
SCOTTISH STATUTORY INSTRUMENTS

2012 No. 89

The Utilities Contracts (Scotland) Regulations 2012

PART 1

GENERAL

Citation, commencement and extent

1.—(1) These Regulations may be cited as the Utilities Contracts (Scotland) Regulations 2012 and come into force on 1st May 2012.

(2) These Regulations extend to Scotland only.

Interpretation

2.—(1) In these Regulations—

“buyer profile” means a page on the internet set up by a utility containing one or more of the following: periodic indicative 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;

“candidate” means an economic operator (other than a tenderer) which applied to be included amongst the economic operators to be selected to tender for, or to negotiate, a contract or framework agreement;

“candidate concerned” means a candidate which has not been informed that they have been unsuccessful;

“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 and which—

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

“the Commission” means the European Commission;

“[Commission Regulation \(EC\) No 1564/2005](#)” means Commission Regulation (EC) No 1564/2005 of 7th September 2005 establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives [2004/17/EC](#) and [2004/18/EC](#) of the European Parliament and of the Council⁽¹⁾ as amended by [Commission Regulation \(EC\) No 1792/2006](#) of 23rd October 2006 adapting certain regulations

(1) OJ L 257, 1.10.05, p.1. The annex to Commission Regulation (EC) 1564/2005 was amended by Commission Regulation (EC) 1150/2009, OJ L 313, 29.11.2009, p.3.

and decisions in the fields of free movement of goods, freedom of movement of persons, competition policy, agriculture (veterinary and phytosanitary legislation), fisheries, transport policy, taxation, statistics, social policy and employment, environment, customs union, and external relations by reason of the accession of Bulgaria and Romania⁽²⁾ and as amended from time to time;

“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 as amended by Commission Regulation (EC) No 213/2008 amending Regulation (EC) No 2195/2002 of the European Parliament and of the Council on the Common Procurement Vocabulary (CPV) and Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council on public procurement procedures, as regards the revision of the CPV⁽³⁾;

“contract” means any services contract, supply contract or works contract;

“contract documents” means the invitation to tender for, or to negotiate, the contract, the proposed conditions of contract, the specifications or descriptions of the goods, services, work or works required by the utility and of the materials or goods to be used in or for such work or works, and all documents supplementary thereto;

“contract notice” means, except in regulation 49, a contract notice sent to the Official Journal in accordance with regulation 16(2)(b);

“contracting authority” has the meaning given to it by regulation 3 of the Public Contracts (Scotland) Regulations 2012⁽⁴⁾;

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

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

“CPC” means Central Product Classification of the United Nations⁽⁵⁾;

“CPV” means Common Procurement Vocabulary;

“design contest” means a competition, particularly in the fields of planning, architecture, civil engineering and data processing—

- (a) which is conducted by or on behalf of a utility and in which that utility invites the entry by the economic operator of plans and designs;
- (b) under the rules of which the plans or designs entered will be judged by a jury;
- (c) under which prizes may or may not be awarded; and
- (d) which enables the utility to acquire the use or ownership of plans or designs selected by the jury;

“disabled person” means any person recognised as disabled within the meaning of the Equality Act 2010⁽⁶⁾;

“disability” has the same meaning as in the Equality Act 2010;

“dynamic purchasing system” means a wholly electronic system of limited duration which is—

- (a) established by a utility to purchase commonly used goods, work, works or services; and

(2) OJ L 362, 20.12.2006, p.1.

(3) OJ L 340, 16.12.02, p.1. Commission Regulation (EC) 1564/2005 was amended by Commission Regulation (EC) No 2151/2003 OJ L 329, 17.12.03, p.1.

(4) S.S.I. 2012/88.

(5) CPC Version 2 (December 2008). Further information may be obtained from the United Nations website at <http://unstats.un.org/unsd/cr/registry/cpc-2.asp>.

(6) 2010 c.15.

- (b) open throughout its duration for the admission of economic operators which—
 - (i) satisfy the selection criteria specified by the utility; and
 - (ii) submit an indicative tender to the utility or person operating the system on its behalf which complies with the specification required by that utility or person;

“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—

- (a) takes place after the initial evaluation of tenders; and
- (b) 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” has the same meaning as in the EU Treaties;

“European standard” has the meaning given to it by regulation 12(1);

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

“framework agreement” means an agreement or other arrangement between one or more utilities 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 utility in the period during which the framework agreement applies;

“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 Procurement Agreement” means the Agreement on Government Procurement between certain parties to the World Trade Organisation (WTO) signed in Marrakesh on 15th April 1994⁽⁷⁾;

“GPA” means the Government Procurement Agreement;

“indicative tender” means a tender prepared by an economic operator seeking admission to a dynamic purchasing system which sets out the terms on which it would be prepared to enter into a contract with a utility under the system should that utility propose to award a contract under the system;

“international standard” has the meaning given to it by regulation 12(1);

“Minister” has the meaning given to it by regulation 39;

“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 utility negotiates the terms of the contract with one or more economic operators selected by it;

(7) Cm 2575. As at 1st January 2012, parties to the Government Procurement Agreement other than Member States were Armenia, Aruba, Canada, Chinese Taipei, Hong Kong China, Iceland, Israel, Japan, Republic of Korea, Liechtenstein, Norway, Singapore, Switzerland and the United States of America.

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

“open procedure” means a procedure leading to the award of a contract whereby all interested economic operators may tender for the contract;

“periodic indicative notice” means a notice sent to the Official Journal in accordance with regulation 15;

“Public Sector Directive” means Directive [2004/18/EC](#) of the European Parliament and of the Council of 31st March 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as amended from time to time⁽⁸⁾;

“relevant standstill period” means—

- (a) where the notice referred to in regulation 33(1) or 46(9)(a) is sent to all tenderers and all candidates concerned (if any) by facsimile or by electronic means, 10 days from the date on which the last notice is sent to those economic operators; or
- (b) where any such notice is sent to any tenderers or candidates concerned only by other means, 15 days from the date on which the last notice is sent to those economic operators;

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

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

“services contract” means a contract, in writing, for consideration (whatever the nature of the consideration) under which a utility engages an economic operator to provide services but does not include either—

- (a) a works contract; or
- (b) a supply contract,

but a contract for both goods and services is a services contract if the value of those services exceeds that of the goods covered by the contract and a contract for services which includes activities specified in Schedule 2 that are only incidental to the principal object of the contract is a services contract;

“services concession contract” means a services contract under which the consideration given by the utility consists of, or includes, the right to exploit the service or services to be provided under the contract;

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

- (a) who either sought, seeks, or who would have wished—
 - (i) to be the person to whom a services contract is awarded; or
 - (ii) to participate in a design contest; and
- (b) who is a national of a relevant State or established in a relevant State;

“ship” includes any boat and any 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;

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

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

(8) OJ L 134, 30.4.04, p.114.

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

- (a) for the purchase of goods by a utility (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
- (b) for the hire of goods by a utility (both where the utility becomes the owner of the goods after the end of the period of hire and where it does not),

and for any siting and installation of those goods, but where, under such a contract, services are also to be provided, the contract is only 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;

“tenderer” means an economic operator which submitted an offer to perform a contract or to be party to a framework agreement;

“tenderer concerned” means a tenderer which—

- (a) has not been informed that they have been excluded from the competition; or
- (b) has been informed that they have been excluded from the competition and where—
 - (i) that exclusion is not prevented from being the subject of proceedings under Part 9 by virtue of regulation 44(5)(b); and
 - (ii) no such proceedings have been brought, or such proceedings have been brought and it has not been determined that the exclusion was lawful;

“TFEU” means the Treaty on the Functioning of the European Union⁽⁹⁾;

“Utilities Directive” means Directive [2004/17/EC](#) of the European Parliament and of the Council of 31st March 2004 co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, as amended from time to time⁽¹⁰⁾;

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

“work” 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 or Bank Holiday within the meaning of the Banking and Financial Dealings Act 1971⁽¹¹⁾;

“works” means any of the activities specified in Schedule 2;

“works concession contract” means a works contract under which the consideration given by a utility consists of or includes the grant of a right to exploit the work or works to be carried out under the contract;

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

- (a) for the carrying out of a work or works for a utility; or
- (b) under which a utility engages a person to procure by any means the carrying out for the utility 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 may include information transmitted and stored by electronic means; and

“year” means a calendar year.

⁽⁹⁾ OJ C 115, 9.5.2008, p.47.

⁽¹⁰⁾ OJ L 134, 30.4.04, p.1.

⁽¹¹⁾ [1971 c.80](#). There are amendments to this Act which are not relevant to these Regulations.

(2) In these Regulations references to Article 16 or 61 are references to Article 16 or, as the case may be, 61 of the Utilities Directive as amended from time to time.

(3) In these Regulations, unless the context otherwise requires, any reference to a numbered Part, regulation, paragraph or Schedule is a reference to the Part, regulation, paragraph or Schedule bearing that number in these Regulations.

(4) Subject to paragraph (5), in these Regulations—

- (a) “a Part A services contract” is a contract under which services specified in Part A of Schedule 3 are to be provided;
- (b) “a Part B services contract” is a contract under which services specified in Part B of Schedule 3 are to be provided.

(5) Where services specified in both Parts A and B of Schedule 3 are to be provided under a single contract, then the contract is 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.

(6) Except in regulation 44(6)(b), where these Regulations refer to a period of time—

- (a) where the period follows an action taken, the day on which the action is taken is not counted in the calculation of the period; and
- (b) where the last day of the period is not a working day, the period is extended to include the next working day.

Utilities

3.—(1) In these Regulations a utility is a relevant person specified in one of the Parts of Schedule 1 carrying out an activity in that Part.

(2) In this regulation and in Schedule 1—

“local authority” means—

- (a) a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994⁽¹²⁾;
- (b) a county council, a district council, a London borough council, a parish council, a community council, a Council of the Isles of Scilly, a county borough council or the Common Council of the City of London in its capacity as local authority or police authority; or
- (c) a district council within the meaning of the Local Government Act (Northern Ireland) 1972⁽¹³⁾;

“network” in relation to a service in the field of transport, means a system operated in accordance with conditions laid down by or under the law in or as regards Scotland including such conditions as the routes to be served, the capacity to be made available and the frequency of the service;

“public undertaking” means a person over whom one or more contracting authorities are able to exercise directly or indirectly a dominant influence by virtue of—

- (a) their ownership of that person;
- (b) their financial participation in that person; or

⁽¹²⁾ 1994 c.39. There are amendments to this Act which are not relevant to these Regulations.

⁽¹³⁾ 1972 c.9 (N.I.).

(c) the rights accorded to them by the rules which govern that person;

“relevant person” means a person who is—

- (a) a contracting authority;
- (b) a public undertaking; or
- (c) not a contracting authority or a public undertaking, but whose activities include an activity specified in the second column of Schedule 1 and carries out that activity on the basis of a special or exclusive right; and

“special or exclusive rights” means rights granted by a competent authority by way of any legislative, regulatory or administrative provision, the effect of which is to limit the exercise of activities specified in the second column of Schedule 1 to one or more entities, and which substantially affects the ability of other entities to carry out such activities.

(3) For the purposes of the definition of “public undertaking” a contracting authority is considered to be able to exercise a dominant influence over a person when it directly or indirectly—

- (a) possesses the majority of the issued share capital of that person or controls the majority of the voting power attached to the issued share capital of that person; or
- (b) may appoint—
 - (i) more than half of the individuals who are ultimately responsible for managing that person’s affairs;
 - (ii) more than half of its members; or
 - (iii) in the case of a group of individuals, more than half of those individuals.

Economic operators

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

(2) When these Regulations apply, a utility must not treat a person who is not a national of a relevant State or is not established in a relevant State more favourably than one who is.

(3) A utility must—

- (a) treat economic operators equally and without discrimination; and
- (b) act in a transparent and proportionate manner.

(4) In these Regulations a relevant State is a member State or a State listed in column 1 of Schedule 4; the agreements with the European Union by which the provisions in relation to public procurement are extended to those States are specified in column 2 to that Schedule and the statutory provision designating them as European Treaties under section 1(3) of the European Communities Act 1972(14) is specified in column 3 of that Schedule.

Application

5.—(1) These Regulations apply whenever a utility seeks offers in relation to a proposed supply contract, works contract, Part A services contract or a dynamic purchasing system other than a contract or dynamic purchasing system excluded from the operation of these Regulations by regulation 6, 7, 8, 9 or 11.

(2) Whenever a utility seeks offers in relation to a proposed Part B services contract other than one excluded from the operation of these Regulations by regulation 6, 7, 8, 9 or 11—

- (a) Part 1 and Parts 9 and 10 of these Regulations apply; and

(14) 1972 c.68.

- (b) the following provisions in Parts 2 to 8 apply—
 - (i) regulation 12 (technical specifications in contract documents);
 - (ii) regulation 32 (contract award notices);
 - (iii) regulation 38 (statistical and other reports);
 - (iv) regulation 39 (provision of reports); and
 - (v) regulation 40 (publication of notices).
- (3) A utility must not enter into separate contracts with the intention of avoiding the application of these Regulations or the Public Contracts (Scotland) Regulations 2012, where applicable.
- (4) Where a utility seeks offers in relation to a contract for the purpose of carrying out—
 - (a) one or more activities specified in the second column of Schedule 1; and
 - (b) one or more activities not specified in the second column of Schedule 1 but to which the Public Contracts (Scotland) Regulations 2012 apply,
 and it is impossible, on objective grounds, to determine the activity for which the contract is principally intended, the utility must award the contract in accordance with the Public Contracts (Scotland) Regulations 2012.
- (5) Where a utility seeks offers in relation to a contract for the purpose of carrying out—
 - (a) one or more activities specified in the second column of Schedule 1; and
 - (b) one or more activities not specified in the second column of Schedule 1 nor subject to the Public Contracts (Scotland) Regulations 2012,
 and it is impossible, on objective grounds, to determine the activity for which the contract is principally intended, the utility must award the contract in accordance with these Regulations.

