)(a), (b), (c) or (d)—
 - (i) an extract from the judicial record; or
 - (ii) in a relevant State which does not maintain such a judicial record, a document issued by the relevant judicial or administrative authority;
- (b) in relation to the grounds specified in sub-paragraphs (g) or (h) of paragraph (4), a certificate issued by the relevant competent authority; and
- (c) in a relevant State where the documentary evidence specified in sub-paragraphs (a) and (b) of paragraph (5) is not issued in relation to one of the grounds specified in paragraphs (1), (4)(a), (b), (c), (d), (g) or (h), a declaration on oath made by the economic operator before the relevant judicial, administrative or competent authority or a relevant notary public or Commissioner for oaths.

(6) In this regulation, “relevant” in relation to a judicial, administrative or competent authority, notary public or Commissioner for oaths means an authority designated by, or a notary public or Commissioner for oaths in the relevant State in which the economic operator is established.

(7) Sub-paragraphs (j) and (k) of paragraph (4) are without prejudice to EU law on the freedom of establishment and the freedom to provide services.

⁽⁵²⁾ 2002 c. 40. There are amendments to this Act which are not relevant to these Regulations.

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(8) An economic operator established in the United Kingdom or Ireland shall be treated as registered on the professional or trade register for the purposes of paragraph (4)(k) if the economic operator—

- (a) is established in Ireland and is certified as registered with the Registrar of Friendly Societies; or
- (b) is established in either State and is either—
 - (i) certified as incorporated by their respective Registrar of Companies; or
 - (ii) is certified as having declared on oath that it is carrying on business in the trade in question in the State in which it is established at a specific place of business and under a specific trading name.

(9) An economic operator established in Cyprus shall be treated as registered on the professional or trade register for the purposes of paragraph (4)(k) if—

- (a) in relation to procedures for the award of a services contract or a supply contract the economic operator is either—
 - (i) certified as incorporated by the Registrar of Companies and Official Receiver (Εφορος Εταιρειών και Επίσημος Παραλήπτης); or
 - (ii) certified as having declared on oath that the economic operator is carrying on business in the trade in question in Cyprus at a specific place of business and under a specific trading name; or
- (b) in relation to procedures for the award of a works contract the economic operator is certified by the Council for the Registration and Audit of Civil Engineering and Building Contractors (Συμβούλιο Εγγραφής και Ελέγχου Εργοληπτών Οικοδομικών και Τεχνικών Έργων) according to the Registration and Audit of Civil Engineering and Building Contractors Law of Cyprus.

(10) An economic operator established in Malta shall be treated as registered on the professional or trade register for the purposes of paragraph (4)(k) if—

- (a) the economic operator produces its “numru ta’ registrazzjoni tat- Taxxa tal- Valur Miżjud (VAT) u n-numru tal-liċenzja ta’ kummerċ”; and
- (b) where the economic operator is a member of a partnership or is a company, it produces the relevant registration number by the Malta Financial Services Authority.

(11) In relation to procedures for the award of a services contract, an economic operator established in Greece shall be treated as registered on the professional or trade register for the purposes of paragraph (4)(k)—

- (a) when the services to be provided under the contract are specified in category 14 of Schedule 2 and when Greek legislation requires persons who provide those services to be registered on the professional register (Μητρώο Μελετητών and Μητρώο Γραφείων Μελετών), if it is registered on that register; and
- (b) in any other case, in accordance with paragraph (14).

(12) In relation to procedures for the award of a services contract, an economic operator established in Hungary shall be treated as registered on the professional or trade register for the purposes of paragraph (4)(k) if the economic operator is certified as being entitled to be engaged in the trade in question in Hungary.

(13) In relation to procedures for the award of a supply contract, an economic operator established in Spain shall be treated as registered on the professional or trade register for the purposes of paragraph (4)(k) if the economic operator is certified as having declared on oath that it is entitled to be engaged in the trade in question in Spain.

(14) An economic operator established in a relevant State, other than the United Kingdom or Ireland, which either has an equivalent professional or trade register which is not listed in Schedule 4 or which does not have an equivalent professional or trade register shall be treated as registered on a professional or trade register for the purposes of paragraph (4)(k) on production of either a certificate that he is registered on the equivalent professional or trade register or where no such register exists, a declaration on oath, or in a relevant State which does not provide for a declaration on oath a solemn declaration, made by the economic operator before the relevant judicial, administrative or competent authority or a relevant notary public or Commissioner for oaths, that he exercises the particular profession or trade.

Information as to economic and financial standing

23.—(1) Subject to regulation 26 and paragraph (2), in assessing whether an economic operator meets any minimum standards of economic and financial standing required of economic operators by the contracting authority—

- (a) for the purposes of regulation 16(7), 17(9), or 18(10), and
- (b) in selecting the economic operators to be invited to tender for or to negotiate the contract in accordance with regulation 16(8), 17(10) or 18(11),

a contracting authority may take into account any of the following information—

- (i) appropriate statements from the economic operator's bankers or where appropriate, evidence of relevant professional risk indemnity insurance;
- (ii) statements of accounts or extracts from those accounts relating to the business of the economic operator where publication of the statement is required under the law of the relevant State in which the economic operator is established; or
- (iii) where appropriate, a statement, covering the three previous financial years of the economic operator, of—
 - (aa) the overall turnover of the business of the economic operator; and
 - (bb) where appropriate, the turnover in respect of the work, works, goods or services which are of a similar type to the subject matter of the contract.

(2) Where the information specified in paragraph (1) is not appropriate in a particular case, a contracting authority may require an economic operator to provide other information to demonstrate the economic operator's economic and financial standing.

(3) A contracting authority which requires information to be provided in accordance with paragraph (1) or (2) shall specify in the contract notice the information which the economic operator must provide.

(4) Where appropriate—

- (a) an economic operator or a group of economic operators as referred to in regulation 27 may rely on the capacities of other entities or members in the group, regardless of the legal nature of the link between the economic operator or group of economic operators and the other entities; and
- (b) the economic operator or the group of economic operators shall prove to the contracting authority that the resources necessary to perform the contract will be available and the contracting authority may, in particular, require the economic operator to provide an undertaking from the other entities to that effect.

(5) Where an economic operator is unable for a valid reason to provide the information which the contracting authority has required, the contracting authority shall accept such other information provided by the economic operator as the contracting authority considers appropriate.

Information as to technical or professional ability

24.—(1) Subject to regulation 26, in assessing whether an economic operator meets any minimum standards of technical or professional ability required of economic operators by the contracting authority—

- (a) for the purposes of regulation 16(7), 17(9) or 18(10), and
- (b) in selecting the economic operators to be invited to tender for or to negotiate the contract in accordance with regulation 16(8), 17(10) or 18(11),

a contracting authority may have regard to any means listed in paragraph (2) according to the purpose, nature, quantity or importance of the contract.

(2) The means referred to in paragraph (1) are—

- (a) in the case of a supply contract requiring the siting or installation of goods, a services contract or a works contract, the economic operator's technical ability, taking into account in particular that economic operator's skills, efficiency, experience and reliability;

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- (b) a list of works carried out over the past five years together with (unless the contracting authority specifies that the following certificate should be submitted direct to the contracting authority by the person certifying) certificates of satisfactory completion for the most important of those works indicating in each case—
 - (i) the value of the consideration received;
 - (ii) when and where the work or works were carried out; and
 - (iii) specifying whether they were carried out according to the rules of the trade or profession and properly completed;
- (c) a statement of the principal goods sold or services provided by the supplier or the services provider in the past five years, or during a shorter period if necessary and—
 - (i) the dates on which the goods were sold or the services provided;
 - (ii) the consideration received;
 - (iii) the identity of the person to whom the goods were sold or the service were provided;
 - (iv) any certificate issued or countersigned by that person confirming the details of the contract for those goods sold or services provided; and
 - (v) where—
 - (aa) that person was not a contracting authority, and
 - (bb) the certificate referred to in sub-paragraph (c)(iv) is not available,any declaration by the economic operator attesting the details of the goods sold or services provided;
- (d) a statement of the technicians or technical services available to the economic operator to—
 - (i) carry out the work under the contract, or
 - (ii) be involved in the production of goods or the provision of services under the contract, particularly those responsible for quality control, whether or not they are independent of the economic operator;
- (e) a statement of the economic operator's—
 - (i) technical facilities;
 - (ii) measures for ensuring quality;
 - (iii) study and research facilities; and
 - (iv) internal rules regarding intellectual property;
- (f) a check carried out by the contracting authority or on its behalf by a competent official body of the relevant State in which the economic operator is established—
 - (i) on the technical capacity of the economic operator; and
 - (ii) if relevant, on the economic operator's study and research facilities and quality control measures;
- (g) in the case of works contracts, services contracts or supply contracts also covering siting and installation operations or services, the economic operator's educational and professional qualifications where the economic operator is an individual and—
 - (i) if any, those of the economic operator's managerial staff; and
 - (ii) those of one or more persons who would be responsible for providing the services or carrying out the work or works under the contract;
- (h) the environmental management measures, evidenced in accordance with paragraph (4), that the services provider or contractor is able to apply when performing the contract, but only where it is necessary for the performance of that contract;
- (i) a statement of the services provider's or contractor's average annual number of staff and managerial staff over the previous three years;

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- (j) a description of the tools, material, technical equipment, staff numbers, know-how and sources of supply (with an indication of the geographical location when it is outside the territory of the EU) available to the economic operator to perform the contract, cope with any additional needs required by the contracting authority as a result of a crisis or carry out the maintenance, modernisation or adaptation of the goods covered by the contract;
 - (k) any samples, descriptions and photographs of the goods to be purchased or hired under the contract and certification of the authenticity of such samples, descriptions or photographs;
 - (l) certification by official quality control institutes or agencies of recognised competence, attesting that the goods to be purchased or hired under the contract conform to standards and technical specifications (within the meaning of regulation 11(1)) identified by the contracting authority;
 - (m) in the case of contracts involving, entailing or containing classified information, evidence of the ability to process, store and transmit such information at the level of protection required by the contracting authority;
 - (n) a certificate—
 - (i) attesting conformity to quality management systems standards based on the relevant European standard; and
 - (ii) from an independent accredited body established in any relevant State conforming to the European standards concerning accreditation and certification; or
 - (o) any other evidence of conformity to quality management systems standards which are equivalent to the standards referred to in sub-paragraph (n)(i).
- (3) Where appropriate—
- (a) an economic operator or a group of economic operators as referred to in regulation 27 may rely on the capacities of other entities or members in the group, regardless of the legal nature of the link between the economic operator or group of economic operators and the other entities; and
 - (b) the economic operator or the group of economic operators shall prove to the contracting authority that the resources necessary to perform the contract will be available and the contracting authority may, in particular, require the economic operator to provide an undertaking from the other entities to that effect.
- (4) The evidence referred to in paragraph (2)(h) is—
- (a) a certificate—
 - (i) attesting conformity to environmental management standards based on—
 - (aa) the EU Eco-Management and Audit Scheme; or
 - (bb) the relevant European or international standards; and
 - (ii) from an independent body established in any relevant State conforming to EU law or the relevant European or international standards concerning certification; or
 - (b) any other evidence of environmental management measures which are equivalent to the standards referred to in sub-paragraph (a)(i).
- (5) The evidence referred to in paragraph (2)(m) may include evidence of holding a security clearance recognised by the United Kingdom appropriate to the relevant protective marking and the contracting authority may grant economic operators which do not yet hold the necessary security clearance additional time to obtain such clearance and, where this is the case, shall indicate this possibility and the time limit in the contract notice.
- (6) A contracting authority which requires information to be provided in accordance with paragraph (2) shall specify in the contract notice the information which the economic operator must provide.
- (7) Where an economic operator is unable for a valid reason to provide the information which the contracting authority has required, the contracting authority shall accept such other information provided by the economic operator as the contracting authority considers appropriate.

