
STATUTORY INSTRUMENTS

1991 No. 2680

PUBLIC PROCUREMENT

The Public Works Contracts Regulations 1991

Made - - - - 28th November 1991

Laid before Parliament 29th November 1991

Coming into force - - 21st December 1991

The Treasury, being the Minister designated((1)) for the purposes of section 2(2) of the European Communities Act 1972((2)) in relation to public procurement, in exercise of the powers conferred upon them by the said section 2(2) and of all other powers enabling them in that behalf, hereby make the following Regulations:—

PART I
GENERAL

Title and commencement

1. These Regulations may be cited as the Public Works Contracts Regulations 1991 and shall come into force on 21st December 1991.

Interpretation

2. —

(1) In these Regulations—

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

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

“the Commission” means the Commission of the Communities;

“concessionaire” means a person who has entered into a public works concession contract with a contracting authority;

(1) S.I.1991/755.

(2) 1972 c. 68.

“contract documents” means the invitation to tender for or negotiate the contract, the proposed conditions of contract, the specifications or description of the work or works required by the contracting authority and of the materials or goods to be used in or for it or them, and all documents supplementary thereto;

“contract notice” means a notice sent to the Official Journal in accordance with regulation 11(2), 12(2), 13(2), 25(2) or 26(3);

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

“contractor” has the meaning ascribed to it by regulation 4;

“ECU” means the European Currency Unit as defined in Council Regulation (EEC) No. 3180/78((3));

“established” means the same as it does for the purposes of the Community Treaties;

“financial year” means the period of 12 months ending on 31st March in any year or, in relation to any person whose accounts are prepared in respect of a different 12 month period, that period of 12 months;

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

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

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

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

“Official Journal” means the Official Journal of the Communities;

“open procedure” means a procedure leading to the award of a public works contract whereby all interested persons may tender for the contract;

“public housing scheme works contract” means a public works contract relating to the design and construction of a public housing scheme;

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

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

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

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

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

“working day” means a day other than a Saturday, Sunday or Bank Holiday within the meaning of the Banking and Financial Dealings Act 1971((4));

“works” means any of the activities specified in Schedule 1, being activities contained in the general industrial classification of economic activities within the Communities; and

“year” means a calendar year.

(2) The value in the currency of any member State of any amount expressed in these Regulations in ECU shall be calculated by reference to the exchange rate for the time being applying for the purposes of Council Directive 71/305/EEC((5)) as published from time to time in the Official Journal.((6))

(3) Where a thing is required to be done under these Regulations—

(a) within a period after an action is taken, the day on which that action was taken shall not be counted in the calculation of that period;

(b) within a certain period, that period must include 2 working days;

(c) within a period and the last day of that period is not a working day, the period shall be extended to include the following working day.

(4) References in these Regulations to a regulation are references to a regulation in these Regulations and references to a Schedule are references to a Schedule to these Regulations.

Contracting authorities

3. –

(1) For the purposes of these Regulations each of the following is a “contracting authority”—

(a) a Minister of the Crown,

(b) a government department,

(c) the House of Commons,

(d) the House of Lords,

(e) the Northern Ireland Assembly,

(f) a local authority,

(g) a fire authority constituted by a combination scheme under the Fire Services Act 1947((7)),

(h) the Fire Authority for Northern Ireland,

(i) a police authority constituted under section 2 of the Police Act 1964((8)) or a combined police authority established by an amalgamation scheme under that Act,

(j) the Police Authority for Northern Ireland,

(k) an authority established under section 10 of the Local Government Act 1985((9)),

(l) a joint authority established by Part IV of that Act,

(m) any body established pursuant to an order under section 67 of that Act,

(n) the Broads Authority,

(4) 1971 c. 80.

(5) OJ No. L185, 16.8.71, p. 5, as amended by Council Directive 89/440/EEC (OJ No. L210, 21.7.89, p. 1).

(6) The rates are determined for each successive period of 2 years by calculating the average of the daily exchange rates between each currency and the ECU over a period of 24 months preceding the determination. The exchange rates applying at the time of coming into force of these Regulations are published in OJ No. C18, 25.1.90, p. 3.

(7) 1947 c. 41.

(8) 1964 c. 48.

(9) 1985 c. 51.

- (o) any joint board the constituent members of which consist of any of the bodies specified in paragraphs (f), (g), (i), (k), (l), (m) and (n) above,
 - (p) a joint or special planning board constituted for a National Park by an order under paragraphs 1 or 3 of Schedule 17 to the Local Government Act 1972((10)), and
 - (q) a joint education board constituted under the provisions of Part I of the First Schedule to the Education Act 1944((11)),
 - (r) a corporation established, or a group of individuals appointed to act together, for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and
 - (i) financed wholly or mainly by another contracting authority, or
 - (ii) subject to management supervision by another contracting authority, or
 - (iii) more than half of the board of directors or members of which, or, in the case of a group of individuals, more than half of those individuals, being appointed by another contracting authority, and
 - (s) associations of or formed by one or more of the above.
- (2) In the application of these Regulations to England and Wales, “local authority” in paragraph (1) above means—
- (a) a county council, a district council, a London borough council, a parish council, a community council, or the Council of the Isles of Scilly;
 - (b) the Common Council of the City of London in its capacity as local authority or police authority.
- (3) In the application of these Regulations to Scotland, “local authority” in paragraph (1) above means a regional, islands or district council or any joint board or joint committee within the meaning of section 235 of the Local Government (Scotland) Act 1973.((12))
- (4) In the application of these Regulations to Northern Ireland, “local authority” in paragraph (1) above means a district council within the meaning of the Local Government Act (Northern Ireland) 1972.((13))
- (5) Where an entity specified in paragraph (1) above does not have the capacity to enter into a contract, the contracting authority in relation to that entity means a person whose function it is to enter into contracts for that entity.

Contractors

4. –

- (1) For the purposes of these Regulations a “contractor” means a person—
- (a) who sought, or who seeks, or would have wished, to be the person to whom a public works contract is awarded, and
 - (b) who is a national of and established in a member State.
- (2) When these Regulations apply a contracting authority shall not treat a person who is not a national of and established in a member State more favourably than one who is.

(10) 1972 c. 70.

(11) 1944 c. 31.

(12) 1973 c. 65.

(13) 1972 c. 9 (N.I.)

Application of the Regulations

5. These Regulations apply whenever a contracting authority seeks offers in relation to a proposed public works contract other than public works contracts excluded from the operation of these Regulations by regulations 6 and 7; except that in Parts II, III, IV and V of these Regulations and in regulations 24, 27 and 28 references to a “public works contract” shall not include a public works concession contract.

General exclusions

6. These Regulations shall not apply to the seeking of offers in relation to a proposed public works contract—

- (a) by a contracting authority which is, or which in seeking the offers is exercising the functions of, a carrier by land, air, sea or inland waterway;
- (b) which concerns the production, transport or distribution of drinking water;
- (c) by a contracting authority whose principal activity is the production or distribution of energy;
- (d) which is classified as secret or where the carrying out of the work or works under it must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions of any part of the United Kingdom or when the protection of the basic interests of the security of the United Kingdom require it;
- (e) where different procedures govern the procedures leading to the award of the contract and it is to be entered into—
 - (i) pursuant to an international agreement to which the United Kingdom and a State which is not a member State are parties and it provides for the carrying out of works intended for the joint implementation or exploitation of a project pursuant to that agreement;
 - (ii) pursuant to an international agreement relating to the stationing of troops; or
 - (iii) in accordance with the contract award procedures of an organisation of which only States are members (an “international organisation”) or of which only States or international organisations are members.

Thresholds

7. —

(1) These Regulations shall not apply to the seeking of offers in relation to a proposed public works contract where the estimated value of the contract (net of value added tax) at the relevant time is less than 5,000,000 ECU.

(2) Subject to paragraphs (3), (5) and (6) below, the estimated value for the purposes of paragraph (1) above of a public works contract shall be the value of the consideration which the contracting authority expects to give under the contract.

(3) Subject to paragraphs (4) and (6) below, the estimated value for the purposes of paragraph (1) above of a public works contract which is one of a number of contracts entered into or to be entered into for the carrying out of a work shall be the aggregate of the value of the consideration which the contracting authority has paid or expects to give under all the contracts for the carrying out of the work.

