
STATUTORY INSTRUMENTS

1993 No. 2810

The Education and Libraries (Northern Ireland) Order 1993

PART II
COMPETITION

Interpretation

Works contract and functional work

3. In this Part—

“works contract” means a contract constituting or including an agreement which provides for the carrying out of work by a board; and

“functional work” means—

- (a) work carried out by a board, other than work carried out under a works contract; and
- (b) work which is carried out otherwise than by a board but which is dependent upon, or incidental or preparatory to, other work which, by virtue of paragraph (a), is functional work in relation to that board;

and work carried out as mentioned in paragraph (b) shall be treated as carried out by the board.

Defined activities

4.—(1) Subject to the following provisions of this Article, each of the following is a defined activity for the purposes of this Part—

- (a) cleaning of buildings;
- (b) catering;
- (c) maintenance of ground; and
- (d) repair and maintenance of vehicles;

and Schedule 1 applies for the purpose of interpreting the preceding provisions of this paragraph.

(2) The Department may by order subject to affirmative resolution provide for an activity to be a defined activity by adding a sub-paragraph to those for the time being appearing in paragraph (1) or by modifying any provision of Schedule 1 which for the time being excludes anything from the activities falling within any of those sub-paragraphs.

(3) Before making an order under paragraph (2), the Department shall consult the boards.

(4) Where work would (apart from this paragraph) fall within more than one defined activity it shall be treated as falling only within such one of them as the board carrying out the work decides.

(5) Work which is carried out by a board through an employee and which would (apart from this paragraph) fall within a defined activity shall not do so if it is incidental to the greater part of the work he is employed to do and the greater part does not constitute a defined activity.

(6) If a board carries out work which (apart from this paragraph) would not fall within a defined activity, and which in the opinion of the board cannot be carried out efficiently separately from a particular defined activity, the work shall (if the board so decides) be treated as falling within that defined activity.

(7) Work which would (apart from this paragraph) fall within a defined activity shall not do so if it is calculated to avert, alleviate or eradicate the effects or potential effects of an emergency or disaster (actual or potential) involving or likely to involve danger to life or health or serious damage to or destruction of property.

(8) The Department may provide by order subject to negative resolution that any activity specified in the order, if carried out by a board or boards so specified, shall not be treated as a defined activity so long as conditions so specified are fulfilled.

Works contracts: restrictions

Works contracts: restrictions

5.—(1) If a board proposes to enter into a works contract with another person (the other party) and under the contract the board is to carry out work falling within a defined activity, the board may not enter into the contract unless—

- (a) the first or second alternative of the first condition is fulfilled; and
 - (b) the second condition is fulfilled.
- (2) The first alternative of the first condition is that—
- (a) the contract is made by acceptance of the board's offer to carry out the work;
 - (b) the board made the offer in response to an invitation by the other party to submit such offers; and
 - (c) the invitation was made to at least 3 other persons who are willing to carry out work of the kind concerned, and who are not boards or include at least 3 persons who are not boards.
- (3) Regulations may vary—
- (a) the number of persons to whom an invitation must be made under paragraph (2)(c); and
 - (b) the minimum number of those persons who are not to be boards.
- (4) The second alternative of the first condition is that before entering into the contract the other party published, in at least 2 newspapers circulating in the locality in which the work is to be carried out and at least one publication circulating among persons who carry out work of the kind concerned, a notice inviting persons to submit offers to carry out the work.
- (5) The second condition is that the other party, in entering into the contract and in doing anything else (whether or not required by this Part) in connection with the contract before entering into it, did not act in a manner having the effect or intended or likely to have the effect of restricting, distorting or preventing competition.
- (6) Anything which (apart from this paragraph) would amount to a failure to fulfil the first or second alternative of the first condition, or the second condition, shall not do so unless the board has become aware of the failure before entering into the contract.
- (7) This Article applies where it is proposed to enter into the works contract at any time after the expiration of 5 months from the day on which this Order is made.
- (8) Without prejudice to section 19(1)(a)(ii) of the Interpretation Act (Northern Ireland) 1954(1), a person entering into a works contract with a board shall not be bound to inquire whether this

Article applies to the contract and, if so, whether this Article has been complied with, and any works contract entered into by a board, if otherwise valid, shall, notwithstanding that this Article applies to the contract and has not been complied with, have full force and effect.