General exclusions

- 6.** These Regulations do not apply to the seeking of offers in relation to a proposed contract or dynamic purchasing system—
- (a) other than for the purpose of carrying out an activity specified in the Part of Schedule 1 in which the utility is specified or in respect of a proposed contract referred to in regulation 5(5);
 - (b) for the purpose of carrying out any activity outside the territory of the Communities but only if the carrying out of that activity does not involve the physical use of a network or geographical area within the Communities;
 - (c) for the purpose of acquiring goods, works or services in order to sell, hire or provide them to another person unless the utility has a special or exclusive right to sell, hire or provide such goods, works or services or other persons are not free to sell, hire or provide them under the same conditions;
 - (d) which is classified as secret or where the performance of the contract must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions of any part of the United Kingdom or when the protection of the essential interests of the security of the United Kingdom requires it;
 - (e) where different rules govern the procedures leading to the award of the contract and it is to be entered into in accordance with—
 - (i) an international agreement concluded in conformity with the TFEU to which the United Kingdom and a State which is not a relevant State are parties and it relates to goods or the carrying out of a work or works or the provision of services intended for the joint implementation or exploitation of a project related to that agreement;

- (ii) an international agreement relating to the stationing of troops; or
- (iii) the contract award procedures of an organisation of which only States are members (an “international organisation”) or of which only States or international organisations are members;
- (f) by a utility which engages in an activity specified in Category 1 of Schedule 1 for the purchase of water;
- (g) by a utility which engages in an activity specified in Categories 2 to 6 of Schedule 1 for the purchase of energy or of fuel for the production of energy;
- (h) by a utility specified in column 1 of Part S of Schedule 1 for the purpose of engaging in an activity specified in column 2 of that Part of that Schedule where that activity is provided in a geographical area in which other persons are free to provide the service under the same conditions as the utility;
- (i) under which services are to be provided by a contracting authority, or by a person who is a contracting authority in another relevant State because that contracting authority or person has an exclusive right—
 - (i) to provide the services; or
 - (ii) which is necessary for the provision of the services,in accordance with any published law, regulation or administrative provision which is compatible with the TFEU;
- (j) 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;
- (k) for arbitration or conciliation services;
- (l) for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, in particular transactions by the utility to raise money or capital, except where these Regulations apply by virtue of part T of Schedule 1 (see paragraph 23(d) in the second column of that Schedule);
- (m) for employment and other contracts of service;
- (n) for research and development services unless—
 - (i) the benefits are to accrue exclusively to the utility for its use in the conduct of its own affairs; and
 - (ii) the services are to be wholly paid for by the utility;
- (o) which is a works concession contract or a services concession contract which is awarded by a utility carrying out an activity specified in the second column of Schedule 1, where the concession contract is awarded for carrying out or providing those activities; or
- (p) where—
 - (i) the Public Defence and Security Public Contracts Regulations 2011(15) apply; or
 - (ii) the application of those Regulations is excluded by regulation 9 (thresholds) or 7 (general exclusions) of those Regulations.

Exclusion of contracts awarded to affiliated undertakings or joint ventures

- 7.—(1) For the purposes of this regulation—
“affiliated undertaking” means—

- (a) in respect of a utility which is subject to the seventh Council Directive [83/349/EC](#) on consolidated accounts⁽¹⁶⁾ as last amended by Directive [2003/15/EC](#) of the European Parliament and of the Council of 18th June 2003⁽¹⁷⁾, any undertaking the accounts of which are consolidated with those of that utility; or
- (b) in any other case, any undertaking which is either a parent undertaking, a subsidiary undertaking or a fellow subsidiary undertaking of the utility and—
 - (i) an undertaking is a parent undertaking of a utility if it exercises a dominant influence over it, directly or indirectly, and for these purposes an undertaking exercises a dominant influence over another if—
 - (aa) it possesses the greater part of the issued share capital of that undertaking or controls the majority of the voting power attached to the issued share capital of that undertaking; or
 - (bb) it may appoint more than half of the individuals who are ultimately responsible for managing the affairs of that company,
 and an undertaking is a subsidiary of a utility if the utility exercises such dominant influence over it; or
 - (ii) an undertaking is a fellow undertaking of a utility if both are subsidiary undertakings of the same parent undertaking; and

“joint venture” means an association formed exclusively by a number of utilities for the purpose of carrying out any of the activities specified in the second column of Schedule 1.

(2) Subject to paragraph (3), these Regulations do not apply to the seeking of offers in relation to contracts which—

- (a) a utility proposes to award to an affiliated undertaking; or
- (b) a joint venture proposes to award to an affiliated undertaking of one of its members.

(3) Paragraph (2) applies—

- (a) in relation to services contracts, provided that at least 80% of the average turnover of the affiliated undertaking in respect of services for the preceding 3 years derives from the provision of such services to one or more of its affiliated undertakings;
- (b) in relation to supplies contracts, provided that at least 80% of the average turnover of the affiliated undertaking in respect of supplies for the preceding 3 years derives from the provision of such supplies to one or more of its affiliated undertakings; and
- (c) in relation to works contracts, provided that at least 80% of the average turnover of the affiliated undertaking in respect of works for the preceding 3 years derives from the provision of such works to one or more of its affiliated undertakings.

(4) Where more than one of its affiliated undertakings provides the same or similar services, supplies or works, a utility must calculate the percentages referred to in paragraph (3) by taking into account the total turnover deriving respectively from the provision of services, supplies or works by those affiliated undertakings.

(5) For the purposes of paragraph (3), when turnover amounts are not available for the preceding three years because of the date upon which a relevant affiliated undertaking was created or commenced activities, it is sufficient for that affiliated undertaking to show, particularly by means of business projections, that the turnover in respect of the provision of services, supplies or works is credible.

(6) These Regulations do not apply to the seeking of offers in relation to contracts which—

⁽¹⁶⁾ OJ L 193, 18.7.83, p.1.

⁽¹⁷⁾ OJ L 178, 17.7.03, p.16.

- (a) a joint venture proposes to award to one of its members; or
 - (b) a utility proposes to award to a joint venture of which it is a member provided that—
 - (i) the joint venture has been set up in order to carry out the activity for which the contract is being sought over a period of at least 3 years; and
 - (ii) the instrument setting up the joint venture stipulates that its members will be part of the joint venture for at least the same period.
- (7) A utility which relies on the exclusions in paragraph (2) or (6) must, if the Commission requests it, send to the Minister—
- (a) the names of the undertakings or joint ventures concerned;
 - (b) the value of the consideration and the type of—
 - (i) services to be provided under any services contract;
 - (ii) goods to be purchased or hired under any supply contract; or
 - (iii) work or works to be carried out under any works contracts, excluded in accordance with paragraph (2) or (6); and
 - (c) any information which is necessary to justify the use of the exclusion.

Exemption in respect of certain utilities operating in the energy sector

8.—(1) A utility carrying out one or more of the activities referred to in Commission Decision [97/367/EC\(18\)](#) is excluded from having to comply with Parts 2 to 5 of these Regulations and regulations 34, 35, 37, 38 other than paragraph (2)(a), 40 and 43 in seeking offers in relation to a contract to be awarded for the purpose of carrying out one or more such activities.

(2) A utility which relies on the exemption in paragraph (1) must observe the principles of non-discrimination and competitive procurement, and in particular must—

- (a) hold a competition unless it can objectively justify not doing so; and
- (b) in—
 - (i) making information about its procurement intentions available to economic operators;
 - (ii) specifying its requirements to them;
 - (iii) establishing and using a qualification system;
 - (iv) selecting economic operators to tender for, or to negotiate, the contract;
 - (v) holding any design contest; and
 - (vi) awarding the contract,

make decisions objectively on the basis of relevant criteria.

(3) A utility which relies on the exemption in paragraph (1) must—

- (a) in respect of a contract awarded by it the value of which, calculated in accordance with regulation 11, exceeds 5,000,000 euro, send to the Commission not later than 48 days after the award the following information—
 - (i) the name and address of the utility;
 - (ii) the nature of the contract, namely whether it is a supply contract, a services contract or a works contract and whether it is a framework agreement;

- (iii) a clear indication of the nature (for example, by using the Classification of Products⁽¹⁹⁾ by activity) of—
 - (aa) the goods to be purchased or hired under the contract;
 - (bb) the work or works to be carried out under the contract; or
 - (cc) the services to be provided under the contract;
 - (iv) whether the contract was advertised and, if so, in which publication and, if not, the procedure or method used to decide to whom the contract should be awarded;
 - (v) the number of offers received;
 - (vi) the date of the award of the contract;
 - (vii) the name and address of the person to whom the contract was awarded;
 - (viii) the value of the contract, calculated in accordance with regulation 11;
 - (ix) the expected duration of the contract;
 - (x) any share of the contract which has been, or may be, sub-contracted to which over 10% of the value of the consideration to be given under the contract is attributable;
 - (xi) in the case of a supply contract, the country of origin of the goods and in the case of a works contract or a services contract, the principal country from which the contract is to be performed;
 - (xii) where the contract was awarded on the basis of the offer which was the most economically advantageous, the main criteria on which the decision was based; and
 - (xiii) whether the contract was awarded to an economic operator which offered a variant on the requirements specified in the contract documents; and
- (b) in respect of a supply contract or a services contract awarded by it the value of which, calculated in accordance with regulation 11, equals or exceeds 400,000 euro but does not exceed 5,000,000 euro—
- (i) retain the information specified in sub-paragraph (a)(i) to (ix) for not less than 4 years after the award; and
 - (ii) either—
 - (aa) if the Commission requests that information in relation to any such contract, forthwith send it to the Minister; or
 - (bb) where no such request has been made, send that information to the Commission not later than 48 days after the end of the period of 3 months ending on the last day of March, June, September or December in which the contract was awarded.

Exemption of contracts where activity is directly exposed to competition

9.—(1) These Regulations do not apply to the seeking of offers in relation to a contract awarded by a utility for the purpose of carrying out an activity specified in column 2 of Schedule 1 where that activity is directly exposed to competition on markets to which access is unrestricted and this will be the case if one of the following conditions is satisfied—

- (a) the Cabinet Office has notified the Commission in accordance with article 30 of the Utilities Directive of all the relevant facts and—

⁽¹⁹⁾ The Classification of Products by activity is the official product classification by activity which is used by the European Union for statistical purposes.

- (i) the Commission has adopted a decision that an exemption should apply in response to such a notification; or
 - (ii) the Commission has not adopted a decision in relation to such a notification within the time limits specified in article 30(6) of the Utilities Directive;
 - (b) the Commission has, on the application of a utility—
 - (i) adopted a decision that an exemption should apply to the activity concerned; or
 - (ii) has not adopted such a decision within the time limit specified in article 30(6) of the Utilities Directive; or
 - (c) the Commission has, of its own initiative—
 - (i) adopted a decision that an exemption should apply to the activity concerned; or
 - (ii) has not adopted such a decision within the time limit specified in article 30(6) of the Utilities Directive and for the purposes of this sub-paragraph that time limit commences on the date that the Commission has informed the Cabinet Office in accordance with that article that the matter was under consideration.
- (2) A utility may make an application to the Commission in accordance with article 30 of the Utilities Directive for a decision that an activity that utility carries out or is proposing to carry out which is specified in the second column of Schedule 1 is directly exposed to competition on markets to which access is not restricted.
- (3) An application made by a utility in accordance with paragraph (2) must be in writing and must specify—
- (a) the activity in respect of which the notification or application is made;
 - (b) the relevant facts and, in particular, any law, regulation, administrative provision or agreement concerning compliance with the conditions that the activity is not directly exposed to competition on markets to which access is not restricted; and
 - (c) whether the activity concerned is subject to any of the EU legislation referred to in Annex XI to the Utilities Directive and where it is, the relevant implementing legislation in the UK.

Reserved contracts

10.—(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;

“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 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.

(2) A utility may reserve the right to participate in a contract award procedure or dynamic purchasing system to economic operators which operate supported factories, supported businesses or supported employment programmes.

(3) Where a utility has reserved the right to participate in a contract or dynamic purchasing system in accordance with paragraph (2), it must follow the contract award procedures set out in these Regulations.

(4) When seeking offers in relation to a contract or dynamic purchasing system a utility must specify in the contract notice if it is using the approach referred to in paragraph (2).

Thresholds

11.—(1) These Regulations, except paragraph (20) of this regulation, do not apply to the seeking of offers in relation to a proposed contract, dynamic purchasing system or framework agreement where the estimated value of the contract, dynamic purchasing system or framework agreement (net of value added tax) at the relevant time is less than the relevant threshold.

(2) Except where paragraph (17) applies, for the purposes of paragraph (1), the relevant threshold is—

- (a) the amount set out in article 16(a) for a supply contract or a services contract; and
- (b) the amount set out in article 16(b) for a works contract.

(3) The value in pounds sterling of any amount expressed in these Regulations in euro is calculated by reference to the rate for the time being applying for the purposes of the Utilities Directive as published from time to time in the Official Journal.