(4) Paragraph (3) above shall not apply to any public works contract (unless the contracting authority chooses to apply that paragraph to that contract) if that contract has an estimated value (calculated in accordance with paragraph (2) above) of less than 1,000,000 ECU, and the aggregate value of that contract and of any other public works contract for the carrying out of the work in respect

of which the contracting authority takes advantage of the disapplication of paragraph (3) above by virtue of this paragraph is less than 20 per cent of the aggregate of the value of the consideration which the contracting authority has paid or expects to pay under all the contracts for the carrying out of the work.

(5) Subject to paragraph (6) below, the estimated value for the purposes of paragraph (1) above of a public works concession contract shall be the value of the consideration which the contracting authority would expect to give for the carrying out of the work or works if it did not propose to grant a concession.

(6) Where a contracting authority intends to provide any goods to the person awarded a public works contract for the purpose of carrying out that contract, the value of the consideration for the purposes of paragraphs (2) and (3) above shall be taken to include the estimated value at the relevant time of those goods.

(7) The relevant time for the purposes of paragraphs (1) and (6) above means, in relation to a public works contract, the date on which a contract notice would be sent to the Official Journal if the requirement to send such a notice applied to that contract in accordance with these Regulations.

(8) A contracting authority shall not enter into separate public works contracts with the intention of avoiding the application of these Regulations to those contracts.

PART II

TECHNICAL SPECIFICATIONS

Technical specifications in the contract documents

8. –

(1) In this regulation–

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

“essential requirements” means requirements relating to safety, health and certain other aspects in the general interest which the works must meet;

“European specification” means a common technical specification, a British standard implementing a European standard or a European technical approval;

“European standard” means a standard approved by the European Committee for Standardisation (“CEN”) or by the European Committee for Electrotechnical Standardisation (“CENELEC”) as a “European Standard (“EN “) or a “Harmonisation Document (“HD “)” according to the Common Rules of those organisations;

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

“standard” means a technical specification approved by a recognised standardising body for repeated and continuous application, compliance with which is in principle not compulsory;

“technical specifications” means the technical requirements defining the characteristics required of the work or works and of the materials and goods used in or for it or them (such as quality, performance, safety or dimensions) so that the works, work, materials and goods are described objectively in a manner which will ensure that they fulfil the use for which

they are intended by the contracting authority. In relation to materials and goods, “technical specifications” include requirements in respect of quality assurance, terminology, symbols, tests and testing methods, packaging, marking and labelling. In relation to a work or works, they include requirements relating to design and costing, the testing, inspection and acceptance of a work or works, and the methods or techniques of construction.

(2) If a contracting authority wishes to lay down technical specifications which the work or works to be carried out under a public works contract and which the materials and goods used in or for it or them must meet it shall specify all such technical specifications in the contract documents.

(3) Subject to paragraph (4) below, the technical specifications in the contract documents relating to a public works contract shall be defined by reference to any European specifications which are relevant.

(4) A contracting authority may define the technical specifications referred to in paragraph (3) above other than by reference to relevant European specifications if–

- (a) the contracting authority is under an obligation to define the technical specifications by reference to technical requirements which are mandatory in the United Kingdom for the work or works to be carried out under the contract or for the materials or goods to be used in or for it or them, (but only to the extent that such an obligation is compatible with Community obligations);
- (b) the relevant European specifications do not include provision for establishing conformity to, or it is technically impossible to establish satisfactorily that the work or works or the materials or goods do conform to, the relevant European specifications;
- (c) subject to paragraph (5) below, application of the relevant European specifications would oblige the contracting authority to acquire a work, works, material or goods incompatible with equipment already in use or would entail disproportionate costs or disproportionate technical difficulties; or
- (d) the work or works are of a genuinely innovative nature for which use of existing relevant European specifications would be inappropriate.

(5) A contracting authority may only define the technical specifications other than by reference to relevant European specifications on the grounds specified in paragraph (4)(c) above where the contracting authority has a clearly defined and recorded strategy for changing over, within a set period, to European specifications.

(6) A contracting authority shall state in the contract notice which of the circumstances specified in paragraph (4) above was the ground for defining the technical specifications other than by reference to European specifications or, if it is impossible to include this information in the contract notice, the contracting authority shall specify it in the contract documents and shall in any event keep a record of this information which, if the Commission or any member State requests it, it shall send to the Treasury for onward transmission to the Commission or member State which requested it.

(7) In the absence of European specifications relevant to the work or works to be carried out under a public works contract or to the materials or goods to be used in or for it or them, the technical specifications in the contract documents–

- (a) shall be defined by reference to the British technical specifications recognised as complying with the basic requirements specified in any Council Directives on technical harmonisation in accordance with the procedures laid down in those directives and, in particular, in accordance with the procedures laid down in Council Directive 89/106/EEC on the approximation of laws, regulations and administrative procedures in the member States relating to construction products((14));

(14) OJ No. L40, 11.2.89, p. 12.

- (b) may be defined by reference to British technical specifications relating to design and method of calculation and execution of a work or works and use of materials and goods;
- (c) may be defined by reference to the following standards (and, if they are so defined, preference shall be given to the following standards in the order in which they are listed)–
 - (i) British standards implementing international standards;
 - (ii) other British standards and technical approvals; or
 - (iii) any other standards.

(8) Subject to paragraph (10) below, the contract documents relating to a public works contract shall not include technical specifications which refer to materials or goods of a specific make or source or to a particular process and which have the effect of favouring or eliminating particular contractors.

(9) Without prejudice to the generality of paragraph (8) above, references to trademarks, patents, types, origin or means of production shall not be incorporated into the technical specifications in the contract documents.

(10) Notwithstanding paragraph (8) and (9) above, a contracting authority may incorporate the references referred to in paragraphs (8) and (9) above into the technical specifications in the contract documents if–

- (a) such references are justified by the subject of the contract, or
- (b) the work or works to be carried out under the contract cannot otherwise be described by reference to technical specifications which are sufficiently precise and intelligible to all contractors, provided that the references are accompanied by the words “or equivalent”.

PART III

PROCEDURES LEADING TO THE AWARD OF A PUBLIC WORKS CONTRACT

Prior information notices

9. A contracting authority intending to seek offers in relation to a public works contract shall, as soon as possible after the decision approving the planning of the work or works, send to the Official Journal a notice, in a form substantially corresponding to that set out in Part A of Schedule 2, and containing the information therein specified in relation to the contract.

Selection of contract award procedure

10. –

(1) For the purpose of seeking offers in relation to a proposed public works contract (but, in the case of a public housing scheme works contract, subject to regulation 24) a contracting authority shall use the open procedure, the restricted procedure or the negotiated procedure and shall decide which of those procedures to use in accordance with the following paragraphs of this regulation.

(2) A contracting authority may use the negotiated procedure in the following circumstances–

- (a) subject to paragraph (4) below, in the event that the procedure leading to the award of a public works contract by the contracting authority using the open or negotiated procedure was discontinued–
 - (i) because of irregular tenders, or
 - (ii) following an evaluation made in accordance with regulation 11(7) or 12(4);

and without prejudice to the generality of the meaning of the words “irregular tenders” a tender may be considered irregular if the contractor fails to meet the requirements of, or the tender offers variations on the requirements specified in, the contract documents where this is not permitted under the terms of the invitation to tender, or the work, works, materials or goods offered do not meet the technical specifications (within the meaning of regulation 8(1)) of the contracting authority;

- (b) when the work or works are to be carried out under the contract purely for the purpose of research, experiment or development but not where the works are to be carried out to establish commercial viability or to recover research and development costs;
- (c) exceptionally, when the nature of the work or works to be carried out under the contract is such, or the risks attaching thereto are such, as not to permit prior overall pricing;
- (d) subject to paragraph (4) below, in the absence of tenders or of appropriate tenders in response to an invitation to tender by the contracting authority using the open or restricted procedure;
- (e) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the work or works to be carried out under the contract may only be carried out by a particular person;
- (f) when (but only if it is strictly necessary) for reasons of extreme urgency brought about by events unforeseeable by, and not attributable to, the contracting authority, the time limits specified in regulations 11, 12 and 13 if the open or restricted procedures or the negotiated procedure pursuant to paragraphs (2)(a) to (c) are used cannot be met;
- (g) subject to paragraph (5) below, when a contracting authority wants a person who has entered into a public works contract with the contracting authority to carry out additional works which through unforeseen circumstances were not included in the project initially considered or in the original public works contract and—
 - (i) such works cannot for technical or economic reasons be carried out separately from the works carried out under the original public works contract without great inconvenience to the contracting authority, or
 - (ii) such works can be carried out separately from the works carried out under the original public works contract but are strictly necessary to the later stages of that contract; and
- (h) subject to paragraph (6) below, when a contracting authority wishes a person who has entered into a public works contract with that contracting authority to carry out new works which are a repetition of works carried out under the original contract and which are in accordance with the project for the purpose of which the first contract was entered into.