Functional work: restrictions

Functional work: restrictions

6.—(1) A board may not carry out functional work falling within a defined activity unless each of the 6 conditions is fulfilled.

(2) The conditions mentioned in paragraph (1) are those set out in Article 7, which shall have effect subject to Article 8.

(3) This Article applies only if the work falls within such a defined activity, is of such a description, is proposed to be carried out by such board or boards, and is proposed to be carried out on or after such date, as may be specified by regulations; and regulations may describe work by reference to a specified proportion of work of a particular description.

(4) Regulations may provide that where a board proposes to carry out functional work which falls within a defined activity specified in the regulations (whether or not by a virtue of Article 4(4) or (6)) and to which this Article would not otherwise apply, it shall (if the board so decides) be treated as work to which this Article applies.

(5) This Article applies even if the work forms part of work begun before any date specified in the regulations, but references in this Article and the following provisions of this Part to the work do not include references to any work carried out before such date.

The conditions

7.—(1) The first condition is that, before carrying out the work, the board published, in at least 2 newspapers circulating in the locality in which the work is to be carried out and at least one publication circulating among persons who carry out work of the kind concerned, a notice containing—

- (a) a brief description of the work;
- (b) a statement that during a period specified in the notice any person may inspect a detailed specification of the work free of charge at a place and time specified in the notice;
- (c) a statement that during that period any person will be supplied with a copy of the detailed specification on request and on payment of such charge as is specified in the notice;
- (d) a statement that any person who may wish to carry out the work should notify the board of that fact within a period specified in the notice; and
- (e) a statement that the board intends to make, in accordance with the third condition, an invitation to carry out the work.

(2) The second condition is that—

- (a) the periods, place, time and charge specified in the notice are reasonable;
- (b) before carrying out the work, the board made a detailed specification of the work available for inspection, and copies of it available for supply, in accordance with the notice; and
- (c) the detailed specification includes a statement of the period during which the work is to be carried out.

(3) The third condition is that, if any person notified the board in accordance with the statement under paragraph (1)(d), the board made an invitation to carry out the work in accordance with the following rules—

- (a) the invitation was made by the board before carrying out the work, and not less than 3 nor more than 6 months after complying with the first condition;
 - (b) if more than 3 persons who are not boards notified the board, at least 3 of them were invited;
 - (c) if less than 4 persons who are not boards notified the board, each of them was invited;
 - (d) if another board or boards notified the board, such one or more (if any) of them as the board decided was invited.
- (4) Regulations may amend sub-paragraphs (b) and (c) of paragraph (3) so as to vary the number of persons who are not boards who must be invited to carry out work in particular circumstances.
- (5) The fourth condition is that before carrying out the work the board, through its direct labour organisation or a similar organisation, prepared a written bid indicating a wish to carry out the work and the bid was prepared in accordance with the following rules—
- (a) if the board would, assuming it were an independent contractor, charge for carrying out the work, the bid must provide for an item to be credited to any account kept (or to be kept) by the board as regards the work under Article 9;
 - (b) if the board would, assuming it were an independent contractor, pay for the right to carry out the work, the bid must provide for an item to be debited to any such account;
 - (c) in the case of an item to be credited, the bid must state either what the board intends as its maximum amount or the method by which it intends to calculate its maximum amount;
 - (d) in the case of an item to be debited, the bid must state either what the board intends as its minimum amount or the method by which it intends to calculate its minimum amount; and
 - (e) a statement mentioned in sub-paragraph (c) or (d) may include provision for any intended amount or method to vary with changes in circumstances.
- (6) The fifth condition is that the board, in reaching the decision that it should carry out the work and in doing anything else (whether or not required by this Part) in connection with the work before reaching the decision, did not act in a manner having the effect or intended or likely to have the effect of restricting, distorting or preventing competition.
- (7) The sixth condition is that in carrying out the work the board complied with the detailed specification of it mentioned in paragraphs (1) and (2).

