
SCOTTISH STATUTORY INSTRUMENTS

2016 No. 49

The Utilities Contracts (Scotland) Regulations 2016

PART 1

GENERAL

CHAPTER 1

CITATION, COMMENCEMENT, EXTENT, DEFINITIONS AND SUBJECT-MATTER

Citation, commencement and extent

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

Commencement

(2) Subject to paragraphs (3) and (4), these Regulations come into force on 18th April 2016.

(3) Regulation 38(1) to (7) (rules applicable to communication) comes into force—

- (a) for the purposes of regulations 50 (dynamic purchasing systems), 51 (electronic auctions), 52 (electronic catalogues), 61 (communication of technical specifications), 69(1) (form and manner of sending notices for publication at EU level) and 71 (electronic availability of procurement documents) on 18th April 2016;
- (b) for the purposes of regulation 53(6) (centralised purchasing activities and central purchasing bodies) on 18th April 2017; and
- (c) for all other purposes on 18th October 2018.

(4) Regulation 53(6) (centralised purchasing activities and central purchasing bodies) comes into force on 18th April 2017.

Extent

(5) These Regulations extend to Scotland only.

Interpretation

2.—(1) In these Regulations—

“accelerated open procedure” means an open procedure in which the utility has exercised the power conferred by regulation 43(5) (open procedure) to fix a time limit for the receipt of tenders which is shorter than the minimum specified in regulation 43(3) (open procedure);

“ancillary purchasing activity” means activity consisting of the provision of support to a purchasing activity, in particular in any of the following forms—

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

“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 on-going invitations to tender, prospective and concluded contracts, cancelled procedures and any useful general information such as a contact point, telephone number, facsimile number, postal address or e-mail address;

“body governed by public law” means a body that has legal personality, is established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and which—

- (a) is financed for the most part by the State, regional or local authorities, or by any other body governed by public law;
- (b) is subject to management supervision by any such authority or body; or
- (c) has an administrative, managerial or supervisory board more than half the members of which were appointed by any body referred to in sub-paragraph (a);

“call for competition” means a call for competition made in a manner permitted by regulation 42(5) (choice of procedures) or, where relevant, one of the notices referred to in regulation 89(1) (publication of notices) or a contest notice;

“candidate” means an economic operator that has sought an invitation or has been invited to take part in—

- (a) a restricted procedure;
- (b) a negotiated procedure with prior call for competition;
- (c) a negotiated procedure without prior call for competition;
- (d) a competitive dialogue procedure; or
- (e) an innovation partnership;

“central purchasing body” means a utility or contracting authority which provides one or more centralised purchasing activities whether or not including an ancillary purchasing activity;

“centralised purchasing activity” means activity conducted on a permanent basis in one of the following forms—

- (a) the acquisition of supplies or services intended for a utility;
- (b) the award of contracts or the conclusion of framework agreements for works, supplies or services intended for a utility;

“commenced”, in relation to procurement, except where otherwise provided, means—

- (a) where a contract notice has been sent to the Official Journal in order to invite offers or requests to be selected to tender for or to negotiate, or be selected to participate in a dialogue in relation to a contract, in respect of a proposed contract, framework agreement or dynamic purchasing system;
- (b) where a periodic indicative notice has been sent to the Official Journal, in which case the contract award procedure that has commenced is the procedure for the award of any proposed contract the intention to award which was indicated in the notice, but only if the requirements in regulation 65(3)(a) or (b) (periodic indicative notices) are satisfied;
- (c) where the utility has dispatched any form of advertisement seeking offers or expressions of interest in the proposed contract, framework agreement or dynamic purchasing system;
- (d) in any case where there is no such advertising, where the utility has contacted any economic operator—
 - (i) in order to seek expressions of interest or offers in respect of a proposed contract, framework agreement or dynamic purchasing system; or

(ii) in response to an unsolicited expression of interest or offer in respect of a proposed contract, framework agreement or dynamic purchasing system; or

(e) where the utility has sent a notice to the Official Journal in order to hold a design contest; “Commission” means the European Commission;

“common technical specification” means a technical specification in the field of information and communication technology laid down in accordance with Articles 13 and 14 of Regulation (EU) No 1025/2012 of the European Parliament and of the Council on European standardisation, amending Council Directives [89/686/EEC](#) and [93/15/EEC](#) and Directives [94/9/EC](#), [94/25/EC](#), [95/16/EC](#), [97/23/EC](#), [98/34/EC](#), [2004/22/EC](#), [2007/23/EC](#), [2009/23/EC](#) and [2009/105/EC](#) of the European Parliament and of the Council and repealing Council [Decision 87/95/EEC](#) and Decision No [1673/2006/EC](#) of the European Parliament and of the Council⁽¹⁾ as amended from time to time;

“concession contract” means a “works concession” or “services concession” as defined in paragraph (1) of Article 5 of the Concession Contracts Directive and which includes the transfer of an operating risk as set out in that paragraph;

“Concession Contracts Directive” means [Directive 2014/23/EU](#) of the European Parliament and Council on the award of concession contracts⁽²⁾;

“contest notice” means the notice referred to in regulation 92(1) (notices);

“contract”, subject to regulation 111(6) (transitional provision and saving where procurement commenced before 18th April 2016), and except where otherwise provided, means any works, supplies or services contract for pecuniary interest concluded in writing between one or more economic operators and one or more utilities;

“contract notice”, subject to regulation 111(6) (transitional provision and saving where procurement commenced before 18th April 2016), means the notice referred to in regulation 67 (contract notices) or, where relevant, 89(1)(a) (publication of notices);

“contracting authority” means the State, a regional or local authority, a body governed by public law or an association formed by one or more such authorities or bodies;

“CPV” means the Common Procurement Vocabulary as adopted by Regulation (EC) [No. 2195/2002](#) of the European Parliament and of the Council on the Common Procurement Vocabulary⁽³⁾ as amended from time to time and “CPV Code” shall be construed accordingly;

“Defence and Security Regulations” means the Defence and Security Public Contracts Regulations 2011⁽⁴⁾;

“design contest”, subject to regulation 111(6) (transitional provision and saving where procurement commenced before 18th April 2016), means those procedures which enable a utility to acquire, mainly in the fields of town and country planning, architecture, engineering or data processing, a plan or design selected by a jury after being put out to competition with or without the award of prizes;

“disabled”, in relation to a person, means a disabled person within the meaning of the Equality Act 2010⁽⁵⁾ and, in relation to a worker, means a disabled person who is a worker;

“dynamic purchasing system”, subject to regulation 111(6) (transitional provision and saving where procurement commenced before 18th April 2016), means the system referred to in regulation 50 (dynamic purchasing systems);

(1) OJ L 316, 14.11.2012, p.1.

(2) OJ L 94, 28.3.2014, p.1.

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

(4) S.I. 2011/1848, amended by [S.S.I. 2012/88](#), [S.S.I. 2012/89](#), [S.I. 2015/102](#) and [S.S.I. 2015/446](#).

(5) 2010 c.15.

“economic operator”, subject to regulation 111(6) (transitional provision and saving where procurement commenced before 18th April 2016), means a person or a utility, or a group of such persons or utilities or both, including any temporary associations of undertakings, which offers the execution of works or a work, the supply of products or the provision of services on the market;

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

“ESPD” means the European Single Procurement Document referred to in regulation 60 of the Public Contracts (Scotland) Regulations;

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

“European Technical Assessment” means the documented assessment of the performance of a construction product, in relation to its essential characteristics, in accordance with the relevant European Assessment Document as defined in point 12 of Article 2 of Regulation (EU) No 305/2011 of the European Parliament and of the Council laying down harmonised conditions for the marketing of construction products and repealing Council [Directive 89/106/EEC](#)(6) as amended from time to time;

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

“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”, subject to regulation 111(6) (transitional provision and saving where procurement commenced before 18th April 2016), means an agreement between one or more utilities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular, terms with regard to price and, where appropriate, the quantity envisaged;

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

“innovation” means the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations including with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy(8) for smart, sustainable and inclusive growth;

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

“invitation to confirm interest” means an invitation which a utility sends in order to comply with regulation 72(3) (invitations to candidates);

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

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

(6) OJ L 88, 4.4.2011, p.5, last amended by Commission Delegated Regulation (EU) No 574/2014 (OJ L 159, 28.5.2014, p.41).