(3) A contracting authority shall not use the negotiated procedure pursuant to paragraphs (2)(a) or (d) above unless the proposed terms of the contract are substantially unaltered from the proposed terms of the contract in relation to which offers were sought using the open or restricted procedure.

(4) A contracting authority shall not use the negotiated procedure pursuant to paragraph (2)(g) above where the aggregate value of the consideration to be given under contracts for the additional works exceeds 50 per cent of the value of the consideration payable under the original contract; and, for the purposes of this paragraph, the value of the consideration shall be taken to include the estimated value of any goods which the contracting authority provided to the person awarded the contract for the purpose of carrying out the contract.

(5) A contracting authority shall not use the negotiated procedure pursuant to paragraph (2)(h) above unless the contract notice relating to the original contract stated that a public works contract for new works which would be a repetition of the works carried out under the original contract may be awarded using the negotiated procedure pursuant to paragraph (2)(h) above and unless the procedure for the award of the new contract is commenced within three years of the original contract being entered into.

(6) In all other circumstances the contracting authority shall use the open procedure or the restricted procedure.

(7) A contracting authority using the negotiated procedure pursuant to paragraph (2)(d) above shall, if the Commission requests it, submit a report recording the fact that it has done so to the Treasury for onward transmission to the Commission.

The open procedure

11. –

(1) A contracting authority using the open procedure shall comply with the following paragraphs of this regulation.

(2) The contracting authority shall publicise its intention to seek offers in relation to the public works contract by sending to the Official Journal as soon as possible after forming the intention a notice, in a form substantially corresponding to that set out in Part B of Schedule 2, inviting tenders and containing the information therein specified in relation to the contract.

(3) Subject to paragraph (4) below, the date which the contracting authority shall fix as the last date for the receipt by it of tenders made in response to the contract notice shall be specified in the notice and shall be not less than 52 days from the date of despatch of the notice but, if the contract documents are too bulky to be supplied within this time or it is necessary that contractors be given the opportunity to inspect the site on which the work or works under the contract is or are to be carried out or documents relating to the contract documents, then that minimum period shall be extended to allow for such supply or inspection.

(4) Where the contracting authority has published a notice in accordance with regulation 9 in relation to the public works contract it may substitute for the period of not less than 52 days specified in paragraph (3) above a period of not less than 36 days.

(5) The contracting authority shall send the contract documents within 6 days of the receipt of a request from any contractor provided that the documents are requested in good time and any fee specified in the contract notice has accompanied the request.

(6) The contracting authority shall supply such further information relating to the contract documents as may reasonably be requested by a contractor provided that the request is received in sufficient time to enable the contracting authority to supply the information no later than 6 days before the date specified in the contract notice as the final date for the receipt of tenders.

(7) The contracting authority may exclude a tender from the evaluation of offers made in accordance with regulation 20 only if the contractor may be treated as ineligible to tender on a ground specified in regulation 14 or if the contractor fails to satisfy the minimum standards of economic and financial standing and technical capacity required of contractors by the contracting authority; for this purpose the contracting authority shall make its evaluation in accordance with regulations 14, 15, 16 and 17.

The restricted procedure

12. –

(1) A contracting authority using the restricted procedure shall comply with the following paragraphs of this regulation.

(2) The contracting authority shall publicise its intention to seek offers in relation to the public works contract by sending to the Official Journal as soon as possible after forming the intention a notice, in a form substantially corresponding to that set out in Part C of Schedule 2, inviting requests to be selected to tender and containing the information therein specified in relation to the contract.

(3) Subject to paragraph (14) below, the date which the contracting authority shall fix as the last date for the receipt by it of requests to be selected to tender shall be specified in the contract notice and shall be not less than 37 days from the date of the despatch of the notice.

(4) The contracting authority may exclude a contractor from those persons from whom it will make the selection of persons to be invited to tender only if the supplier may be treated as ineligible on a ground specified in regulation 14 or if the contractor fails to satisfy the minimum standards of economic and financial standing and technical capacity required of contractors by the contracting authority; for this purpose the contracting authority shall make its evaluation in accordance with regulations 14, 15, 16 and 17.

(5) The contracting authority shall make the selection of the contractors to be invited to tender in accordance with regulations 14, 15, 16 and 17; and in making the selection and in issuing invitations the contracting authority shall not discriminate between contractors on the grounds of their nationality or the member State in which they are established.

(6) The contracting authority may predetermine the range within which the number of persons which it intends to invite to tender for the contract shall be fixed but only if—

- (a) the lower number of the range is not less than 5 and the higher number not more than 20,
- (b) the range is determined in the light of the nature of the work to be carried out under the contract, and
- (c) the range is specified in the contract notice.

(7) The number of persons invited to tender shall be sufficient to ensure genuine competition.

(8) The contracting authority shall send invitations to each of the contractors selected to tender and the invitation shall be accompanied by the contract documents, or the invitation shall state the address for requesting them.

(9) The invitation shall be sent in writing simultaneously to each contractor selected to tender.

(10) The following information shall be included in the invitation—

- (a) the address to which requests for the contract documents (if not accompanying the invitation) and further information relating to those documents should be sent, the final date for making such a request and the amount and terms of the fee which may be charged for supplying that material;
- (b) the final date for the receipt of tenders, the address to which they must be sent and the language or languages in which they must be drawn up;
- (c) a reference to the contract notice published in accordance with paragraph (2) above;
- (d) an indication of the information to be included with the tender which the contracting authority may require to be provided in accordance with regulations 15, 16 and 17; and
- (e) the criteria for the award of the contract if this information was not specified in the contract notice published in accordance with paragraph (2) above.

(11) Subject to paragraphs (12) and (14) below, the date which the contracting authority shall fix as the last date for the receipt by it of tenders made in response to the invitation to tender which shall be specified in the invitation to tender in accordance with paragraph (10)(b) above shall not be less than 40 days from the date of the despatch of the invitation but, if it is necessary that contractors should be given the opportunity to inspect the premises on which the works under the contract are to be carried out or documents relating to the contract documents, then that minimum period shall be extended to allow for such inspection.

(12) Subject to paragraph (14) below, where the contracting authority has published a notice in accordance with regulation 9 in relation to the public works contract, it may substitute for the period of not less than 40 days in paragraph (11) above a period of not less than 26 days.

(13) Subject to paragraph (14) below, the contracting authority shall supply such further information relating to the contract documents as may reasonably be requested by a contractor selected to tender provided that the request for such information is received in sufficient time to enable the contracting authority to supply it not less than 6 days before the date specified in the invitation to tender as the final date for the receipt of tenders.

(14) Where compliance with the minimum periods referred to in paragraphs (3), (11), (12) and (13) above is rendered impracticable for reasons of urgency, the contracting authority may substitute for the period specified in paragraph (3) a period of not less than 15 days and for the periods specified in (11) and (12) periods of not less than 10 days and for the period specified in paragraph (13) a period of not less than 4 days and, in those circumstances, the contracting authority must send the invitation to tender by the most rapid means possible.

(15) A contracting authority shall not refuse to consider an application to be invited to tender if it is made by letter, telegram, telex, facsimile or telephone provided that, in the last 4 cases, it is confirmed by letter before the date fixed by the contracting authority as the last date for the receipt of requests to be selected to tender.

The negotiated procedure

13. –

(1) A contracting authority using the negotiated procedure shall comply with the following provisions of this regulation except that–

- (a) a contracting authority using the negotiated procedure pursuant to regulation 10(2)(d), (e), (f), (g) or (h), and
- (b) a contracting authority using the negotiated procedure pursuant to regulation 10(2)(a) who invites to negotiate the contract every contractor who submitted a tender following an invitation made during the course of the discontinued open or restricted procedure (not being a tender which was excluded pursuant to regulation 11(6)), need not comply with paragraphs (2) to (6) below.

(2) The contracting authority shall publicise its intention to seek offers in relation to the public works contract by sending to the Official Journal as soon as possible after forming the intention a notice, in a form substantially corresponding to that set out in Part D of Schedule 3, inviting requests to be selected to negotiate and containing the information therein specified in relation to the contract.