The conditions: further provisions

- 8.—**(1) Regulations may provide that the second condition shall not be treated as fulfilled if the period stated by virtue of Article 7(2)(c)—
- (a) exceeds a period specified in the regulations; or
 - (b) is less than another period so specified.
- (2) Regulations may provide that the third condition shall not be treated as fulfilled unless—
- (a) the contents of any invitation included prescribed matters (which may relate to the time allowed for responding, the method of responding, or otherwise); and
 - (b) if any response was made to any invitation, before carrying out the work the board complied with prescribed requirements as to responses (which may include requirements to disregard certain responses, requirements about the keeping or opening of responses, or otherwise).
- (3) Regulations may provide that the fourth condition shall not be treated as fulfilled unless before carrying out the work the board complied with prescribed requirements as to the bid (which may include requirements about the preparation, keeping or opening of the bid, or otherwise).
- (4) Regulations may provide that the fifth condition shall not be treated as fulfilled unless—

- (a) in accordance with prescribed requirements there is prepared and certified a document which appraises and fulfils such other conditions as may be prescribed with respect to responses falling within paragraph (2) and the bid referred to in paragraph (3); and
- (b) at such time or times (prior to reaching the decision referred to in Article 7(6)) as may be prescribed, copies of that document are provided or made available in accordance with any prescribed requirements.

(5) Where any document is provided or made available in accordance with the requirements of regulations under paragraph (4), the publication thereby of any defamatory matter in the document shall be privileged unless the publication is proved to be made with malice.

Accounts, reports and information

Accounts to be kept

9.—(1) This Article applies where a board carries out, in the financial year beginning in 1993 or in a subsequent financial year, work which falls within a defined activity and fulfils the condition that—

- (a) it is carried out under a works contract to which Article 5 applies; or
- (b) Article 6 applies to it.

(2) For each financial year in which the work is carried out, the board shall keep an account as regards all work which falls within that activity, is carried out by it in that year and fulfils that condition.

(3) Where any work falling within the activity is carried out under a works contract, the board shall credit to the account kept under this Article as regards the activity for the financial year in which the work is carried out such an amount as is specified in the contract, or ascertained under it, as the price for carrying out the work in that year.

(4) Where any work falling within the activity is functional work, the board shall enter, in the account kept under this Article as regards the activity for the financial year in which the work is carried out, such item as is necessary to carry out any intention expressed by the board in relation to the work in any bid prepared under Article 7(5).

(5) The Department may specify—

- (a) items which are to be entered in accounts kept under this Article (in addition to items to be entered by virtue of paragraphs (3) and (4)); and
- (b) the method of determining the amount of any item to be entered by virtue of the specification.

(6) No item may be credited to an account kept under this Article except an item required to be credited by paragraph (3) or (4) or by virtue of a specification under paragraph (5).

Financial objectives to be met

10.—(1) This Article applies where a board carries out, in the financial year beginning in 1993 or in a subsequent financial year, work which falls within a defined activity and fulfils the condition that—

- (a) it is carried out under a works contract to which Article 5 applies; or
- (b) Article 6 applies to it.

(2) The board shall secure that such financial objective as the Department may specify for the year concerned is met by—

- (a) the revenue for all work which falls within that activity, is carried out by the board in that year and fulfils that condition; or
 - (b) that revenue, adjusted by making such additions or subtractions (or both) as may be required by the specification.
- (3) The reference in paragraph (2) to the revenue for the work concerned is to the aggregate of the items credited to the account kept under Article 9 as regards the work.
- (4) A specification under this Article may define the financial objective concerned by reference to such factors as the Department thinks fit.

