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STATUTORY INSTRUMENTS

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**2006 No. 6**

**The Utilities Contracts Regulations 2006**

**PART 1**

**GENERAL**

**Citation, commencement and extent**

1.—(1) These Regulations may be cited as the Utilities Contracts Regulations 2006 and come into force on 31st January 2006.

(2) These Regulations do not extend to Scotland.

**Interpretation**

2.—(1) In these Regulations—

“attestation system” means a system under which a utility may have its contract award procedures and practices within the scope of the Utilities Directive examined periodically by an independent person or body with a view to obtaining an attestation that at the time of examination those procedures and practices are in conformity with these Regulations and the Community law to which they give effect;

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

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

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

“central purchasing body” means a utility which is a contracting authority and which—

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

“the Commission” means the European Commission;

“Commission Regulation (EC) No 1564/2005” means Commission Regulation (EC) No 1564/2005 of 7 September 2005(1);

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(1) OJ L 257, 1.10.2005, p.1. The standard forms set out in the Annex to this Regulation are available at <http://simap.eu.int>.

“Common Procurement Vocabulary” means the reference nomenclature applicable to contracts as adopted by Regulation (EC) No 2195/2002 of 5 November 2002 of the European Parliament and of the Council on the Common Procurement Vocabulary(2);

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

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

“contract notice” means, except in regulation 48, a contract notice sent to the Official Journal in accordance with regulation 16(2)(b);

“contracting authority” has the meaning given to it by regulation 3 of the Public Contracts Regulations 2006(3);

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

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

“CPC” means Central Product Classification of the United Nations(4);

“CPV” means Common Procurement Vocabulary;

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

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

“disabled person” means any person recognised as disabled within the meaning of the Disability Discrimination Act 1995(5) and “disabled persons” shall be interpreted accordingly;

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

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

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

“EC Treaty” means the Treaty establishing the European Economic Community, signed at Rome on 25 March 1957 as amended by the Community Treaties;

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

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

(3) S.I.2006/5

(4) CPC (provisional version). Further information may be obtained from the United Nations website <http://unstats.un.org>.

(5) 1995 c. 50; section 1 was amended by S.I. 2005/1117 in relation to Northern Ireland. Sections 2 and 3 were amended by sections 18 and 19 of, and Schedule 1 to the Disability Discrimination Act 2005 (c. 13.) There are other amendments which are not relevant to these Regulations.

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

- (a) takes place after the initial evaluation of tenders; and
- (b) enables tenders to be ranked using automatic evaluation methods;

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

“established” has the same meaning as in the Community Treaties;

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

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

“framework agreement” means an agreement or other arrangement, which is not in itself a supply contract, a works contract or a services contract, between one or more utilities and one or more economic operators which establishes the terms (in particular the terms as to price and, where appropriate, quantity) under which the economic operator will enter into one or more contracts with a utility in the period during which the framework agreement applies;

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

“Government Procurement Agreement” means the Agreement on Government Procurement between certain parties to the World Trade Organisation (WTO) signed in Marrakesh on 15<sup>th</sup> April 1994<sup>(6)</sup>;

“GPA” means the Government Procurement Agreement;

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

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

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

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

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

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

“Office of Government Commerce” means the office of the Treasury having that title<sup>(7)</sup>;

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

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

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

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(6) Cm 2575. As at 1<sup>st</sup> January 2000, parties to the Government Procurement Agreement other than member States were Aruba, Canada, Hong Kong Special Administrative Region, Iceland, Israel, Japan, Republic of Korea, Liechtenstein, Norway, Singapore, Switzerland and the United States of America.

(7) The address of the Office of Government Commerce is 1 Horse Guards Road, London, SW1A 2HQ.

“Public Sector Directive” means Directive [2004/18/EC](#) of the European Parliament and of the Council of 31 March 2004<sup>(8)</sup>;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“Utilities Directive” means Directive [2004/17/EC](#) of the European Parliament and of the Council of 31 March 2004<sup>(9)</sup>;

(8) OJ No L 134, 30.4.2004, p.114.