(3) Subject to paragraph (4) below, the date which the contracting authority shall fix as the last date for the receipt by it of requests to be selected to negotiate shall be specified in paragraph 6(a) of the contract notice and shall be not less than 37 days from the date of despatch of the notice.

(4) Where compliance with the minimum period of 37 days in paragraph (3) above is rendered impracticable for reasons of urgency, the contracting authority may substitute a period of not less than 15 days and, in those circumstances, the contracting authority must send the invitation to negotiate the contract by the most rapid means possible.

(5) Where there is a sufficient number of persons who are suitable to be selected to negotiate the contract, the number selected to negotiate shall be not less than 3.

(6) A contracting authority shall not refuse to consider an application to be selected to negotiate if it is made by letter, telegram, telex, facsimile or by telephone provided that, in the last 4 cases, it is confirmed by letter before the date fixed by the contracting authority as the last date for the receipt of requests to be selected to negotiate.

(7) The contracting authority may exclude a contractor from those persons from whom it will make the selection of persons to be invited to negotiate the contract only if the supplier may be treated as ineligible on a ground specified in regulation 14 or if the contractor fails to satisfy the minimum standards of economic and financial standing and technical capacity required of contractors by

the contracting authority; for this purpose the contracting authority shall make its evaluation in accordance with regulations 14, 15, 16 and 17.

(8) The contracting authority shall make the selection of the contractors to be invited to negotiate in accordance with regulations 14, 15, 16 and 17; and in making the selection and in issuing the invitations to negotiate the contracting authority shall not discriminate between contractors on the grounds of their nationality or the member State in which they are established.

PART IV

SELECTION OF CONTRACTORS

Criteria for rejection of contractors

14. –

(1) A contracting authority may treat a contractor as ineligible to tender for, or to be included amongst those persons from whom it will make the selection of persons to be invited to tender for or to negotiate a public works contract in accordance with regulations 11(7), 12(4), and 13(7), or decide not to select a contractor to tender for or to negotiate a public works contract in accordance with regulations 12(5) and 13(8) on one of the following grounds, namely that the contractor–

- (a) being an individual is bankrupt or has had a receiving order or administration order made against him or has made any composition or arrangement with or for the benefit of his creditors or has made any conveyance or assignment for the benefit of his creditors or appears unable to pay, or to have no reasonable prospect of being able to pay, a debt within the meaning of section 268 of the Insolvency Act 1968((15)), or article 242 of the Insolvency (Northern Ireland) Order 1989((16)), or in Scotland has granted a trust deed for creditors or become otherwise apparently insolvent, or is the subject of a petition presented for sequestration of his estate, or is the subject of any similar procedure under the law of any other state;
- (b) being a partnership constituted under Scots law has granted a trust deed or become otherwise apparently insolvent, or is the subject of a petition presented for sequestration of its estate;
- (c) being a company has passed a resolution or is the subject of an order by the court for the company's winding up otherwise than for the purposes of bona fide reconstruction or amalgamation, or has had a receiver, manager or administrator on behalf of a creditor appointed in respect of the company's business or any part thereof or is the subject of proceedings for any of the above procedures or is the subject of similar procedures under the law of any other state;
- (d) has been convicted of a criminal offence relating to the conduct of his business or profession;
- (e) has committed an act of grave misconduct in the course of his business or profession;
- (f) has not fulfilled obligations relating to the payment of social security contributions under the law of any part of the United Kingdom or of the member State in which the contractor is established;
- (g) has not fulfilled obligations relating to the payment of taxes under the law of any part of the United Kingdom;

(15) 1986 c. 45.

(16) S.I. 1989/2405 (N.I. 19).

- (h) is guilty of serious misrepresentation in providing any information required of him under this regulation and regulation 15, 16 and 17; or
- (i) subject to paragraphs (5) and (6) below, is not registered on the professional or trade register of the member State in which the contractor is established under the conditions laid down by that State.

(2) Subject to regulation 18, the contracting authority may require a contractor to provide such information as it considers it needs to make the evaluation in accordance with paragraph (1) above except that it shall accept as conclusive evidence that a contractor does not fall within the grounds specified in paragraphs (1)(a), (b), (c), (d), (f), or (g) above if that contractor provides to the contracting authority—

- (a) in relation to the grounds specified in paragraphs (1)(a), (b), (c) or (d) above,
 - (i) an extract from the judicial record, or
 - (ii) in a member State which does not maintain such a judicial record, a document issued by the relevant judicial or administrative authority;
- (b) in relation to the grounds specified in paragraph (1)(f) or (g) above, a certificate issued by the relevant competent authority;
- (c) in a member State where the documentary evidence specified in paragraphs (2)(a) and (b) above is not issued in relation to one of the grounds specified in paragraph (1)(a), (b), (c), (d), (f) or (g) above, a declaration on oath made by the contractor before the relevant judicial, administrative or competent authority or a relevant notary public or commissioner for oaths.

(3) In this regulation, “relevant” in relation to a judicial, administrative or competent authority, notary public or commissioner for oaths means an authority designated by, or a notary public or commissioner for oaths in, the member State in which the contractor is established.

(4) The following are the appropriate professional or trade registers for the purposes of paragraph (1)(i) above—

- in Belgium, the registre du commerce/Handelsregister;
- in Denmark, the Erhvervsand Selskabsstyrelsen;
- in France, the registre du commerce or the repertoire des metiers;
- in Germany, the Handelsregister or the Handwerksrolle;
- in Italy, the Registro della Camera di commercio, industria, agricoltura e artigianato;
- in Luxembourg, the registre aux firmes and the role de la Chambre des metiers;
- in the Netherlands, the Handelsregister;
- in Portugal, the Commissao de Alvaras de Empresas de Obras Publicas e Particulares (“CAEOPP”); and
- in Spain, the Registro Oficial de Contratistas del Ministerio de Industria y Energia.

(5) A contractor established in the United Kingdom or Ireland shall be treated as registered on the professional or trade register for the purposes of paragraph (1)(i) above if the contractor—

- (a) is established in Ireland and is certified as registered with the Registrar of Friendly Societies, or
- (b) is established in either State and is either—
 - (i) certified as incorporated by the Registrar of Companies, or
 - (ii) is certified as having declared on oath that he is carrying on business in the trade in question in the State in which he is established at a specific place of business and under a specific trading name.

(6) A contractor established in Greece shall be treated as registered on the professional or trade register for the purposes of paragraph (1)(i) if the contractor is certified as having declared on oath before a notary public that he exercises the profession of public works contractor.

Information as to economic and financial standing

15. –

(1) Subject to regulation 18 and paragraph (2) below, in assessing whether a contractor meets any minimum standards of economic and financial standing required of contractors by the contracting authority for the purposes of regulations 11(7), 12(4) and 13(7), and selecting the contractors to be invited to tender for or to negotiate the contract in accordance with regulations 12(5) and 13(8), a contracting authority shall only take into account any of the following information (and it may require a contractor to provide such of that information as it considers it needs to make the assessment or selection)–

- (a) appropriate statements from the contractor’s bankers;
- (b) statement of accounts or extracts therefrom relating to the business of the contractor where publication of the statement is required under the law of the Member State in which the contractor is established;
- (c) a statement of the overall turnover of the business of the contractor and the turnover in respect of works in the 3 previous financial years of the contractor.

(2) Where the information specified in paragraph (1) above is not appropriate in a particular case a contracting authority may require a contractor to provide other information to demonstrate the contractor’s economic and financial standing.

(3) A contracting authority which requires information to be provided in accordance with paragraphs (1) and (2) above, shall specify in the contract notice or in the invitation to tender the information which the contractor must provide.

(4) Where a contractor is unable for a valid reason to provide the information which the contracting authority has required, the contracting authority shall accept such other information provided by the contractor as the contracting authority considers appropriate.