(7) All the substantive provisions of the Agreement were substituted by the Protocol which was approved, on behalf of the EU, by Council [Decision 2014/115/EU](#) (OJ L 68, 7.3.2014, p.1), to which the text of the Protocol is attached (at OJ L 68, 7.3.2014, p.2). In accordance with Article 3 of the Protocol, the Protocol has entered into force in the EU.

(8) European Commission COM(2010) 2020 3.3.2010.

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

“main contractor” means an economic operator to which a utility has awarded a contract or framework agreement;

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

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

“periodic indicative notice”, subject to regulation 111(6) (transitional provision and saving where procurement commenced before 18th April 2016), means the notice referred to in regulation 65 (periodic indicative notices), or where relevant, 89(1)(b) (publication of notices);

“procurement” means the process leading to the award of a contract or framework agreement or establishment of a dynamic purchasing system for the acquisition of works, supplies or services from an economic operator;

“procurement document” means a document produced or referred to by the utility to describe or determine elements of the procurement or the procedure, including the contract notice, the periodic indicative notice or the notices on the existence of a qualification system where they are used as a means of calling for competition, the technical specifications, the descriptive document, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents;

“Public Contracts (Scotland) Regulations” means the Public Contracts (Scotland) Regulations 2015⁽⁹⁾;

“selection criteria”, except in regulation 93 (rules on the organisation of design contests and the selection of participants and the jury), means selection criteria set out by the utility in accordance with regulations 76 (criteria for qualitative selection) or 78 (use of exclusion grounds and selection criteria provided for under the Public Contracts (Scotland) Regulations);

“service contract” means a contract which has as its object the provision of services other than those referred to in the definition of “works contract”;

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

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

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

“technical specification” has the meaning given by regulation 58 (technical specifications);

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

“TFEU” means the Treaty on the Functioning of the European Union⁽¹⁰⁾;

⁽⁹⁾ S.S.I. 2015/446.

⁽¹⁰⁾ OJ C 326, 26.10.2012, p.47.

“Utilities Contracts Directive” means [Directive 2014/25/EU](#) of the European Parliament and of the Council on procurement entities operating in the water, energy, transport and postal services sectors and repealing [Directive 2004/17/EC](#)(**11**);

“utility”, subject to regulation 111(6) (transitional provision and saving where procurement commenced before 18th April 2016), has the meaning given to it by regulation 4 (utilities);

“VAT” means value added tax charged in accordance with the Value Added Tax Act 1994(**12**);

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

“works” means activities within the meaning of Schedule 1 (activities constituting works) and activities related to these;

“working day” means a day other than a Saturday, Sunday or bank holiday in Scotland within the meaning of the Banking and Financial Dealings Act 1971(**13**);

“works contract” means a contract which has as its object one of the following—

- (a) the execution, or both the design and execution, of works related to one of the activities specified in Schedule 1;
- (b) the execution, or both the design and execution, of a work;
- (c) the realisation by whatever means of a work corresponding to the requirements specified by the utility exercising decisive influence on the type or design of the work; and

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

(2) Unless the context otherwise requires, any expression used both in these Regulations and in the Utilities Contracts Directive has the meaning that it bears in that Directive.

(3) The value in pounds sterling of any amount expressed in Euros in these Regulations, except in regulation 95 (retention of contract copies), or any of the provisions of the Utilities Contracts Directive mentioned in these Regulations shall be taken to be the value determined by the Commission in accordance with Article 17 of the Utilities Contracts Directive and published from time to time in the Official Journal.

(4) In these Regulations (except regulation 101(4) (enforcement of duties through the courts)), where these Regulations refer to a period of time—

- (a) where the period follows an action taken, the day on which the action takes place is not counted in the calculation of the period;
- (b) the period must include at least 2 working days; and
- (c) where the last day of the period is not a working day, the period is extended to include the next working day.

Subject-matter and application of these Regulations

3.—(1) Parts 1 to 4 establish rules on the procedures for procurement for the award of a contract, or to the organisation of a design contest, by a utility which—

- (a) has a value estimated to be not less than the threshold mentioned in regulation 15 (thresholds); and
- (b) is not excluded from the scope of Parts 1 to 4 by any other provision in Chapters 2 and 3 of this Part.

(11) OJ L 94, 28.3.2014, p.243.

(12) 1994 c.23.

(13) 1971 c.80.

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

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

Utilities

4.—(1) For the purpose of these Regulations, a utility is a person which—

- (a) is a contracting authority or public undertaking and which pursues one of the activities referred to in regulations 8 to 14;
- (b) is not a contracting authority or public undertaking but whose activities include an activity referred to in regulations 8 to 14 which operate on the basis of special or exclusive rights granted by a competent authority.

(2) In this regulation, “public undertaking” means a person over which one or more contracting authorities are able to exercise, directly or indirectly, a dominant influence by virtue of one or more of the following—

- (a) their ownership of that person;
- (b) their financial participation in that person;
- (c) the rights accorded to them by the rules which govern that person.

(3) For the purposes of paragraph (2), a contracting authority is considered to be able to exercise a dominant influence over a person in any one or more of the following cases where it, directly or indirectly—

- (a) possesses the majority of the undertaking’s subscribed capital;
- (b) controls the majority of the voting power attached to the issued share capital of that person;
- (c) can 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.

(4) In this regulation, “special or exclusive rights” mean rights granted by a competent authority by way of any legislative, regulatory or administrative provision, the effect of which is to limit the exercise of activities specified in regulations 8 to 14 to one or more entities, and which substantially affects the ability of other entities to carry out such activity.

(5) For the purposes of paragraph (4), rights do not constitute “special or exclusive rights” if they are granted by means of a procedure in which—

- (a) there was adequate publicity; and
- (b) the granting of those rights was based on objective criteria.

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

- (a) procurement with a prior call for competition in accordance with—
 - (i) these Regulations or the Utilities Contracts (Scotland) Regulations 2012(14);
 - (ii) the Public Contracts (Scotland) Regulations or the Public Contracts (Scotland) Regulations 2012(15);
 - (iii) the Concession Contracts Directive; or
 - (iv) the Defence and Security Regulations; and

(14) S.S.I. 2012/89.

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

- (b) procedures in accordance with other legal acts of the EU as mentioned in Annex II of the Utilities Contracts Directive, as amended from time to time.

Mixed procurement covering the same activity

5.—(1) Where a procurement has as its subject different types of procurement all covering the same activity any part of which is covered by Article 346 of the TFEU or the Defence and Security Regulations, regulation 24 (mixed procurement covering the same activity and involving defence and security aspects) applies.

(2) Where a procurement has as its subject a mixed contract including works, supplies or services for the pursuit of a single activity covered by these Regulations, the application of these Regulations to the procurement is determined by that part of the contract that characterises the main subject of the contract in question.

(3) For the purposes of paragraph (2), in the case of a mixed contract—

- (a) consisting partly of services of a kind referred to in Chapter 1 of Part 3 and partly of other services; or
- (b) consisting partly of supplies and partly of services,

the main subject shall be determined by reference to which of the respective supplies or services has the highest estimated value.