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

(5) In determining the value of the total consideration which the utility expects to be payable under a contract it must, where appropriate, take account of—

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

(6) 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 utility 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 utility 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.

(7) 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 consideration which the utility 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 utility 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.

(8) Subject to paragraphs (9) and (12), where a utility 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 utility expects to be payable under each of those contracts.

(9) Paragraph (8) does not apply to any contract (unless the utility 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,

and the aggregate value of that contract and any other such contract is less than 20% of the aggregate of the value of the consideration which the utility 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 a work or works.

(10) Subject to paragraph (12), where a utility 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 must be the amount calculated in accordance with paragraph (11).

(11) The utility must calculate the amount referred to in paragraph (10) either—

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

during the last financial year of the utility 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 utility 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 public services contracts, from the first date on which the services will be performed; or
 - (ii) the financial year, where the end of that financial year is later than 12 months after the first date of the delivery of goods or the first date on which the services will be performed, as the case may be.

(12) Notwithstanding paragraphs (8) and (10), 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 utility 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 utility,

the valuation methods described in paragraphs (8) and (11) must be adapted by aggregating only the value of the consideration which was payable or the utility 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.

(13) Where a utility intends to provide any goods or services 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 (2) and (8) is taken to include the estimated value at the relevant time of those goods and services.

(14) Where the estimated value of a works contract is less than the threshold and where goods or services which are not necessary for its execution are to be purchased, hired or provided under it, the estimated value of the contract for the purposes of paragraph (1) is the value of the consideration which the utility expects to give for the goods and services and the relevant contract is treated as a supply or services contract, as appropriate.

(15) Where under a contract both goods are to be purchased or hired and services are to be provided, the estimated value of the contract is the aggregate of the values of the consideration attributable to the purchase or hire of the goods including any siting and installation of the goods and of the consideration attributable to the provision of the services, regardless of whether the estimated value of either the goods or services is less than the threshold specified in paragraph (2).

(16) The estimated value of a dynamic purchasing system or 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 or dynamic purchasing system.

(17) The relevant threshold for the purposes of paragraph (1) for a dynamic purchasing system or a framework agreement is the threshold for—

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

(18) A utility must 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.

(19) The relevant time for the purposes of paragraphs (1), (11) and (13) means—

- (a) if the utility selects economic operators to tender for, or to negotiate, the contract in accordance with a qualification system established in accordance with regulation 25, the date on which the selection commences;
- (b) if the utility satisfies the requirement that there be a call for competition by indicating the intention to award the contract in a periodic indicative notice in accordance with regulation 16(2)(a)(i), the date on which the notice is sent to the Official Journal; or
- (c) in any other case, the date on which a contract notice would be sent to the Official Journal if the requirement that there be a call for competition applied and the utility decided to satisfy that requirement by sending such a notice.

(20) When a utility which is a public undertaking proposes to award a contract which has an estimated value for the purpose of paragraph (1) which is below the relevant threshold, or where a proposed contract is otherwise exempt from the requirement for prior publication of a contract notice, the utility must, if required by its general EU obligations, for the benefit of any potential economic operator, ensure a degree of advertising and follow a procedure leading to the award of the contract which is sufficient to enable open competition and meet the requirements of the principles of equal treatment, non-discrimination and transparency.

PART 2

TECHNICAL SPECIFICATIONS

Technical specifications in contract documents

12.—(1) In this regulation—

“common technical specification” means a 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;

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

“British standard” means a 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” is interpreted accordingly;

“standard” means a technical specification approved by a recognised standardising 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 processes and methods 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 utility and these characteristics 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 utility 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 utility 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 must specify those technical specifications in the contract documents.

(3) When laying down technical specifications in accordance with paragraph (2), a utility must wherever possible take into account accessibility criteria for disabled persons or the suitability of the design for all users.

(4) A utility must 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.

(5) Subject to technical requirements which are mandatory in the United Kingdom and to the extent that those requirements are compatible with EU obligations, a utility must define the technical specifications required for a contract in accordance with paragraph (6), (7), (8) or (9).

- (6) A utility may define the technical specifications referred to in paragraph (5)—
- (a) by reference to technical specifications in the following order of preference—
 - (i) British standards transposing European standards;
 - (ii) European technical approvals;
 - (iii) common technical specifications;
 - (iv) international standards; or
 - (v) other technical reference systems established by the European standardisation bodies; or
 - (b) in the absence of the technical specifications referred to in sub-paragraph (a), 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,

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

(7) A utility may define the technical specifications referred to in paragraph (5) 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 a utility to award the contract.

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

(9) A utility may define the technical specifications referred to in paragraph (5) by reference to technical specifications referred to in paragraph (6) for certain characteristics and by reference to performance or functional requirements referred to in paragraph (7) for other characteristics.

(10) Where a utility defines technical specifications as referred to in paragraph (6), it must 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 utility by any appropriate means that the one or more solutions that economic operator proposes in its tender satisfy the requirements of the technical specifications in an equivalent manner.

(11) Where a utility defines technical specifications in terms of performance or functional requirements as referred to in paragraph (7), it must 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 utility and the economic operator proves in its tender to the satisfaction of the utility by any appropriate means that the work, works, materials, goods or services meet the performance or functional requirements of the utility.

(12) Where a utility lays down environmental characteristics in terms of performance or functional requirements as referred to in paragraph (7), it may use the detailed technical specifications, or if necessary, parts thereof, 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;
- (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.

(13) A utility 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 must accept any other appropriate means of proof that the materials, goods or services comply with those technical specifications.

(14) The term “appropriate means” referred to in paragraphs (10), (11) and (13) includes a technical dossier of a manufacturer or a test report from a recognised body.

(15) A utility must 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 utility in accordance with paragraph (2).

(16) Subject to paragraph (17), a utility must 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.

(17) Exceptionally, a utility may incorporate the references referred to in paragraph (16) 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 indispensable; 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.

(18) Subject to paragraph (19), a utility must provide to any economic operator which is interested in obtaining a contract and which makes such a request, a copy of the technical specifications which are regularly laid down as terms of the contracts which that utility awards or which it intends to lay down as terms of a contract and which has been indicated in a periodic indicative notice sent to the Official Journal in accordance with regulation 15.

(19) Where the technical specifications referred to in paragraph (18) are based on documents which are separately available to economic operators, the obligation in paragraph (18) must be satisfied by informing any economic operator which makes a request of the documents which include those technical specifications.

Variants

13.—(1) Where a utility 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 must 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 utility must not accept an offer which contains a variant without that indication.

(2) Where a utility authorises a variation in accordance with paragraph (1), it must state in the contract notice the minimum requirements to be met by the variants and any specific requirements for the presentation of an offer which contains variants.

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

(4) A utility must 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

The open, restricted and negotiated procedures

14. For the purposes of seeking offers in relation to a proposed contract a utility must use the open procedure, the restricted procedure or the negotiated procedure.

Periodic indicative notices

15.—(1) Subject to paragraphs (4), (6) and (7), a utility must, at least once every 12 months, send a notice in the form of the periodic indicative notice in Annex IV to [Commission Regulation \(EC\)](#)

No 1564/2005(20) and containing the information therein specified to the Commission or publish it on that utility's buyer profile as soon as possible after—

- (a) the beginning of the financial year in the case of supply contracts, services contracts or framework agreements for the purchase or hire of goods or for the provision of services; or
 - (b) the decision authorising the programme of works contracts or framework agreements for the carrying out of work or works, in the case of works contracts or framework agreements for the carrying out of work or works.
- (2) The notice referred to in paragraph (1) must contain information in respect of—
- (a) the supply contracts, the services contracts or the framework agreements referred to in paragraph (1)(a) which the utility expects to award during the period of 12 months beginning with the date of the notice; and
 - (b) the works contracts or the framework agreements referred to in paragraph (1)(b) which the utility expects to award during the period of 12 months beginning with the date of the notice,

and that notice must be sub-divided to give that information separately for each product area of goods by reference to the CPV nomenclature of each category of works or services as specified in Schedules 2 and 3.

(3) Where a utility publishes a notice on its buyer profile in accordance with paragraph (1), it must also send a notice informing of such publication to the Commission by electronic means in accordance with the format and procedure for sending notices specified in paragraph (3) of Annex XX to the Utilities Directive.

(4) The obligation to publish a periodic indicative 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 regulations 6, 7, 8, 9 or 11 and where, at the date of dispatch of the notice—

- (a) the total consideration which the utility expects to be payable under—
 - (i) supply contracts or framework agreements for the purchase or hire of goods falling within the same product area; or
 - (ii) Part A services contracts or framework agreements for the provision of services falling within the same category specified in Part A of Schedule 3,is equal to or exceeds 750,000 euro; or
- (b) the total consideration which the utility expects to be payable under works contracts or framework agreements for the carrying out of work or works is equal to or exceeds the amount set out in Article 16(b).

(5) A notice sent to the Commission or published on the utility's buyer profile in accordance with paragraph (1) need not repeat information about contracts included in a previous periodic indicative notice, provided that the notice clearly states that it is an additional notice.

(6) The obligation to publish a periodic indicative notice applies only where the utility takes the option of shortening time limits for the receipt of tenders in accordance with regulation 22(3).

(7) This regulation does not apply to a proposed contract or framework agreement where the procedure for the award or conclusion of the framework agreement is a contract award procedure without a call for competition in accordance with regulation 17.

(20) The annex to [Commission Regulation \(EC\) No 1564/2005](#) was amended by [Commission Regulation \(EC\) 1150/2009](#), OJ L 313, 29.11.2009, p.3.

Call for competition

16.—(1) Subject to regulation 17, for the purposes of seeking offers in relation to a proposed contract a utility must make a call for competition.

- (2) The requirement under paragraph (1) to make a call for competition is satisfied—
- (a) in the case of a contract to be awarded using the restricted procedure or the negotiated procedure—
 - (i) if the intention to award the contract has been indicated in a periodic indicative notice and the requirements referred to in paragraph (3) are satisfied in relation to the contract; or
 - (ii) if a notice indicating the existence of a qualification system for economic operators has been sent to the Official Journal in accordance with regulation 25(17) and the requirement referred to in paragraph (5) is satisfied; or
 - (b) in any case by sending to the Official Journal a contract notice in the form of Annex V to [Commission Regulation \(EC\) No 1564/2005](#)⁽²¹⁾ and containing the information therein specified in respect of the contract.
- (3) The requirements referred to in paragraph (2)(a)(i) are that—
- (a) the periodic indicative notice refers specifically to the goods, works or services which are to be the subject of the proposed contract;
 - (b) the notice states that offers are to be sought using the restricted procedure or the negotiated procedure without further publication of a notice calling for competition and invites economic operators to express their interest in writing;
 - (c) the utility sends to all economic operators which express an interest detailed information including the information described in paragraph (4), on the contract concerned and before beginning the selection of economic operators invites them to confirm their wish to be selected to tender for or to negotiate the contract; and
 - (d) the notice referred to in sub-paragraph (b) was not published more than 12 months before the date on which the invitation is sent out in accordance with sub-paragraph (b).
- (4) The information referred to in paragraph (3)(c) must include—
- (a) the nature and either the quantity or extent of the goods, work, works or services to be supplied under the contract;
 - (b) any options for further supplies, work, works or services and, if known, an estimate of the timing when such options may be exercised;
 - (c) in the case of recurring contracts for goods, work, works or services, their nature and either their quantity or extent, and, if known, the estimated date of the subsequent calls for competition for the goods to be supplied, the work or works to be carried out or the services to be provided;
 - (d) a statement of whether the contract is to be awarded using the restricted procedure or the negotiated procedure;
 - (e) any date for beginning or completing the delivery of goods or for the carrying out of work or works or for providing services;
 - (f) the address to which and the date by which an application to be invited to tender must be submitted and the one or more languages in which it must be submitted;
 - (g) the address of the utility and any information needed to obtain specifications and other documents relating to the proposed contract;

(21) The annex to [Commission Regulation \(EC\) No 1564/2005](#) was amended by [Commission Regulation \(EC\) 1150/2009](#), OJ L 313, 29.11.2009, p.3.

- (h) any economic and technical requirements, financial guarantees and information required from economic operators;
- (i) the amount to be paid for and the terms of payment in respect of the documents relating to the proposed contract;
- (j) a statement of whether the utility is inviting offers for purchase, lease, rental or hire purchase or involving more than one of these methods; and
- (k) the contract award criteria and their weighting in accordance with regulation 30(3) and 30(4) or the descending order of importance of such criteria in accordance with regulation 30(5), if this information is not specified in the periodic indicative notice or the contract documents.

(5) The requirement referred to in paragraph (2)(a)(ii) is that the economic operators selected to tender for or to negotiate the contract are selected from the candidates which qualify in accordance with the system.