Report for financial year

11.—(1) This Article applies where a board carries out, in the financial year beginning in 1993 or in a subsequent financial year, work which falls within a defined activity and fulfils the condition that—

- (a) it is carried out under a works contract to which Article 5 applies; or
 - (b) Article 6 applies to it.
- (2) The board shall prepare a report for the financial year concerned, containing as regards all work which falls within that activity, is carried out by the board in that year and fulfils that condition—
- (a) a summary of the account kept for that year under Article 9 as regards the work;
 - (b) a statement showing whether the requirement under Article 10 has been fulfilled for that year as regards the work;
 - (c) a statement identifying such of the work (if any) as falls only within the activity by virtue of a decision under Article 4(4);
 - (d) a statement identifying such of the work (if any) as falls within the activity by virtue of a decision under Article 4(6); and
 - (e) a statement identifying such of the work (if any) as is work to which Article 6 applies by virtue of a decision under Article 6(4).
- (3) The summary referred to in paragraph (2)(a) shall present fairly the financial result, during the financial year concerned, of the work having been carried out and shall be expressed in such form as the Department may specify.
- (4) A report under this Article shall also contain, as regards the work, such other information (and expressed in such form) as the Department may specify.
- (5) The report may contain such other information as the board thinks fit.
- (6) The report shall be prepared not later than 30th September in the financial year following that for which it is prepared, and the board concerned shall send a copy to the Department not later than 31st October in the financial year following that for which it is prepared.
- (7) The Department shall appoint an auditor to consider the statement contained in the report by virtue of paragraph (2)(b) and give his written opinion on the statement to the board and to the Department.

Information

12.—(1) If a board, having decided to carry out functional work to which Article 6 applies, is requested by a person to supply the person with a statement falling within paragraph (2), the board shall supply such a statement to the person.

- (2) A statement falling within this paragraph is a written statement showing—

- (a) the board's decision to carry out the work;
 - (b) the financial provisions shown in each offer (if any) to carry out the work made in response to an invitation made under Article 7(3); and
 - (c) the financial provisions of the bid prepared under Article 7(5) in relation to the work.
- (3) Where a board makes a decision in consequence of which any work is required to be carried out (whether by the board itself or by some other person) in accordance with a specification which has been made available for inspection in accordance with a notice published for the purposes of Article 7(1), it shall be the duty of the board—
- (a) to make arrangements for—
 - (i) a copy of the specification; and
 - (ii) a document containing a summary of the main requirements of the specification, to be kept available, throughout the period during which the work in question is to be carried out, for inspection by members of the public, at all reasonable hours, at the principal office of the board; and
 - (b) to give such publicity to those arrangements as it thinks sufficient for drawing the attention of members of the public who may be interested to the fact that the specification and that document are so available.
- (4) Paragraphs (5) to (7) apply to any report required to be prepared under Article 11.
- (5) Any person may, at a place and time stated by a board which has prepared a report, inspect the report free of charge.
- (6) A board which has prepared a report shall supply a copy (on request) to any person who pays such charge as the board may reasonably require.
- (7) A board shall publish in at least 2 newspapers circulating in the area of the board notice of—
- (a) the place and time at which any report prepared by the board may be inspected in accordance with paragraph (5);
 - (b) the fact that copies of the report are available for supply in accordance with paragraph (6); and
 - (c) the charge for each copy.

Sanctions

Notice for purpose of getting information

- 13.—**(1) If it appears to the Department that in the financial year beginning in 1993 or in a subsequent financial year a board—
- (a) has entered into a contract to carry out work and has done so in contravention of Article 5;
 - (b) has carried out work as regards which the conditions set out in Article 7 have to be but, in the circumstances, have not been fulfilled;
 - (c) has decided to carry out work as regards which (if the work is carried out in accordance with the decision) those conditions will have to be but, in the circumstances in which it is proposed to carry it out, will not be fulfilled;
 - (d) has carried out work in circumstances where Article 9 has not been complied with for the year concerned in relation to the defined activity within which the work falls or in relation to an account required by that Article to be kept for the year concerned as regards the activity;

- (e) has carried out work in circumstances where Article 10 has not been complied with for the year concerned in relation to the defined activity within which the work falls; or
- (f) has carried out work in circumstances where Article 11 has not been complied with for the year concerned in relation to the defined activity within which the work falls or in relation to a report required by that Article to be prepared for the year concerned as regards the activity,

the Department may serve on the board a notice falling within paragraph (2).