(4) Where a procurement has as its subject a mixed contract intended to cover a single activity but which includes different parts which are objectively separable and the procurement of which, if separate, would include matters that would be subject to the application of these Regulations and matters that would not, a utility may choose to award—

- (a) separate contracts for the separate parts; or
- (b) a single contract.

(5) Where a utility decides to award separate contracts under paragraph (4)(a) the application or otherwise of these Regulations to the procurement of each separate part shall be determined by reference to the characteristics of such part.

(6) Where a utility decides to award a single contract under paragraph (4)(b) these Regulations shall apply to the procurement of the single contract irrespective of the estimated value of any parts that, if separated, would not have been subject to the application of these Regulations.

(7) Where a single contract referred to in paragraph (4)(b) combines elements of works, supplies or service contracts together with a concession contract, the procurement shall be subject to the application of these Regulations where the estimated value of the part of the contract that would constitute a contract covered by these Regulations, calculated in accordance with regulation 16 (methods for calculating the estimated value), is equal to or greater than the applicable threshold determined in accordance with regulation 15 (thresholds).

(8) Where a mixed contract includes different parts which are objectively not separable the application or otherwise of these Regulations to the procurement of that contract shall be determined by reference to the main subject-matter of that contract.

Procurement covering several activities

6.—(1) Where a procurement has as its subject a contract intended to cover several activities and includes an activity which is covered by Article 346 of the TFEU or the Defence and Security Regulations, regulation 25 (procurement covering several activities and involving defence and security aspects) applies.

(2) Where a procurement has as its subject a contract intended to cover several activities, a utility may decide to undertake procurement for the award of—

- (a) separate contracts for the separate activities; or
- (b) a single contract.

(3) For the purposes of paragraph (2), the choice between awarding a single contract or a number of separate contracts must not be made with the objective of excluding any such contract from the scope of (where applicable)—

- (a) these Regulations;
- (b) the Public Contracts (Scotland) Regulations; or
- (c) the Concession Contracts Directive.

(4) Where a utility decides to award separate contracts under paragraph (2)(a), the application or otherwise of these Regulations to the procurement of each separate activity is determined by reference to the characteristics of such activity.

(5) Where a utility decides to award a single contract under paragraph (2)(b) the application of these Regulations to the procurement of the contract is determined by the activity for which the contract is principally intended.

(6) Where it is objectively impossible to determine for which activity the contract is principally intended pursuant to paragraph (5), the application of these Regulations to the procurement of the contract is determined in accordance with the following—

- (a) if one of the activities for which the contract is intended is subject to these Regulations and another is subject to the Public Contracts (Scotland) Regulations, the procurement of the contract is subject to the Public Contracts (Scotland) Regulations;
- (b) if one of the activities for which the contract is intended is subject to these Regulations and another is subject to the Concession Contracts Directive, the procurement of the contract is subject to these Regulations;
- (c) if one of the activities for which the contract is intended is subject to these Regulations and the other is not subject to these Regulations, the Public Contracts (Scotland) Regulations nor the Concession Contracts Directive, the procurement of the contract is subject to these Regulations.

CHAPTER 2

ACTIVITIES

Common Provisions

7.—(1) For the purposes of regulations 8 (gas and heat), 9 (electricity) and 10 (water), “supply” includes—

- (a) generation;
- (b) production, with the exception of the production of gas in the form of extraction; and
- (c) wholesale and retail sale.

(2) For the purposes of regulation 14 (extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels) “supply” includes production of gas in the form of extraction.

Gas and heat

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

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

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

- (a) the production of gas or heat by that utility is the unavoidable consequence of carrying out an activity other than one referred to in paragraph (1) or in regulations 9 to 11; and
- (b) the supply to the public network is aimed only at the economic exploitation of such production and amounts to not more than 20% of the utility's turnover, calculated on the basis of the average for the preceding 3 years, including the current year.

Electricity

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

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

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

- (a) the production of electricity by that utility takes place because its consumption is necessary for carrying out an activity other than one referred to in paragraph (1) or regulations 8 (gas and heat), 10 (water) or 11 (transport services); and
- (b) the supply to the public network depends only on that utility's own consumption and has not exceeded 30% of that utility's total production of energy, calculated on the basis of the average for the preceding 3 years, including the current year.

Water

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

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

(2) These Regulations also apply to procurement for the award of a contract or design contest by a utility which pursues an activity referred to in paragraph (1) and which is connected with any of the following—

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

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

- (a) the production of drinking water by that utility takes place because its consumption is necessary for carrying out an activity other than one referred to in paragraph (1) or (2) or regulation 8, 9 or 11; and
- (b) the supply to the public network depends only on that utility's own consumption and has not exceeded 30% of that utility's total production of drinking water, on the basis of the average for the preceding 3 years, including the current year.

Transport services

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

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

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

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

Ports and airports

12. These Regulations apply to activities relating to the exploitation of a geographical area for the purpose of the provision of any of the following—

- (a) airports;
- (b) maritime ports;
- (c) inland ports;
- (d) other terminal facilities to carriers by air, sea or inland waterway.

Postal services

13.—(1) These Regulations apply to activities relating to the provision of any of the following—

- (a) postal services;
- (b) services other than postal services, on condition that such services are provided by an entity which also provides postal services which are not directly exposed to competition within the meaning of regulation 32(2) (activities directly exposed to competition).

(2) In this regulation—

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

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

“postal services” means services consisting of the clearance, sorting, routing and delivery of postal items, including both services falling within as well as services falling outside the scope of the universal service set up in accordance with the Postal Services Act 2011(16); and

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

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

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

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

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

CHAPTER 3

MATERIAL SCOPE

SECTION 1

Thresholds

Thresholds

15.—(1) These Regulations apply to a procurement where the estimated value of the contract to be awarded (not including VAT) is equal to or greater than—

- (a) in the case of a supply or service contract or design contest, the amount specified in Article 15(a) of the Utilities Contracts Directive;
- (b) in the case of a works contract, the amount specified in Article 15(b) of the Utilities Contracts Directive;
- (c) in the case of a contract for a service listed in Schedule 2 (social and other specified services), the amount specified in Article 15(c) of the Utilities Contracts Directive.

(2) Where proposed works, acquisition of supplies or provision of services may be procured in the form of separate lots these Regulations do not apply to the award of a contract for a lot where—

- (a) the estimated value of that lot is less than—
 - (i) 80,000 Euros, in the case of supplies or services; or
 - (ii) 1 million Euros, in the case of works; and
- (b) the estimated total aggregate value of all such lots to be awarded without application of these Regulations does not exceed 20% of the estimated aggregate value of all the lots calculated in accordance with regulation 16 (methods for calculating the estimated value).

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

(4) In this regulation reference to a “contract” includes reference to a framework agreement, dynamic purchasing system and design contest.

(16) 2011 c.5.

Methods for calculating the estimated value

16.—(1) A utility must calculate the estimated value of a contract by reference to the total amount payable under it (regardless of the form of such payment), not including VAT.

(2) The total amount payable includes the amount payable as a result of the exercise of any form of option and any renewal of the contract as explicitly set out in the procurement documents.

(3) Where a utility provides for prizes or payments to candidates or tenderers it must take them into account when calculating the estimated value.

(4) Where a utility is comprised of separate operational units the utility—

(a) may calculate the estimated value by reference to each such unit or certain category thereof where that unit or certain category thereof is independently responsible for its procurement; and

(b) must calculate the estimated value by reference to the total for all the operational units which are not so responsible.

(5) A utility must not choose a method to be used to calculate the estimated value of a contract with the intention of excluding the contract from the application of these Regulations.

(6) A utility must not sub-divide a contract with the effect of excluding the contract from the application of these Regulations unless such sub-division is justified by objective reasons.

(7) The estimated value must be the value estimated at the moment at which the procurement is commenced.