Supplementary information

25. Subject to regulation 26, the contracting authority may require an economic operator to provide information supplementing the information provided in accordance with regulations 22, 23 or 24 or to clarify that information, provided that the information so required relates to the matters specified in regulations 22, 23 or 24.

Official lists of approved economic operators

26.—(1) This regulation applies where an economic operator is registered in accordance with paragraph (2) or certified in accordance with paragraph (3).

(2) An economic operator is registered in accordance with this paragraph where it is registered on the official list of approved contractors, services providers or suppliers in a relevant State which maintains such lists and in which the economic operator is established.

(3) An economic operator is certified in accordance with this paragraph where it is certified by a certification body complying with European certification standards in a relevant State which maintains such certification and in which the economic operator is established.

(4) Where an economic operator which is registered or certified submits to the contracting authority—

- (a) a certificate of registration issued by the authority administering the official list referred to in paragraph (2), or
- (b) a certificate issued by the body administering the certification referred to in paragraph (3),

which specifies the information submitted to that authority or body which enabled the economic operator to be registered or certified and which states the classification given, the contracting authority shall accept the certificate as evidence of the matters referred to in paragraph (5).

(5) Subject to paragraph (6), where the certificate referred to in paragraph (4) deals with the grounds referred to in regulations 22(1), (4)(a) to (e), (i), and (k), 23(1)(b)(ii) and (iii) and—

- (a) in the case of a contractor, regulation 24(2)(b), (d), (e), (f), (g), (h) and (i),
- (b) in the case of a services provider, regulation 24(2)(c), (d), (e), (f), (g) and (i), or
- (c) in the case of a supplier, regulation 24(2)(c), (d), (e), (f), (g), (k) and (l),

the contracting authority shall—

- (i) accept the certificate that the economic operator does not fall within the grounds specified in regulation 22(1), (4)(a) to (e), (i) and (k) and shall not be entitled to require the economic operator to submit such information relating to those grounds as is specified in regulation 22;
- (ii) not be entitled to require the economic operator to provide information specified in regulation 23(1)(b)(ii) and (iii) and—
 - (aa) in the case of a contractor, regulation 24(2)(b), (d), (e), (f), (g), (h) and (i);
 - (bb) in the case of a services provider, regulation 24(2)(c), (d), (e), (f), (g) and (i); and
 - (cc) in the case of a supplier, regulation 24(2)(c), (d), (e), (f), (g), (k) and (l); and
- (iii) not be entitled to seek any supplementary information in accordance with regulation 25 in relation to the matters specified in sub-paragraph (c)(i) and (ii).

(6) A contracting authority is not required to comply with paragraph (5) where it considers that it has justification for not doing so.

Consortia

27.—(1) In this regulation a “consortium” means two or more persons, at least one of whom is an economic operator, acting jointly for the purpose of being awarded a contract.

(2) Subject to paragraph (3), a contracting authority shall not treat the tender of a consortium as ineligible nor decide not to include a consortium amongst those economic operators from which it will make the selection of

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economic operators to be invited to tender for or to negotiate a contract on the grounds that the consortium has not formed a legal entity for the purposes of tendering for or negotiating the contract.

(3) Where a contracting authority awards a contract to a consortium it may, if it is justified for the satisfactory performance of the contract, require the consortium to form a legal entity before entering into, or as a term of, the contract.

(4) In these Regulations references to an economic operator where the economic operator is a consortium includes a reference to each person who is a member of that consortium.

Corporations

28.—(1) A contracting authority shall not treat the tender of a services provider as ineligible nor decide not to include a services provider amongst those services providers from which it will make the selection of services providers to be invited to tender for or to negotiate a contract on the ground that under the law of any part of the United Kingdom the services provider is required to be an individual, a corporation or other type of body, if under the law of the relevant State in which the services provider is established, that services provider is authorised to provide such services.

(2) In the case of—

- (a) a services contract,
- (b) a works contract, or
- (c) a supply contract which includes services or siting and installation operations,

a contracting authority may require an economic operator which is not an individual to indicate in the tender or in the request to be selected to tender for or to negotiate the contract, the names and relevant professional qualifications of the staff who will be responsible for the performance of the contract.

Notification

29.—(1) Where a contracting authority decides, prior to the stage at which it makes a decision to which regulation 32(1) (award decision) applies, to exclude an applicant, the contracting authority shall notify the applicant of that exclusion.

(2) In this regulation, “applicant” means an economic operator which submitted an offer, applied to be included amongst the economic operators to be selected to tender for or to negotiate the contract, or applied to be a party to the framework agreement.

(3) For the purposes of this regulation, an applicant is excluded if, and only if—

- (a) the applicant, or the applicant’s tender, is excluded as mentioned in regulation 16(7), 17(9) or 18(10); or
- (b) the applicant is not among those selected to be—
 - (i) invited to tender as mentioned in regulation 16(8);
 - (ii) invited to negotiate, as mentioned in regulation 17(10) or (25), or for the purposes of regulation 17(24); or
 - (iii) invited to participate, as mentioned in regulation 18(11) or (25), or for the purposes of regulation 18(24).

PART 5

THE AWARD OF A CONTRACT

Criteria for the award of a contract

30.—(1) Subject to regulation 18(29) and to paragraphs (6) and (9) of this regulation, a contracting authority shall award a contract on the basis of the offer which—

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- (a) is the most economically advantageous from the point of view of the contracting authority; or
- (b) offers the lowest price.

(2) A contracting authority shall use criteria linked to the subject matter of the contract to determine that an offer is the most economically advantageous including quality, price, technical merit, functional characteristics, environmental characteristics, running costs, life cycle costs, cost effectiveness, after sales service, technical assistance, delivery date and delivery period, period of completion, security of supply, interoperability and operational characteristics.

(3) Where a contracting authority intends to award a contract on the basis of the offer which is the most economically advantageous it shall state the weighting which it gives to each of the criteria chosen in the contract notice or contract documents, or both.

(4) When stating the weightings referred to in paragraph (3), a contracting authority may give the weightings a range and specify a minimum and maximum weighting where it considers it appropriate in view of the subject matter of the contract.

(5) Where, in the opinion of the contracting authority, it is not possible to provide weightings for the criteria referred to in paragraph (3) on objective grounds, the contracting authority shall indicate the criteria in descending order of importance in the contract notice or contract documents, or both.

(6) If an offer for a contract is abnormally low the contracting authority may reject that offer but only if it has—

- (a) requested in writing an explanation of the offer or of those parts which it considers contribute to the offer being abnormally low;
- (b) taken account of the evidence provided in response to a request in writing; and
- (c) subsequently verified the offer or parts of the offer being abnormally low with the economic operator.

(7) Where a contracting authority requests an explanation in accordance with paragraph (6), the information requested may, in particular, include—

- (a) the economics of the method of construction, the manufacturing process or the services provided;
- (b) the technical solutions suggested by the economic operator or the exceptionally favourable conditions available to the economic operator for the execution of the work or works, for the supply of goods or for the provision of the services;
- (c) the originality of the work, works, goods or services proposed by the economic operator;
- (d) compliance with the provisions relating to employment protection and working conditions in force at the place where the contract is to be performed; or
- (e) the possibility of the economic operator obtaining State aid.

(8) Where a contracting authority establishes that a tender is abnormally low because the economic operator has obtained State aid, the offer may be rejected on that ground alone only after—

- (a) consultation with the economic operator; and
- (b) the economic operator is unable to prove, within a reasonable time limit fixed by the contracting authority, that the aid was granted in a way which is compatible with the TFEU.

(9) Where a contracting authority rejects an abnormally low offer in accordance with paragraph (8), it shall send a report justifying the rejection to the Office of Government Commerce for onward transmission to the Commission, except—

- (a) where the contracting authority is the Secretary of State for Defence, in which case the Ministry of Defence shall transmit the report to the Commission; or
- (b) where the contracting authority is a contracting authority within the meaning of regulation 3(1)(w) of the Public Contracts Regulations 2006⁽⁵³⁾ or regulation 3(1)(aa) of the Public Contracts (Scotland) Regulations 2006⁽⁵⁴⁾ and the Secretary of State for Defence is “another contracting authority” within the

⁽⁵³⁾ S.I. 2006/5.

⁽⁵⁴⁾ S.S.I. 2006/1.

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meaning of those provisions, in which case the contracting authority shall send the report to the Ministry of Defence for onward transmission to the Commission.

(10) In this regulation “offer” includes a bid by one part of a contracting authority to provide services, to carry out work or works or to make goods available to another part of the contracting authority when the former part is invited by the latter part to compete with the offers sought from other persons.

Contract award notice

31.—(1) Subject to paragraphs (2) and (3), a contracting authority which has awarded a contract or concluded a framework agreement shall, not later than 48 days after the award or conclusion, send to the Official Journal a notice, in the form of the contract award notice in Annex IV to the Defence and Security Procurement directive as amended from time to time including the information therein specified.

(2) Any of the information specified in the form of the contract award notice in Annex IV to the Defence and Security Procurement directive as amended from time to time to be included in the contract award notice may be omitted in a particular case where to publish such information—

- (a) would impede law enforcement;
- (b) would otherwise be contrary to the public interest, in particular defence or security interests, or both;
- (c) would prejudice the legitimate commercial interest of any person; or
- (d) might prejudice fair competition between economic operators.

(3) A contracting authority shall not be required to send a contract award notice in accordance with paragraph (1) where it awards a contract under a framework agreement.

Information about contract award procedures

Award decision notice

32.—(1) Subject to paragraph (11), a contracting authority shall, as soon as possible after the decision has been made, inform the tenderers and candidates of its decision to—

- (a) award the contract, or
- (b) conclude the framework agreement,

and shall do so by notice in writing by the most rapid means of communication practicable.

(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 economic operator which is to receive the notice, and
 - (ii) the economic operator—
 - (aa) to be awarded the contract; or
 - (bb) to become a party to the framework agreement,and anything required by paragraph (8);
- (c) the name of the economic operator—
 - (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 33, 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

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(ii) the date before which the contracting authority will not, in conformity with regulation 33, enter into the contract or conclude the framework agreement.

(3) 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).

(4) Where the contract or framework agreement is permitted by these Regulations to be awarded or concluded without the prior publication of a contract notice, the contracting authority need not comply with paragraph (1).

(5) 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, the contracting authority need not comply with paragraph (1).

(6) Where a contracting authority awards a contract under a framework agreement, that contracting authority need not comply with paragraph (1).

Reasons to be given on request to unsuccessful economic operators

(7) Except to the extent that the contracting authority has already informed the economic operator (whether by notice under paragraph (1) or otherwise), and subject to paragraph (11), a contracting authority shall within 15 days of the date on which it receives a request in writing from any economic operator which was unsuccessful (whether in accordance with regulation 16(7), 16(8), 17(9), 17(10), 17(24), 17(25), 18(10), 18(11), 18(24), 18(25), 19(9) or 30)—

- (a) inform that economic operator of the reasons why it was unsuccessful; and
- (b) if the economic operator submitted an admissible tender, the contracting authority shall inform that economic operator of the characteristics and relative advantages of the successful tender and—
 - (i) the name of the economic operator to be awarded the contract; or
 - (ii) the names of the parties to the framework agreement.