(9) OJ No L 134, 30.4.2004, p.1.

“Utilities Remedies Directive” means Council Directive [92/13/EC](#) of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors<sup>(10)</sup>;

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

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

“working day” means a day other than a Saturday, Sunday or Bank Holiday within the meaning of the Banking and Financial Dealings Act 1971<sup>(11)</sup>;

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

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

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

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

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

“year” means a calendar year.

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

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

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

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

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

- (a) within a certain period after an action is taken, the day on which that action is taken shall not be counted in the calculation of that period;
- (b) within a certain period, that period must include at least 2 working days; and
- (c) except for regulation 33(3), within a certain period and the last day of that period is not a working day, the period shall be extended to include the next working day.

## Utilities

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

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<sup>(10)</sup> OJ No L 76, 23.3.1992, p.14.

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

(2) In this regulation and in Schedule 1—

“local authority” means—

- (a) in relation to a local authority in England, an authority referred to in regulation 3(2) of the Public Contracts Regulations 2006;
- (b) in relation to a local authority in Wales, an authority referred to in regulation 3(3) of those Regulations;
- (c) in relation to a local authority in Scotland, an authority referred to in regulation 3(4) of those Regulations; and
- (d) in relation to a local authority in Northern Ireland, an authority referred to in regulation 3(5) of those Regulations;

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

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

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

“relevant person” means a person who is—

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

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

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

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

### **Economic operators**

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

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

- (3) A utility shall (in accordance with Article 10 of the Utilities Directive)—
  - (a) treat economic operators equally and in a non-discriminatory way; and
  - (b) act in a transparent way.

(4) In these Regulations a relevant State is a member State or a State listed in column 1 of Schedule 4; the agreements with the European Union by which the provisions in relation to public procurement are extended to those States are specified in column 2 of that Schedule and the statutory provision designating them as European Treaties under section 1(3) of the European Communities Act 1972<sup>(12)</sup> is specified in column 3 of that Schedule.

### **Application**

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

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

- (a) Part 1 and Parts 9 and 10 of these Regulations apply; and
- (b) the following provisions in Parts 2 to 8 apply—
  - (i) regulation 12 (technical specifications in contract documents);
  - (ii) regulation 32 (contract award notices);
  - (iii) regulation 38 (statistical and other reports);
  - (iv) regulation 39 (provision of reports); and
  - (v) regulation 40 (publication of notices).

(3) A utility shall not enter into separate contracts with the intention of avoiding the application of these Regulations or the Public Contracts Regulations 2006, where applicable.

(4) Where a utility seeks offers in relation to a contract for the purpose of carrying out—

- (a) one or more activities specified in the second column of Schedule 1; and
- (b) one or more activities not specified in the second column of Schedule 1 but to which the Public Contracts Regulations 2006 apply;

and it is impossible, on objective grounds, to determine the activity for which the contract is principally intended, the utility shall award the contract in accordance with the Public Contracts Regulations 2006.

(5) Where a utility seeks offers in relation to a contract for the purpose of carrying out—

- (a) one or more activities specified in the second column of Schedule 1; and
- (b) one or more activities not specified in the second column of Schedule 1 nor subject to the Public Contracts Regulations 2006;

and it is impossible, on objective grounds, to determine the activity for which the contract is principally intended, the utility shall award the contract in accordance with these Regulations.

### **General exclusions**

**6.** These Regulations do not apply to the seeking of offers in relation to a proposed contract or dynamic purchasing system—

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(12) 1972 c. 68.