(8) In the case of a framework agreement or dynamic purchasing system the estimated value shall be the total estimated value of all of the contracts envisaged pursuant to and for the total term of the agreement or system.

(9) In the case of an innovation partnership the estimated value shall be the total estimated value of the research and development activities to take place during all stages of the partnership together with the estimated value of works, supplies or services to be developed and delivered by the partner.

(10) In the case of a works contract the estimated value shall include the total estimated value of any supplies and services that are necessary for executing the works and are to be provided by the utility to the contractor.

(11) In the case of a works or service contract to be awarded in the form of separate lots, the estimated value shall be the total estimated value of all such lots.

(12) In the case of a contract for supplies which may be awarded in the form of separate lots the estimated value shall be the total estimated value of all such lots and these Regulations apply to each lot accordingly where the aggregate value of the lots is equal to or greater than the relevant threshold referred to in regulation 15 (thresholds).

(13) In the case of supply or service contracts which are regular in nature or which are intended to be renewed in a given period, the estimated value shall be calculated by reference to—

(a) the total actual value of contracts of the same type awarded during the period of 12 months or the financial year preceding the proposed award of a further contract but with adjustment of such value, where possible, to take account of the changes in quantity or value which the utility considers likely to occur during the period of 12 months following the award of the contract; or

(b) the total estimated value of the successive contracts awarded during the 12 months following the first delivery, or during the financial year.

(14) In the case of a supply contract relating to the leasing, rental, hire or hire purchase of products the estimated value shall be—

- (a) in the case of a fixed term contract for a period of less than or equal to 12 months, the total estimated value of the contract;
 - (b) in the case of a fixed term contract for a period of more than 12 months, the total value including the estimated residual value; and
 - (c) in the case of a contract without a fixed term or the term of which cannot be defined, the monthly value multiplied by 48.
- (15) In the case of a service contract for a service of a kind mentioned herein, the estimated value shall be calculated by reference to—
- (a) for insurance services, the premium payable and any other form of remuneration;
 - (b) for banking and other financial services, the fees, commissions payable, interest and any other form of remuneration; and
 - (c) for design contracts, the fees, commissions payable and any other form of remuneration.
- (16) In the case of a service contract which does not indicate a total price, the estimated value must be calculated by reference to—
- (a) in the case of a contract for a fixed term of less than or equal to 48 months, the total value of the contract for its full term; and
 - (b) in the case of a contract for a term of more than 48 months or a contract without a fixed term, the monthly value multiplied by 48.

SECTION 2

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

SUB-SECTION 1 Exclusions applicable to all utilities and special exclusions for the water and energy sectors

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

17.—(1) Subject to paragraph (3), these Regulations do not apply to procurement for the award of a contract for the purpose of resale or lease to third parties, provided that the utility enjoys no special or exclusive right to sell or lease the subject of such contracts and other entities are free to sell or lease the subject of such contracts under the same conditions as the utility.

(2) A utility must notify the Commission, if so requested, of all the categories of products or activities which the utility regards as excluded under paragraph (1).

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

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

18.—(1) These Regulations do not apply to procurement for the award of a contract or the organisation of a design contest by a utility—

- (a) for purposes other than the pursuit of its activities as described in regulations 8 to 14; or
- (b) for the pursuit of such activities in a third country, in conditions not involving the physical use of a network or geographical area within the EU.

(2) A utility must notify the Commission, if so requested, of any activities which the utility regards as excluded under paragraph (1).

Exclusion: Contracts awarded and design contests organised pursuant to international rules

19.—(1) These Regulations do not apply to procurement for the award of a contract or the organisation of a design contest which the utility is obliged to award or organise in accordance with a procurement which is established by—

- (a) an international agreement or any other legal instrument creating international law obligations, concluded in conformity with the Treaties, between the United Kingdom and one or more third country or any part thereof and covering works, supplies or services intended for the joint implementation or exploitation of a project by its signatories; or
- (b) an international organisation.

(2) These Regulations do not apply to procurement for the award of a contract or the organisation of a design contest which the utility undertakes or organises in accordance with procurement rules provided by an international organisation or international financing institution where the contracts or design contests concerned are fully financed by that organisation or institution or are co-financed for the most part by that organisation or institution.

(3) This regulation does not apply to procurement for the award of a contract or the organisation of a design contest involving defence or security aspects which are awarded or organised pursuant to international rules.

Exclusion: Specific exclusions for service contracts

20.—(1) These Regulations do not apply to procurement for the award of a service contract, framework agreement or dynamic purchasing system—

- (a) for the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or of any estate, right, servitude or other interest in or over such land, buildings or property;
- (b) to an audio-visual or radio media service provider, for broadcasting time or programme provision;
- (c) for arbitration or conciliation services;
- (d) for any of the following legal services—
 - (i) legal representation of a client by a lawyer within the meaning of Article 1 of the Lawyers' Services Directive⁽¹⁷⁾ in—
 - (aa) arbitration or conciliation proceedings held in a member State, a third country or before an international arbitration or conciliation instance; or
 - (bb) judicial proceedings before the courts, tribunals or public authorities of a member State or a third country or before international courts, tribunals or institutions;
 - (ii) legal advice given by a lawyer within the meaning of Article 1 of the Lawyers' Services Directive—
 - (aa) in preparation of any proceedings referred to in paragraph (i); or
 - (bb) where there is a tangible indication and high probability that the matter to which the advice relates will become the subject of such proceedings;
 - (iii) document certification or authentication services which must be provided by a notary public;
 - (iv) legal services provided by trustees or appointed guardians or other legal services the providers of which are designated by a court or tribunal in the member State

⁽¹⁷⁾ OJ L 78, 26.3.1977, p.17, last amended by Council Directive 2013/25/EU (OJ L 158, 10.6.2013, p.368).

- concerned or are designated by law to carry out specific tasks under the supervision of such tribunals or courts;
- (v) other legal services which, in the member State concerned, are connected, even occasionally, with the exercise of official authority;
- (e) for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of [Directive 2004/39/EC](#) of the European Parliament and of the Council on markets in financial instruments amending Council Directives [85/611/EEC](#) and [93/6/EEC](#) and [Directive 2000/12/EC](#) of the European Parliament and of the Council and repealing Council [Directive 93/22/EEC](#)(**18**) as amended from time to time;
- (f) for operations conducted with the European Financial Stability Facility or the European Stability Mechanism;
- (g) for loans, whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments;
- (h) which is an employment contract;
- (i) for civil defence, civil protection or danger prevention services that are provided by non-profit organisations or associations and which are specified under CPV Codes 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8, 98113100-9 and 85143000-3 except patient transport ambulance services; or
- (j) for public passenger transport services by rail or metro.
- (2) In this regulation—
- (a) “Audio-visual Media Services Directive” means [Directive 2010/13/EU](#) of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in member States concerning the provision of audio-visual media services(**19**) as amended from time to time;
- (b) “Lawyers’ Services Directive” means Council [Directive 77/249/EEC](#) to facilitate the effective exercise by lawyers of freedom to provide services(**20**);
- (c) “media service provider” has the meaning given by Article 1(1)(d) of the Audio-visual Media Services Directive; and
- (d) “programme” has the meaning given by Article 1(1)(b) of the Audio-visual Media Services Directive but also includes radio programmes and radio programme materials, and “programme material” is to be construed accordingly.

Exclusion: Service contracts awarded on the basis of an exclusive right

21. These Regulations do not apply to procurement for a service contract to be awarded to a contracting authority or to an association of contracting authorities on the basis of an exclusive right which such authority or association of authorities enjoy pursuant to a law, regulation or published administrative provision which is compatible with the TFEU.

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

22. These Regulations do not apply to procurement for the award of a contract—

(18) OJ L 145, 30.4.2004, p.1.