Award without a call for competition

17.—(1) A utility may seek offers in relation to a proposed contract without a call for competition in the following circumstances—

- (a) in the absence of tenders, suitable tenders or applications in response to a procedure with a call for competition but only if the original terms of the proposed contract offered in the discontinued procedure have not been substantially altered;
- (b) when the contract is to be awarded purely for the purposes of research, experiment, study or development but not where it has the purpose of securing profit or of recovering research and development costs and insofar as its award will not prejudice the competitive award of subsequent contracts which are, in particular, for the same purposes;
- (c) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may only be performed by a particular economic operator;
- (d) when (but only if it is strictly necessary) for reasons of extreme urgency brought about by events unforeseeable by the utility, the time limits specified in regulation 22(2) to (11) cannot be met;
- (e) when the contract to be awarded is a supply contract and the goods to be purchased or hired under the contract are required by the utility 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 utility to acquire goods having different technical characteristics which would result in—
 - (i) incompatibility between the existing goods or the installation and the goods to be purchased or hired under the contract; or
 - (ii) disproportionate technical difficulties in the operation and maintenance of the goods or the installation;
- (f) when a utility wants an economic operator which has entered into a works contract or a services contract with that utility 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—
 - (i) cannot for technical or economic reasons be carried out or provided separately from those under the original contract without major inconvenience to the utility; or
 - (ii) 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;

- (g) subject to paragraph (2), when the utility wants an economic operator which has entered into a works contract with that utility following a call for competition which satisfies the requirement of regulation 16(1) to carry out new work or works which are a repetition of the work or works carried out under the original contract and which are in accordance with the project for the purpose of which the first contract was entered into;
 - (h) in respect of a supply contract for the purchase or hire of goods quoted and purchased on a commodity market;
 - (i) when the contract to be awarded is to be awarded under a framework agreement which has been concluded in accordance with these Regulations and to which the provisions of regulation 18 apply;
 - (j) when the contract to be awarded is a supply contract, to take advantage of a particularly advantageous bargain available for a very short period of time at a price considerably lower than normal market prices;
 - (k) when the contract to be awarded is a supply contract, to take advantage of particularly advantageous conditions 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 26(5) (a), (b) and (c); and
 - (l) in the case of services contracts, when the rules of a design contest require the contract to be awarded to the successful contestant or to one of the successful contestants, provided that all successful contestants are invited to negotiate the contract.
- (2) A utility must not seek offers without a call for competition in accordance with paragraph (1) (g) unless—
- (a) the original contract was awarded after a call for competition;
 - (b) when the utility invited contractors to tender for or negotiate the contract it gave notice that a works contract for new work or works which would be a repetition of the work or works carried out under the original contract may be awarded without a call for competition in accordance with paragraph (1)(g); and
 - (c) in determining the estimated value of the original contract for the purposes of regulation 11 the utility took into account the value of the consideration which it expected to be payable for the new works.

Framework agreements

18.—(1) A utility may regard a framework agreement as a contract within the meaning of these Regulations and award it in accordance with these Regulations and in such a case a reference in these Regulations to a contract includes a framework agreement, except where the context otherwise requires.

(2) A utility which has entered into a framework agreement awarded in accordance with these Regulations may rely on regulation 17(1)(i) when awarding a contract under a framework agreement.

(3) A utility which has not entered into a framework agreement awarded in accordance with these Regulations must not rely on regulation 17(1)(i) when awarding a contract under a framework agreement.

(4) A utility may not misuse a framework agreement in order to prevent, restrict or distort competition.

Dynamic purchasing systems

19.—(1) A utility using a dynamic purchasing system must comply with this regulation.

(2) The utility which seeks to establish a dynamic purchasing system must comply with the requirements of regulation 42(2) to (7) and must use only electronic means to—

- (a) establish that system; and
- (b) award contracts under it.

(3) The utility must use the open procedure in accordance with these Regulations to establish a dynamic purchasing system up to the beginning of the procedure for the award of contracts under the system set out in this Regulation.

(4) When establishing a dynamic purchasing system, the utility must—

- (a) send to the Official Journal as soon as possible after forming the intention a notice, in the form of the contract notice in Annex V to Commission Regulation (EC) No 1564/2005⁽²²⁾ stating that a dynamic purchasing system is to be established; and
- (b) produce a specification which indicates—
 - (i) the nature of the goods, work, works or services intended to be purchased under that system; and
 - (ii) information concerning the purchasing system, the electronic equipment to be used in its operation, the arrangements for technical connection to the system, the rules governing its operation and any other necessary information relating to the system.

(5) When establishing a dynamic purchasing system the utility may also produce additional documents relating to the operation of the system.

(6) Where the utility establishes a dynamic purchasing system it must—

- (a) offer unrestricted, direct and full access to the specification and to any additional documents by electronic means from the date of publication of the contract notice to the date when the system ceases to be operated; and
- (b) indicate in the contract notice the internet address at which such documents may be examined.

(7) Throughout the duration of the dynamic purchasing system, the utility must—

- (a) give any economic operator the opportunity to—
 - (i) submit an indicative tender; and
 - (ii) be admitted to that system under the conditions referred to in paragraph (8); and
- (b) complete the evaluation of an indicative tender within 15 days from the date of its submission or such longer period as that utility may determine if no invitation to tender is issued under the system as provided in paragraph (13) within the 15 day period.

(8) The utility must admit to the dynamic purchasing system each economic operator which satisfies the selection criteria and has submitted an indicative tender which complies with the specification and any additional documents produced in accordance with paragraph (5) by the utility when establishing the system.

(9) The utility must as soon as possible notify an economic operator of its admission to a dynamic purchasing system or of the rejection of its indicative tender and must do so in writing if requested by the economic operator.

(10) An economic operator which is admitted to a dynamic purchasing system may improve its indicative tender at any time provided that the improved tender complies with the specification described in paragraph (4)(b).

⁽²²⁾ The annex to [Commission Regulation \(EC\) No 1564/2005](#) was amended by [Commission Regulation \(EC\) 1150/2009](#), OJ L 313, 29.11.2009, p.3.

(11) Where the utility proposes to award a contract under a dynamic purchasing system, it must send to the Official Journal as soon as possible after forming the intention a notice, in the form of a simplified contract notice on a dynamic purchasing system in Annex IX to [Commission Regulation \(EC\) No 1564/2005](#), inviting economic operators to submit an indicative tender in accordance with paragraph (7)(a)(i) not less than 15 days from the date of the dispatch of the simplified contract notice.

(12) The indicative tenders received within the period specified in paragraph (11) must be evaluated by the utility for admittance to the dynamic purchasing system before it proceeds with the issue of invitations to submit tenders in relation to any contract to be awarded under the dynamic purchasing system to an economic operator admitted to the system.

(13) The utility must invite all economic operators admitted to the dynamic purchasing system to submit a tender for each contract within a time limit specified by the utility.

(14) For each contract to be awarded under the dynamic purchasing system the utility—

- (a) must award the contract to the economic operator which submits the tender which best meets the award criteria specified in the contract notice for the establishment of the dynamic purchasing system; and
- (b) may, if appropriate, formulate those award criteria more precisely in the invitation to submit tenders.

(15) The utility must by notice in writing as soon as reasonably practicable after a decision has been made in accordance with paragraph (14)(a), inform the economic operators that submitted tenders of its decision in relation to the award of the contract.

(16) The utility must not charge any economic operator seeking admission to a dynamic purchasing system or which has been admitted to such a system in relation to any aspect of that system.

(17) A dynamic purchasing system established by the utility must not be operated for more than 4 years, unless there are exceptional circumstances.

(18) The utility must not use a dynamic purchasing system improperly or in such a way as to prevent, restrict or distort competition.

Electronic auctions

20.—(1) A utility which holds an electronic auction must comply with this regulation.

(2) Subject to paragraph (3), the utility may hold an electronic auction when using—

- (a) the open procedure;
- (b) the restricted procedure;
- (c) the negotiated procedure with a prior call for competition; or
- (d) the procedure set out in regulation 19 on the opening of competition for contracts to be awarded under a dynamic purchasing system.

(3) The utility must 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 utility may only hold an electronic auction to precede the award of a contract when the contract specification can be established with precision.

(5) The utility must 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 specification, 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 utility intends to hold an electronic auction it must state this in the contract notice.
- (7) A contract specification prepared by the utility in relation to a contract the award of which is to be preceded by an electronic auction must 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 specification) 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 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 utility must—
- (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.
- (9) Where the utility is to award a contract on the basis of the offer which is most economically advantageous to it in accordance with regulation 30(1)(a), each invitation referred to in paragraph (8)(b) must 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 utility must 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 reranking of tenders on the basis of the new prices or new values to be 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 utility, a separate mathematical formula for each variant; 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 must 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 utility—

- (a) must 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 specification; 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 utility must not disclose the identity of any economic operator participating in the auction.
- (15) The utility must 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 number of phases in the electronic auction specified in the invitation referred to in paragraph (8)(b) has been completed.
- (16) Where the utility intends to close an electronic auction—
- (a) as described in paragraph (15)(b), it must 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 must state in the invitation referred to in paragraph (8) (b) the timetable for each phase in the auction.
- (17) After closing an electronic auction a utility must award the contract in accordance with regulation 30 on the basis of the results of the electronic auction.
- (18) The utility must 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 specification.
- (19) The references to values in paragraphs (5)(b), (8)(b), (10)(d), (13)(b) and (15)(b) must be interpreted as including price.

Central purchasing bodies

21.—(1) A utility may purchase work, works, goods or services from or through a central purchasing body.

(2) Where a utility makes purchases in accordance with paragraph (1), it must be deemed to have complied with these Regulations or, where appropriate, the Public Contracts (Scotland) Regulations 2012⁽²³⁾, to the extent that the central purchasing body has complied with them.

Time limits

22.—(1) Subject to the minimum time limits specified in this regulation, a utility must 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 receipt by it of requests to be selected to tender for, or to negotiate, the contract and for the receipt by it of tenders.

(2) Subject to paragraphs (3), (6) and (7), the date which a utility using the open procedure fixes as the last date for the receipt by it of tenders made in response to the contract notice must be specified in the notice and must be not less than 52 days from the date of dispatch of the notice.

(23) S.S.I. 2012/88.

(3) Where—

- (a) the utility has published a periodic indicative notice in accordance with regulation 15;
- (b) the periodic indicative notice contained as much of the information specified in the form of periodic indicative notice used to call for competition in Annex IV to [Commission Regulation \(EC\) No 1564/2005](#)⁽²⁴⁾ as was available at the time of publication; and
- (c) the periodic indicative 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 was dispatched,

a utility using the open procedure may substitute for the period of not less than 52 days specified in paragraph (2) a shorter period of generally not less than 36 days and in any event not less than 22 days.

(4) The date which a utility using the restricted procedure or the negotiated procedure with a call for competition fixes as the last date for the receipt by it of requests to be selected to tender for, or to negotiate, the contract, must be specified in the contract notice or, where the call for competition is made by means of a periodic indicative notice, in the invitation to economic operators made in accordance with regulation 16(3)(b), and must in general be at least 37 days from the date of the dispatch of the notice or invitation and must in any case be not less than 22 days from that date, apart from when the notice is transmitted by electronic means in accordance with paragraph (6) or facsimile in which case it must be not less than 15 days.

(5) The date which is the last date for the receipt of tenders made in response to an invitation to tender by a utility using the restricted procedure or the negotiated procedure with a call for competition may be agreed between the utility and the economic operators invited to tender and must be the same date for all economic operators or, in the absence of agreement as to the date, must be fixed by the utility and must be as a general rule at least 24 days and in any event not less than 10 days from the dispatch of the invitation to tender.

(6) Where a contract notice is transmitted by electronic means in accordance with the format and procedures referred to in paragraph (3) of Annex XX to the Utilities Directive a utility may reduce the time limits by 7 days for—

- (a) the receipt by it of requests to be selected to tender for or to negotiate the contract; and
- (b) the receipt by it of tenders when using the open procedure.

(7) Subject to paragraph (5), a utility using the open procedure, the restricted procedure or the negotiated procedure may reduce the time limits for the receipt by it of tenders by 5 days provided that—

- (a) the utility 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.

(8) When using the reductions specified in paragraphs (3), (6) and (7), the date which a utility using the open procedure fixes as the last date for the receipt by it of tenders, must be not less than 15 days from the date of dispatch of the contract notice.

(9) Where the contract notice is not transmitted by facsimile or electronic means and when using the reductions specified in paragraphs (3), (6) and (7), the date which a utility using the open procedure fixes as the last date for the receipt by it of tenders, must be not less than 22 days from the date of dispatch of the contract notice.

(10) When using the reductions specified in paragraphs (3), (6) and (7) the date which a utility using the restricted procedure or the negotiated procedure with a call for competition fixes as the

⁽²⁴⁾ The annex to [Commission Regulation \(EC\) No 1564/2005](#) was amended by Commission Regulation [\(EC\) 1150/2009](#), OJ L 313, 29.11.2009, p.3.

last date for the receipt by it of requests to be selected to tender for or to negotiate the contract, must be not less than 15 days from the date of dispatch of the notice or invitation.

(11) Subject to paragraph (5) and when using the reductions specified in paragraphs (3), (6) and (7), the date which a utility using the restricted procedure or the negotiated procedure with a call for competition fixes as the last date for the receipt by it of tenders, must be not less than 10 days from the date of dispatch of the invitation to tender.

(12) Subject to paragraph (5), a utility must 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 utility to respond in accordance with paragraphs (13) and (14) and, for whatever reason, the contract documents are not supplied in accordance with those paragraphs; 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.

(13) Where a utility using the open procedure does not offer unrestricted and full direct access by electronic means to the contract documents in accordance with paragraph (7), the utility must send the contract documents to an economic operator within 6 days of the receipt of a request from that economic operator, provided that the documents are requested in good time before the date specified in the contract notice as the final date for the receipt by it of tenders.

(14) A utility using the open procedure, the restricted procedure or the negotiated procedure must 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 is received in sufficient time to enable the utility to supply the information not later than 6 days before the date specified in the contract notice as the final date for the receipt by it of tenders.