(8) The reasons referred to in paragraphs (2)(b) and (7)(a) shall include—

- (a) any reason for the contracting authority’s decision that the economic operator did not meet the technical specifications—
 - (i) as specified in regulation 11(5) by an equivalent means; or
 - (ii) in terms of the performance or functional requirements in regulation 11(6) by an equivalent means; and
- (b) any reason for the contracting authority’s decision that the economic operator did not meet its requirements of security of information and security of supply as set out in accordance with regulations 37 and 38.

Abandonment or recommencement of procedure

(9) Subject to paragraph (11), a contracting authority shall as soon as possible after the decision has been made, inform any candidates and tenderers, of its decision to abandon or to recommence a contract award procedure in respect of which a contract notice has been published, in relation to—

- (a) the award of a contract; or
- (b) the conclusion of a framework agreement.

(10) A contracting authority which informs an economic operator of its decision in accordance with paragraph (9) shall—

- (a) include the reasons for the decision; and
- (b) provide the decision and reasons in writing if requested by the economic operator.

Grounds for withholding information

(11) A contracting authority may withhold any information to be provided in accordance with paragraph (1), (7) or (9) where the disclosure of such information—

- (a) would impede law enforcement;

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- (b) would otherwise be contrary to the public interest, in particular defence or security interests, or both;
- (c) would prejudice the legitimate commercial interests of any economic operator; or
- (d) might prejudice fair competition between economic operators.

Records and reports

(12) A contracting authority shall prepare a record in relation to each contract awarded by it or framework agreement concluded by it, specifying—

- (a) the name and address of the contracting authority;
- (b) the award procedure chosen;
- (c) the value of the consideration to be given under the contract or framework agreement and—
 - (i) the type of goods purchased or hired;
 - (ii) the work or works to be carried out; or
 - (iii) the services to be provided;
- (d) where offers were evaluated in accordance with regulation 30, the names of the economic operators which submitted those offers and where the contracting authority has used the restricted procedure or negotiated procedure, the reasons why those economic operators were selected;
- (e) the name of any economic operator—
 - (i) to which the contract was awarded, or
 - (ii) with which the framework agreement was concluded,and the reasons for having awarded the contract to, or concluded the framework agreement with that economic operator;
- (f) the names of the economic operators which were unsuccessful in the circumstances referred to in regulation 16(7), 16(8), 17(9), 17(10), 18(10), 18(11) or 30 and the reasons why they were unsuccessful;
- (g) if known to the contracting authority, the parts and proportion of the contract or framework agreement that the economic operator to which the contract has been awarded, or with which the framework agreement has been concluded, intends to sub-contract to another economic operator;
- (h) in the case of a contracting authority which used the negotiated procedure without the prior publication of a contract notice, which of the circumstances specified in regulation 15 constituted grounds for using that procedure;
- (i) in the case of a contracting authority which used the negotiated procedure without the prior publication of a contract notice, if relevant, justification for exceeding the time limits laid down in regulation 15(3);
- (j) if relevant, the reasons for the framework agreement lasting more than seven years;
- (k) in the case of a contracting authority which used the competitive dialogue procedure, details of the circumstances which constituted grounds for using that procedure in accordance with regulation 18(2); and
- (l) where a contracting authority has abandoned a contract award procedure or the conclusion of a framework agreement, the reasons why the contracting authority has decided not to award the contract or conclude the framework agreement as the case may be.

(13) A contracting authority shall keep appropriate information to document the progress of contract award procedures conducted by electronic means.

(14) If the Commission requests a report containing the information specified in paragraph (12), the contracting authority shall send a written report containing that information, or the main features of it, to the Office of Government Commerce for onward transmission to the Commission, except—

- (a) where the contracting authority is the Secretary of State for Defence, in which case the Ministry of Defence shall transmit the report to the Commission; or

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- (b) where the contracting authority is a contracting authority within the meaning of regulation 3(1)(w) of the Public Contracts Regulations 2006⁽⁵⁵⁾ or regulation 3(1)(aa) of the Public Contracts (Scotland) Regulations 2006⁽⁵⁶⁾ and the Secretary of State for Defence is “another contracting authority” within the meaning of those provisions, in which case the contracting authority shall send the report to the Ministry of Defence for onward transmission to the Commission.

Definitions

(15) For the purposes of this regulation—

- (a) “candidate” means an economic operator (other than a tenderer) which applied—
- (i) to be included amongst the economic operators to be selected to tender or to negotiate the contract, or
 - (ii) to be a party to the framework agreement,
- but does not include an economic operator which has been informed of the rejection of its application, and the reasons for it; and
- (b) “tenderer” means an economic operator which submitted an offer.

Standstill period

33.—(1) Where regulation 32(1) applies, the contracting authority must not enter into the contract or conclude the framework agreement before the end of the standstill period.

(2) Subject to paragraph (6), where the contracting authority sends a regulation 32(1) notice to all the relevant economic operators by facsimile or electronic means, the standstill period ends at midnight at the end of the 10th day after the relevant sending date.

(3) Subject to paragraph (6), where the contracting authority sends a regulation 32(1) notice to all the relevant economic operators only by other means, the standstill period ends at whichever of the following occurs first—

- (a) midnight at the end of the 15th day after the relevant sending date;
- (b) midnight at the end of 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 32(1) 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) Subject to paragraph (6), where the contracting authority sends a regulation 32(1) notice to one or more of the relevant economic operators by facsimile or electronic means and to the others by other means, the standstill period ends at whichever of the following two times occurs latest—

- (a) midnight at the end of the 10th day after the date on which the last notice is sent by facsimile or electronic means;
- (b) the time when whichever of the following occurs first—
 - (i) midnight at the end of the 15th day after the date on which the last notice is sent by other means;
 - (ii) midnight at the end of the 10th day after the date on which the last of the economic operators to receive a notice sent by any such other means receives it.

(6) Where the last day of the standstill period reckoned in accordance with paragraphs (2) to (5) is not a working day, the standstill period is extended to midnight at the end of the next working day.

(7) In this regulation—

“regulation 32(1) notice” means a notice given in accordance with regulation 32(1); and

⁽⁵⁵⁾ S.I. 2006/5.

⁽⁵⁶⁾ S.S.I. 2006/1.

“relevant economic operators” means economic operators to which regulation 32(1) requires information to be given.

PART 6

MATTERS RELATING TO A CONTRACT

Obligations relating to taxes, environmental protection, employment protection and working conditions

34.—(1) A contracting authority may include in the contract documents relating to a works contract or to a services contract information as to where a contractor or services provider may obtain information about the obligations relating to taxes, environmental protection, employment protection and working conditions which will apply to—

- (a) the work or works to be carried out under a works contract; or
- (b) the services to be provided under a services contract.

(2) A contracting authority which provides the information referred to in paragraph (1) shall request contractors or services providers to indicate that they have taken account of the obligations relating to those employment protection provisions and those working conditions in preparing their tender or in negotiating the contract.

Conditions for performance of contracts

35.—(1) A contracting authority may impose special conditions relating to the performance of a contract, provided that the special conditions are compatible with EU law and are indicated in the contract notice or contract documents, or both.

(2) The special conditions referred to in paragraph (1) may, in particular, concern sub-contracting or include the requirements of the contracting authority relating to the security of classified information and the security of supply in accordance with regulations 36, 37 and 38, or take environmental or social considerations into account.

Sub-contracting

36.—(1) Subject to paragraph (3), the successful economic operator is free to select its sub-contractors for all sub-contracts and, in particular, shall not be required to discriminate against potential sub-contractors on grounds of nationality.

(2) The contracting authority may ask the economic operator—

- (a) to indicate in its tender—
 - (i) any part of the contract it intends to sub-contract;
 - (ii) the details of any proposed sub-contractor; and
 - (iii) the subject matter of the proposed sub-contracts; and
- (b) to indicate any change occurring with respect to proposed sub-contracting before or during the execution of the contract.

(3) The contracting authority may oblige the successful economic operator to apply the provisions set out in Part 7 to all or certain sub-contracts which the successful economic operator intends to award to third parties.

(4) The contracting authority may reject the sub-contractors selected by—

- (a) the economic operator at the stage of the award procedure of the main contract, or
- (b) the successful economic operator during the performance of the main contract,

but such a rejection may only be based on criteria applied for the selection of the economic operators for the main contract.

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(5) Where a contracting authority rejects a sub-contractor in accordance with paragraph (4), it must produce a written justification to the economic operator or the successful economic operator setting out why it considers that the sub-contractor does not meet the criteria but may withhold any information where any of the grounds referred to in regulation 32(11)(a) to (d) would apply to the disclosure of such information.

(6) Where the contracting authority requires an economic operator to fulfil requirements in accordance with paragraph (2) or (3) or may reject a sub-contractor in accordance with paragraph (4), it shall set out the requirements or indicate the possibility of rejection in the contract notice.

(7) For the purposes of paragraph (3), the following shall not be considered to be third parties—

- (a) related undertakings;
- (b) groups of undertakings which have formed to obtain the contract, or undertakings related to them.

(8) For the purposes of paragraph (7), “related undertaking” means any undertaking over which the successful economic operator can exert a dominant influence, whether directly or indirectly, or any undertaking which can exert a dominant influence on the successful economic operator or which, as the successful economic operator, is subject to the dominant influence of another undertaking as a result of ownership, financial participation or the rules which govern it and a dominant influence shall be presumed when, directly or indirectly in relation to another undertaking, the dominant undertaking—

- (a) holds a majority of the other undertaking’s subscribed capital;
- (b) controls a majority of the votes attached to the shares issued by the other undertaking; or
- (c) is entitled to appoint more than half of the other undertaking’s administrative, management or supervisory bodies.

(9) The economic operator shall include a list of undertakings to which paragraph (7) applies in the tender and shall update the list following any change of relationship between the undertakings.

Security of information

37.—(1) Where a contract involves, requires or contains classified information, the contracting authority shall specify, in the contract notice or contract documents, or both, the measures and requirements necessary to ensure the security of that information at the requisite level.

(2) Where paragraph (1) applies, the contracting authority may require that the tender contain particulars including, but not limited to, the following—

- (a) a commitment from the economic operator and the sub-contractors already identified to appropriately safeguard the confidentiality of all classified information in their possession or coming to their notice throughout the duration of the contract and after the termination or conclusion of the contract;
- (b) a commitment from the economic operator to obtain the commitment referred to in sub-paragraph (a) from other sub-contractors to which it will sub-contract during the execution of the contract;
- (c) sufficient information on sub-contractors already identified to enable the contracting authority to determine that each of them possess the capabilities required to appropriately safeguard the confidentiality of the classified information to which they have access or which they are required to produce when carrying out their sub-contracting activities;
- (d) a commitment from the economic operator to provide the information referred to in sub-paragraph (c) on any new sub-contractor before awarding a sub-contract.

(3) The measures and requirements referred to in paragraph (2) shall comply with the security clearance provisions of the United Kingdom appropriate to the relevant protective marking or to any other security clearance considered by the Secretary of State to be equivalent.

Security of supply

38.—(1) The contracting authority shall specify, in the contract notice or contract documents, or both, its security of supply requirements.