Information as to technical capacity

16. –

(1) Subject to regulation 18, in assessing whether a contractor meets any minimum standards of technical capacity required of contractors by the contracting authority for the purposes of regulations 11(7), 12(4) and 13(7), and in selecting the contractors to be invited to tender for or to negotiate the contract in accordance with regulations 12(5) and 13(8), a contracting authority shall only take into account any of the following information (and it may require a contractor to provide such of that information as it considers it needs to make the assessment or selection)–

- (a) a list of the contractor’s educational and professional qualifications where the contractor is an individual and a list of such qualifications of the contractor’s managerial staff if any and those of the person or persons who would be responsible for carrying out the works under the contract;
- (b) a list of works carried out over the past 5 years together with (unless the contracting authority specifies that the following certificate should be submitted direct to the contracting authority by the person certifying) certificates of satisfactory completion for the most important of those works indicating in each case the value of the consideration received, when and where the works were carried out and specifying whether they were carried out according to the rules of the trade or profession and properly completed;

- (c) a statement of the tools, plant and technical equipment available to the contractor for carrying out the work under the contract;
 - (d) a statement of the contractor's average annual manpower and the number of managerial staff over the previous 3 years;
 - (e) a statement of the technicians or technical services which the contractor may call upon for the carrying out of the work under the contract, whether or not the technicians or persons providing the technical services are independent of the contractor.
- (2) The contracting authority shall specify in the contract notice which of the information specified in paragraph (1) above it requires to be provided.

Supplementary information

17. Subject to regulation 18, the contracting authority may require a contractor to provide information supplementing the information provided in accordance with regulations 14, 15 and 16 or to clarify that information, provided that the information so required relates to the matters specified in regulations 14, 15 and 16.

Official lists of recognised contractors

18. Where a contractor is registered on the official list of recognised contractors in a Member State which maintains such lists and in which the contractor is established and the contractor submits to the contracting authority a certificate of registration issued by the authority administering the official list which specifies the information submitted to that authority which enabled the contractor to be registered and which states the classification given, the contracting authority, to the extent that the certificate deals with the grounds referred to in regulation 14(1)(a) to (e), (h), and (i), 15(1)(b) and (c) and 17(1)(b) and (d)–

- (a) shall accept the certificate as evidence that the contractor does not fall within the grounds specified in regulation 14(1)(a) to (e), (h) and (i) and shall not be entitled to require the contractor to submit such information relating to those grounds as is specified in regulation 14,
- (b) shall not be entitled to require the contractor to provide information specified in regulations 15(1)(b) and (c) and 16(1)(b) and (d), and
- (c) shall not be entitled to seek any supplementary information in accordance with regulation 17 in relation to the matters specified in paragraphs (a) and (b) above.

Consortium

19. –

(1) In this regulation a “consortium” means 2 or more persons, at least one of whom is a contractor, acting jointly for the purpose of being awarded a public works contract.

(2) A contracting authority shall not treat the tender of a consortium as ineligible nor decide not to include a consortium amongst those persons from whom it will make the selection of persons to be invited to tender for or to negotiate a public works contract on the grounds that the consortium has not formed a legal entity for the purposes of tendering for or negotiating the contract; but where a contracting authority awards a public works contract to a consortium it may require the consortium to form a legal entity before entering into, or as a term of, the contract.

(3) In these Regulations references to a contractor or to a concessionaire where the contractor or concessionaire is a consortium includes a reference to each person who is a member of that consortium.

PART V

THE AWARD OF A PUBLIC WORKS CONTRACT

Criteria for the award of a public works contract

20. –

(1) Subject to paragraphs (6) and (7) below, a contracting authority shall award a public works contract on the basis of the offer which–

- (a) offers the lowest price, or
- (b) is the most economically advantageous to the contracting authority.

(2) The criteria which a contracting authority may use to determine that an offer is the most economically advantageous include price, period for completion, running costs, profitability and technical merit.

(3) Where a contracting authority intends to award a public works contract on the basis of the offer which is the most economically advantageous it shall state the criteria on which it intends to base its decision, where possible in descending order of importance, in the contract notice or in the contract documents.

(4) Where a contracting authority awards a public works contract on the basis of the offer which is the most economically advantageous, it may take account of offers which offer variations on the requirements specified in the contract documents if the offer meets the minimum requirements of the contracting authority and it has indicated in the contract notice that offers offering variations will be considered and has stated in the contract documents the minimum requirements which the offer must meet and any specific requirements for the presentation of an offer offering variations.

(5) A contracting authority may not reject a tender on the ground that the technical specifications in the tender have been defined by reference to European specifications (within the meaning of regulation 8(1)) or to the national technical specifications specified in regulation 8(7)(a) and (b).

(6) If an offer for a public works contract is abnormally low the contracting authority may reject that offer but only if it has requested in writing an explanation of the offer or of those parts which it considers contribute to the offer being abnormally low and has–

- (a) if awarding the contract on the basis of the offer which offers the lowest price, examined the details of all the offers made, taking into account any explanation given to it of the abnormally low tender, before awarding the contract, or
- (b) if awarding the contract on the basis of the offer which is the most economically advantageous, taken any such explanation into account in assessing which is the most economically advantageous offer,

and, in considering that explanation, the contracting authority may take into account explanations which justify the offer on objective grounds including the economy of the construction method, the technical solutions suggested by the contractor or the exceptionally favourable conditions available to the contractor for the carrying out of the works or the originality of the works proposed by the contractor.

(7) If a contracting authority which rejects an abnormally low offer is awarding the contract on the basis of the offer which offers the lowest price, it shall send a report justifying the rejection to the Treasury for onward transmission to the Commission.

(8) For the purposes of this regulation an “offer” includes a bid by one part of a contracting authority to carry out work or works for another part of the contracting authority when the former part is invited by the latter part to compete with the offers sought from other persons.

Contract award notice

21. –

(1) A contracting authority which has awarded a public works contract shall, no later than 48 days after the award, send to the Official Journal a notice, substantially corresponding to the form set out in Part E of Schedule 2 and, subject to paragraph (2) below, including the information therein specified in relation to the contract.

(2) Any of the information specified in Part E of Schedule 2 to be included in the contract award notice may be omitted in a particular case where to publish such information would impede law enforcement, would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of any person or might prejudice fair competition between contractors.

Information about contract award procedures

22. –

(1) A contracting authority which has awarded a public works contract shall, within 15 days of the date on which it receives a request from any contractor who was unsuccessful (whether pursuant to regulation 11(7), 12(4), 12(5), 13(7), 13(8) or 20), inform that contractor of the reasons why he was unsuccessful and, if the contractor was unsuccessful as a result of the evaluation of offers made in accordance with regulation 20, the name of the person awarded the contract.

(2) A contracting authority shall prepare a record in relation to each public works contract awarded by it specifying–

- (a) the name and address of the contracting authority;
- (b) the work or works to be carried out under the contract and the value of the consideration to be given under it;
- (c) the names of the persons whose offers were evaluated in accordance with regulation 20 and, where the contracting authority has used the restricted or negotiated procedure, the reasons for their selection;
- (d) the names of the persons who were unsuccessful pursuant to regulation 11(7), 12(4), 12(5), 13(7) or 13(8);
- (e) the name of the person to whom the contract was awarded and the reasons for having awarded the contract to him;
- (f) if known to the contracting authority, the works under the contract which the person to whom the contract has been awarded intends to sub-contract to another person;
- (g) in the case of a contracting authority which used the negotiated procedure, which of the circumstances specified in regulation 10(2) constituted the grounds for using that procedure.

(3) If the Commission requests a report in relation to a public works contract containing the information specified in paragraph (2) above, the contracting authority shall send a written report containing that information, or the main features of it, to the Treasury for onward transmission to the Commission.

(4) Where a contracting authority decides not to award a public works contract in respect of which a contract notice was published nor to seek offers in relation to another public works contract for the same purpose it shall inform the Official Journal of that decision and shall, if so requested by any contractor who submitted an offer or who applied to be included amongst the persons to be selected to tender for or negotiate the contract, the reasons for its decision.

PART VI

MISCELLANEOUS

Subsidised works contracts

23. –

(1) Where a contracting authority undertakes to contribute more than half of the consideration to be or expected to be paid under a contract to which this paragraph applies by virtue of paragraph (2) below which has been or is to be entered into by a person other than another contracting authority (in this paragraph referred to as “the subsidised body”), that contracting authority shall–

- (a) make it a condition of the making of such contribution that the subsidised body complies with the provisions of these Regulations in relation to that contract as if it were a contracting authority, and
- (b) ensure that the subsidised body does so comply or recover the contribution.

(2) Paragraph (1) above applies to a contract which would be a public works contract if the subsidised body were a contracting authority and which is for the carrying out of any of the activities specified in Schedule 1 as are included in Group 502 or for the carrying out of building work for hospitals, facilities intended for sports, recreation and leisure, school and university building or buildings for administrative purposes.