(19) OJ L 95, 15.4.2010, p.1.

(20) OJ L 78, 26.3.1977, p.17, last amended by Council [Directive 2013/25/EU](#) (OJ L 158, 10.6.2013, p.368).

- (a) for the purchase of water by a utility engaged in one or both of the activities relating to drinking water referred to in regulation 10(1) (water);
- (b) by a utility which is active in the energy sector by engaging in an activity referred to in regulation 8(1) (gas and heat), 9(1) (electricity) or 14 (extraction of oil and gas and exploration for, or extraction of, coal or other solid fuel) for the supply of—
 - (i) energy; or
 - (ii) fuels for the production of energy.

SUB-SECTION 2 Procurement involving defence and security aspects

Defence and security

23.—(1) These Regulations apply to procurement for the award of contracts and to design contests organised in the fields of defence and security, with the exception of procurement or design contests—

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

(2) These Regulations do not apply to procurement for the award of contracts or design contests, not otherwise exempt by virtue of paragraph (1), to the extent that—

- (a) the protection of the essential security interests of the United Kingdom or another member State cannot be guaranteed by less intrusive measures; or
- (b) the application of these Regulations would oblige the United Kingdom to supply information the disclosure of which it considers contrary to the essential interests of its security.

(3) These Regulations do not apply where—

- (a) the procurement and performance of the contract or design contest are classified as secret or must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in any part of the United Kingdom; and
- (b) the United Kingdom has determined that the protection of the essential interests concerned cannot be guaranteed by less intrusive measures.

(4) In this regulation reference to “less intrusive measures” includes, but is not limited to, imposing requirements aimed at protecting the confidential nature of information which the utility makes available in a contract award procedure as provided for in these Regulations.

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

24.—(1) This regulation applies where a procurement has as its subject different types of procurement all covering the same activity, any part of which is covered by Article 346 of the TFEU or the Defence and Security Regulations.

(2) Where different parts of a given contract are objectively separable, a utility may decide to undertake procurement for the award of—

- (a) separate contracts for the separate parts; or
- (b) a single contract.

(3) Any decision to undertake a procurement for the award of a single contract must not be made for the purpose of excluding the procurement from the application of these Regulations or the Defence and Security Regulations.

(4) Where a utility decides to undertake procurement for the award of separate contracts for separate parts the applicable law for the procurement of each separate part is to be determined by the characteristics of such part.

(5) Where a utility decides, in accordance with paragraph (6), to undertake a procurement for the award of a single contract and—

(a) part of the contract is covered by Article 346 of the TFEU, the contract may be awarded without applying these Regulations; or

(b) part of the contract is covered by the Defence and Security Regulations, the procurement may be undertaken in accordance with those Regulations, in which event these Regulations will not apply to such procurement.

(6) A utility may only decide to undertake a procurement for the award of a single contract of a kind referred to in paragraph (5) where—

(a) different parts of such a contract are not objectively separable; or

(b) such decision is justified by objective reasons.

(7) Paragraph (5)(b) is without prejudice to the thresholds and exclusions provided for by the Defence and Security Regulations.

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

Procurement covering several activities and involving defence or security aspects

25.—(1) This regulation applies where a procurement has as its subject a contract covering more than one activity, where one or more of those activities are covered by Article 346 of the TFEU or the Defence and Security Regulations.

(2) A utility may decide to undertake procurement for the award of—

(a) separate contracts for the separate activities; or

(b) a single contract.

(3) Any decision to undertake a procurement for the award of a single contract must not be made for the purpose of excluding the procurement from the application of these Regulations or the Defence and Security Regulations.

(4) Where a utility decides to undertake procurement for the award of separate contracts for separate activities the applicable law for the procurement of each separate activity will be determined by the characteristics of such activity.

(5) Where a utility decides, in accordance with paragraph (6), to undertake a procurement for the award of a single contract and—

(a) part of the contract is intended to cover an activity which is covered by Article 346 of the TFEU, the contract may be awarded without applying these Regulations; or

(b) part of the contract is intended to cover an activity which is covered by the Defence and Security Regulations, the procurement may be undertaken in accordance with those Regulations, in which event these Regulations do not apply to such procurement.

(6) A utility may only decide to undertake a procurement for the award of a single contract of a kind referred to in paragraph (5) where such decision is justified by objective reasons.

(7) Paragraph (5)(b) is without prejudice to the thresholds and exclusions provided for by the Defence and Security Regulations.

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

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

26.—(1) These Regulations do not apply to procurement for the award of a contract or to a design contest involving defence or security aspects which the utility is obliged to award or organise in accordance with a procurement which is established by—

- (a) an international agreement or arrangement, concluded in conformity with the Treaties, between the United Kingdom and one or more third country or part thereof and covering works, supplies or services intended for the joint implementation or exploitation of a project by their signatories;
- (b) an international agreement or arrangement relating to the stationing of troops and concerning the undertakings of the United Kingdom or a third country; or
- (c) an international organisation.

(2) These Regulations do not apply to procurement for the award of a contract or to the organisation of a design contest involving defence or security aspects which the utility carries out in accordance with procurement rules provided by an international organisation or international financing institution where the contract or design contest concerned is fully financed by that organisation or institution or is co-financed for the most part by such organisation or institution.

SUB-SECTION 3Special relations (cooperation, affiliated undertakings and joint ventures)

Exclusion: contracts between contracting authorities

27.—(1) These Regulations do not apply to procurement for the award of a contract—

- (a) by a contracting authority to a controlled person;
- (b) by a controlled person to a contracting authority which controls that person; or
- (c) by a controlled person to another controlled person where both such persons are controlled by the same contracting authority.

(2) For the purpose of this regulation, a person is a “controlled person” where—

- (a) the contracting authority exercises over that person control similar to that which it exercises over its own departments;
- (b) the person carries out more than 80% of its activities in the performance of tasks entrusted to it by the authority or by other persons controlled by that authority; and
- (c) no other person has direct private capital participation in the person with the exception of non-controlling and non-blocking forms of private capital participation required by any enactment, in conformity with the Treaties, which do not exert a decisive influence on the person being awarded the contract.

(3) For the purpose of paragraph (2)(a) an authority shall be deemed to exercise control over a person similar to the control that it exercises over its own departments where—

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

(4) These Regulations do not apply to procurement for the award of a contract by a contracting authority to a person which is jointly controlled.

(5) For the purpose of paragraph (4) a person is jointly controlled where—

- (a) the contracting authority, jointly with other contracting authorities, exercises over that person control similar to that which the authorities exercise over their own departments;

- (b) the person carries out more than 80% of its activities in the performance of tasks entrusted to it by the contracting authorities or by other persons controlled by those authorities; and
 - (c) no other person has direct private capital participation in the person with the exception of non-controlling and non-blocking forms of private capital participation required by any enactment, in conformity with the Treaties, which do not exert a decisive influence on the person being awarded the contract.
- (6) For the purpose of paragraph (5)(a) contracting authorities shall be deemed to exercise control over a person similar to the control that they exercise over their own departments where—
- (a) the decision making bodies of the person are composed of representatives of all participating contracting authorities;
 - (b) those contracting authorities jointly exercise a decisive influence over the strategic objectives and significant decisions of the person; and
 - (c) the person does not pursue any interests which are contrary to those of the contracting authorities.
- (7) For the purpose of paragraph (6)(a) individual representatives may represent several or all of the contracting authorities.
- (8) These Regulations do not apply to procurement for the award of a contract exclusively between two or more contracting authorities where—
- (a) the contract is for the purpose of establishing or implementing co-operation between those contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;
 - (b) the implementation of that co-operation is governed solely by considerations relating to the public interest; and
 - (c) the contracting authorities perform on the open market less than 20% of the activities concerned by the co-operation.
- (9) The percentage of activities referred to in paragraphs (2)(b), (5)(b) and (8)(c), shall be determined by reference to—
- (a) the average turnover of the person or, as the case may be, contracting authority for the period of 3 years preceding the date of the proposed contract award; or
 - (b) an appropriate alternative activity-based measure such as costs incurred by the relevant person or contracting authority with respect to works, supplies and services for such 3 year period.
- (10) Where paragraph (11) applies, an alternative credible measurement of activity shall be used and for this purpose use of business projections shall be treated as a credible measure.
- (11) This paragraph applies where the turnover or an appropriate activity-based measure is not available for the preceding 3 years or is no longer relevant because of—
- (a) the date on which the person or contracting authority was created or commenced activities; or
 - (b) a reorganisation of its activities.