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(2) Where paragraph (1) applies, the contracting authority may require that the tender contain particulars including, but not limited to, the following—

- (a) certification or documentation demonstrating to the satisfaction of the contracting authority that the economic operator will be able to honour its obligations regarding the export, transfer and transit of goods associated with the contract, including any supporting documentation received from the member State concerned;
- (b) an indication of any restriction on the contracting authority regarding disclosure, transfer or use of the products and services or any result of those products and services, which would result from export control or security arrangements;
- (c) certification or documentation demonstrating that the organisation and location of the economic operator's supply chain will allow it to comply with the requirements of the contracting authority concerning security of supply set out in the contract documents, and a commitment to ensure that possible changes in its supply chain during the execution of the contract will not adversely affect compliance with these requirements;
- (d) a commitment from the economic operator to establish or maintain, or both, the capacity required to meet additional needs required by the contracting authority as a result of a crisis, according to terms and conditions to be agreed;
- (e) any supporting documentation received from the economic operator's national authorities regarding the fulfilment of additional needs required by the contracting authority as a result of a crisis;
- (f) a commitment from the economic operator to carry out the maintenance, modernisation or adaptation of the goods covered by the contract;
- (g) a commitment from the economic operator to inform the contracting authority in due time of any change in its organisation, supply chain or industrial strategy that may affect its obligations to the contracting authority;
- (h) a commitment from the economic operator to provide the contracting authority, according to terms and conditions to be agreed, with all specific means necessary for the production of spare parts, components, assemblies and special testing equipment, including technical drawings, licences and instructions for use, in the event that it is no longer able to provide these goods.

(3) An economic operator may not be required to obtain a commitment from a member State that would prejudice that member State's freedom to apply, in accordance with international or EU law, its national export, transfer or transit licensing criteria in the circumstances prevailing at the time of such a licensing decision.

PART 7

RULES APPLICABLE TO SUB-CONTRACTING

CHAPTER 1

Sub-contracts awarded by economic operators which are not contracting authorities

Scope

39. When in accordance with regulation 36(3) this Part applies, an economic operator which is not a contracting authority shall apply the rules set out in regulations 41 to 44 when it awards sub-contracts to third parties.

Principles

40. When applying the rules set out in this Part, the economic operator shall act transparently and treat all potential sub-contractors in an equal and non-discriminatory way.

Thresholds and rules on advertising

41.—(1) When a successful economic operator which is not a contracting authority intends to award a sub-contract which has a value, excluding VAT, estimated not to be lower than the thresholds laid down in regulation 8, it shall make known its intention by way of a sub-contract notice.

(2) Sub-contract notices shall contain the information referred to in Annex V to the Defence and Security Procurement Directive and any other information deemed useful by the successful economic operator, if necessary with the approval of the contracting authority.

(3) Sub-contract notices shall be published in accordance with regulation 47(1)(b), and (3) and the successful economic operators shall not place a notice in any publication—

- (a) before the date on which the notice is despatched in accordance with regulation 47(1)(b); or
- (b) which contains any additional information to that contained in the notice despatched in accordance with regulation 47(1)(b).

(4) A sub-contract notice shall not be required when a sub-contract meets the conditions of regulation 42.

(5) The successful economic operator may fulfil the sub-contracting requirements in regulation 36(3) by awarding sub-contracts on the basis of a framework agreement concluded in accordance with the rules set out in regulations 40 and 43 and in paragraphs (1) to (4) of this regulation.

(6) Sub-contracts based on a framework agreement concluded in accordance with paragraph (5)—

- (a) shall be awarded within the limits of the terms laid down in the framework agreement and when awarding sub-contracts, neither the contracting authority nor the successful economic operator shall include in the sub-contract terms that are substantially amended from the terms laid down in that framework agreement; and
- (b) may only be awarded to economic operators that were originally party to the framework agreement.

(7) The term of a framework agreement concluded in accordance with paragraph (5) may not exceed seven years, except in exceptional circumstances determined by taking into account the expected service life of any delivered items, installations or systems, and the technical difficulties which a change of supplier may cause.

(8) A framework agreement concluded in accordance with paragraph (5) may not be used improperly or in such a way as to prevent, restrict or distort competition.

(9) For the award of sub-contracts which have a value, excluding VAT, estimated to be less than the thresholds laid down in regulation 8, successful economic operators shall apply the principles of the TFEU regarding transparency and competition.

(10) Regulation 8 shall apply to the calculation of the estimated value of sub-contracts.

Award of a sub-contract without publication of a sub-contract notice

42.—(1) A successful economic operator may award a sub-contract without publication of a sub-contract notice in the following circumstances—

- (a) in the case of a sub-contract—
 - (i) in the absence of tenders, suitable tenders or applications in response to the sub-contract notice issued by the successful economic operator using the procedure set out in regulation 41(1) to (3), but only if the original terms of the proposed sub-contract are not substantially altered in the new sub-contract award procedure;
 - (ii) when, for technical reasons, or for reasons connected with the protection of exclusive rights, the sub-contract may be awarded only to a particular sub-contractor;
 - (iii) where the publication of a sub-contract notice would be incompatible with the urgency resulting from a crisis;
 - (iv) when (but only if it is strictly necessary) for reasons of extreme urgency brought about by events unforeseeable by, and not attributable to, the successful economic operator, the requirement to publish a sub-contract notice cannot be met;

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- (b) in the case of a supply sub-contract—
 - (i) subject to paragraph (2), when the goods to be purchased or hired under the sub-contract are required by the successful economic operator as a partial replacement for, or in addition to, existing goods or an installation and when to obtain the goods from a supplier other than the supplier which supplied the existing goods or installation would oblige the successful economic operator to acquire goods having different technical characteristics which would result in—
 - (aa) incompatibility between the existing goods or the installation and the goods to be purchased or hired under the sub-contract; or
 - (bb) disproportionate technical difficulties in the operation and maintenance of the existing goods or the installation;
 - (ii) for the purchase or hire of goods quoted and purchased on a commodity market;
 - (iii) to take advantage of particularly advantageous terms for the purchase of goods in a closing down sale or in a sale brought about because a supplier is subject to a procedure referred to in regulation 22(4)(a), (b) or (c);
- (c) in the case of a service sub-contract or a supply sub-contract—
 - (i) for research and development services;
 - (ii) when the goods to be purchased or hired under the sub-contract are to be manufactured solely for the purpose of research or development but not when the goods are to be purchased or hired with the aim of ensuring profitability or to recover research and development costs;
- (d) in the case of a works sub-contract or a services sub-contract—
 - (i) subject to paragraph (4), when the successful economic operator wants the sub-contractor to carry out additional work or works or provide additional services which were not included in the project initially considered or in the original works sub-contract or services sub-contract but which through unforeseen circumstances have become necessary, and such work, works or services—
 - (aa) cannot for technical or economic reasons be carried out or provided separately from those under the original sub-contract without major inconvenience to the successful economic operator; or
 - (bb) can be carried out or provided separately from those under the original sub-contract but are strictly necessary to the later stages of the performance of that sub-contract; and
 - (ii) subject to paragraph (5), when a successful economic operator wants a sub-contractor which has entered into a works sub-contract or a services sub-contract with that successful economic operator to carry out a new work or works or provide new services which are a repetition of the work or works carried out or the services provided under the original sub-contract and which are in accordance with the project for the purpose of which the first sub-contract was entered into;
- (e) in the case of a sub-contract related to the provision of air and maritime transport services for the armed forces of a member State deployed or to be deployed abroad, when the successful economic operator has to procure such services from sub-contractors that guarantee the validity of their tenders only for such short periods that the requirement to publish the sub-contract notice cannot be met;
- (f) in the event of irregular tenders or the submission of tenders which are unacceptable under the conditions relating to the performance of a sub-contract or the criteria for qualitative selection prescribed by the contracting authority under regulation 43, but only if—
 - (i) the original terms of the proposed sub-contract are not substantially altered;
 - (ii) the successful economic operator includes in the new sub-contract award procedure all of, and only, those tenderers which satisfy all the criteria for the qualitative selection of sub-contracts and which, during the prior sub-contract award procedure, submitted a tender.

(2) A successful economic operator shall not award a sub-contract in accordance with paragraph (1)(b)(i) if the term of the proposed sub-contract, or the term of that sub-contract and of any other sub-contract entered into for the same purposes, is more than five years, unless there are exceptional circumstances which require that this period should be exceeded.

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(3) For the purposes of paragraphs (2) and (5)(c), exceptional circumstances shall be determined by taking into account the expected service life of any delivered items, installations or systems, and the technical difficulties which a change of sub-contractor may cause.

(4) A successful economic operator shall not award a sub-contract in accordance with paragraph (1)(d)(i), where the aggregate value of consideration to be given under the sub-contract for the additional work, works or services exceeds 50% of the value of the consideration payable under the original sub-contract.

(5) A successful economic operator shall not award a sub-contract in accordance with paragraph 1(d)(ii) unless—

- (a) the sub-contract notice relating to the original sub-contract stated that a works sub-contract or a services sub-contract for new work, works or services which would be a repetition of the work or works carried out or the services provided under the original sub-contract may be awarded in accordance with paragraph (1)(d)(ii);
- (b) in determining the estimated value of the original sub-contract for the purposes of regulations 8 and 41(1), the successful economic operator took into account the value of the consideration which it expected to be payable for the new work, works or services; and
- (c) the procedure for the award of the new sub-contract is commenced within five years of the original sub-contract being entered into, unless there are exceptional circumstances which require that the procedure for the award of the new sub-contract be commenced outside this period.

Criteria for qualitative selection of sub-contractors

43.—(1) In the sub-contract notice, the successful economic operator shall indicate the criteria for qualitative selection prescribed by the contracting authority, as well as any other criteria it will apply for the qualitative selection of sub-contractors.

(2) All the criteria for qualitative selection prescribed shall be objective, non-discriminatory and consistent with the criteria applied by the contracting authority for the selection of the economic operators for the main contract and the capabilities required must be directly related to the subject of the sub-contract, and the levels of ability required must be commensurate with it.

(3) The successful economic operator shall not be required to sub-contract if it proves to the satisfaction of the contracting authority that none of the sub-contractors participating in the competition or their proposed bids meet the criteria indicated in the sub-contract notice and thereby would prevent the successful economic operator from fulfilling the requirements set out in the main contract.

CHAPTER 2

Sub-contracts awarded by economic operators which are contracting authorities

44. Where an economic operator is a contracting authority, it shall comply with the provisions on main contracts laid down in Parts 1 to 8 when it awards sub-contracts.

PART 8

MISCELLANEOUS

Statistical and other reports

45.—(1) Subject to regulation 46, a contracting authority which is not the Secretary of State for Defence shall, not later than 31st July in each year, send to the Office of Government Commerce or, where paragraph (3) applies, to the Ministry of Defence a report specifying in relation to each contract awarded by it or framework agreement concluded by it during the reporting period—

- (a) whether the contract was a services contract, a supply contract or a works contract;

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- (b) whether the framework agreement was for the provision of services, for the purchase or hire of goods or for the carrying out of work or works;
 - (c) the value (estimated if necessary) of the consideration payable under the contract or framework agreement;
 - (d) whether the restricted procedure, the negotiated procedure or the competitive dialogue procedure was used;
 - (e) if the negotiated procedure was used without the prior publication of a contract notice, under which provision of regulation 15 that procedure was used;
 - (f) in the case of—
 - (i) a services contract or a framework agreement for the provision of services, the principal category of service provided or to be provided under the contract or framework agreement according to the nomenclature used in Schedule 2;
 - (ii) a supply contract or a framework agreement for the purchase or hire of goods, the type of goods purchased or hired or to be purchased or hired under the contract or framework agreement; and
 - (iii) a works contract or a framework agreement for the carrying out of works, the principal category of works carried out or to be carried out under the contract or framework agreement according to the nomenclature used in Schedule 1; and
 - (g) the nationality of any economic operator to which the contract was awarded or the framework agreement was concluded and the relevant State in which that economic operator is established.

(2) Subject to regulation 46, a contracting authority which is not the Secretary of State for Defence shall send to the Office of Government Commerce or, where paragraph (3) applies, to the Ministry of Defence a report containing such other information as the Office of Government Commerce or the Ministry of Defence, as appropriate, may from time to time require in respect of a particular contract or framework agreement (including a contract or framework agreement which is excluded from the application of these Regulations by regulation 6 or 8) for the purposes of providing the Commission with information.