(2) The notice is one which—

- (a) informs the board that it appears to the Department that in a financial year identified in the notice the board has acted as mentioned in one of the sub-paragraphs (so identified) of paragraph (1);
- (b) identifies the work concerned and states why it so appears; and
- (c) contains the requirement mentioned in paragraph (3).

(3) The requirement is that the board submit to the Department within such time as is specified in the notice a written response which—

- (a) states that the board has not acted as mentioned in the sub-paragraph concerned of paragraph (1) and justifies the statement; or
- (b) states that the board has acted as so mentioned and gives reasons why the Department should not give a direction under Article 14.

(4) Where work is specified under Article 6(3) as a proportion of particular work, the reference in paragraph (2)(b) to work is to the work of which the proportion forms a part.

(5) The Department may serve on a board different notices under this Article identifying the same financial year and the same work, whether such notices identify the same sub-paragraph or different sub-paragraphs of paragraph (1).

Directions in respect of work carried out in contravention of this Part

14.—(1) Paragraph (2) applies where—

- (a) the Department has served a notice on a board under Article 13;
- (b) the time specified in the notice has expired (whether or not the Department has received a written response to the notice); and
- (c) it still appears to the Department that the board has acted as mentioned in the sub-paragraph concerned of Article 13(1).

(2) Without prejudice to Article 101 of the 1986 Order, the Department may direct that with effect from such date as is specified in the direction the board—

- (a) shall not carry out any work falling within the appropriate activity;
- (b) shall not carry out such work falling within that activity as is identified in the direction;
- (c) may only carry out work falling within that activity if such conditions as are specified in the direction are fulfilled; or
- (d) as regards such work falling within that activity as is identified in the direction, may only carry it out if such conditions as are specified in the direction are fulfilled.

(3) Where the Department has given a direction under paragraph (2) or this paragraph (the previous direction) the Department may give a direction (a new direction) that with effect from such date as is specified in the new direction—

- (a) any prohibition applying by virtue of the previous direction (whether the prohibition applies outright or if conditions are not fulfilled) shall cease to apply;

- (b) any outright prohibition applying by virtue of the previous direction is replaced by a prohibition applying (as regards the same work) if conditions specified in the new direction are not fulfilled; or
 - (c) any prohibition applying as regards work by virtue of the previous direction (whether the prohibition applies outright or if conditions are not fulfilled) is replaced by a prohibition which applies only to such of that work as is identified in the new direction but which is otherwise in the same terms as the prohibition in the previous direction.
- (4) If the Department directs under this Article that a board shall not carry out work, or may only carry out work if certain conditions are fulfilled, the direction shall have effect notwithstanding any statutory provision under which the board is required or authorised to do the work or (as the case may be) to do it without the need for the conditions to be fulfilled.
- (5) The conditions that may be imposed by a direction given under this Article in relation to the carrying out of any work include a condition restricting the carrying out of the work to cases where—
- (a) the Department has been satisfied as to any matter specified or described in the direction; or
 - (b) the work is carried out under and in accordance with an authorisation or consent given for the purposes of the direction by the Department.
- (6) Where a direction under this Article imposes any condition in relation to the carrying out of any work, that direction may provide that the requirement that the condition is fulfilled is to have effect, in relation to that work, instead of any requirement which (apart from the direction) would have effect in relation to that work by virtue of this Part.
- (7) Without prejudice to paragraph (3), the power to give a direction under this Article shall include power, at any time, to make such variations of a direction under this Article as may be agreed with the board to which the direction relates.
- (8) In this Article “the appropriate activity” means the defined activity within which the work identified in the notice concerned falls.