Exclusion: contracts awarded to an affiliated undertaking

28.—(1) Provided that the conditions in paragraphs (2) to (4) are met, these Regulations do not apply to procurement for the award of a contract—

- (a) by a utility to an affiliated undertaking; or

- (b) by a joint venture, formed exclusively by a number of utilities for the purpose of carrying out activities described in regulations 8 to 14, to an affiliated undertaking of one of its members.
- (2) The conditions are that:—
- (a) in respect of service contracts, at least 80% of the average total turnover of the affiliated undertaking over the preceding 3 years, taking into account all services provided by that undertaking, derives from the provision of services to the utility or one or more of the utility’s affiliated undertakings;
 - (b) in respect of supply contracts, at least 80% of the average total turnover of the affiliated undertaking over the preceding 3 years, taking into account all supplies provided by that undertaking, derives from the provision of supplies to the utility or one or more of the utility’s affiliated undertakings;
 - (c) in respect of works contracts, at least 80% of the average total turnover of the affiliated undertaking over the preceding 3 years, taking into account all works provided by that undertaking, derives from the provision of works to the utility or one or more of the utility’s affiliated undertakings.
- (3) Where the turnover referred to in paragraph (2) is not available for the preceding 3 years because of the date on which an affiliated undertaking was created or commenced activities an alternative credible measurement of turnover shall be used for paragraph (2) and for this purpose use of business projections shall be treated as a credible measure.
- (4) Where more than one affiliated undertaking of a utility form an economic group and provide the same or similar works, supplies or services, the percentages referred to in paragraph (2) shall be calculated taking into account the total turnover deriving respectively from the provision of works, supplies or services by those affiliated undertakings.
- (5) In this regulation, “affiliated undertaking” means—
- (a) any undertaking the annual accounts of which are consolidated with those of the utility in accordance with the requirements of [Directive 2013/34/EU](#) of the European Parliament and of the Council on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending [Directive 2006/43/EC](#) of the European Parliament and of the Council and repealing Council Directives [78/660/EEC](#) and [83/349/EEC](#)(**21**); or
 - (b) in the case of an undertaking which is not subject to that Directive, any undertaking that—
 - (i) may be, directly or indirectly, subject to a dominant influence by the utility;
 - (ii) may exercise a dominant influence over the utility; or
 - (iii) in common with the utility, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation or the rules which govern it.
- (6) For the purposes of paragraph (5)(b), a dominant influence has the same meaning as in regulation 4(3) (utilities).
- (7) This regulation applies despite the provisions of regulation 27 (exclusions: contracts between contracting authorities).

(21) OJ L 182, 29.6.2013, p.19.

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

29.—(1) Subject to paragraphs (2) and (3), these Regulations do not apply to procurement for the award of a contract—

- (a) by a joint venture, formed exclusively by a number of utilities for the purpose of carrying out activities within the meaning of regulations 8 to 14, to one of those utilities; or
- (b) by a utility to such a joint venture of which it forms part.

(2) The joint venture must have been set up in order to carry out the activity concerned over a period of at least 3 years and the instrument setting up the joint venture must stipulate that the utilities which form it will be part of the joint venture for at least the same period.

(3) This regulation applies despite the provisions of regulation 27 (exclusions: contracts between contracting authorities).

Notification of information

30. A utility must notify to the Commission, if it so requests, the following information—

- (a) the names of the undertakings or joint ventures referred to in regulation 28 (exclusions: contracts awarded to an affiliated undertaking) or 29 (contracts awarded to a joint venture or to a utility forming part of a joint venture);
- (b) the nature and value of the contracts referred to in those regulations;
- (c) proof, as considered necessary by the Commission, that the relationship between the undertaking or joint venture, to which the contracts are awarded, and the utility complies with the requirements of those regulations.

SUB-SECTION 4 Specific situations

Research and development services

31. These Regulations only apply to procurement for the award of service contracts for research and development services which are covered by CPV Codes 73000000-2 to 73120000-9, 73300000-5, 73420000-2 and 73430000-5 provided that—

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

SUB-SECTION 5 Activities directly exposed to competition and related procedural provisions

Activities directly exposed to competition

32.—(1) These Regulations do not apply to procurement for the award of a contract or a design contest intended to enable an activity mentioned in regulations 8 to 14 to be carried out where that activity is directly exposed to competition on markets to which access is not restricted.

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

- (a) the activity is covered by the following Commission decisions—
 - (i) Commission [Decision 2006/211/EC](#) establishing that Article 30(1) of [Directive 2004/17/EC](#) of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors applies to electricity generation in England, Scotland and Wales (notified under document number C(2006) 690)(**22**);

(22) OJ L 76, 15.3.2006, p.6.

- (ii) Commission [Decision 2007/141/EC](#) establishing that Article 30(1) of [Directive 2004/17/EC](#) of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors applies to the supply of electricity and gas in England, Scotland and Wales (notified under document number C(2007) 559)(**23**); and
 - (iii) Commission [Decision 2010/192/EU](#) exempting exploration for and exploitation of oil and gas in England, Scotland and Wales from the application of [Directive 2004/17/EC](#) of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (notified under document C(2010) 1920)(**24**); or
- (b) the procedure specified in regulation 33 (procedure for establishing whether regulation 32(2)(b) is applicable) is followed and regulation 33(2) applies.
- (3) The activity referred to in paragraph (1) may form a part of a larger sector or be exercised only in certain parts of the United Kingdom.

Procedure for establishing whether regulation 32(2)(b) is applicable

33.—(1) The procedure referred to in regulation 32(2)(b) (activities directly exposed to competition) is as follows—

- (a) the Scottish Ministers or a utility submit a request to the Commission, where appropriate together with the position adopted by an independent national authority that is competent in relation to the activity concerned, demonstrating that the activity in question is directly exposed to competition on markets to which access is not restricted on the basis of criteria that are in conformity with the provisions on competition of the TFEU; and
 - (b) the request must specify—
 - (i) all the relevant facts including any law, regulation, administrative provision or agreement concerning compliance with the condition that the activity is directly exposed to competition on markets to which access is not restricted;
 - (ii) that the activity concerned is subject to the EU legislation listed in Annex III to the Utilities Contracts Directive where it is and, if so, the request must also specify the relevant implementing legislation applied in the United Kingdom giving rise to a presumption that access to the market is not restricted;
 - (c) if free access to a given market cannot be presumed on the basis of paragraph (b)(ii), it must be demonstrated in the request referred to in sub-paragraph (b) that access to the market in question is free as a matter of fact and law;
- (2) This paragraph applies if, subject to paragraph (8), the Commission—
- (a) has adopted an implementing act establishing that the activity is directly exposed to competition on markets to which access is not restricted within the time limits specified in Annex IV to the Utilities Contracts Directive; or
 - (b) has not adopted an implementing act establishing whether or not the activity is directly exposed to competition on markets to which access is not restricted within the time limits specified in Annex IV to the Utilities Contracts Directive.
- (3) The request referred to in paragraph (1)(a) and (b) may concern activities which are part of a larger sector or which are exercised in certain parts of the United Kingdom.
- (4) The criteria referred to in paragraph (1)(a) may include—

(23) OJ L 62, 1.3.2007, p.23.