(3) This paragraph applies where the contracting authority is a contracting authority within the meaning of regulation 3(1)(w) of the Public Contracts Regulations 2006⁽⁵⁷⁾ or regulation 3(1)(aa) of the Public Contracts (Scotland) Regulations 2006⁽⁵⁸⁾ and the Secretary of State for Defence is “another contracting authority” within the meaning of those provisions.

(4) In this regulation “the reporting period” means the year preceding the year in which the reports referred to in paragraph (1) are to be made.

Provision of reports

46.—(1) Where a contracting authority—

- (a) is not a Minister of the Crown or a government department, and
- (b) is required in accordance with these Regulations to send a report to the Office of Government Commerce,

it shall instead send the report to the Minister responsible for that contracting authority and that Minister shall be responsible for sending the report to the Office of Government Commerce.

(2) The Minister responsible for a contracting authority shall be the Minister of the Crown whose areas of responsibility are most closely connected with the functions of the contracting authority.

(3) Any questions as to which Minister of the Crown’s areas of responsibility are most closely connected with the functions of a contracting authority in accordance with paragraph (2) shall be determined by the Office of Government Commerce whose determination is final.

⁽⁵⁷⁾ S.I. 2006/5.

⁽⁵⁸⁾ S.S.I. 2006/1.

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(4) The requirement on a contracting authority to send any report in accordance with paragraph (1) to the Minister of the Crown responsible for that contracting authority shall be enforceable, on the application of the Minister responsible to the High Court or the Court of Session by specific implement, by mandatory order.

(5) In the application of this regulation to Northern Ireland references to the Minister shall include references to the head of a Northern Ireland department.

(6) In the application of this regulation to Scotland the reference in paragraph (1)(a) to a Minister of the Crown shall include a reference to a Scottish Minister and the requirement in paragraph (1) shall be to send the report to the Scottish Ministers or to the Minister responsible for that contracting authority and that Minister shall be responsible for sending the report to the Office of Government Commerce.

Publication of notices

47.—(1) Any notice required by these Regulations to be sent to the Official Journal shall be—

- (a) in the correct format and contain the necessary information specified by Annex IV to the Defence and Security Procurement Directive as amended from time to time and contain any other information which the contracting authority considers useful; and
- (b) subject to paragraph (2), sent to the Office for Official Publications of the European Union by electronic means in the format and in accordance with the procedures specified in paragraph (3) of Annex VI to the Defence and Security Procurement Directive or by other means.

(2) Where the contracting authority is applying the restricted procedure or the negotiated procedure and, for reasons of urgency, is applying the provisions of regulation 16(6), 16(19) or 17(8) the notice shall be sent by facsimile or by electronic means in the format and in accordance with the procedures referred to in paragraph (3) of Annex VI to the Defence and Security Procurement Directive.

(3) Where a notice is not sent by electronic means in accordance with paragraph (1)(b) or (2), it shall not contain more than 650 words.

(4) The contracting authority shall not place a notice in any publication—

- (a) before the date on which the notice is despatched in accordance with paragraph (1)(b) or (2); or
- (b) which contains any additional information to that contained in the notice despatched in accordance with paragraph (1)(b) or (2) or published on the contracting authority's buyer profile in accordance with regulation 13(1).

(5) The contracting authority shall refer in the notice to the date of despatch of that notice to the Official Journal or the date of its publication on its buyer profile where it publishes a notice in the circumstances referred to in paragraph (4).

(6) The contracting authority shall not publish a prior information notice on its buyer profile before the date on which notice of its publication in that form is despatched to the Commission in accordance with regulation 13(3) and the contracting authority shall refer to the date of that despatch on its buyer profile.

(7) The contracting authority shall retain evidence of the date of despatch to the Official Journal of each notice.

(8) Where the contracting authority is not required to send a contract notice to the Official Journal in respect of a particular contract or framework agreement it may nevertheless publish such a notice in accordance with the provisions of this regulation.

Means of communication

48.—(1) A contracting authority may specify than any communication referred to in these Regulations may be made—

- (a) by post;
- (b) by facsimile;
- (c) by electronic means in accordance with paragraphs (4) and (5);
- (d) by telephone in the circumstances referred to in paragraph (8); or

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- (e) by any combination of those means of communication.
- (2) The means of communication specified by a contracting authority shall be generally available and shall not restrict economic operators' access to the contract award procedures specified in these Regulations.
- (3) A contracting authority shall ensure that the specified means of communication and the storage of information enables—
- (a) the integrity of data provided by economic operators and the confidentiality of tenders and requests to be selected to tender for or to negotiate the contract to be maintained; and
 - (b) tenders and requests to be selected to tender for or to negotiate the contract to be opened only after the time limit for their submission has expired.
- (4) The equipment used for communications made by electronic means shall be—
- (a) non-discriminatory;
 - (b) generally available; and
 - (c) interoperable with information and communication technology products in general use.
- (5) Where a contracting authority requires that tenders and requests to be selected to tender for or to negotiate the contract are to be transmitted by electronic means, it shall ensure that—
- (a) details of the equipment including any software which is necessary for the electronic receipt of tenders and requests to be selected to tender for or to negotiate the contract, including encryption, are available to all interested economic operators; and
 - (b) the equipment for the electronic receipt of tenders and requests to be selected to tender for or to negotiate the contract complies with the requirements of paragraph (6).
- (6) The requirements referred to in paragraph (5)(b) are—
- (a) electronic signatures relating to tenders and requests to participate comply with national provisions adopted in accordance with Directive 1999/93/EC of the European Parliament and the Council of 13th December 1999 on a Community framework for electronic signatures;
 - (b) the exact time and date of the receipt of tenders and requests to participate are capable of being determined precisely;
 - (c) it may reasonably be considered that—
 - (i) data is not capable of being accessed before the time limits specified by the contracting authority; and
 - (ii) any such unauthorised access is clearly detectable;
 - (d) only authorised persons shall set or change the dates for opening data received from economic operators;
 - (e) access to any data shall be possible only through simultaneous action by authorised persons and only after the prescribed date; and
 - (f) data received and opened in accordance with these requirements must remain accessible only to authorised persons.
- (7) A contracting authority may require any documents, certificates and declarations referred to in regulations 22, 23, 24, 25 and 26 which do not exist in electronic format to be submitted before the time limit has expired for the receipt by it of tenders or requests to be selected to tender for or to negotiate the contract.
- (8) Requests to be selected to tender for or to negotiate the contract may be made—
- (a) in writing; or
 - (b) by telephone.
- (9) Where a request to be selected to tender for or to negotiate the contract is made by telephone, an economic operator shall confirm the request in writing before the deadline for receipt of such requests has expired.
- (10) Where a request to be selected to tender for or to negotiate the contract is made by facsimile, a contracting authority—

- (a) may require that the request be confirmed by post or by electronic means where this is necessary for the purposes of legal proof; and
- (b) shall specify any requirement for such confirmation and the time limit for sending it in the contract notice.

PART 9

Applications to the Court

Interpretation of Part 9

49.—(1) In this Part, except where the context otherwise requires—

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

“contract”, except in regulation 63, means a contract or a framework agreement;

“declaration of ineffectiveness” means a declaration made under regulation 58(2)(a) or 63(3);

“grounds for ineffectiveness” has the meaning given to it by regulation 59;

“proceedings” means court proceedings taken for the purposes of regulation 51; and

“standstill period”, and references to its end, have the same meaning as in regulation 33.

(2) In this Part, except in regulation 52(2), any reference to a period of time, however expressed, is to be interpreted subject to the requirement that, if the period would otherwise have ended on a day which is not a working day, the period is to end at the end of the next working day.

Duty owed to economic operators

50.—(1) This regulation applies to the obligation on a contracting authority to comply with—

(a) the provisions of these Regulations, other than regulations 15(2), 30(9), 32(12), 45 and 46(1); and

(b) any enforceable EU obligation in respect of a contract (other than one excluded from the application of these Regulations by regulation 6 or 8).

(2) That obligation is a duty owed to an economic operator.

Enforcement of duties through the Court

51.—(1) A breach of the duty owed in accordance with regulation 50 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 or in either the Sheriff Court or the Court of Session, and regulations 52 to 64 apply to such proceedings.

(3) Proceedings for that purpose must not be brought unless the economic operator bringing the proceedings has informed the contracting authority of the breach or the apprehended breach of the duty owed to it and of its intention to bring proceedings in respect of it.

General time limits for starting proceedings

52.—(1) This regulation limits the time within which proceedings may be started where the proceedings do not seek a declaration of ineffectiveness.

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Special time limits for seeking a declaration of ineffectiveness

53.—(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 other case, within six 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 the prior publication of a contract notice; and
- (b) the contract award notice includes justification of the decision of the contracting authority to award the contract without the prior publication of a contract notice.

(5) This paragraph applies where the contracting authority has informed the economic operator of—

- (a) the conclusion of the contract, and
- (b) a summary of the relevant reasons,

in which case the relevant date is the day after the date on which the economic operator was informed of the conclusion or, if later, was informed of a summary of the relevant reasons.

(6) In paragraph (5), “the relevant reasons” means the reasons which the economic operator would have been entitled to receive in response to a request under regulation 32(7).

(7) In this regulation, “contract award notice” means a notice in accordance with regulation 31(1).

(8) For the purposes of this regulation, proceedings are to be regarded as started only when the claim form is served, or in Scotland proceedings are served, in compliance with regulation 54(1).

Starting proceedings

54.—(1) Where proceedings are to be started, the economic operator must—

- (a) after filing the claim form, serve it on the contracting authority; or
- (b) in Scotland, serve the proceedings on the contracting authority.

(2) Paragraph (3) applies where proceedings are started—

- (a) seeking a declaration of ineffectiveness; or
- (b) alleging a breach of regulation 33, 55 or 56(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, or in Scotland the proceedings, to each person, other than the contracting authority, who is a party to the contract in question.

(4) The contracting authority must, as soon as practicable, comply with any request from the economic operator for any information that the economic operator may reasonably require for the purpose of complying with paragraph (3).

(5) In this regulation “serve” means serve in accordance with rules of court, and for the purposes of this regulation a claim form or, in Scotland, proceedings are deemed to be served on the day on which they are deemed by rules of court to be served.

Contract-making suspended by challenge to award decision

55.—(1) Where—

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- (a) proceedings are started in respect of a contracting authority's decision to award the contract, and
- (b) the contract has not been entered into,

the starting of the proceedings requires the contracting authority 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 56(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) For the purposes of paragraph (1), proceedings are to be regarded as started only when the claim form is, or in Scotland proceedings are, served in compliance with regulation 54(1).

(4) This regulation does not affect the obligations imposed by regulation 33.

Interim orders

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

- (a) bringing to an end the requirement imposed by regulation 55(1);
- (b) restoring or modifying that requirement;
- (c) suspending the procedure leading to the award of the contract in relation to which the breach of the duty owed in accordance with regulation 50 is alleged;
- (d) suspending the implementation of any decision or action taken by the contracting authority in the course of following such a procedure.

(2) When deciding whether to make an order under paragraph (1), the Court must take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and in particular defence or security interests.

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

- (a) the Court must also consider whether, if regulation 55(1) were not applicable, it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract; and
- (b) only if the Court considers that it would not be appropriate to make such an interim order may it make an order under paragraph (1)(a).

(4) If the Court considers that it would not be appropriate to make an interim order of the kind mentioned in paragraph (3)(a) in the absence of undertakings or conditions, it may require or impose such undertakings or conditions in relation to the requirement in regulation 55(1).