Public housing scheme works contracts

24. –

(1) For the purpose of seeking offers in relation to a public housing scheme works contract, where the size and complexity of the scheme and the estimated duration of the works involved require that the planning of the scheme be based from the outset on a close collaboration of a team comprising representatives of the contracting authority, experts and the contractor, a contracting authority may, except as indicated in the following paragraphs, depart from the provisions of these Regulations insofar as it is necessary to do so to select the contractor who is most suitable for integration into the team.

(2) The contracting authority shall comply with the provisions of regulation 12(1) to (5).

(3) The contracting authority shall include in the contract notice a job description which is as accurate as possible so as to enable contractors to form a valid idea of the scheme and of the minimum standards relating to the business or professional status, the economic and financial standing and the technical capacity which the person awarded the contract will be expected to fulfil.

Public works concession contracts

25. –

(1) A contracting authority seeking offers in relation to a public works concession contract shall comply with the following paragraphs of this regulation.

(2) The contracting authority shall publicise its intention to seek offers in relation to the concession contract by sending to the Official Journal as soon as possible after forming the intention a notice in a form substantially corresponding to that set out in Part F of Schedule 2 and containing the information therein specified in relation to the concession contract.

(3) The date which the contracting authority shall fix as the last date for the receipt by it of tenders or of requests to be selected to tender for or negotiate the contract, as the case may be, shall be specified in paragraph 3(a) of the notice and shall be not less than 52 days from the date of despatch of the notice.

Sub-contracting the work or works to be carried out under a public works concession contract

26. –

(1) A contracting authority seeking offers in relation to a public works concession contract shall either–

- (a) include in the invitation to tender for, or to apply to be selected to tender for or to negotiate, the concession contract a request that the applicant specify whether he would intend, if awarded the concession contract, to sub-contract to persons who are not affiliated to him any of the work or works to be carried out under the concession contract and, if so, how much as a proportion of the value of such work or works would be so sub-contracted, or
- (b) require as a term of the concession contract–
 - (i) that the concessionaire sub-contract to persons who are not affiliated to the concessionaire some or all of the work or works to be carried out under the concession contract, and
 - (ii) that the amount of the works so sub-contracted be not less than 30%, or such higher percentage as may be specified in the contract at the option of the contracting authority or the concessionaire, of the value of the consideration which the contracting authority would expect to give for the carrying out of the work or works if it did not grant a concession.

(2) Where the concessionaire is a contracting authority that contracting authority shall comply with the provisions of these Regulations in respect of public works contracts it seeks offers in relation to for the purpose of sub-contracting the work or works to be carried out under the public works concession contract.

(3) Where the concessionaire is not a contracting authority the concessionaire shall–

- (a) publicise his intention to seek offers in relation to any contract to which this paragraph applies by virtue of paragraph (4) below by sending to the Official Journal as soon as possible after forming the intention a notice in a form substantially corresponding to that set out in Part G of Schedule 2 and containing the information therein specified in relation to the contract;
- (b) comply with regulation 30 in relation to that notice as if the concessionaire were a contracting authority;
- (c) if that notice invites tenders, fix as the last date for the receipt by the concessionaire of tenders a date of not less than 40 days from the date of the despatch of the notice and specify that date in paragraph 4(a) of the notice; and
- (d) if the notice invites applications to be selected to tender for or negotiate the contract–
 - (i) fix as the last date for the receipt of such applications a date not less than 37 days from the date of despatch of the notice and specify that date in paragraph 4(a) of the notice; and
 - (ii) fix as the last date for the receipt of tenders following selection of the persons to be invited to tender a date of not less than 40 days from the date of despatch of the invitation and specify that date in the invitation.

(4) Paragraph (3) above applies to a contract–

- (a) in relation to which the concessionaire is seeking offers for the purpose of sub-contracting any of the work or works to be carried out under the public works concession contract,
- (b) which the concessionaire does not intend to enter into with a person affiliated to him,

- (c) which would, if the concessionaire were a contracting authority, be a public works contract other than a public works contract in respect of which a contracting authority would be entitled to use the negotiated procedure pursuant to regulation 10(2)(d) to (h).

(5) For the purposes of this regulation a person is to be treated as affiliated to another person if either exercises, directly or indirectly, a dominant influence over the other or any person exercises, directly or indirectly, a dominant influence over both of them or if they are both members of any consortium formed for the purpose of performing the public works concession contract; and a person shall be taken to exercise a dominant influence over another person—

- (a) if he possesses the greater part of the issued share capital of that person or controls the voting power attached to such greater part, or
- (b) if he may appoint more than half of the individuals who are ultimately responsible for managing that person's affairs.

(6) A contracting authority shall require applicants for a public works concession contract to submit a list of all persons affiliated to the applicant with the application and to update that list from time to time to take account of any changes in the persons affiliated to the applicant.

Obligations relating to employment protection and working conditions

27. A contracting authority which includes in the contract documents relating to a public works contract information as to where a contractor may obtain information about obligations relating to employment protection and working conditions which will apply to the works to be carried out under the contract, shall request contractors to indicate that they have taken account of those obligations in preparing their tender or in negotiating the contract.

Statistical and other reports

28. —

(1) A contracting authority shall, no later than 31st July 1993 and 31st July in each alternate year thereafter, send to the Treasury a report specifying in relation to each public works contract awarded by it during the year preceding the year in which the report is made—

- (a) the value (estimated if necessary) of the consideration payable under the contract;
- (b) whether the open, restricted or negotiated procedure was used in awarding the contract;
- (c) if the negotiated procedure was used, pursuant to which provision of regulation 10(2) that procedure was used;
- (d) the principal category of works carried or to be carried out under the contract; and
- (e) the nationality of the person to whom the contract was awarded.

(2) A contracting authority shall send to the Treasury a report containing such other information as the Treasury may from time to time require in respect of a particular public works contract (including public works contracts excluded from the application of these Regulations by regulations 6 and 7) for the purpose of informing the Commission.

Responsibility for obtaining reports

29. —

(1) Where a contracting authority is not a Minister of the Crown or a government department, that contracting authority shall send any report which it is required in accordance with regulations 8(6), 10(7), 20(7), 22(3) and 28 to send to the Treasury instead to the Minister responsible for that contracting authority and that Minister shall be responsible for sending the report to the Treasury.

(2) The Minister responsible for a contracting authority shall be the Minister of the Crown whose areas of responsibility are most closely connected with the functions of the contracting authority; and any question as to which Minister of the Crown's areas of responsibility are most closely connected with the functions of a contracting authority shall be determined by the Treasury whose determination shall be final.

(3) The requirement on a contracting authority to send any report in accordance with paragraph (1) above to the Minister of the Crown responsible for that contracting authority shall be enforceable, on the application of the Minister responsible, by mandamus or, in Scotland, for an order for specific performance.

(4) Proceedings under paragraph (3) above brought in Scotland shall be brought before the Court of Session.

(5) In the application of this regulation to Northern Ireland references to the Minister shall include references to the head of a Northern Ireland department.

Publication of notices

30. –

(1) Any notice required by these Regulations to be sent to the Official Journal shall be sent by the most appropriate means to the Office for Official Publications of the European Communities⁽¹⁷⁾ and where the contracting authority is applying the restricted procedure or the negotiated procedure and, for reasons of urgency, is applying the provisions of regulations 12(14) and 13(4), the notice shall be sent by telex, telegram or telefax.

(2) Any such notice shall not contain more than 650 words.

(3) The contracting authority shall retain evidence of the date of despatch to the Official Journal of each notice.

(4) The contracting authority shall not place a contract notice in the press or like publications in the United Kingdom before the date on which the notice is despatched in accordance with paragraph (1) above and if it does after that date, so place the notice it shall not add to the notice any information in relation to the contract which was not contained in the notice sent to the Official Journal.

PART VII

APPLICATIONS TO THE COURT

Enforcement of obligations relating to a public works contract

31. –

(1) The obligation on a contracting authority to comply with the provisions of these Regulations other than regulations 8(6), 10(7), 20(7), 22(3), 28 and 29(1), and with any enforceable Community obligation in respect of a public works contract (other than one excluded from the application of these Regulations by regulations 6 and 7), and the obligation on a concessionaire to comply with the provisions of regulation 26(3) is a duty owed to contractors.

(2) In this regulation and notwithstanding regulation 4, references to "contractor" include, where the duty owed pursuant to paragraph (1) above is the obligation on a concessionaire to comply with regulation 26(3), any person–

(17) The address for the Office for Official Publications of the European Communities is 2 Rue Mercier, 2985, Luxembourg (tel: 499 28–1, telex: 1324 pubof lu, fax: 49 00 03, 49 57 19).