Miscellaneous

Power to define conduct as competitive or anti-competitive

- 15.**—(1) The Department may by regulations make provision, for the purposes of the condition set out in Article 5(5) or 7(6), for conduct described in the regulations to be regarded, in accordance with the regulations and in such circumstances as may be so described—
- (a) as conduct which has the effect of restricting, preventing or distorting competition or is likely to have that effect; or
 - (b) as conduct which does not have that effect and is not likely to have that effect.
- (2) Without prejudice to the generality of paragraph (1) or to any power conferred by Article 8, regulations under this Article may—
- (a) prescribe the matters which are to be taken into account, or disregarded, in the course of any evaluation made for the purpose of deciding who should undertake or carry out particular work;
 - (b) prescribe the manner in which, or extent to which, any matter described in the regulations is to be so taken into account or disregarded;
 - (c) prescribe maximum and minimum periods for the periods which are required, by virtue of sub-paragraphs (b) and (d) of paragraph (1) of Article 7, to be specified in a notice published for the purposes of that paragraph;

- (d) prescribe a maximum and a minimum period for the period which is to elapse, in a case where a notice has been so published, between—
 - (i) the announcement of the decision as to who should carry out the work in question; and
 - (ii) the beginning of the period during which the work is to be carried out;
- (e) make provision for the issue by the Department of guidance as to how conduct restricting, distorting or preventing competition is to be avoided in the doing of anything under or for the purposes of this Part; and
- (f) require the extent (if any) to which there has been a contravention of guidance issued by the Department under the regulations to be taken into account in any determination of whether or not a condition mentioned in paragraph (1) has been fulfilled.

Application of this Part to professional services, etc.

16.—(1) The Department may by order subject to affirmative resolution make such provision in relation to proposals for the carrying out of work to which this Article applies as it considers appropriate for facilitating or requiring separate procedures to be followed for—

- (a) the evaluation for the purposes of this Part of the quality of the services which persons willing to carry out the work are able to provide and of their fitness to provide them; and
 - (b) the evaluation for those purposes of the financial terms on which such persons would carry out the work.
- (2) This Article applies to any work which—
- (a) by virtue of an order under Article 4(2), falls within a defined activity for the purposes of this Part; and
 - (b) consists in, or involves, the provision of professional advice or of other professional services or the application of any financial or technical expertise.
- (3) Before making an order under this Article the Department shall consult the boards.
- (4) Without prejudice to Article 17(3), the power to make an order under this Article shall include power, for the purposes of, or in connection with, any separate procedures for which an order under this Article provides, to modify any provision of this Part.

Regulations, orders, specifications and directions

- 17.—**(1) Regulations under this Part shall be subject to negative resolution.
- (2) The power to specify under Article 9, 10 or 11, and the power to give a direction under Article 14, shall be exercised in writing.
- (3) Any order or regulations under this Part and any specification or direction mentioned in paragraph (2) may include such supplementary, incidental, consequential or transitional provisions as appear to the Department to be necessary or expedient; and without prejudice to the generality of the foregoing—
- (a) an order under Article 4(2) may include provision amending or adapting any provision of this Part for the purpose of interpreting any sub-paragraph added by the order or for purposes of commencement or otherwise; and
 - (b) a direction under Article 14 may include provision with respect to work in progress or outstanding contractual commitments.

Supplementary

18.—(1) No provision of this Part relating to accounts shall prejudice any provision of Article 119 of the 1986 Order.

(2) Nothing in Articles 13 and 14 shall prejudice any remedy available to a person (apart from those Articles) in respect of a failure to observe a provision of this Part.

(3) Nothing in this Part shall be construed as authorising a board to enter into any contract or carry out any work which it would not be authorised to enter into or carry out apart from this Part.