(5) The Court may not make an order under paragraph (1)(a) or (b) or (4) before the end of the standstill period.

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

Remedies where the contract has not been entered into

57.—(1) Paragraph (2) applies where—

- (a) the Court is satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with regulation 50; and
- (b) the contract has not yet been entered into.

(2) In those circumstances, the Court may do one or more of the following—

- (a) order the setting aside of the decision or action concerned;
- (b) order the contracting authority to amend any document;
- (c) award damages to an economic operator which has suffered loss or damage as a consequence of the breach.

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

Remedies where the contract has been entered into

58.—(1) Paragraph (2) applies if—

- (a) the Court is satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with regulation 50; 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 60 requires the Court not to do so;
- (b) must, where required by regulation 62, 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 sub-paragraphs (a) and (b);
- (d) must not order any other remedies.

(3) Paragraph (2)(d) is subject to regulation 63(3) and 63(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 61(3) or 62(14) (orders which supplement a declaration of ineffectiveness or a contract-shortening order).

Grounds for ineffectiveness

59.—(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 the prior publication of a contract notice in any case in which these Regulations required the prior publication of a contract notice.

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

- (a) the contracting authority considered the award of the contract without the prior publication of a contract notice to be permitted by these Regulations;
- (b) the contracting authority has had published in the Official Journal a voluntary transparency notice expressing its intention to enter into the contract; and
- (c) the contract has not been entered into before the end of a period of at least 10 days beginning with the day after the date on which the voluntary transparency notice was published in the Official Journal.

(4) In paragraph (3), “voluntary transparency notice” means a notice—

- (a) which contains the following information—
 - (i) the name and contact details of the contracting authority;
 - (ii) a description of the object of the contract;
 - (iii) a justification of the decision of the contracting authority to award the contract without the prior publication of a contract notice;
 - (iv) the name and contact details of the economic operator to be awarded the contract; and
 - (v) where appropriate, any other information which the contracting authority considers it useful to include; and
- (b) which, if [] as amended from time to time 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 the following apply—

- (a) the contract has been entered into in breach of any requirement imposed by—
 - (i) regulation 33 (the standstill period);
 - (ii) regulation 55 (contract-making suspended by challenge to award); or
 - (iii) regulation 56(1)(b) (interim order restoring or modifying a suspension originally imposed by regulation 55);
- (b) there has also been a breach of the duty owed to the economic operator in accordance with regulation 50 in respect of obligations other than those imposed by regulation 33 (the standstill period) and this Part;
- (c) the breach mentioned in sub-paragraph (a) has deprived the economic operator of the possibility of starting proceedings in respect of the breach mentioned in sub-paragraph (b), or pursuing them to a proper conclusion, before the contract was entered into; and
- (d) the breach mentioned in sub-paragraph (b) has affected the chances of the economic operator obtaining the contract.

The third ground

- (6) Subject to paragraph (7), the third ground applies where all the following apply—
 - (a) the contract is based on a framework agreement;
 - (b) the contract was awarded in breach of any requirement imposed by regulation 19(7)(b), (8), and (9) (award of particular contracts under framework agreements through re-opening of competition); and
 - (c) the estimated value of the contract exceeds the relevant threshold for the purposes of regulation 8.
- (7) The third ground does not apply if all the following apply—
 - (a) the contracting authority considered the award of the contract to be in accordance with the provisions mentioned in paragraph (6)(b);
 - (b) the contracting authority has, despite regulation 32(6), voluntarily complied with the requirements set out in regulation 32(1) to (3); 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

60.—(1) Subject to paragraph (5), where the Court is satisfied that any of the grounds for ineffectiveness applies, the Court must not make a declaration of ineffectiveness if—

- (a) the contracting authority or another party to the proceedings raises an issue under this regulation; and
- (b) the Court is satisfied that overriding reasons relating to a general interest, in particular, defence or security interests, or both, 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) The Court shall not make a declaration of ineffectiveness if the consequences of that ineffectiveness would seriously endanger the existence of a wider defence or security programme which is essential for the United Kingdom's security interests.

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(6) 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 62(3)(a).

The consequences of ineffectiveness

61.—(1) Where a declaration of ineffectiveness is made, the contract is to be considered to be prospectively, but not retrospectively, ineffective as from the time when the declaration is made and, accordingly, those obligations under the contract which at that time have yet to be performed are not to be performed.

(2) Paragraph (1) does not prevent the exercise of any power under which the orders or decisions of the Court may be stayed, but at the end of any period during which a declaration of ineffectiveness is stayed, the contract is then to be considered to have been ineffective as from the time when the declaration had been made.

(3) When making a declaration of ineffectiveness, or at any time after doing so, the Court may make any order that it thinks appropriate for addressing—

- (a) the implications of paragraph (1) or (2) for the particular circumstances of the case;
- (b) any consequential matters arising from the ineffectiveness.

(4) Such an order may, for example, address issues of restitution and compensation as between those parties to the contract who are parties to the proceedings so as to achieve an outcome which the Court considers to be just in all the circumstances.

(5) Paragraph (6) applies where the parties to the contract have, at any time before the declaration of ineffectiveness is made, agreed by contract any provisions for the purpose of regulating their mutual rights and obligations in the event of such a declaration being made.

(6) In those circumstances, the Court must not exercise its power to make an order under paragraph (3) in any way which is inconsistent with those provisions, unless and to the extent that the Court considers that those provisions are incompatible with the requirement in paragraph (1) or (2).

Penalties in addition to, or instead of, ineffectiveness

62.—(1) Where the Court makes a declaration of ineffectiveness, it must also order that the contracting authority pay a civil financial penalty of the amount specified in the order.

(2) Paragraph (3) applies where—

- (a) in proceedings for a declaration of ineffectiveness, the Court is satisfied that any of the grounds for ineffectiveness applies but does not make a declaration of ineffectiveness because regulation 60 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 33, 55, or 56(1)(b), and does not make a declaration of ineffectiveness (whether because none was sought or because the Court is not satisfied that any of the grounds for ineffectiveness applies).

(3) In those circumstances, the Court must order at least one, and may order both, of the following penalties—

- (a) that the duration of the contract be shortened to the extent specified in the order;
- (b) that the contracting authority pay a civil financial penalty of the amount specified in the order.

(4) When the Court is considering what order to make under paragraph (1) or (3), the overriding consideration is that the penalties must be effective, proportionate and dissuasive.

(5) In determining the appropriate order, the Court must take account of all the relevant factors, including—

- (a) the seriousness of the relevant breach of the duty owed in accordance with regulation 50;
- (b) the behaviour of the contracting authority;
- (c) where the order is to be made under paragraph (3), the extent to which the contract remains in force.

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(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 contracting authority is ordered by the High Court of England and Wales to pay a civil financial penalty under this regulation—

- (a) the Court's order must state that the penalty is payable to the Treasury;
- (b) the Court must send a copy of the order to the Office of Government Commerce or where—
 - (i) the contracting authority is the Secretary of State for Defence, or
 - (ii) the contracting authority is a contracting authority within the meaning of regulation 3(1)(w) of the Public Contracts Regulations 2006⁽⁵⁹⁾ or regulation 3(1)(aa) of the Public Contracts (Scotland) Regulations 2006⁽⁶⁰⁾ and the Secretary of State for Defence is “another contracting authority” within the meaning of those provisions,

the Court must send a copy of the order to the Ministry of Defence;

- (c) the contracting authority must pay the penalty to the Treasury through the Office of Government Commerce or where—
 - (i) the contracting authority is the Secretary of State for Defence, or
 - (ii) the contracting authority is a contracting authority within the meaning of regulation 3(1)(w) of the Public Contracts Regulations 2006⁽⁶¹⁾ or regulation 3(1)(aa) of the Public Contracts (Scotland) Regulations 2006⁽⁶²⁾ and the Secretary of State for Defence is “another contracting authority” within the meaning of those provisions,

the contracting authority must pay the penalty to the Treasury through the Ministry of Defence; and

- (d) the Treasury must, when they receive the penalty, pay it into the Consolidated Fund.

(8) Where a contracting authority is ordered by the Sheriff Court or the Court of Session to pay a civil financial penalty under this regulation—

- (a) the Court's order must state that the penalty is payable to the Scottish Ministers;
- (b) the Court must send an extract of the decree (without charge) to the Scottish Ministers;
- (c) the contracting authority must pay the penalty to the Scottish Ministers; and
- (d) the Scottish Ministers must, when they receive the penalty, pay it into the Scottish Consolidated Fund.

(9) Paragraph (8) does not apply to any civil financial penalty ordered to be paid by the Scottish Ministers or an office in the Scottish Administration which is not a ministerial office.

(10) An office in the Scottish Administration which is not a ministerial office shall pay any civil financial penalty ordered to be paid by them into the Scottish Consolidated Fund.

(11) In this regulation, “an office in the Scottish Administration which is not a ministerial office” is construed in accordance with section 126(8) of the Scotland Act 1998⁽⁶³⁾.

(12) Where a contracting authority is ordered by the High Court of Northern Ireland to pay a civil financial penalty under this regulation—

- (a) the Court's order must state that the penalty is payable to the Department of Finance and Personnel;
- (b) the Court must send a copy of the order to the Department;
- (c) the contracting authority must pay the penalty to the Department; and

⁽⁵⁹⁾ S.I. 2006/5.

⁽⁶⁰⁾ S.S.I. 2006/1.

⁽⁶¹⁾ S.I. 2006/5.

⁽⁶²⁾ S.S.I. 2006/1.

⁽⁶³⁾ 1998 c. 46.

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-
- (d) the Department must, when it receives the penalty, pay it into the Consolidated Fund of Northern Ireland.
- (13) Where a contracting authority is a non-Crown body—
- (a) any payment due under paragraph (7) may be enforced by the Treasury as a judgment debt due to them; and
 - (b) any payment due under paragraph (12) may be enforced by the Department of Finance and Personnel as a judgment debt due to it.

Contract shortening

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

(15) 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.

(16) Paragraph (17) 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 purposes of regulating their mutual rights and obligations in the event of such an order being made.

(17) In those circumstances, the Court must not exercise its power to make an order under paragraph (14) 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).

(18) In paragraph (3)(a), “duration of the contract” refers only to its prospective duration as from the time when the Court makes the order.

Ineffectiveness etc in relation to specific contracts based on a framework agreement

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

- (a) is based on the terms of a framework agreement; and
- (b) was entered into before a declaration of ineffectiveness (if any) was made in respect of the framework agreement.

(2) A specific contract is not to be considered to be ineffective merely because a declaration of ineffectiveness has been made in respect of the framework agreement.

(3) Where a declaration of ineffectiveness has been made in respect of the framework agreement, the Court must, subject to paragraph (5), make a separate declaration of ineffectiveness in respect of each relevant specific contract.

(4) For that purpose, a specific contract is relevant only if a claim for a declaration of ineffectiveness in respect of that specific contract has been made—

- (a) within the time limits mentioned in regulation 53 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 60 (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—

- (a) the third ground of ineffectiveness set out in regulation 59(6) and (7); or
- (b) the second ground of ineffectiveness set out in regulation 59(5), where—
 - (i) the relevant breach of the kind mentioned in regulation 59(5)(a) is entering into the specific contract in breach of regulation 55 or 56(1)(b); and

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- (ii) the relevant breach of the kind mentioned in regulation 59(5)(b) relates specifically to the award of the specific contract and the procedure relating to that award, rather than to the award of the framework agreement and the procedure relating to it.

(7) A declaration of ineffectiveness must not be made in respect of a specific contract otherwise than in accordance with paragraph (3) or on a basis mentioned in paragraph (6).