- (a) who sought, or who seeks, or would have wished, to be the person to whom a contract to which regulation 26(3) applies is awarded, and
 - (b) who is a national of and established in a member State.
- (3) A breach of the duty owed pursuant to paragraph (1) above shall not be a criminal offence but any breach of the duty shall be actionable by any contractor who, in consequence, suffers, or risks suffering, loss or damage.
- (4) Proceedings under this regulation shall be brought in England and Wales and in Northern Ireland in the High Court and, in Scotland, before the Court of Session.
- (5) Proceedings under this regulation may not be brought unless—
- (a) the contractor bringing the proceedings has informed the contracting authority or concessionaire, as the case may be, of the breach or apprehended breach of the duty owed to him pursuant to paragraph (1) above by that contracting authority or concessionaire and of his intention to bring proceedings under this regulation in respect of it; and
 - (b) they are brought promptly and in any event within 3 months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending the period within which proceedings may be brought.
- (6) Subject to paragraph (6) below, but otherwise without prejudice to any other powers of the Court, in proceedings brought under this regulation the Court may—
- (a) by interim order suspend the procedure leading to the award of the contract in relation to the award of which the breach of the duty owed pursuant to paragraph (1) above is alleged, or suspend the implementation of any decision or action taken by the contracting authority or concessionaire, as the case may be, in the course of following such a procedure; and
 - (b) if satisfied that a decision or action taken by a contracting authority was in breach of the duty owed pursuant to paragraph (1) above—
 - (i) order the setting aside of that decision or action or order the contracting authority to amend any document, or
 - (ii) award damages to a contractor who has suffered loss or damage as a consequence of the breach, or
 - (iii) do both of those things.
- (7) In proceedings under this regulation the Court shall not have power to order any remedy other than an award of damages in respect of a breach of the duty owed pursuant to paragraph (1) above if the contract in relation to which the breach occurred has been entered into.
- (8) Notwithstanding sections 21 and 42 of the Crown Proceedings Act 1947((18)), in proceedings brought under this regulation against the Crown the court shall have power to grant an injunction or interdict.

28th November 1991

Irvine Patnick
Thomas Sackville
Two of the Lords Commissioners of Her
Majesty's Treasury

(18) 1947 c. 44; the Crown Proceedings Act 1947 was extended to Northern Ireland in relation to Her Majesty's Government in the United Kingdom and in Northern Ireland by and with the additions, exceptions and modifications set out in the Crown Proceedings (Northern Ireland) Order 1981, S.I. 1981/233, to which there is an amendment not relevant to these regulations.

Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.

SCHEDULE 1

Regulation 2(1)

ACTIVITIES CONSTITUTING WORKS

<i>Classes</i>	<i>Groups</i>	<i>Subgroups and items</i>	<i>Descriptions</i>
50			BUILDING AND CIVIL ENGINEERING
	500		General building and civil engineering work (without any particular specialisation) and demolition work
		500.1	General building and civil engineering work (without any particular specialisation)
		500.2	Demolition work
	501		Construction of flats, office blocks, hospitals and other buildings, both residential and non-residential
		501.1	General building contractors
		501.2	Roofing
		501.3	Construction of chimneys, kilns and furnaces
		501.4	Waterproofing and damp-proofing
		501.5	Restoration and maintenance of outside walls (repainting, cleaning, etc.)
		501.6	Erection and dismantlement of scaffolding
		501.7	Other specialised activities relating to construction work (including carpentry)
	502		Civil engineering: construction of roads, bridges, railways, etc.

Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.

<i>Classes</i>	<i>Groups</i>	<i>Subgroups and items</i>	<i>Descriptions</i>
		502.1	General civil engineering work
		502.2	Earth-moving (navvying)
		502.3	Construction of bridges, tunnels and shafts, drilling
		502.4	Hydraulic engineering (rivers, canals, harbours, flows, locks and dams)
		502.5	Road-building (including specialised construction of airports and runways)
		502.6	Specialised construction work relating to water (i.e. to irrigation, land drainage, water supply, sewage disposal, sewerage, etc.)
		502.7	Specialised activities in other areas of civil engineering
	503		Installation (fittings and fixtures)
		503.1	General installation work
		503.2	Gas fitting and plumbing, and the installation of sanitary equipment
		503.3	Installation of heating and ventilating apparatus (central heating, air conditioning, ventilation)
		503.4	Sound and heat insulation, insulation against vibration
		503.5	Electrical fittings

Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.

<i>Classes</i>	<i>Groups</i>	<i>Subgroups and items</i>	<i>Descriptions</i>
		503.6	Installation of aerials, lightning conductors, telephones, etc.
	504		Building completion work
		504.1	General building completion work
		504.2	Plastering
		504.3	Joinery, primarily engaged in on the site assembly and/or installation (including the laying of parquet flooring)
		504.4	Painting, glazing, paper hanging
		504.5	Tiling and otherwise covering floors and walls
		504.6	Other building completion work (putting in fireplaces, etc.)

SCHEDULE 2

Regulations 9, 11(2), 12(2), 13(2), 25(2), and 26(3)

FORMS OF NOTICES FOR PUBLICATION IN THE OFFICIAL JOURNAL

PART A

PRIOR INFORMATION NOTICE

1. The name, address, telegraphic address, telephone, telex and facsimile numbers of the contracting authority.

- (a) (a) The site.
- (b) The nature and extent of the services to be provided and, where relevant, the main characteristics of any lots by reference to the work.
- (c) If available: an estimate of the cost range of the proposed services.
- (a) (a) Estimated date for initiating the award procedures in respect of the contract or contracts.
- (b) If known: estimated date for the start of the work.
- (c) If known: estimated timetable for completion of the work.

4. If known: terms of financing of the work and of price revision and/or references to the provisions in which these are contained.
5. Other information.
6. Date of despatch of the notice.

PART B

OPEN PROCEDURE NOTICE

1. The name, address, telephone number, telegraphic address, telex and facsimile numbers of the contracting authority.
 - (a) (a) The award procedure chosen.
 - (b) Nature of the contract for which tenders are being requested.
 - (a) (a) The site.
 - (b) The nature and extent of the services to be provided and general nature of the work.
 - (c) If the work or the contract is subdivided into several lots, the size of the different lots and the possibility of tendering for one, for several or for all of the lots.
 - (d) Information concerning the purpose of the work or the contract where the latter also involves the drawing up of projects.
4. Any time limit for completion.
 - (a) (a) Name and address of the service from which the contract documents and additional documents may be requested.
 - (b) Where applicable, the amount and terms of payment of the sum to be paid to obtain such documents.
 - (a) (a) The final date for receipt of tenders.
 - (b) The address to which they must be sent.
 - (c) The language or languages in which they must be drawn up.
 - (a) (a) Where applicable, the persons authorised to be present at the opening of tenders.
 - (b) The date, hour and place of such opening.
8. Any deposit and guarantees required.
9. Main terms concerning financing, and payment and/or references to the provisions in which these are contained.
10. Where applicable, the legal form to be taken by the grouping of contractors to whom the contract is awarded.
11. Minimum standards of economic and financial standing and technical capacity required of the contractor to whom the contract is awarded.
12. Period during which the tenderer is bound to keep open his tender.
13. The criteria for the award of the contract. Criteria other than that of the lowest price shall be mentioned where they do not appear in the contract documents.
14. Where applicable, prohibition on variants.
15. Other information.

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16. Date of publication of the prior information notice in the *Official Journal of the European Communities* or references to its non-publication.

17. Date of despatch of the notice.

PART C

RESTRICTED PROCEDURE NOTICE

1. The name, address, telephone number, telex and facsimile numbers of the contracting authority.

- (a) (a) The award procedure chosen.
- (b) Where applicable, justification for the use of the shorter time limits. **(19)**
- (c) Nature of the contract which tenders are being requested.
- (a) (a) The site.
- (b) The nature and extent of the services to be provided and general nature of the work.
- (c) If the work of the contract is subdivided into several lots, the size of the different lots and the possibility of tendering for one, for several or for all of the lots.
- (d) Information concerning the purpose of the work or the contract where the latter also involves the drawing up of projects.

4. Any time limit for completion.

5. Where applicable, the legal form to be taken by the grouping of contractors to whom the contract is awarded.

- (a) (a) The final date for receipt of requests to participate.
- (b) The address to which they must be sent.
- (c) The language or languages in which they must be drawn up.