- (a) other than for the purpose of carrying out an activity specified in the Part of Schedule 1 in which the utility is specified or in respect of a proposed contract referred to in regulation 5(5);
- (b) for the purpose of carrying out any activity outside the territory of the Communities but only if the carrying out of that activity does not involve the physical use of a network or geographical area within the Communities;
- (c) for the purpose of acquiring goods, works or services in order to sell, hire or provide them to another person unless the utility has a special or exclusive right to sell, hire or provide such goods, works or services or other persons are not free to sell, hire or provide them under the same conditions;
- (d) which is classified as secret or where the performance of the contract must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions of any part of the United Kingdom or when the protection of the essential interests of the security of the United Kingdom requires it;
- (e) where different rules govern the procedures leading to the award of the contract and it is to be entered into in accordance with—
  - (i) an international agreement concluded in conformity with the EC Treaty to which the United Kingdom and a State which is not a relevant State are parties and it relates to goods or the carrying out of a work or works or the provision of services intended for the joint implementation or exploitation of a project related to that agreement;
  - (ii) an international agreement relating to the stationing of troops; or
  - (iii) the contract award procedures of an organisation of which only States are members (an “international organisation”) or of which only States or international organisations are members;
- (f) by a utility which engages in an activity specified in Category 1 of Schedule 1 for the purchase of water;
- (g) by a utility which engages in an activity specified in Categories 2 to 6 of Schedule 1 for the purchase of energy or of fuel for the production of energy;
- (h) by a utility specified in column 1 of Part S of Schedule 1 for the purpose of engaging in an activity specified in column 2 of that Part of that Schedule where that activity is provided in a geographical area in which other persons are free to provide the service under the same conditions as the utility;
- (i) under which services are to be provided by a contracting authority, or by a person which is a contracting authority in another relevant State because that contracting authority or person has an exclusive right—
  - (i) to provide the services; or
  - (ii) which is necessary for the provision of the services;in accordance with any published law, regulation or administrative provision which is compatible with the EC Treaty;
- (j) for the acquisition of land, including existing buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land;
- (k) for arbitration or conciliation services;
- (l) for financial services in connection with the issue, purchase, sale or transfer of securities or other financial instruments, in particular transactions by the utility to raise money or capital;
- (m) for employment and other contracts of service;



- (n) for research and development services unless—
  - (i) the benefits are to accrue exclusively to the utility for its use in the conduct of its own affairs; and
  - (ii) the services are to be wholly paid for by the utility; or
- (o) which is a works concession contract or a services concession contract which is awarded by a utility carrying out an activity specified in the second column of Schedule 1, where the concession contract is awarded for carrying out or providing that activity.

### **Exclusion of contracts awarded to affiliated undertakings or joint ventures**

7.—(1) For the purposes of this regulation—

“affiliated undertaking” means—

- (a) in respect of a utility which is subject to the seventh Council Directive [83/349/EC](#) on consolidated accounts<sup>(13)</sup> as last amended by Directive [2003/51/EC](#) of the European Parliament and of the Council of 18 June 2003<sup>(14)</sup>, any undertaking the accounts of which are consolidated with those of that utility; or
- (b) in any other case, any undertaking which is either a parent undertaking, a subsidiary undertaking or a fellow subsidiary undertaking of the utility and—
  - (i) an undertaking is a parent undertaking of a utility if it exercises a dominant influence over it, directly or indirectly, and for these purposes an undertaking exercises a dominant influence over another if—
    - (aa) it possesses the greater part of the issued share capital of that undertaking or controls the majority of the voting power attached to the issued share capital of that undertaking; or
    - (bb) it may appoint more than half of the individuals who are ultimately responsible for managing the affairs of that company;and an undertaking is a subsidiary of a utility if the utility exercises such dominant influence over it; or
  - (ii) an undertaking is a fellow undertaking of a utility if both are subsidiary undertakings of the same parent undertaking; and

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

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

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

(3) Paragraph (2) applies—

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

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<sup>(13)</sup> OJ No L 193, 18.7.1983, p.1.

<sup>(14)</sup> OJ No L 178, 17.7.2003, p.16.