(8) Where a declaration of ineffectiveness is made in respect of a specific contract in accordance with paragraph (3)—

- (a) regulation 61 (the consequences of ineffectiveness) applies;
- (b) regulation 62(1) (requirement to impose a civil financial penalty) does not apply.

(9) Where the Court refrains, by virtue of paragraph (5), from making a declaration of ineffectiveness which would otherwise have been required by paragraph (3), the Court must, subject to paragraph (10), order that the duration of the contract be shortened to the extent specified in the order.

(10) The extent by which the duration of the contract is to be shortened under paragraph (9) is the maximum extent, if any, which the Court considers to be possible having regard to what is required by the overriding reasons mentioned in paragraph (5).

(11) In paragraphs (9) and (10), “duration of the contract” refers only to its prospective duration as from the time when the Court makes the order.

Injunctions against the Crown

64. In proceedings against the Crown, the Court has power to grant an injunction despite section 21 of the Crown Proceedings Act 1947⁽⁶⁴⁾.

PART 10

Consequential Amendments and Transitional Provisions

Consequential amendments, repeals and revocations

65. Subject to regulation 66, the instruments specified in Schedule 5 are amended in accordance with the provisions of that Schedule.

Transitional provisions

66.—(1) Nothing in these Regulations affects any contract award procedure commenced before 21st August 2011.

(2) Nothing in these Regulations affects the award of a specific contract based on a framework agreement where the framework agreement was concluded—

- (a) before 21st August 2011; or
- (b) on or after 21st August 2011 following a contract award procedure commenced before that date.

(3) Nothing in these Regulations affects the award of a specific contract under a dynamic purchasing system where the system was established —

- (a) before 21st August 2011; or
- (b) on or after 21st August 2011 following a contract award procedure commenced before that date.

(4) For the purposes of paragraphs (1), (2) and (3), a contract award procedure has been commenced before 21st August 2011 if, before that date—

⁽⁶⁴⁾ 1947 c. 44.

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- (a) a contract notice has been sent to the Official Journal in accordance with the Public Contracts Regulations 2006⁽⁶⁵⁾, the Utilities Contracts Regulations 2006⁽⁶⁶⁾, the Public Contracts (Scotland) Regulations 2006⁽⁶⁷⁾ or the Utilities Contracts (Scotland) Regulations 2006⁽⁶⁸⁾ where applicable in order to invite offers or requests to be selected to tender for or to negotiate in respect of a proposed public contract, contract, framework agreement or dynamic purchasing system;
- (b) the contracting authority has had published any form of advertisement seeking offers or expressions of interest in respect of a proposed public contract, contract, framework agreement or dynamic purchasing system; or
- (c) the contracting authority has contacted any economic operator in order to—
- (i) seek expressions of interest or offers in respect of a proposed public contract, contract, framework agreement or dynamic purchasing system; or
- (ii) respond to an unsolicited expression of interest or offer received from that economic operator in relation to a proposed public contract, contract, framework agreement or dynamic purchasing system.
- (5) In this regulation—
- (a) “contract notice”, “dynamic purchasing system” and “framework agreement” have the same meaning as in the Public Contracts Regulations 2006, the Utilities Contracts Regulations 2006, the Public Contracts (Scotland) Regulations 2006 or the Utilities Contracts (Scotland) Regulations 2006;
- (b) “public contract” has the same meaning as in the Public Contracts Regulations 2006 and the Public Contracts (Scotland) Regulations 2006; and
- (c) “contract” has the same meaning as in the Utilities Contracts Regulations 2006 and the Utilities Contracts (Scotland) Regulations 2006.

Name
Parliamentary Under Secretary of State
Ministry of Defence

Date

SCHEDULE 1

Regulation 2(1)

ACTIVITIES CONSTITUTING WORKS

<i>Section F</i>				<i>Construction</i>	
<i>Division</i>	<i>Group</i>	<i>Class</i>	<i>Subject</i>	<i>Notes</i>	<i>CPV Code</i>
45			Construction	Construction of new buildings and works, restoring and common repairs	45000000
	45.1		Site preparation		45100000

⁽⁶⁵⁾ S.I. 2006/5, amended by S.I. 2007/2157, 2007/3542, 2008/2256, 2008/2683, 2008/2848, 2009/1307 and 2009/2992.

⁽⁶⁶⁾ S.I. 2006/6, amended by S.I. 2007/2157, 2007/3542, 2008/2256, 2008/2848 and 2009/3100.

⁽⁶⁷⁾ S.S.I. 2006/1, amended by S.I. 2007/2157 and S.S.I. 2007/565, 2008/94, 2008/291, 2008/376, 2009/428 and 2009/439.

⁽⁶⁸⁾ S.S.I. 2006/2, amended by S.I. 2007/2157 and S.S.I. 2007/565, 2008/94, 2008/291, 2008/376, 2009/428 and 2009/439.

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45.11	Demolition and wrecking of buildings; earth moving	Demolition of buildings and other structures	45110000
		Clearing of building sites	
		Earth moving; excavation, landfill, levelling and grading of construction sites, trench digging, rock removal, blasting, etc.	
		Site preparation for mining; overburden removal and other development and preparation of mineral properties and sites	
45.2	Building of complete constructions or parts of constructions; civil engineering	Building site drainage	
		Drainage of agricultural or forestry land	
		Test drilling and boring	45120000
		Test drilling, test boring and core sampling for construction, geophysical, geological or similar purposes	45120000
45.21	General construction of buildings and civil engineering works	Construction of all types of buildings	45200000
		Except:	45210000
			45213316
			45220000
45.21	General construction of buildings and civil engineering works	Construction of civil engineering constructions	45231000
			45232000
		Bridges, including those for elevated highways, viaducts, tunnels and subways	

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		Long-distance pipelines, communication and power lines	
		Urban pipelines, urban communication and power lines	
		Ancillary urban works	
		Assembly and erection of prefabricated constructions on the site	
45.22	Erection of roof covering and frames	Erection of roofs	45261000
		Roof covering	
		Waterproofing	
45.23	Construction of highways, roads, airfields and sport facilities	Construction of highways, streets, roads, other vehicular and pedestrian ways	45212212 and DA03 45230000 Except: 45231000 45232000 45234115
		Construction of railways	
		Construction of airfield runways	
		Construction works, other than buildings, for stadiums, swimming pools, gymnasiums, tennis courts, golf courses and other sports installations	
		Painting of markings on road surfaces and car parks	
45.24	Construction of water	Construction of:	45240000

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	projects	waterways, harbour and river works, pleasure ports (marinas), locks, etc. dams and dykes dredging subsurface work	
45.25	Other construction work involving special trades	Construction activities specialising in one aspect common to different kinds of structures, requiring specialised skill or equipment Construction of foundations, including pile driving Water well drilling and construction, shaft sinking Erection of non-self-manufactured steel elements Steel bending Bricklaying and stone setting Scaffolds and work platform erecting and dismantling, including renting of scaffolds and work platforms Erection of chimneys and industrial ovens	45250000 45262000
45.3	Building installation		45300000

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45.31	Installation of electrical wiring and fittings	Installation in buildings or other construction projects of: electrical wiring and fittings telecommunications systems electrical heating systems residential antennas and aerials fire alarms burglar alarm systems lifts and escalators lightning conductors, etc.	45213316 45310000 Except: 45316000
45.32	Insulation work activities	Installation in buildings or other construction projects of thermal, sound or vibration insulation	45320000
45.33	Plumbing	Installation in buildings or other construction projects of: plumbing and sanitary equipment gas fittings	45330000

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		heating, ventilation, refrigeration or air- conditioning equipment and ducts	
		sprinkler systems	
	45.34	Other building installation	Installation of illumination and signalling systems for roads, railways, airports and harbours 45234115 45316000 45340000
		Installation in buildings or other construction projects of fittings and fixtures n.e.c.	
45.4		Building completion	45400000
	45.41	Plastering	Application in buildings or other construction projects of interior and exterior plaster or stucco, including related lathing materials 45410000
	45.42	Joinery installation	Installation of non-self- manufactured doors, windows, door and window frames, fitted kitchens, staircases, shop fittings and the like, of wood or other materials 45420000
		Interior completion such as ceilings, wooden wall coverings, movable partitions, etc.	
	45.43	Floor and wall covering	Laying, tiling, hanging or fitting in buildings or other construction projects of: 45430000
		ceramic, concrete or cut stone wall or floor tiles	
		parquet and other wood floor coverings, carpets and linoleum floor coverings, including of rubber or plastic	

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terrazzo, marble, granite or
slate floor or wall coverings

wallpaper

45.44	Painting and glazing	Interior and exterior painting of buildings	45440000
		Painting of civil engineering structures	
		Installation of glass, mirrors, etc.	
45.45	Other building completion	Installation of private swimming pools	45212212 and DA04 45450000
		Steam cleaning, sand blasting and similar activities for building exteriors	
		Other building completion and finishing work n.e.c.	
45.5	Renting of construction or demolition equipment with operator		45500000
45.50	Renting of construction or demolition equipment with operator		45500000

SCHEDULE 2

Regulation 2(2)

CATEGORIES OF SERVICES

Part A

Category Services

CPV Code

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1	Maintenance and repair services	50000000-5, from 50100000-6 to 50884000-5 (except from 50310000-1 to 50324200-4 and 50116510-9, 50190000-3, 50229000-6, 50243000-0) and from 51000000-9 to 51900000-1
2	Foreign military-aid-related services	75211300-1
3	Defence services, military defence services and civil defence services	75220000-4, 75221000-1, 75222000-8
4	Investigation and security services	From 79700000-1 to 79720000-7
5	Land transport services	60000000-8, from 60100000-9 to 60183000-4 (except 60160000-7, 60161000-4), and from 64120000-3 to 64121200-2
6	Air transport services of passengers and freight, except transport of mail	60400000-2, from 60410000-5 to 60424120-3 (except 60411000-2, 60421000-5), from 60440000-4 to 60445000-9 and 60500000-3
7	Transport of mail by land and by air	60160000-7, 60161000-4, 60411000-2, 60421000-5
8	Rail transport services	From 60200000-0 to 60220000-6
9	Water transport services	From 60600000-4 to 60653000-0, and from 63727000-1 to 63727200-3
10	Supporting and auxiliary transport services	From 63100000-0 to 63111000-0, from 63120000-6 to 63121100-4, 63122000-0, 63512000-1 and from 63520000-0 to 6370000-6
11	Telecommunication services	From 64200000-8 to 64228200-2, 72318000-7, and from 72700000-7 to 72720000-3
12	Financial services: Insurance services	From 66500000-5 to 66720000-3
13	Computer and related services	From 50310000-1 to 50324200-4, from 72000000-5 to 72920000-5 (except 72318000-7 and from 72700000-7 to 72720000-3), 79342410-4, 9342410-4
14	Research and development services, where the benefits accrue exclusively to the contracting authority for its own use in the conduct of its own affairs and the services are to be wholly paid for by the contracting authority, and evaluation tests	From 73000000-2 to 73436000-7

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15	Accounting, auditing and bookkeeping services	From 79210000-9 to 79212500-8
16	Management consulting services, but not arbitration and conciliation services, and related services	From 73200000-4 to 73220000-0, from 79400000-8 to 79421200-3 and 79342000-3, 79342100-4, 79342300-6, 79342320-2, 79342321-9, 79910000-6, 79991000-7 and 98362000-8
17	Architectural services: engineering services and integrated engineering services; urban planning and landscape engineering services; related scientific and technical consulting services; technical testing and analysis services	From 71000000-8 to 71900000-7 (except 71550000-8) and 79994000-8
18	Building-cleaning services and property management services	From 70300000-4 to 70340000-6 and from 90900000-6 to 90924000-0
19	Sewage and refuse disposal services; sanitation and similar services	From 90400000-1 to 90743200-9 (except 90712200-3), from 90910000-9 to 90920000-2 and 50190000-3, 50229000-6, 50243000-0
20	Training and simulation services in the fields of defence and security	80330000-6, 80600000-0, 80610000-3, 80620000-6, 80630000-9, 80640000-2, 80650000-5, 80660000-8