(15) A utility using the restricted procedure or the negotiated procedure with or without a call for competition must send invitations in writing simultaneously to each of the economic operators selected to tender for, or to negotiate, the contract and the invitation must—

- (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 in accordance with paragraph (7); or
- (c) where the contract documents are held by an entity other than the utility, 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 utility, the utility must ensure that the contract documents are sent to economic operators by the most rapid means practicable.

(17) The utility must include the following information in the invitation—

- (a) the final date for making requests for further information and the amount and method of payment of any fee which may be charged for supplying that information;
- (b) the final date for 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;
- (c) a reference to any contract notice;
- (d) an indication of the information to be included with the tender;
- (e) the criteria for the award of the contract if this information was not specified in the contract notice, the notice on the existence of a qualification system used as a means of

calling for competition published in accordance with regulation 16(2)(a)(ii) or the contract documents; and

- (f) the relative weighting of the contract award criteria or, where appropriate, the descending order of importance of such criteria if this information was not specified in the contract notice, the notice on the existence of a qualification system or the contract documents.

(18) The utility must by notice in writing, as soon as reasonably practicable after sending the invitations referred to in paragraph (15), inform any candidates that have not been selected to be invited to tender or to negotiate that they have been unsuccessful.

(19) Where a utility using the negotiated procedure reduces the number of tenders to be negotiated, the utility must, by notice in writing as soon as reasonably practicable, inform the affected economic operators that they have been excluded from the competition.

PART 4

QUALIFICATION AND SELECTION OF ECONOMIC OPERATORS

General

23.—(1) Where a utility establishes criteria for the rejection of economic operators in accordance with regulation 26(1), 26(3), 27(1) or 27(2), it must exclude any economic operator which meets those criteria when making its selection of the economic operators to be awarded a contract, to be invited to tender for, or to negotiate the contract.

(2) A utility must make its selection of the economic operators to be awarded a contract, to be invited to tender for, or to negotiate the contract in accordance with the selection criteria established by it in accordance with regulations 26 and 27.

(3) A utility using the restricted or negotiated procedure with a call for competition must reduce, where appropriate and in accordance with regulation 27, the number of economic operators selected in accordance with paragraphs (1) and (2) of this regulation.

(4) Where a utility makes a call for competition in respect of a contract by publishing a notice on the existence of a qualification system, when making its selection of the economic operators to be invited to tender for or to negotiate that contract, the utility must—

- (a) qualify economic operators in accordance with regulation 25; and
- (b) apply the provisions of paragraphs (1), (2) and (3) which are relevant to the restricted procedure or the negotiated procedure to such qualified economic operators.

(5) A utility must verify that the tenders submitted by the economic operators which have been selected by the utility comply with the rules and requirements applicable to tenders and must award the contract on the basis of the criteria referred to in regulation 30.

Mutual recognition concerning administrative, technical or financial conditions

24.—(1) When using the negotiated procedure or the restricted procedure and in determining what rules and criteria are to be met by economic operators to be invited to tender for, or to negotiate, a contract or to qualify under a qualification system, a utility must not—

- (a) impose conditions of an administrative, technical or financial nature on some economic operators which are not imposed on others; or
- (b) require tests or the submission of evidence which duplicates objective evidence already available.

(2) For the purpose of assessing an economic operator's technical ability, a utility may request that economic operator to provide—

- (a) a certificate—
 - (i) attesting its conformity to quality assurance standards based on the relevant European standard; and
 - (ii) from an independent body established in any relevant State conforming to the European standard concerning certification; or
- (b) any other evidence of its conformity to quality assurance measures which are equivalent to the standards referred to in sub-paragraph (a)(i).

(3) Where the contract to be awarded is a works contract or a services contract, for the purposes of verifying the economic operator's technical abilities, a utility may, where appropriate, request an indication of the environmental management measures which the economic operator will apply when performing the contract and a utility may request that economic operator to provide—

- (a) a certificate—
 - (i) attesting its conformity to environmental management standards based on—
 - (aa) the Community Eco-Management and Audit Scheme⁽²⁵⁾; or
 - (bb) the relevant European standard or international standard; and
 - (ii) from an independent body established in any relevant State conforming to EU law or the relevant European standard or international standard concerning certification; or
- (b) any other evidence of its conformity to environmental management measures which are equivalent to the standards referred to in sub-paragraph (a)(i).

Qualification system

25.—(1) A utility may establish and operate a system of qualification of economic operators if that system complies with this regulation.

(2) The utility must permit economic operators to apply for qualification under the system at any time during its operation.

(3) The system may involve different stages of qualification and must be based on objective rules and criteria as determined from time to time by the utility and those criteria and rules may include technical specifications in which case the provisions of regulation 12 apply.

(4) The rules and criteria referred to in paragraph (3) may include the rejection criteria referred to in regulation 26(3) and (5).

(5) Where the utility is a contracting authority, the rules and criteria referred to in paragraph (3) include the rejection criteria referred to in regulation 26(1).

(6) Where the criteria referred to in paragraph (3) includes requirements relating to the economic and financial capacity or the technical or professional abilities of an economic operator—

- (a) the economic operator, or a group of economic operators as referred to in regulation 28, may rely on the capacity or abilities of other entities or members in the group, whatever the legal nature of the link between the economic operator or the group of economic operators and the other entities; and
- (b) the economic operator or the group of economic operators must prove to the utility that the necessary resources will be available to it, and such proof may in particular include an undertaking from those entities to that effect.

⁽²⁵⁾ The Community Eco-Management and Audit Scheme (EMAS) is a management tool for companies and other organisations to evaluate, report and improve their environmental performance; for more information, see www.europa.eu.int/comm/environment/emas/index-en.htm.

(7) In determining what rules and criteria are to be met by applicants to qualify under the system a utility must comply with regulation 24.

(8) Where the utility makes a call for competition in respect of a contract by publishing a notice on the existence of a qualification system, it must comply with regulation 23(4).

(9) The rules of, and criteria applying to, the system must be made available on request to economic operators and any amendment of those rules and criteria must be sent to them as the amendment is incorporated into the system.

(10) The utility may establish a system of qualification where an economic operator may qualify under the system of, or be certified by, another person, and in those circumstances the utility must inform economic operators, which apply to qualify, of the name of that other person.

(11) The utility must inform applicants for qualification of the success or failure of their application within 6 months from the date of presentation of an application and, if the decision will take longer than 4 months, the utility must inform the applicant, within 2 months of the date of presentation of the application of—

- (a) the reasons justifying a longer period; and
- (b) the date by which its application will be accepted or refused.

(12) The utility must inform any applicant whose application to qualify is refused of the decision, and the reasons for refusal, as soon as possible and under no circumstances later than 15 days after the date of the decision.

(13) An application may only be refused if the applicant fails to meet the requirements for qualification laid down in accordance with paragraph (3).

(14) The utility must keep a written record of qualified economic operators which may be divided into categories according to the type of contract for which the qualification is valid.

(15) The utility may cancel the qualification of an economic operator which has qualified under the qualification system only if it does not continue to meet the rules and criteria laid down in accordance with paragraph (3).

(16) The utility may not cancel a qualification unless it notifies the economic operator in writing at least 15 days before the qualification is due to be cancelled of the reasons for the proposed cancellation.

(17) The utility must send a notice in the form of the qualification system notice in Annex VII to [Commission Regulation \(EC\) No 1564/2005](#)⁽²⁶⁾ and containing the information relating to the qualification system therein specified to the Official Journal when the system is first established.

(18) If the utility expects to operate the system for more than 3 years, or if it has operated the system for more than 3 years, it must send a notice as referred to in paragraph (17) on an annual basis after the year in which the system is first established.

Criteria for rejection of economic operators

26.—(1) Subject to paragraph (2), where a utility is a contracting authority, it must treat as ineligible and must not select an economic operator in accordance with these Regulations if the utility 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) the common law offence of conspiracy where that conspiracy relates to participation in a criminal organisation as defined in Article 2 of Council Framework Decision 2008/841/

(26) The annex to [Commission Regulation \(EC\) No 1564/2005](#) was amended by [Commission Regulation \(EC\) 1150/2009](#), OJ L 313, 29.11.2009, p.3.

- JHA(27) or an offence under sections 28 or 30 of the Criminal Justice and Licensing (Scotland) Act 2010(28);
- (b) corruption within the meaning of section 1(2) of the Public Bodies Corrupt Practices Act 1889(29) or section 1 of the Prevention of Corruption Act 1906(30), where the offence relates to active corruption as defined in Article 3 of the Council Act of 26th May 1997(31) and Article 3(1) of Council Joint Action 98/742/JHA(32);
- (c) bribery or corruption within the meaning of sections 68 and 69 of the Criminal Justice (Scotland) Act 2003(33) where the offence relates to active corruption, or bribery within the meaning of sections 1 or 6 of the Bribery Act 2010(34);
- (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 Communities(35), within the meaning of—
- (i) the offence of cheating the Revenue;
 - (ii) the common law offence of fraud;
 - (iii) the common law offence of theft;
 - (iv) fraudulent trading within the meaning of section 458 of the Companies Act 1985(36) or section 993 of the Companies Act 2006(37);
 - (v) fraudulent evasion within the meaning of section 170 of the Customs and Excise Management Act 1979(38) or section 72 of the Value Added Tax Act 1994(39);
 - (vi) an offence in connection with taxation in the European Community within the meaning of section 71 of the Criminal Justice Act 1993(40);
 - (vii) the common law offence of uttering; or
 - (viii) the common law offence of attempting to pervert the course of justice;
- (e) the common law offence of incitement to commit a crime;
- (f) money laundering within the meaning of section 340(11) of the Proceeds of Crime Act 2002(41) or the Money Laundering Regulations 2007(42), or an offence in connection with proceeds of drug trafficking within the meaning of sections 49, 50 or 51 of the Drug Trafficking Act 1994(43); or
- (g) any other offence within the meaning of Article 45(1) of the Public Sector Directive as defined by the national law of any relevant State.

(27) OJ L 300, 11.11.2008, p.42.

(28) 2010 asp 13.

(29) 1889 c.69. This Act was repealed by Schedule 2 to the Bribery Act 2010 (c.23).

(30) 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 (asp 7) and repealed by Schedule 2 to the Bribery Act 2010 (c.23).

(31) OJ C 195, 25.6.1997, p.2.

(32) OJ L 358, 31.12.1998, p.2; repealed by Council Framework Decision 2003/568/JHA (OJ L 192, 31.7.2003, p.54).

(33) 2003 asp 7. Sections 68 and 69 were repealed by Schedule 2 to the Bribery Act 2010 (c.23).

(34) 2010 c.23.

(35) OJ C 316, 27.11.95, p.49.

(36) 1985 c.6. Section 458 was modified by regulation 4 of, and Part 1 of schedule 2 to, the Limited Liability Partnerships Regulations 2001 (S.I. 2001/1090) and repealed by Schedule 16 to the Companies Act 2006 (c.46).

(37) 2006, c.46.

(38) 1979 c.2. There are amendments to this Act which are not relevant to these Regulations.

(39) 1994 c.23. Section 72 was amended by section 17 of the Finance Act 2003 (c.14). There are other amendments to this Act which are not relevant to these Regulations.

(40) 1993 c.36. There are amendments to this Act which are not relevant to these Regulations.

(41) 2002 c.29.

(42) S.I. 2007/2157. These Regulations were amended by S.I. 2007/3299, S.I. 2011/1781 and S.I. 2011/2833.

(43) 1994, c.37. Sections 49, 50 and 51 were repealed by Schedules 11 and 12 to the Proceeds of Crime Act 2002 (c.29).

(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 utility 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) Where a utility is not a contracting authority, the criteria which the utility uses for deciding not to select an economic operator may include the fact 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 offences in paragraph (1).

(4) A utility 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 paragraphs (1) and (3).

(5) A utility 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 a person in respect of whom a debt relief order has been made or is bankrupt or has had a receiving order or administration order or bankruptcy restrictions order or debt relief restrictions order made against that economic operator or has made any composition or arrangement with, or for the benefit of, that economic operator's creditors or has made any conveyance or assignment for the benefit of that economic operator's 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⁽⁴⁴⁾, or article 242 of the Insolvency (Northern Ireland) Order 1989⁽⁴⁵⁾, 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 that economic operator's estate, or is the subject of any similar procedure under the law of any other State;
- (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⁽⁴⁶⁾ 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 thereof 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 that economic operator's business or profession;
- (e) has committed an act of grave misconduct in the course of that economic operator's business or profession;
- (f) 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;
- (g) 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; or

⁽⁴⁴⁾ 1986 c.45. There are amendments to this Act which are not relevant to these Regulations.

⁽⁴⁵⁾ S.I. 1989/2405 (N.I. 19). There are amendments to this Order which are not relevant to these Regulations.

⁽⁴⁶⁾ 2002 c.40. There are amendments to this Act which are not relevant to these Regulations.

(h) is guilty of serious misrepresentation in providing any information referred to in this regulation or regulation 24 to 27 or has not provided such information in response to a request of a contracting authority.

(6) A utility may require an economic operator to provide such information as it considers it needs to make the evaluation in accordance with paragraphs (1), (3) and (5) except that it must accept as conclusive evidence that an economic operator does not fall within the grounds specified in paragraphs (1), (3), (5)(a), (b), (c), (d), (f) or (g) if that economic operator provides to the utility—

- (a) in relation to the grounds specified in paragraphs (1), (3), (5)(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 paragraphs (5)(f) or (g), a certificate issued by the relevant competent authority; and
- (c) in a relevant State where the documentary evidence specified in paragraphs (6)(a) and (b) is not issued in relation to one of the grounds specified in paragraphs (1), (3), (5)(a), (b), (c), (d), (f) or (g) 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.