- (c) in relation to works contracts, provided that at least 80% of the average turnover of the affiliated undertaking in respect of works for the preceding 3 years derives from the provision of such works to one or more of its affiliated undertakings.
- (4) Where more than one of its affiliated undertakings provides the same or similar services, supplies or works, a utility may calculate the percentages referred to in paragraph (3) by taking into account the total turnover deriving respectively from the provision of services, supplies or works by those affiliated undertakings.
- (5) For the purposes of paragraph (3), when turnover amounts are not available for the preceding three years because of the date upon which a relevant affiliated undertaking was created or commenced activities, it is sufficient for that affiliated undertaking to show, particularly by means of business projections, that the turnover in respect of the provision of services, supplies or works is credible.
- (6) These Regulations do not apply to the seeking of offers in relation to contracts which—
- (a) a joint venture proposes to award to one of its members; or
  - (b) a utility proposes to award to a joint venture of which it is a member provided that—
    - (i) the joint venture has been set up in order to carry out the activity for which the contract is being sought over a period of at least 3 years; and
    - (ii) the instrument setting up the joint venture stipulates that its members will be part of the joint venture for at least the same period.
- (7) A utility which relies on the exclusions in paragraphs (2) or (6) shall, if the Commission requests it, send to the Minister—
- (a) the names of the undertakings or joint ventures concerned;
  - (b) the value of the consideration and the type of—
    - (i) services to be provided under any services contract;
    - (ii) goods to be purchased or hired under any supply contract; or
    - (iii) work or works to be carried out under any works contracts;
 excluded in accordance with paragraphs (2) or (6); and
  - (c) any information which is necessary to justify the use of the exclusion.

### **Exemption in respect of certain utilities operating in the energy sector**

**8.—(1)** A utility carrying out one or more of the activities referred to in Commission Decision [97/367/EC](#) **(15)** is excluded from having to comply with Parts 2 to 5 of these Regulations and regulations 34, 35, 37, 38 other than paragraphs (2)(a), 40 and 43 in seeking offers in relation to a contract to be awarded for the purpose of carrying out one or more such activities.

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

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

- (v) holding any design contest; and
  - (vi) awarding the contract;
- make decisions objectively on the basis of relevant criteria.
- (3) A utility which relies on the exemption in paragraph (1) shall—
- (a) in respect of a contract awarded by it the value of which, calculated in accordance with regulation 11, exceeds 5,000,000 euro, send to the Commission not later than 48 days after the award the following information—
    - (i) the name and address of the utility;
    - (ii) the nature of the contract, namely whether it is a supply contract, a services contract or a works contract and whether it is a framework agreement;
    - (iii) a clear indication of the nature (for example, by using the Classification of Products by Activity<sup>(16)</sup>) of—
      - (aa) the goods to be purchased or hired under the contract;
      - (bb) the work or works to be carried out under the contract; or
      - (cc) the services to be provided under the contract;
    - (iv) whether the contract was advertised and, if so, in which publication and, if not, the procedure or method used to decide to whom the contract should be awarded;
    - (v) the number of offers received;
    - (vi) the date of the award of the contract;
    - (vii) the name and address of the person to whom the contract was awarded;
    - (viii) the value of the contract, calculated in accordance with regulation 11;
    - (ix) the expected duration of the contract;
    - (x) any share of the contract which has been, or may be, sub-contracted, to which over 10% of the value of the consideration to be given under the contract is attributable;
    - (xi) in the case of a supply contract, the country of origin of the goods and in the case of a works contract or a services contract, the principal country from which the contract is to be performed;
    - (xii) where the contract was awarded on the basis of the offer which was the most economically advantageous, the main criteria on which the decision was based; and
    - (xiii) whether the contract was awarded to an economic operator which offered a variant on the requirements specified in the contract documents; and
  - (b) in respect of a supply contract or a services contract awarded by it the value of which, calculated in accordance with regulation 11, equals or exceeds 400,000 euro but does not exceed 5,000,000 euro—
    - (i) retain the information specified in sub-paragraphs (a)(i) to (ix) for not less than 4 years after the award; and
    - (ii) either—
      - (aa) if the Commission requests that information in relation to any such contract, forthwith send it to the Minister; or
      - (bb) where no such request has been made, send that information to the Commission not later than 48 days after the end of the period of 3 months

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<sup>(16)</sup> The Classification of Products by Activity is the official product classification by activity which is used by the European Union for statistical purposes.

ending on the last day of March, June, September or December in which the contract was awarded.