7. The final date for despatch of invitations to tender.

8. Any deposit and guarantees required.

9. Main terms concerning financing and payment and/or provisions in which these are contained.

10. Information concerning the contractor's personal position and minimum standards of economic and financial standing and technical capacity required of the contractor to whom the contract is awarded.

11. The criteria for the award of the contract where they are not mentioned in the invitation to tender.

12. Where applicable, prohibition on variants.

13. Other information.

14. Date of publication of the prior information notice in the *Official Journal of the European Communities* or reference to its non-publication.

15. Date of despatch of the notice.

(19) In accordance with regulation 12.

PART D

NEGOTIATED PROCEDURE NOTICE

1. The name, address, telegraphic address, telephone, telex and facsimile numbers of the contracting authority.

- (a) (a) The award procedure chosen.
- (b) Where applicable, justification for the use of the shorter time limits.(20)
- (c) Nature of the contract for which tenders are being requested.
- (a) (a) The site.
- (b) The nature and extent of the services to be provided and general nature of the work.
- (c) If the work or the contract is subdivided into several lots, the size of the different lots and the possibility of tendering for one, for several or for all of the lots.
- (d) Information concerning the purpose of the work or the contract where the latter also involves the drawing up of projects.

4. Any time limit.

5. Where applicable, the legal form to be taken by the grouping of contractors to whom the contract is awarded.

- (a) (a) final date for receipt of tenders.
- (b) The address to which they must be sent.
- (c) The language or languages in which they must be drawn up.

7. Any deposit and guarantees required.

8. Main terms concerning financing and payment and/or the provisions in which these are contained.

9. Information concerning the contractor's personal position and information and formalities necessary in order to evaluate the minimum standards of economic and financial standing and technical capacity required of the contractor to whom the contract is awarded.

10. Where applicable, prohibition on variants.

11. Where applicable, the names and addresses of suppliers already selected by the awarding authority.

12. Where applicable, date(s) of previous publications in the *Official Journal of the European Communities*.

13. Other information.

14. Date of publication of the prior information notice in the *Official Journal of the European Communities*.

15. Date of despatch of the notice.

PART E

CONTRACT AWARD NOTICE

1. Name and address of contracting authority.

(20) In accordance with regulation 13.

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2. Award procedure chosen.
3. Date of award of contract.
4. Criteria for award of contract.
5. Number of offers received.
6. Name and address of successful contractor(s).
7. Nature and extent of the services provided, general characteristics of the finished structure.
8. Price or range of prices (minimum/maximum) paid.
9. Where appropriate, value and proportion of contract likely to be subcontracted to third parties.
10. Other information.
11. Date of publication of the tender notice in the *Official Journal of the European Communities*.
12. Date of despatch of the notice.

PART F

PUBLIC WORKS CONCESSION CONTRACT NOTICE

1. The name, address, telegraphic address, telephone, telex and facsimile numbers of the contracting authority.
 - (a) (a) The site.
 - (b) The subject of the concession and extent of the services to be provided.
- (a) (a) Final date for receipt of candidatures.
 - (b) The address to which they must be sent.
 - (c) The language or languages in which they must be drawn up:
4. Personal, technical and financial conditions to be fulfilled by the candidates.
5. The criteria for the award of the contract.
6. Where applicable, the minimum percentage of the works contracts awarded to third parties.
7. Other information.
8. Date of despatch of the notice.

PART G

NOTICE OF WORKS CONTRACTS AWARDED BY CONCESSIONAIRES

- (a) (a) The site.
 - (b) The nature and extent of the service to be provided and the general nature of the work.
2. Any time limit for the completion of the works.
3. Name and address of the service from which the contract documents and additional documents may be requested.
 - (a) (a) The final date for receipt of requests to participate and/or for receipt of tenders.
 - (b) The address to which they must be sent.

- (c) The language or languages in which they must be drawn up.
5. Any deposit and guarantees required.
 6. The minimum standards of economic and financial standing and technical capacity required of the contractor.
 7. The criteria for the award of the contract.
 8. Other information.
 9. Date of despatch of the notice.
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EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations enact in its entirety Council Directive [71/305/EEC](#) concerning the co-ordination of procedures for the award of public works contracts (OJ No. L185, 16.8.71, p. 5) as amended by Council Directive [89/440/EEC](#) (OJ No. L210, 21.7.89, p. 1). They also implement, to the extent that it relates to that Directive, Council Directive [89/665/EEC](#) on the co-ordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ No. L395, 30.12.89, p. 33).

The Regulations apply to certain public bodies called in the Regulations “contracting authorities” (regulation 3) when they are seeking offers in relation to certain contracts providing for, or engaging a person to procure, the carrying out or the design and carrying out of certain building and engineering works called in the Regulations “public works contracts” (regulations 2(1) and 5). They deal in particular with the treatment to be accorded to contractors or potential contractors who are nationals of and established in member State (regulation 4). Certain contracts are excluded from the application of the Regulations, principally where the contracting authority operates in the transport, water and energy fields, secret contracts or contracts connected with international agreements (regulation 6) and those contracts where the value of the contract is beneath the threshold for coverage (regulation 7).

The principal requirement of the Regulations is that, in seeking offers in relation to a public works contract, a contracting authority must use one of three procedures: the open procedure, whereby any person who is interested may submit a tender; the restricted procedure whereby only those persons selected by the contracting authority may submit tenders; and the negotiated procedure whereby the contracting authority negotiates the terms of the contract with one or more persons selected by it. The Regulations lay down provisions for making the choice of procedure. The negotiated procedure may only be used in certain limited circumstances (regulation 10).

The contracting authority is required to publicise its intention to seek offers in relation to a public works contract in the Official Journal of the European Communities as soon as the decision approving the planning of works has been taken (regulation 9) and again when it starts the procedure leading to the award although this latter requirement is dispensed with in certain circumstances when the negotiated procedure is used. The form of the advertisement and the information which it has to contain in relation to the proposed contract is specified in Schedule 2. If the notice is also to be published in the UK press it must be limited to the information published in the Official Journal and must not be published before the notice is sent to the Official Journal (regulation 30). The various

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procedures also lay down the time to be allowed for the response by potential contractors to the invitations and for obtaining relevant documents. The Regulations also specify the matters to which the contracting authority may have regard in excluding tenders from contractors who are regarded as ineligible or in selecting contractors to tender for or to negotiate the contract (regulations 11 to 13). The detailed rules for the selection of contractors are laid down and relate to their business and professional status, their economic and financial standing and their technical capacity. The contracting authority is restricted in the information on which it may rely to demonstrate these matters (regulations 14 to 17).

The contracting authority is required to award a public works contract on the basis either of the offer (including in-house bids) which offers the lowest price or the one which is the most economically advantageous (regulation 20).

There are various other requirements in the Regulations. The most important is the requirement that where the contracting authority wishes to lay down technical specifications which the work or works to be carried out under the contract and the material or goods used in or for them must meet all such specifications must be specified in the contract documents and that, except in certain circumstances, these specifications must be defined by reference to European specifications. It is also provided that, except where it is not possible to describe the goods or materials otherwise, the technical specifications may not refer to goods or materials of a specific make or source or to a particular process which have the effect of favouring or eliminating particular contractors (regulation 8). All contracting authorities are required to publicise in the Official Journal information about the public works contracts they have awarded (regulation 21). The contracting authorities are also required to submit various reports in respect of works and public works contracts awarded by them, in particular, a biennial report (regulation 28). There is a requirement that, where a contracting authority contributes more than half the consideration payable under certain works contracts awarded by another person, compliance with the Regulations is made a condition of the contribution (regulation 23). Special provisions apply to public works concession contracts (public works contracts whereby the contractor is granted the right to exploit the works under the contract) (regulation 25) and for works contracts awarded by such concessionaires (regulation 26), and there is a relaxation of the rules for public works contracts relating to the design and construction of a public housing scheme (regulation 24).

Finally, the Regulations provide that the obligation on a contracting authority to comply with the Regulations, and with any enforceable Community obligation in relation to the award of a public works contract, is a duty owed to contractors. A breach of the duty is not a criminal offence but is actionable by a contractor. Proceedings are assigned to the High Court in England, Wales and Northern Ireland and to the Court of Session in Scotland. The court is given power to grant appropriate interim and final relief and to award damages except that, where the contract in respect of which there has been an infringement has already been entered into, the court's powers are restricted to awarding damages. The obligation on concessionaires in respect of sub-contracting works under a public works concession contract is likewise enforceable (regulation 31).