(7) In this regulation, “relevant” in relation to a judicial, administrative or competent authority, notary public or Commissioner for oaths means an authority nominated by, or a notary public or Commissioner for oaths in, the relevant State in which the economic operator is established.

Criteria for selection of economic operators

27.—(1) A utility using the open procedure must establish selection criteria on the basis of objective criteria and rules which it determines and which it makes available to economic operators which request them.

(2) A utility using the restricted procedure or the negotiated procedure, with or without a call for competition, must make the selection of the economic operators to be invited to tender for or to negotiate the contract on the basis of objective criteria and rules which it determines and which it makes available to economic operators which request them.

(3) Where the criteria referred to in paragraphs (1) and (2) include requirements relating to the economic and financial capacity or the technical or professional abilities of the economic operator—

- (a) the economic operator, or a group of economic operators as referred to in regulation 28 may rely on the capacity or abilities of other entities or members in the group, regardless of the legal nature of the link between the economic operator or the group of economic operators and the other entities; and
- (b) the economic operator, or the group of economic operators must prove to the utility that the resources necessary to perform the contract will be available to it, and such proof may in particular include an undertaking from those entities to that effect.

(4) Without prejudice to the generality of paragraph (2), the criteria may be based on the need of the utility to reduce the number of economic operators selected to tender for or to negotiate the contract to a level which is justified by the characteristics of the award procedure and the resources required to complete it.

(5) The utility must take account of the need to ensure adequate competition in determining the number of economic operators selected to tender for or to negotiate the contract.

Consortia

28.—(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 utility must 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 economic operators to be invited to tender for, or to negotiate, a contract or be admitted to a dynamic purchasing system on the grounds that the consortium has not formed a legal entity for the purpose of tendering for, or negotiating, the contract or being admitted to a dynamic purchasing system.

(3) Where a utility awards a contract to a consortium it may, if to do so 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 include a reference to each person who is a member of that consortium.

Corporations

29.—(1) A utility must not treat the tender of a services provider as ineligible or 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 or to be admitted to a dynamic purchasing system on the ground that under the law of any part of the United Kingdom the services provider is required to be an individual, 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 of operations,

a utility may require an economic operator which is not an individual to indicate in the tender, the indicative 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.

PART 5

THE AWARD OF A CONTRACT

Criteria for the award of a contract

30.—(1) Subject to regulation 31 and paragraphs (6) and (9) of this regulation, a utility must award a contract on the basis of the offer which—

- (a) is the most economically advantageous from the point of view of the utility; or
- (b) offers the lowest price.

(2) In order to determine that an offer is the most economically advantageous, a utility must use criteria linked to the subject matter of the contract which may include delivery date or period for completion, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, environmental characteristics, technical merit, after sales service and technical assistance, commitments with regard to parts, security of supplies and price or otherwise.

(3) Where a utility intends to award a contract on the basis of the offer which is the most economically advantageous, it must state the weighting which it gives to each of the criteria chosen in the contract notice or in the contract documents.

(4) When stating the weightings referred to in paragraph (3), a utility may give the weighting 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 utility, it is not possible to provide weightings for the criteria referred to in paragraph (3) on objective grounds, the utility must indicate the criteria in descending order of importance in the contract notice or contract documents.

(6) If an offer for a contract is abnormally low, the utility 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 any 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 utility 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 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 utility 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 utility, that the aid has been granted in a way which is compatible with the TFEU.

(9) Where a utility rejects an abnormally low offer in accordance with paragraph (8), it must send a report justifying the rejection to the Minister for onward transmission to the Commission.

(10) In this regulation, “offer” includes a bid by one part of a utility to provide services, to carry out work or works or to make goods available to another part of the utility when the former part is invited by the latter part to compete with the offers sought from other persons.

Rejection of third country tenders – supply contracts

31.—(1) In this regulation—

“an offer of third country origin” means an offer to enter a supply contract under which more than 50% of the total value of the goods offered originate in States with which the Communities have not concluded, multilaterally or bilaterally, an agreement ensuring comparable and effective access for undertakings in member States to the markets of those States or in States to which the benefit of the provisions of the Utilities Directive has not been extended; and

“goods” includes software used in telecommunications network equipment.

(2) The origin of the goods must be determined in accordance with Council Regulation No 450/2008 of the European Parliament and of the Council laying down the Community Customs Code (Modernised Customs Code)(47).

(3) Notwithstanding regulation 30, a utility need not accept an offer of third country origin.

(4) Notwithstanding regulation 30, where an offer of third country origin is equivalent to an offer which is not of third country origin a utility must not accept the offer of third country origin unless not to accept that offer would oblige the utility to acquire—

- (a) goods having technical characteristics different from those of existing goods; or
- (b) an installation resulting in incompatibility, technical difficulties in operation and maintenance or disproportionate costs.

(5) In the case of a supply contract to be awarded on the basis of the offer which offers the lowest price, offers are equivalent for the purposes of paragraph (4) if their prices are to be treated as equivalent in accordance with paragraph (7).

(6) In the case of a supply contract to be awarded on the basis of the offer which is the most economically advantageous to the utility, offers are equivalent for the purposes of paragraph (4) if—

- (a) their prices are to be treated as equivalent in accordance with paragraph (7); and
- (b) disregarding any difference in price the offer which is not of third country origin is at least as economically advantageous to the utility as the offer of third country origin.

(7) The prices of offers are to be treated as equivalent for the purposes of paragraphs (5) and (6) if the price of the offer which is not of third country origin is the same as or is not more than 3% greater than the offer of third country origin.

Contract award notices

32.—(1) Subject to paragraphs (2) and (3), a utility which has awarded a contract or concluded a framework agreement must, not later than 2 months after the award or conclusion, send to the Official Journal a notice, in the form of the contract award notice in Annex VI to [Commission Regulation \(EC\) No 1564/2005](#)(48) including the information therein specified.

(2) When sending the contract award notice to the Official Journal, a utility may indicate that information regarding—

- (a) the number of tenders received;
- (b) the identity of the economic operator; or
- (c) prices,

is of a sensitive commercial nature, and require that it not be published.

(3) A utility is not required to send a contract award notice in accordance with paragraph (1) where it awards a contract under a framework agreement.

(4) A utility which has awarded a contract under a dynamic purchasing system in accordance with regulation 19 may—

- (a) send the contract award notice in accordance with paragraph (1); or
- (b) retain any notice it is proposing to send to the Official Journal in accordance with paragraph (1) for a period of 3 months commencing on the date that the first notice was retained.

(47) OJ L 145, 4.6.2008, p.1.

(48) The annex to [Commission Regulation \(EC\) No 1564/2005](#) was amended by Commission Regulation (EC) 1150/2009, OJ L 313, 29.11.2009, p.3.

(5) Where a utility retains contract award notices in accordance with paragraph (4)(b), it must send those contract award notices to the Official Journal not later than 2 months after the end of each period of 3 months.

(6) A utility which has awarded a Part B services contract must state in the contract award notice whether or not it agrees to its publication.

(7) Where a utility has awarded a research and development services contract it may, if the contract was awarded without a call for competition in accordance with regulation 17(1)(b), insert in section II.1.4 of the form of contract award notice in Annex VI to Commission Regulation (EC) No 1564/2005 only the title of the category of services.

(8) Where the services contract referred to in paragraph (7) was not awarded in accordance with regulation 17(1)(b), the utility may provide limited information at section II.1.4 of the form of contract award notice in Annex VI to [Commission Regulation \(EC\) No 1564/2005](#) if the information which would otherwise be given is of a commercially sensitive nature, provided that the information given is no less detailed than that already provided in either its call for competition in accordance with regulation 16(2), or where a qualification system is used, than that recorded in accordance with regulation 25(14).

Information about contract award procedures and standstill period

33.—(1) Subject to paragraphs (4) and (10), a utility must by notice in writing as soon as possible after the decision has been made, inform all tenderers and all candidates concerned (if any) of its decision to—

- (a) award the contract; or
- (b) conclude the framework agreement.

(2) The notice referred to in paragraph (1) must include—

- (a) the criteria for the award of the contract;
- (b) where practicable, the score 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;
- (c) the name of the economic operator—
 - (i) to be awarded the contract; or
 - (ii) to become a party to the framework agreement;
- (d) in the case of an unsuccessful economic operator, a summary of the reasons why the economic operator was unsuccessful;
- (e) in the case of an unsuccessful tenderer, the characteristics and relative advantages of the successful tender; and
- (f) a precise statement of the effect of paragraph (3) on the economic operator which is to receive the notice.

(3) A utility must allow a period of at least the relevant standstill period to elapse between the date of dispatch of the notice referred to in paragraph (1) and the date on which that utility enters into the contract or concludes the framework agreement.

(4) Paragraphs (1) to (3) do not apply where—

- (a) the only tenderer is the economic operator to be awarded the contract or to become a party to the framework agreement, and there are no candidates concerned; or

- (b) the contract is a contract awarded under a framework agreement or a dynamic purchasing system.
- (5) Without prejudice to paragraph (4), paragraph (3) does not apply where—
 - (a) the contract or framework agreement is exempt from the requirement to make a call for competition; or
 - (b) there are no tenderers concerned or candidates concerned.
- (6) Subject to paragraph (10), a utility must within 15 days of the date on which it receives a request in writing from any economic operator which was unsuccessful—
 - (a) inform that economic operator of the reasons why it was unsuccessful; and
 - (b) in the case of an unsuccessful tenderer, other than a tenderer which has been informed by notice under paragraph (1), inform that economic operator of the characteristics and relative advantages of the successful tender and the name of—
 - (i) the economic operator to be awarded the contract;
 - (ii) the parties to the framework agreement; or
 - (iii) the economic operators admitted to the dynamic purchasing system.
- (7) The reasons referred to in paragraphs (2)(d) and (6)(a) include any reason for the utility's decision that the economic operator did not meet the technical specifications or their equivalent—
 - (a) as specified in regulation 12(6); or
 - (b) in terms of the performance or functional requirements referred to in regulation 12(7).
- (8) Subject to paragraph (10), a utility must as soon as possible after the decision has been made, inform all candidates and tenderers of its decision to abandon or to recommence a contract award procedure in respect of which a call for competition has been made, in relation to—
 - (a) the award of a contract;
 - (b) the conclusion of a framework agreement; or
 - (c) the establishment of a dynamic purchasing system.
- (9) A utility which informs an economic operator of its decision in accordance with paragraph (8) must include the reasons for the decision and, if so requested by the economic operator, must provide the decision and reasons in writing.
- (10) A utility may withhold any information to be provided in accordance with paragraph (1), (6) or (8) where the disclosure of such information—
 - (a) would impede law enforcement;
 - (b) would otherwise be contrary to the public interest;
 - (c) would prejudice the legitimate commercial interests of any economic operator; or
 - (d) might prejudice fair competition between economic operators.

PART 6

SPECIALISED CONTRACTS

Design contests

- 34.—(1) A utility which organises a design contest—
 - (a) must establish the rules for that design contest in accordance with the provisions of this regulation; and

- (b) must not limit the admission of any economic operator to the design contest by reference to the territory or part of the territory of a relevant State.
- (2) This regulation applies to a design contest if it is organised as part of a procedure leading to the award of a services contract whose estimated value (net of value added tax and including the value of any prizes or payments) is not less than the amount set out in Article 61(1).
- (3) This regulation applies to a design contest whether or not it is organised as part of a procedure leading to the award of a services contract if—
- (a) the contest is conducted for the purpose of carrying out an activity specified in any Part of Schedule 1 in which the utility is specified; and
 - (b) the aggregate value of the prizes or payments for the contest, including the estimated value (net of value added tax) of the contract which might subsequently be awarded in accordance with regulation 17(1)(1) provided that the utility does not exclude such an award in the contest notice, is not less than the amount set out in Article 61(2).
- (4) This regulation does not apply to a design contest—
- (a) which is organised by the utility other than for the purpose of carrying out an activity specified in the Part of Schedule 1 in which the utility is specified;
 - (b) which is organised by the utility for the purpose of carrying out any activity outside the territory of the European Union but only if the carrying out of that activity does not involve the physical use of a network or geographical area within the European Union;
 - (c) which is classified as secret or where it must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions of any part of the United Kingdom or when the protection of the essential interests of the security of the United Kingdom requires it;
 - (d) where different rules govern the procedures of the design contest and it is to be entered into in accordance with—
 - (i) an international agreement to which the United Kingdom and a State which is not a relevant State are parties and it relates to a design contest intended for the joint implementation or exploitation of a project related to that agreement;
 - (ii) an international agreement relating to the stationing of troops; or
 - (iii) the design contest procedures of an organisation of which only States are members (an “international organisation”) or of which only States or international organisations are members; or
 - (e) organised by the utility for the purpose of carrying out an activity specified in column 2 of Schedule 1 where that activity is directly exposed to competition on markets to which access is unrestricted and this will be the case if one of the following conditions is satisfied—
 - (i) the Cabinet Office has notified the Commission in accordance with Article 30 of the Utilities Directive that the activity concerned is directly exposed to competition on markets to which access is not restricted and—
 - (aa) the Commission has adopted a decision that an exemption should apply in response to such a notification; or
 - (bb) the Commission has not adopted a decision in relation to such a notification within the time limits specified in Article 30(6) of the Utilities Directive;
 - (ii) the Commission has, on the application of the utility—
 - (aa) adopted a decision that an exemption should apply to the activity concerned;
 - or