Part B

<i>Category</i>	<i>Services</i>	<i>CPV Code</i>
21	Hotel and restaurant services	From 55100000-1 to 55524000-9 and from 98340000-8 to 98341100-6
22	Supporting and auxiliary transport services	From 63000000-9 to 63734000-3 (except 63711200-8, 63712700-0, 63712710-3), from 63727000-1 to 63727200-3 and 98361000-1
23	Legal services	From 79100000-5 to 79140000-7
24	Personnel placement and supply services but not employment contracts	From 79600000-0 to 79635000-4 (except 79611000-0, 79632000-3, 79633000-0) and from 98500000-8 to 98514000-9
25	Health and social services	79611000-0 and from 85000000-9 to 85323000-9 (except 85321000-5, 85322000-2)
26	Other services	

SCHEDULE 3

Ref

EXTENSION TO NON-MEMBER STATES

SCHEDULE 4

Regulation 22(4)(k)

PROFESSIONAL OR TRADE REGISTERS

Services Contracts

67. In relation to procedures for the award of a services contract, the following are the appropriate professional or trade registers for the purposes of regulation 22(4)(j)—

- in Austria, the Firmenbuch, the Gewerberegister or the Mitgliederverzeichnisse der Landeskammern;
- in Belgium, the Registre du Commerce/Handelsregister and the Ordres Professionels/Beroepsorden;
- in Bulgaria, the Търговски регистър;
- in the Czech Republic, the obchodní rejstřík;
- in Denmark, the Erhvervs- og Selskabsstyrelsen;
- in Estonia, the Registrate ja Infosüsteemide Keskus;
- in Finland, the Kaupparekisteri and Handelsregistret;
- in France, the Registre du commerce et des sociétés and the Répertoire des métiers;
- in Germany, the Handelsregister, the Handwerksrolle, the Vereinsregister, Partnerschaftsregister and the Mitgliedsverzeichnisse der Berufskammern der Ländern;
- in Hungary, the Cégnylvántartás, the egyéni vállalkozók jegyzői nyilvántartása, or a szakmai kamarák nyilvántartása;
- in Iceland, the Firmaskrá or Hlutafélagaskrá;
- in Italy, the Registro della Camera di commercio, industria, agricoltura e artigianato, the Registro delle commissioni provinciali per l'artigianato or the Consiglio nazionale degli ordini professionali;
- in Latvia, the Uzņēmumu reģistrs (Enterprise Register);
- in Lithuania, the Juridinių asmenų registras;
- in Luxembourg, the Registre aux firmes and the Rôle de la Chambre des métiers;
- in the Netherlands, the Handelsregister;
- in Norway, the Foretaksregisteret;
- in Poland, Krajowy Rejestr Sądowy (National Court Registry);
- in Portugal, the Registro Nacional das Pessoas Colectivas;
- in Romania, the Registrul Comerțului;
- in Slovakia, the Obchodný register;
- in Slovenia, the Sodni register and the obrtni register;
- in Spain, the Registro Oficial de Licitadores y Empresas Clasificadas del Estado; and
- in Sweden, the aktiebolags-, handels- eller föreningsregistren.

Works Contracts

68. In relation to procedures for the award of a works contract the following are the appropriate professional or trade registers for the purposes of regulation 22(4)(j)—

- in Austria, the Firmenbuch, the Gewerberegister or the Mitgliederverzeichnisse der Landeskammern;
- in Belgium, the Registre du Commerce/Handelsregister;
- in Bulgaria, the Търговски регистър;
- in the Czech Republic, the obchodní rejstřík;
- in Denmark, the Erhvervs- og Selskabsstyrelsen;
- in Estonia, the Registrate ja Infosüsteemide Keskus;
- in Finland, the Kaupparekisteri/Handelsregistret;
- in France, the Registre du commerce et des sociétés and the Répertoire des métiers;
- in Germany, the Handelsregister and the Handwerksrolle;
- in Greece, the registrar of contractors' enterprises (Μητρώο Εργοληπτικών Επιχειρήσεων) of the Ministry for Environment, Town and Country Planning and Public Works (ΨΤΙΕΞΩΔΕ);
- in Hungary, the Cégnylvántartás or the egyéni vállalkozók jegyzői nyilvántartása;
- in Iceland, the Firmaskrá;
- in Italy, the Registro della Camera di commercio, industria, agricoltura e artigianato;
- in Latvia, the Uzņēmumu reģistrs (Enterprise Register);
- in Lithuania, the Juridinių asmenų registras;
- in Luxembourg, the Registre aux firmes and the Rôle de la Chambre des métiers;
- in the Netherlands, the Handelsregister;
- in Norway, the Foretaksregisteret;
- in Poland, Krajowy Rejestr Sądowy (National Court Registry);
- in Portugal, the Instituto da Construção e do Imobiliário (INCI);
- in Romania, the Registrul Comerțului;
- in Slovakia, the Obchodný register;
- in Slovenia, the Sodni register and the obrtni register;
- in Spain, the Registro Oficial de Licitadores y Empresas Clasificadas del Estado; and
- in Sweden, the aktiebolags-, handels- eller föreningsregistren.

Supply Contracts

69. In relation to procedures for the award of a supply contract the following are the appropriate professional or trade registers for the purposes of regulation 22(4)(j)—

- in Austria, the Firmenbuch, the Gewerberegister or the Mitgliederverzeichnisse der Landeskammern;
- in Belgium, the Registre du Commerce/Handelsregister;
- in Bulgaria, the Търговски регистър;
- in the Czech Republic, the obchodní rejstřík;
- in Denmark, the Erhvervs- og Selskabsstyrelsen;
- in Estonia, the Registrate ja Infosüsteemide Keskus;
- in Finland, the Kaupparekisteri and Handelsregistret;
- in Germany, the Handelsregister and Handwerksrolle;

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in Greece, the Βιοτεχνικό ή Εμπορικό ή Βιομηχανικό Επιμελητήριο and the Μητρώο Κατασκευαστών Αμυντικού Υλικού;

in Hungary, the Cégnylvántartás, the egyéni vállalkozók jegyzői nyilvántartása;

in Iceland, the Firmaskrá;

in Italy, the Registro della Camera di commercio, industria, agricoltura e artigianato and the Registro delle Commissioni provinciali per l'artigianato;

in Latvia, the Uzņēmumu reģistrs (Enterprise Register);

in Lithuania, the Juridinių asmenų registras;

in Luxembourg, the Registre aux firmes and the Rôle de la Chambre des métiers;

in Norway, the Foretaksregisteret;

in the Netherlands, the Handelsregister;

in Poland, Krajowy Rejestr Sądowy (National Court Registry);

in Portugal, the Registro Nacional das Pessoas Colectivas;

in Romania, the Registrul Comerțului;

in Slovakia, the Obchodný register;

in Slovenia, the Sodni register and the obrtni register;

in Spain, the Registro Mercantil; and

in Sweden, the aktiebolags-, handels- eller föreningsregistren.

SCHEDULE 5

Regulation 65

CONSEQUENTIAL AMENDMENTS, REPEALS AND REVOCATIONS

Public Contracts Regulations 2006

70.—(1) Regulation 6 of the Public Contracts Regulations 2006⁽⁶⁹⁾ shall be amended as follows.

(2) After paragraph (2) there shall be inserted—

“(3) These Regulations do not apply to the seeking of offers in relation to a proposed public contract, framework agreement or dynamic purchasing system if—

- (a) those offers are sought in relation to a contract or a framework agreement to which the Defence and Security Public Contract Regulations 2011 apply; or
- (b) the application of the Defence and Security Public Contract Regulations 2011 to the contract or framework agreement is excluded by regulation 8 (thresholds) or 6 (general exclusions) of those Regulations.”

Public Contracts (Scotland) Regulations 2006

71.—(1) Regulation 6 of the Public Contracts (Scotland) Regulations 2006⁽⁷⁰⁾ shall be amended as follows.

(2) After paragraph (2) there shall be inserted—

“(3) These Regulations do not apply to the seeking of offers in relation to a proposed public contract, framework agreement or dynamic purchasing system if—

- (a) those offers are sought in relation to a contract or a framework agreement to which the Defence and Security Public Contract Regulations 2011 apply; or

⁽⁶⁹⁾ S.I. 2006/5.

⁽⁷⁰⁾ S.S.I. 2006/1.

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- (b) the application of the Defence and Security Public Contract Regulations 2011 to the contract or framework agreement is excluded by regulation 8 (thresholds) or 6 (general exclusions) of those Regulations.”

Utilities Contracts Regulations 2006

72.—(1) Regulation 6 of the Utilities Contracts Regulations 2006⁽⁷¹⁾ shall be amended as follows.

(2) The word “or” at the end of sub-paragraph (n)(ii) shall be deleted.

(3) For “.” at the end of sub-paragraph (o) there shall be substituted “; or”.

(4) After sub-paragraph (o) there shall be inserted—

“(p) if—

- (i) those offers are sought in relation to a contract or a framework agreement to which the Defence and Security Public Contracts Regulations 2011 apply; or
- (ii) the application of the Defence and Security Public Contracts Regulations 2011 to the contract or framework agreement is excluded by regulation 8 (thresholds) or 6 (general exclusions) of those Regulations.”

Utilities Contracts (Scotland) Regulations 2006

73.—(1) Regulation 6 of the Utilities Contracts (Scotland) Regulations 2006⁽⁷²⁾ shall be amended as follows.

(2) The word “or” at the end of sub-paragraph (n)(ii) shall be deleted.

(3) For “.” at the end of sub-paragraph (o) there shall be substituted “; or”.

(4) After sub-paragraph (o) there shall be inserted—

“(p) if—

- (i) those offers are sought in relation to a contract or a framework agreement to which the Defence and Security Public Contracts Regulations 2011 apply; or
- (ii) the application of the Defence and Security Public Contracts Regulations 2011 to the contract or framework agreement is excluded by regulation 8 (thresholds) or 6 (general exclusions) of those Regulations.”

Quality Contracts Schemes (Tendering Requirements) (England) Regulations 2009

74.—(1) Regulation 9 of the Quality Contracts Schemes (Tendering Requirements) (England) Regulations 2009⁽⁷³⁾ shall be amended as follows.

(2) After the words “the Public Contracts Regulations 2006” there shall be inserted “,” and the word “or” shall be deleted.

(3) After the words “the Utilities Contracts Regulations 2006” there shall be inserted “or the Defence and Security Public Contracts Regulations 2011”.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement Directive 2009/81/EC of the European Parliament and Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts in the field of defence and security (OJ L 216, 20.8.2009, p.76-136).

These Regulations specify the procedures to be followed in relation to the award of such contracts by public bodies called contracting authorities and by utilities.

⁽⁷¹⁾ S.I. 2006/6. Regulation 6 is amended by regulation 3(a) of S.I. 2008/2848.

⁽⁷²⁾ S.S.I. 2006/2. Regulation 6 is amended by regulation 1(1) of S.S.I. 2008/376.

⁽⁷³⁾ S.I. 2009/3244.

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These Regulations also provide remedies for breaches of these Regulations.

A full regulatory impact assessment of the effect that this instrument will have on the costs of business has been prepared and placed in the library of each House of Parliament. Copies may be obtained from [the website of the Ministry of Defence at [...]].

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