(24) OJ L 84, 31.3.2010, p.52.

- (a) the characteristics of the products or services concerned;
 - (b) the existence of alternative products or services considered to be substitutable on the supply side or demand side;
 - (c) the prices; and
 - (d) the actual or potential presence of more than one supplier of the products or provider of the services in question;
- (5) The geographical reference market on the basis of which exposure to competition is assessed shall consist of the area in which the utility concerned is involved in the supply and demand of products or services in which the conditions of competition—
- (a) are sufficiently homogenous; and
 - (b) can be distinguished from neighbouring areas (including because conditions of competition are appreciably different in those areas).
- (6) The assessment in paragraph (5) shall take into account, among other factors—
- (a) the nature and characteristics of the products or services concerned;
 - (b) the existence of entry barriers;
 - (c) the existence of consumer preferences;
 - (d) appreciable differences of the utility's market shares between the area concerned and neighbouring areas; and
 - (e) substantial price differences.
- (7) After the submission of a request, the Scottish Ministers or the utility may, with the Commission's agreement, substantially modify its request, including as regards the activities or the geographical area concerned.
- (8) Where a request has been modified, a new period for the adoption of the implementing act shall be calculated in accordance with paragraph 1 of Annex IV to the Utilities Contracts Directive unless a shorter period is agreed on between the Commission and either the Scottish Ministers or the utility which has submitted the request.

CHAPTER 4

GENERAL PRINCIPLES

Principles of procurement

34.—(1) A utility must, in carrying out any procurement or design contest which is subject to the application of these Regulations—

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

(2) A utility must not design a procurement or design contest with the intention of excluding it from the application of these Regulations or of artificially narrowing competition.

(3) Without prejudice to the generality thereof, competition shall be deemed to be artificially narrowed for the purpose of paragraph (2) where the design of the procurement or design contest is made with the intention of unduly favouring or disadvantaging any particular economic operator.

(4) A utility must include in each contract or framework agreement such conditions relating to the performance of the contract or framework as meet the requirements mentioned in paragraph (5) and are reasonably necessary to ensure that the economic operator complies with environmental, social and employment law, including any relevant collective agreements or international law measures referred to in Annex XIV of the Utilities Contracts Directive as amended from time to time.

- (5) The requirements referred to in paragraph (4) are that the conditions are—
- (a) linked to the subject matter of the contract or framework within the meaning of regulation 84 (conditions for performance of contracts); and
 - (b) indicated in the call for competition or in the procurement documents.

Economic operators

35.—(1) A utility must not reject an economic operator solely on the ground that under the law of any part of the United Kingdom it would require to be a natural or legal person if such economic operator is entitled to provide the relevant service under the law of the member State in which that operator is established.

(2) Where paragraph (3) applies, a utility may require an economic operator to state, in its tender or request to participate, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract.

(3) This paragraph applies where an economic operator which is a legal person is seeking the award of—

- (a) a works contract;
- (b) a supply contract which includes services or siting and installation operations; or
- (c) a services contract.

(4) A utility must not require a group of economic operators, including temporary associations, to have a specific legal form in order to be able to submit a tender or a request to participate.

(5) A utility may specify in the procurement documents the method by which a group of economic operators is to meet the requirements for qualification and qualitative selection referred to in regulations 75 to 79.

(6) Any method specified as referred to in paragraph (5) must be justified by objective reasons and must be proportionate.

(7) Any conditions for the performance of a contract by a group of economic operators, which are different from those imposed upon individual participants, must be justified by objective reasons and must be proportionate.

(8) A utility may, if it is necessary for the satisfactory performance of the contract, require a group of economic operators to assume a specific legal form for the purpose of the award of the contract.

(9) In this regulation reference to a “contract” includes reference to a framework agreement, dynamic purchasing system and design contest.

Reserved contracts

36.—(1) A utility may—

- (a) reserve the right to participate in procurement for the award of a contract or framework agreement to a supported business; or
- (b) provide for such a contract or framework agreement to be performed in the context of a supported employment programme.

(2) Where a utility is following the approach set out in paragraph (1), it must specify that fact in the call for competition and refer to Article 38 of the Utilities Contracts Directive.

(3) In this regulation—

“supported business” means an economic operator whose main aim is the social and professional integration of disabled or disadvantaged persons and where at least 30% of the employees of the economic operator are disabled or disadvantaged persons; and

“supported employment programme” means an employment programme operated by an economic operator the main aim of which is the social and professional integration of disabled or disadvantaged persons and where at least 30% of those engaged in the programme are disabled or disadvantaged persons.

Confidentiality

37.—(1) A utility must not disclose information forwarded to it by an economic operator which the economic operator has designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.

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

- (a) any other provision of these Regulations, including the obligation relating to advertising of awarded contracts and to provision of information to candidates and tenderers set out in regulations 68 (contract award notices) and 73 (informing applicants for qualification, candidates and tenderers);
- (b) the Freedom of Information (Scotland) Act 2002⁽²⁵⁾;
- (c) the Environmental Information (Scotland) Regulations 2004⁽²⁶⁾; and
- (d) any other enactment to which the entity is subject relating to the disclosure of information.

(3) A utility may impose upon an economic operator requirements aimed at protecting the confidential nature of information which the utility makes available throughout the procurement.

Rules applicable to communication

38.—(1) Subject to paragraphs (3), (5) and (8), a utility must ensure that all communication and information exchange, including submission, pursuant to these Regulations is performed using electronic means of communication in accordance with this regulation.

(2) Subject to paragraph (13), the tools and devices to be used for electronic means of communication, and their technical characteristics, must—

- (a) be non-discriminatory;
- (b) be generally available;
- (c) be interoperable with the information and communication technology products in general use; and
- (d) not restrict economic operators’ access to the procurement.

(3) A utility is not obliged to require electronic means of communication in the submission process where—

- (a) due to the specialised nature of the procurement, the use of electronic means of communication would require specific tools, devices or file formats that are not generally available or supported by generally available applications;
- (b) the applications supporting file formats that are suitable for the description of the tenders use file formats that cannot be handled by any other open or generally available applications or are under a proprietary licencing scheme and cannot be made available by the utility for downloading or remote use;
- (c) the use of electronic means of communication would require specialised office equipment that is not generally available to a utility; or

⁽²⁵⁾ 2002 asp 13.

⁽²⁶⁾ S.S.I. 2004/520, amended by the Environmental Information (Scotland) Amendment Regulations 2013, S.S.I. 2013/127.