- (bb) has not adopted such a decision within the time limit specified in Article 30 of the Utilities Directive; or
- (iii) the Commission has, of its own initiative adopted a decision that an exemption should apply to the activity concerned and for the purposes of this sub-paragraph that time limit commences on the date that the Commission has informed the Cabinet Office in accordance with Article 30 that the matter is under consideration.
- (5) The utility must publicise its intention to hold a design contest by sending to the Official Journal a notice in the form of the design contest notice in Annex XII to [Commission Regulation \(EC\) No 1564/2005](#)⁽⁴⁹⁾ and containing the information therein specified.
- (6) The utility must make the rules of the design contest available to economic operators which wish to participate in the contest.
- (7) Regulations 28(2) and 29 apply to design contests as they apply to the seeking of offers in relation to a proposed contract.
- (8) Regulation 40(1)(b) to (7) applies to notices relating to design contests as it applies to notices in relation to a proposed contract.
- (9) Regulation 42(1), (2) and (4) applies to all communications relating to design contests as it applies to a proposed contract.
- (10) The utility must ensure that the specified means of communication and the storage of information enables—
- (a) the integrity and confidentiality of information provided by those economic operators participating in the design contest to be maintained; and
 - (b) the jury to ascertain the contents of proposals only after the time limit for their submission has expired.
- (11) Where the utility requires that proposals are to be transmitted by electronic means, it must ensure that—
- (a) details of the equipment which is necessary for the electronic receipt of proposals, including encryption, are available to all economic operators which wish to participate in the design contest; and
 - (b) the equipment for the electronic receipt of proposals complies with the requirements of regulation 42(6).
- (12) Where the utility restricts the number of economic operators in the design contest, it must—
- (a) establish clear and non-discriminatory criteria to select those economic operators;
 - (b) ensure that the number of economic operators selected is sufficient to ensure adequate competition; and
 - (c) by notice in writing as soon as reasonably practicable after restricting the number of economic operators, inform the affected operators that they have been excluded from the design contest.
- (13) The utility must ensure that—
- (a) the members of the jury are all individuals who are independent of those economic operators participating in the design contest;
 - (b) where the economic operators are required to possess a particular professional qualification, that at least one third of the members of the jury also possess that qualification or an equivalent qualification;

⁽⁴⁹⁾ The annex to [Commission Regulation \(EC\) No 1564/2005](#) was amended by [Commission Regulation \(EC\) 1150/2009](#), OJ L 313, 29.11.2009, p.3.

- (c) the proposals of the economic operators are submitted to the jury without any indication as to the authorship of each proposal;
- (d) the jury makes its decisions or opinions independently and solely on the basis of the criteria specified in the notice referred to in paragraph (5);
- (e) the jury is not informed of the authorship of any proposal until after it has reached its decision or opinion;
- (f) the jury prepares minutes signed by its members in which it records—
 - (i) its ranking of the proposals based upon its assessment of each proposal's merits; and
 - (ii) its observations or details of any issues upon which clarification is required in relation to each proposal; and
- (g) the jury may invite the economic operators to answer any questions to clarify issues noted in the minutes referred to in sub-paragraph (f) and must record complete minutes of any such communications with economic operators.

(14) The utility must, not later than 2 months after the date the jury makes its selection, publicise the results of the design contest by sending to the Official Journal a notice in the form of the notice of the results of a design contest in Annex XIII to [Commission Regulation \(EC\) No 1564/2005](#) and including the information therein specified.

(15) When sending the notice of the results of a design contest to the Official Journal in accordance with paragraph (14), the utility may indicate that information regarding—

- (a) the number of proposals received;
- (b) the identity of the economic operators; or
- (c) prices,

is of a sensitive commercial nature, and require that it not be published.

PART 7

MATTERS RELATING TO A CONTRACT

Obligations relating to taxes, environmental protection, employment protection and working conditions

35.—(1) A utility may include in the contract documents relating to a works contract or 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 the works contract; or
- (b) the services to be provided under the services contract.

(2) A utility which provides the information referred to in paragraph (1) must request contractors or services providers to indicate that they have taken account of the obligations relating to employment protection provisions and those working conditions in preparing their tender or in negotiating the contract.

Conditions for performance of contracts

36.—(1) A utility may stipulate conditions relating to the performance of a contract, provided that those conditions are compatible with EU law and are indicated in—

- (a) the notice used as a means of calling for competition and in the contract documents; or

(b) the contract documents.

(2) The conditions referred to in paragraph (1) may, in particular, include social or environmental considerations.

PART 8

MISCELLANEOUS

Preservation of records

37.—(1) When these Regulations apply to the seeking of offers in relation to a contract, a utility must keep appropriate information on each contract sufficient to justify decisions taken in connection with—

- (a) the qualification and selection of economic operators and the award of contracts; and
- (b) the use of a procedure without a prior call for competition by virtue of regulation 17.

(2) When a utility decides not to apply these Regulations to the seeking of offers in relation to a contract in accordance with regulation 6, 7, 8, 9 or 11, it must keep appropriate information on such a contract sufficient to justify that decision.

(3) A utility must take appropriate steps to document the progress of contract award procedures conducted by electronic means.

(4) The information referred to in paragraphs (1), (2) and (3) must be preserved for at least 4 years from the date of the award of the contract.

Statistical and other reports

38.—(1) A utility must each year, by the date notified to it by the Minister, send to the Minister a report specifying—

- (a) the aggregate value (estimated if necessary) of the consideration payable under contracts awarded in the previous year which have been excluded from the operation of these Regulations by regulation 11 for the purpose of carrying out the activities in each Part of Schedule 1 in which the utility is specified; and
- (b) the type of activities for which those contracts were awarded.

(2) A utility, when requested, must for the purpose of informing the Commission send to the Minister a report—

- (a) containing such information as the Minister may from time to time require in respect of a particular contract (including contracts excluded or exempted from the application of all or some of these Regulations by regulation 6, 7, 8, 9 or 11);
- (b) specifying which of its activities it considers are not activities specified in the Part of Schedule 1 in which the utility is specified, or are activities outside the territory of the Communities not involving the physical use of a network or geographical area within the Communities; and
- (c) specifying the categories of goods, work, works or services it considers comprise the goods, work, works or services which it acquires in order to sell, hire or provide them to another person, but which it does not have a special or exclusive right to sell, hire or provide and which other persons are free to sell, hire or provide under the same conditions.

(3) Subject to paragraph (4), a utility specified in Parts A to F, O, P, R or S of Schedule 1 must, not later than 31st July in each year, send to the Minister a report specifying in relation to each contract

awarded by it in the previous year (including contracts excluded or exempted from the application of some or all of these Regulations by regulation 6, 7, 8, 9 or 11)—

- (a) the value (estimated if necessary) of the consideration payable under the contract;
 - (b) the principal category of works or services carried out or to be carried out under the contract according to the nomenclature used in Schedule 2 or 3 or the type of goods purchased or hired under the contract; and
 - (c) the nationality of the economic operator to which the contract was awarded and the relevant State in which that economic operator is established.
- (4) The report referred to in paragraph (3) need not include information concerning contracts for—
- (a) research and development services specified in category 8 of Part A of Schedule 3;
 - (b) telecommunications services specified under CPV references 64221000-1, 64227000-3, 64228000-0, 64228100-1 and 64228200-2 within category 5 of Part A of Schedule 3; or
 - (c) the services specified in Part B of Schedule 3.
- (5) A utility may indicate that any of the information in a report sent to the Minister in accordance with paragraph (2)(c) is of a sensitive commercial nature, and require that it not be published.

Provision of reports

39.—(1) Any reference to the Minister in these Regulations is deemed to be a reference to the Minister responsible for that utility.

(2) The Minister responsible for a utility is in relation to Scotland the Scottish Ministers or the Minister of the Crown whose areas of responsibility are most closely connected with the functions of the utility.

(3) Any question as to which Minister of the Crown's areas of responsibility are most closely connected with the functions of a utility is determined by the Cabinet Office whose determination is final.

(4) The requirement on a utility to send any report in accordance with regulation 7(7), 8(3)(b)(ii)(aa), 30(9) or 38 to the Minister is enforceable, on the application of the Minister responsible to the High Court, by mandatory order, or on the application of the Scottish Ministers to the Court of Session, by specific implement.

(5) The Minister to whom a report is sent in accordance with regulation 7(7), 8(3)(b)(ii)(aa), 30(9) or 38 must send the report to the Cabinet Office for onward transmission to the Commission.

Publication of notices

40.—(1) Any notice required by these Regulations to be sent to the Official Journal must be—

- (a) in the correct format and contain the necessary information specified by Commission Regulation EC No 1564/2005 and contain any other information which the utility considers useful; and
- (b) 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 XX to the Utilities Directive or by other means.

(2) Where a notice is not sent by electronic means in accordance with paragraph (1)(b), the utility may in exceptional cases request the Official Journal to publish a contract notice within 5 days of the date of dispatch, provided that the notice is sent to the Official Journal by facsimile.

(3) The utility must not place a notice in any publication—

- (a) before the date on which the notice is dispatched in accordance with paragraph (1)(b); or
 - (b) which contains any additional information to that contained in the notice dispatched in accordance with paragraph (1)(b) or published on the utility's buyer profile in accordance with regulation 15.
- (4) The utility must refer in the notice to the date of dispatch 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 (3).
- (5) A utility must not publish a periodic indicative notice on its buyer profile before the date on which notice of its publication in that form is dispatched to the Commission in accordance with regulation 15(3) and the utility must refer to the date of that dispatch on its buyer profile.
- (6) A utility must retain evidence of the date of dispatch to the Official Journal of each notice.
- (7) When a utility is not required to publish a contract notice in respect of a particular contract, it may nevertheless publish such a notice in accordance with the provisions of this regulation.

Confidentiality of information

- 41.—**(1) A utility which makes information available to an economic operator in accordance with these Regulations may impose requirements on that operator for the purpose of protecting the confidentiality of that information.
- (2) Subject to the provisions of these Regulations, the utility must not disclose information forwarded to it by an economic operator which the economic operator has reasonably designated as confidential.
- (3) In this regulation, confidential information includes technical or trade secrets and the confidential aspects of tenders.

Means of communication

- 42.—**(1) A utility may specify that any communications referred to in these Regulations may be made by—
- (a) post;
 - (b) facsimile;
 - (c) electronic means in accordance with paragraphs (4) and (5);
 - (d) telephone in the circumstances referred to in paragraph (8); or
 - (e) a combination of the means of communication.
- (2) The means of communication specified by a utility must be generally available and must not restrict economic operators' access to the contract award procedures specified in these Regulations.
- (3) A utility must 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 must be—
- (a) non-discriminatory;
 - (b) generally available; and
 - (c) interoperable with information and communication technology products in general use.

- (5) Where a utility requires that tenders and requests to be selected to tender for, or to negotiate, the contract are to be received by electronic means, it must 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 of the Council of 13th December 1999 on a Community framework for electronic signatures⁽⁵⁰⁾;
 - (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 utility; and
 - (ii) any such unauthorised access is clearly detectable;
 - (d) only authorised persons must set or change the dates for opening data received from economic operators;
 - (e) access to any data is 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 utility may require any documents, certificates and declarations referred to in regulations 24(2), (3), 25, 26 and 27 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 must 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 utility—
- (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) must specify any requirement for such confirmation and the time limit for sending it in the notice used as a means of calling for competition or in the invitation referred to in regulation 16(3)(b).

Sub-contracting

- 43.** A utility may require an economic operator to indicate in its tender—

⁽⁵⁰⁾ OJ L 13, 19.1.2000, p.12.

- (a) any part of the contract that the economic operator intends to sub-contract to another person; and
- (b) the identity of any person to whom that economic operator proposes to sub-contract any part of the contract.

PART 9

APPLICATIONS TO THE COURT

Enforcement of obligations

44.—(1) The obligation on a utility to comply with the provisions of these Regulations, other than regulations 30(9) and 38, and with any enforceable EU obligation in respect of a contract, framework agreement, dynamic purchasing system or design contest (other than one excluded from the application of these Regulations by regulation 6, 7, 8, 9, 11 or 34) is a duty owed to an economic operator.

(2) The duty owed to an economic operator in accordance with paragraph (1) is also owed to a GPA economic operator, except in relation to—

- (a) a Part B services contract; or
- (b) a contract for research and development services specified in category 8 of Part A of Schedule 3.

(3) Notwithstanding regulation 4, references to an “economic operator” in this Part, except in paragraph (1) of this regulation, include a reference to a GPA economic operator.

(4) A breach of the duty owed under paragraph (1) or (2) is actionable by any economic operator which, in consequence of the breach, suffers, or risks suffering, loss or damage and such proceedings may be brought in either the Sheriff Court or the Court of Session.

(5) Proceedings under this Part shall not be brought unless—

- (a) the economic operator bringing the proceedings has informed the utility of—
 - (i) the breach or apprehended breach of the duty owed to it in accordance with paragraph (1) or (2); and
 - (ii) its intention to bring proceedings under this Part in respect of that breach or apprehended breach; and
- (b) the proceedings are brought in accordance with paragraph (6).

(6) For the purposes of paragraph (5)(b), proceedings shall be brought—

- (a) in the case of proceedings seeking an ineffectiveness order (as defined in regulation 46)—
 - (i) where paragraph (7) applies, within 30 days from the relevant date referred to in that paragraph; or
 - (ii) in any other case, within 6 months from the date of the contract being entered into or the date of conclusion of the framework agreement; and
- (b) in any other case, within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen unless the Court considers that there is a good reason for extending the period within which proceedings may be brought, in which case the Court may extend that period up to a maximum of 3 months from that date.