### **Exemption of contracts where activity is directly exposed to competition**

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

- (a) the Office of Government Commerce has notified the Commission in accordance with Article 30 of the Utilities Directive of all the relevant facts and—
  - (i) the Commission has adopted a decision that an exemption should apply in response to such a notification; or
  - (ii) the Commission has not adopted a decision in relation to such a notification within the time limits specified in Article 30(6) of the Utilities Directive;
- (b) the Commission has, on the application of a utility—
  - (i) adopted a decision that an exemption should apply to the activity concerned; or
  - (ii) has not adopted such a decision within the time limit specified in Article 30(6) of the Utilities Directive; or
- (c) the Commission has, of its own initiative—
  - (i) adopted a decision that an exemption should apply to the activity concerned; or
  - (ii) has not adopted such a decision within the time limit specified in Article 30(6) of the Utilities Directive and for the purposes of this sub-paragraph that time limit commences on the date that the Commission has informed the Office of Government Commerce in accordance with that Article that the matter was under consideration.

(2) A utility may make an application to the Commission in accordance with Article 30 of the Utilities Directive for a decision that an activity that utility carries out or is proposing to carry out which is specified in the second column of Schedule 1 is directly exposed to competition on markets to which access is not restricted.

(3) An application made by a utility in accordance with paragraph (2) shall be in writing and shall specify—

- (a) the activity in respect of which the notification or application is made;
- (b) the relevant facts and in particular, any law, regulation, administrative provision or agreement concerning compliance with the conditions that the activity is not directly exposed to competition on markets to which access is not restricted; and
- (c) whether the activity concerned is subject to any of the Community legislation referred to in Annex XI to the Utilities Directive and where it is, the relevant implementing legislation in the UK.

### **Reserved Contracts**

10.—(1) In this regulation—

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

“supported employment programme” means a scheme under which work is provided for disabled persons and where more than 50% of the workers so supported are disabled persons

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

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

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

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

### **Thresholds**

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

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

- (a) 422,000 euro for a supply contract or a services contract; and
- (b) 5,278,000 euro for a works contract.

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

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

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

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

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

- (a) the value of the consideration which the utility expects to be payable under the contract if the term of the contract is fixed for 12 months or less;
- (b) the value of the consideration which the utility expects to be payable under the contract if the term of the contract is fixed for more than 12 months; or

(c) the value of the monthly consideration payable under the contract multiplied by 48 if the term of the contract is indefinite or uncertain at the time the contract is entered into.

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

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

(8) Subject to paragraphs (9) and (12), where a utility has a single requirement for goods or services or for the carrying out of a work or works and a number of contracts have been entered into or are to be entered into to fulfil that requirement, the estimated value for the purposes of paragraph (1) of each of those contracts is the aggregate of the value of the consideration which the utility expects to be payable under each of those contracts.

(9) Paragraph (8) does not apply to any contract (unless the utility chooses to apply that paragraph to a contract) if the contract has an estimated value of less than—

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

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

(10) Subject to paragraph (12), where a utility has a requirement over a period for goods or services and for that purpose enters into—

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

the estimated value for the purposes of paragraph (1) of the contract shall be the amount calculated in accordance with paragraph (11).

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

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

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

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

(12) Notwithstanding paragraphs (8) and (10), in relation to a supply contract or a services contract, when the goods or services are required for the sole purposes of a discrete operational unit within the organisation of a utility and—

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

the valuation methods described in paragraphs (8) and (11) shall be adapted by aggregating only the value of the consideration which was payable or the utility expects to be payable, as the case may be, under a supply contract or a services contract which was or is required for the sole purpose of that unit.

(13) Where a utility intends to provide any goods or services to the economic operator awarded a works contract for the purpose of carrying out that contract, the value of the consideration of the works contract for the purposes of paragraphs (2) and (8) shall be taken to include the estimated value at the relevant time of those goods and services.

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

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

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

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

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

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

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

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