- (d) the procurement documents require the submission of physical or scale models which cannot be transmitted using electronic means.
- (4) Where, in accordance with paragraph (3), electronic means of communication is not required, communication must be carried out—
 - (a) by post or by other suitable carrier; or
 - (b) by a combination of post or other suitable carrier and, to the extent that electronic means of communication is possible, by such means.
- (5) A utility is not obliged to require electronic means of communication in the submission process to the extent that the use of means of communication other than electronic means is necessary—
 - (a) because of a breach of security of the electronic means of communication; or
 - (b) for the protection of information of a particularly sensitive nature which requires such a high level of protection that it cannot properly be ensured by using electronic tools and devices that are either generally available to economic operators or that can be made available to them by suitable alternative means of access in accordance with paragraph (14).
- (6) Where, in accordance with paragraph (3), a utility requires means of communication in the submission process other than electronic means, the utility must state the reason for this in the documentation referred to in regulation 96 (reporting and documentation requirements).
- (7) Where electronic means of communication is not required for a reason referred to in paragraph (5), the utility must state in the documentation referred to in regulation 96 (reporting and documentation requirements) the reasons why use of means of communication other than electronic means has been considered necessary under that paragraph.
- (8) Notwithstanding paragraph (1), oral communication may be used in respect of communications other than those concerning the essential elements of a procurement, provided that the content of the oral communication is documented by the utility.
- (9) For the purposes of paragraph (8) reference to “the essential elements of a procurement” includes the procurement documents, requests for participation, confirmations of interest and tenders.
- (10) A utility must, to a sufficient extent and by appropriate means, document oral communications with tenderers which could have a substantial impact on the content and assessment of the tenders, in particular, by preparing written or audio records or summaries of the main elements of the communication.
- (11) In all communication, exchange and storage of information, a utility must ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved.
- (12) A utility must examine the content of tenders and requests to participate only after the time limit set for submitting them has expired.
- (13) A utility may, where necessary, require the use of tools and devices which are not generally available, provided that the utility offers suitable alternative means of access.
- (14) A utility shall be deemed to offer suitable alternative means of access where the utility—
 - (a) offers unrestricted and full direct access free of charge by electronic means to those tools and devices from the date of publication of the call for competition or from the date when the invitation to confirm interest is sent;
 - (b) ensures that tenderers having no access to the tools and devices concerned, or no possibility of obtaining them within the relevant time limits (provided that the lack of access is not attributable to the tenderer) may access the procurement through the use of provisional tokens made available free of charge online; or

(c) supports an alternative channel for electronic submission of tenders.

(15) For the purpose of paragraph (14)(a) “date of publication of the call for competition” means the date of publication in the Official Journal after being sent in accordance with regulation 69 (form and manner of sending notices for publication at EU level).

(16) A utility must specify in the call for competition or the invitation to confirm interest, referred to in paragraph (14)(a), the internet address at which those tools and devices are accessible.

(17) Tools and devices for the electronic receipt of tenders, requests to participate, applications for qualification and, in design contests, plans and projects, must—

- (a) enable the precise determination of the exact time and date of the receipt of tenders, requests to participate, applications for qualification and the submission of plans and projects;
- (b) to the extent reasonably possible, ensure that, before the time limit referred to in paragraph (12) has expired, no-one can have access to data transmitted to the utility using the tools and devices;
- (c) ensure that only authorised persons may set or change the dates for opening data received;
- (d) ensure that, during the various stages of the qualification procedure, the procurement or the design contest, only authorised persons may have access to data submitted or to part of such data;
- (e) ensure that only authorised persons may give access to data transmitted and only after the time limit referred to in paragraph (12) has expired;
- (f) ensure that data received and opened in accordance with the requirements in sub-paragraphs (a) to (e) remains accessible only to persons authorised to acquaint themselves with the data; and
- (g) to the extent reasonably possible, ensure that any infringement, or attempted infringement, of the conditions referred to in sub-paragraphs (b) to (f) is clearly detectable.

(18) In addition to the requirements set out in paragraph (17), a utility must comply with all of the following requirements in relation to tools and devices for the electronic transmission and receipt of tenders and for the electronic receipt of requests to participate—

- (a) information on specifications for the electronic submission of tenders and requests to participate, including encryption and time-stamping, must be available to interested parties;
- (b) a utility must specify the level of security required for the electronic means of communication in the various stages of the specific procurement;
- (c) the level of security specified in accordance with sub-paragraph (b) must be proportionate to the risks attached;
- (d) where paragraph (19) applies, the utility must accept advanced electronic signatures supported by a qualified certificate, created with or without a secure signature creation device, subject to compliance with all of the following conditions—
 - (i) the utility must establish the required advanced electronic signature format on the basis of formats established in the Electronic Signature Commission Decision and must put in place necessary measures to be able to process these formats technically;
 - (ii) where a different format of electronic signature is used, the electronic signature or the electronic document carrier must include information on existing validation possibilities;
 - (iii) the validation possibilities must allow the utility to validate the received electronic signature as an advanced electronic signature supported by a qualified certificate,

such validation to be online, free of charge and in a way that is understandable for non-English speakers;

- (iv) where a tender is signed with an advanced electronic signature with the support of a qualified certificate from a provider that is included on a trusted list provided for in the Trusted Lists Commission Decision as amended from time to time, the utility must not apply additional requirements that may hinder the use of the signature by the tenderer.

(19) This paragraph applies where a utility concludes that the level of risk assessed in accordance with paragraphs (21) and (22) is such that advanced electronic signatures as defined by [Directive 1999/93/EC](#) of the European Parliament and of the Council on a Community framework for electronic signatures⁽²⁷⁾ as amended from time to time, are required.

(20) A utility shall assess the certificate referred to in paragraph (18)(d) by taking into account whether the certificate is provided by a certificate services provider which is on a trusted list provided for in the Trusted Lists Commission Decision as amended from time to time.

(21) In deciding the level of security required at each stage of a procurement, and in concluding whether the level of risk is such that advanced electronic signatures are required, a utility must assess the risks having regard to—

- (a) the likelihood of particular risks materialising;
- (b) the potential adverse consequences if those risks materialise;
- (c) the need for consistency as between similar procurements performed by the same utility; and
- (d) the need for proportionality between the expected benefits of any particular security requirements (in terms of eliminating or reducing any of the risks referred to in paragraph (22)) and the costs, burdens and obligations which those requirements may impose upon an economic operator.

(22) A utility must assess all relevant risks, including, in particular, where applicable—

- (a) the risk to the proper functioning and integrity of the specific procurement process, including risks of breaching these Regulations;
- (b) risks to national security;
- (c) the risk of inadvertent or unauthorised disclosure of, or access to, any economic operator's confidential information;
- (d) the risk of inadvertent or unauthorised disclosure of, or access to, information held by the utility including information relating to the specific procurement;
- (e) the risk that use of electronic communications could provide opportunity for malicious attacks on the electronic systems of, or data held by, the utility, any economic operator or any other person, including introduction of malware or denial of service attacks; and
- (f) any other material risk relating to the procurement in question.

(23) Paragraph (24) applies where—

- (a) a competent authority of the United Kingdom located in Scotland; or
- (b) another issuing entity located in Scotland,

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

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

(24) The competent authority or issuing entity may establish the required advanced signature format in accordance with the requirements set out in Article 1(2) of the Electronic Signature Commission Decision, as amended from time to time, and where it does so—

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

(25) In this regulation—

“Electronic Signature Commission Decision” means Commission [Decision 2011/130/EU](#) establishing minimum requirements for the cross-border processing of documents signed electronically by competent authorities under [Directive 2006/123/EC](#) of the European Parliament and of the Council on services in the internal market (notified under document C(2011) 1081)(**28**); and

“Trusted Lists Commission Decision” means Commission [Decision 2009/767/EC](#) setting out measures facilitating the use of procedures by electronic means through the points of single contact under [Directive 2006/123/EC](#) of the European Parliament and of the Council on services in the internal market (notified under document C(2009) 7806)(**29**).

Nomenclatures

39. Any references to nomenclatures in the context of procurement must be made using the CPV.

Conflicts of interest

40.—(1) A utility must take appropriate measures to prevent, identify and remedy conflicts of interest arising in the conduct of a procurement so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.

(2) Without prejudice to the generality thereof, reference to “conflicts of interest” in paragraph (1) includes any situation where relevant staff members have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement.

(3) In paragraph (2)—

“relevant staff member” means staff members of the utility or of a procurement service provider acting on behalf of the utility, who are involved in the conduct of the procurement or may influence the outcome of that procedure; and

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

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

(29) OJ L 274, 20.10.2009, p.36, last amended by Commission [Decision 2013/662/EU](#) (OJ L 306, 16.11.2013, p.21).