(7) For the purposes of paragraph (6)(a)(i), this paragraph applies where—

- (a) the utility has sent a contract award notice to the Official Journal in accordance with regulation 32 (contract award notices), including reasons for its decision to enter into the contract or conclude the framework agreement without making a call for competition, in which case the relevant date is the date of publication of the notice in the Official Journal; or
 - (b) the utility has by notice in writing informed all tenderers concerned and all candidates concerned (if any) of its decision in relation to the award of the contract or the conclusion of the framework agreement, and the notice includes the information referred to in regulation 33(2)(d), in which case the relevant date is the date of sending of the notice.
- (8) Except in the case of a contract or framework agreement to which regulation 6, 7 or 9 applies, and without prejudice to the application of any relevant standstill period, where proceedings under this Part are served on a utility in relation to a contract that has not been entered into or a framework agreement that has not been concluded, the utility shall not enter into the contract or conclude the framework agreement unless—
- (a) the proceedings are determined, discontinued or disposed of; or
 - (b) the Court, by interim order, brings to an end the prohibition.
- (9) In this regulation—
- “GPA economic operator” means a person from a GPA State who sought, who seeks, or would have wished, to be the person to whom the contract is awarded;
- “GPA State” means any country other than a relevant State which at the relevant time is a signatory to the GPA and has agreed with the European Union that the GPA applies to a contract of the type to be awarded; and
- “relevant time” has the same meaning it has in regulation 11(19).

Powers and duties of the court

- 45.**—(1) Subject to paragraphs (3) and (7), but otherwise without prejudice to any other powers of the Court, in proceedings brought under this Part the Court—
- (a) may by interim order suspend—
 - (i) the procedure leading to the award of a contract, the conclusion of a framework agreement, the establishment of a dynamic purchasing system or the determination of a design contest; and
 - (ii) the implementation of any decision or action taken by the utility in the course of following a procedure referred to in paragraph (i); and
 - (b) if satisfied that a decision or action taken by a utility was in breach of the duty owed under regulation 44(1) or (2), may—
 - (i) order the setting aside of that decision or action;
 - (ii) order the utility to amend any document; and
 - (iii) award damages to an economic operator which has suffered loss or damage as a consequence of the breach.
- (2) In any interim proceedings under this Part the Court may decide not to grant an interim order when the negative consequences of such an order are likely to outweigh the benefits, having regard to the following considerations—
- (a) that decisions taken by a utility must be reviewed effectively and, in particular, as rapidly as possible;
 - (b) the probable consequences of an interim order for all interests likely to be harmed; and
 - (c) the public interest.

(3) Where the Court is satisfied that regulation 46(7)(a) applies but the second ground for ineffectiveness is not otherwise met, the Court must, without prejudice to the other powers of the Court, order—

- (a) the payment by the utility of a financial penalty; or
 - (b) where the contract in relation to which the breach occurred has been entered into, or the framework agreement in relation to which the breach occurred has been concluded, the shortening of the duration of the contract or framework agreement.
- (4) In determining what order to make under paragraph (3) the Court must—
- (a) ensure that the order is effective, proportionate and dissuasive; and
 - (b) have regard to all relevant factors including—
 - (i) the seriousness of the breach; and
 - (ii) the behaviour of the utility.

(5) Where the Court makes an order under paragraph (3)(b) the Court must, without prejudice to the other powers of the Court, make such other order as the Court considers appropriate to address the consequences of the shortening of the duration of the contract or framework agreement on the rights and obligations of the parties to the contract or framework agreement.

(6) Before making an order under paragraph (5), the Court must have regard to any terms of the contract or framework agreement relating to the rights and obligations of the parties should the duration of the contract or framework agreement be shortened.

(7) Subject to paragraph (3) and regulation 46, in proceedings under this Part the Court does not have power to order any remedy other than an award of damages in respect of a breach of the duty owed under regulation 44(1) or (2) if the contract in relation to which the breach occurred has been entered into, or the framework agreement in relation to which the breach occurred has been concluded.

(8) Where paragraph (9) applies, the economic operator is entitled to damages amounting to its costs in preparing its tender and in participating in the procedure leading to the award of the contract, the conclusion of a framework agreement or admission to a dynamic purchasing system, or its costs of participating in the procedure leading to the determination of the design contest.

(9) This paragraph applies where, in proceedings under this Part, the Court is satisfied that an economic operator would have had a real chance of being awarded a contract, becoming a party to a framework agreement, being admitted to a dynamic purchasing system or winning a design contest if that chance had not been adversely affected by a breach of the duty owed to it by the utility in accordance with regulation 44(1) or (2).

(10) Paragraph (8) does not affect a claim by an economic operator that it has suffered other loss or damage or that it is entitled to relief other than damages and is without prejudice to the matters on which an economic operator may be required to satisfy the Court in respect of any other such claim.

(11) Sections 21 and 42 of the Crown Proceedings Act 1947(51) do not apply in proceedings brought under this Part against the Crown.

Ineffectiveness orders

46.—(1) Without prejudice to all rights and obligations in respect of the period leading up to the date of the order, an ineffectiveness order made in relation to a contract renders unenforceable all rights and obligations directly arising from the contract in respect of the period commencing on the date of the order.

(2) Subject to any order made under paragraph (10)(b), obligations rendered unenforceable by an ineffectiveness order made in relation to a contract must not be performed by the parties to the contract.

(3) Without prejudice to any power of the Court to make an ineffectiveness order in relation to a contract awarded under a framework agreement in accordance with this Part, an ineffectiveness order made in relation to a framework agreement prohibits, with effect from the date of the order, the awarding of contracts under the framework agreement.

(4) Subject to paragraphs (12) and (18), the Court must make an ineffectiveness order where one of the grounds for ineffectiveness set out in paragraphs (5), (7) and (8) applies.

(5) The first ground for ineffectiveness is that the utility has entered into a contract or has concluded a framework agreement without making a call for competition in circumstances where the contract or framework agreement was not exempt from the requirement to make a call for competition.

(6) The first ground for ineffectiveness does not apply where—

(a) the utility sent to the Official Journal a notice in the form of the voluntary ex ante transparency notice in Annex XIV to Commission Regulation (EC) No 1564/2005⁽⁵²⁾, expressing its intention to enter into the contract or to conclude the framework agreement and containing—

(i) the name and contact details of the utility;

(ii) a description of the object of the contract or framework agreement;

(iii) a justification of the decision of the utility to award the contract or conclude the framework agreement without making a call for competition;

(iv) the name and contact details of the economic operator to be awarded the contract or to become party to the framework agreement; and

(v) any other information which the utility considered useful; and

(b) the utility allowed a period of at least 10 days to elapse between the date of publication in the Official Journal of the notice referred to in sub-paragraph (a) and the date on which the utility entered into the contract or concluded the framework agreement.

(7) The second ground for ineffectiveness is that—

(a) the utility has breached regulation 33(1) (requirement to send decision notice to all tenderers and all candidates concerned) or (3) (requirement to delay entering into a contract or concluding a framework agreement for an applicable standstill period) or 44(8) (prohibition on entering into a contract or concluding a framework agreement when proceedings are brought);

(b) the utility's breach prevented the economic operator from bringing proceedings or obtaining a remedy before the contract was entered into or the framework agreement was concluded;

(c) in awarding the contract or concluding the framework agreement there has been another breach of these Regulations, other than a breach of regulation 4(3) (in the case of a Part B services contract), 11(20), 33(1) or (3) or this Part; and

(d) the breach referred to in sub-paragraph (c) has affected the chances of the economic operator bringing proceedings under this Part to obtain the contract or become a party to the framework agreement.

(8) The third ground for ineffectiveness is that—

⁽⁵²⁾ The annex to [Commission Regulation \(EC\) No 1564/2005](#) was amended by [Commission Regulation \(EC\) 1150/2009](#), OJ L 313, 29.11.2009, p.3.

- (a) the contract is a contract awarded under a dynamic purchasing system;
 - (b) the contract was awarded in breach of regulation 19(11), (12), (13) or (14) (rules governing the award of contracts under a dynamic purchasing system); and
 - (c) the estimated value of the contract at the relevant time is not less than the relevant threshold.
- (9) The third ground for ineffectiveness does not apply where—
- (a) the utility has by notice in writing informed the economic operators that submitted tenders of its decision in relation to the award of the contract in accordance with regulation 19(15), and the notice includes the information referred to in regulation 33(2)(d); and
 - (b) the utility allowed a period of at least the relevant standstill period to elapse between the date of sending of the notice referred to in sub-paragraph (a) and the date on which the utility entered into the contract.
- (10) If an ineffectiveness order is made, the Court must, without prejudice to the other powers of the Court—
- (a) order the payment by the utility of a financial penalty; and
 - (b) make such other order as the Court considers appropriate to address the consequences of the ineffectiveness order on the rights and obligations of the parties to the contract or framework agreement.
- (11) Before making an order under paragraph (10)(b), the Court must have regard to any terms of the contract or framework agreement relating to the rights and obligations of the parties should an ineffectiveness order be made in relation to the contract or framework agreement.
- (12) The Court may decline to make an ineffectiveness order where the Court is satisfied that overriding reasons relating to a general interest require that the enforceability of the rights and obligations arising from the contract or framework agreement should be maintained.
- (13) For the purposes of paragraph (12)—
- (a) economic interests directly linked to the contract or framework agreement do not constitute overriding reasons relating to a general interest; and
 - (b) economic interests in the effectiveness of the contract or framework agreement may only be considered as overriding reasons relating to a general interest in exceptional circumstances where ineffectiveness would lead to disproportionate consequences.
- (14) For the purposes of paragraph (13)(a), economic interests directly linked to the contract or framework agreement include the costs—
- (a) resulting from the delay in the performance of the contract or framework agreement;
 - (b) resulting from the commencement of a new procurement procedure;
 - (c) resulting from the change of the economic operator performing the contract or framework agreement; and
 - (d) of legal obligations resulting from an ineffectiveness order.
- (15) Where the Court declines to make an ineffectiveness order under paragraph (12), the Court must, without prejudice to the other powers of the Court, order—
- (a) the payment by the utility of a financial penalty; or
 - (b) the shortening of the duration of the contract or framework agreement.
- (16) In determining what order to make under paragraph (10)(a) or (15), regulation 45(4) applies and, in the case of an order made under paragraph (10)(a), the Court must have regard to the extent to which the contract or framework agreement will remain in effect in respect of the period leading up to the date of the ineffectiveness order.

(17) Regulation 45(5) and (6) applies to an order made under paragraph (15)(b) as it applies to an order made under regulation 45(3)(b).

(18) In proceedings under this Part to which regulation 44(6)(b) applies, the Court does not have power to make an ineffectiveness order if the proceedings would be incompetent if regulation 44(6)(a) applied to the proceedings.

(19) In paragraph (8)(c), “estimated value”, “relevant time” and “relevant threshold” have the same meanings they have in regulation 11.

Financial penalties

47.—(1) Subject to paragraph (2), where a financial penalty is ordered to be paid under this Part—

- (a) the order must state that the financial penalty must be paid to the Scottish Ministers; and
- (b) the clerk of the Court must send an extract of the decree (without charge) to the Scottish Ministers.

(2) Paragraph (1) does not apply to any financial penalty ordered to be paid by the Scottish Ministers.

(3) The Scottish Ministers must pay into the Scottish Consolidated Fund any financial penalty—

- (a) ordered to be paid by them under this Part; or
- (b) recovered by them under paragraph (1).

PART 10

REVOCATION, SAVINGS AND TRANSITIONAL PROVISIONS

Revocations

48. Subject to regulation 49, the instruments specified in column 1 of Part A of Schedule 5 (which have the numbers specified in column 2) are revoked to the extent specified in column 3 of that part.

Savings and transitional provisions

49.—(1) Where a utility has commenced a contract award procedure or a design contest before 1st May 2012, the Regulations referred to in regulation 48 continue to have effect on and after 1st May 2012 in relation to that contract award procedure or design contest, as if those Regulations had not been revoked in accordance with regulation 48.

(2) For the purposes of paragraph (1), a procedure or contest has been commenced before 1st May 2012 if, before that date—

- (a) a call for competition has been made in order to invite offers or requests to be selected to tender for, or to negotiate in respect of, a proposed contract, framework agreement or dynamic purchasing system;
- (b) in any case where there is no requirement to make a call for competition, the utility has dispatched any form of advertisement seeking offers or expressions of interest in a proposed contract, framework agreement or dynamic purchasing system;
- (c) where there is no such advertising, the utility has contacted any economic operator in order to—
 - (i) seek expressions of interest or offers in respect of a proposed contract, framework agreement or dynamic purchasing system; or

- (ii) respond to an unsolicited expression of interest or offer in respect of a proposed contract, framework agreement or dynamic purchasing system; or
 - (d) the utility has sent a notice to the Official Journal in accordance with the Utilities Contracts (Scotland) Regulations 2006(**53**) in order to hold a design contest.
- (3) Where a framework agreement has been concluded before 1st May 2012, these Regulations do not apply to the award of any specific contract under that framework agreement.

Consequential amendments

50. The instruments specified in column 1 of Part B of Schedule 5 (which have the numbers specified in column 2) are amended in accordance with the provisions in column 3 of that Part.

St Andrew's House,
Edinburgh
14th March 2012

ALEX NEIL
A member of the Scottish Executive