

**2015 No. 102**

**PUBLIC PROCUREMENT**

**The Public Contracts Regulations 2015**

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*Coming into force in accordance with regulation 1(2) to (6)*

**CONTENTS**

**PART 1  
GENERAL**

1. Citation, commencement, extent and application
2. Definitions

**PART 2  
RULES IMPLEMENTING THE PUBLIC CONTRACTS DIRECTIVE**

**CHAPTER 1**

**SCOPE AND GENERAL PRINCIPLES**

**SECTION 1**

*Scope*

3. Subject-matter and scope of Part 2
4. Mixed procurement
5. Threshold amounts
6. Methods for calculating the estimated value of a procurement
7. Utilities
8. Specific exclusions in the field of electronic communications
9. Public contracts awarded, and design contests organised, pursuant to international rules
10. Specific exclusions for service contracts
11. Service contracts awarded on the basis of an exclusive right
12. Public contracts between entities within the public sector
13. Contracts subsidised by contracting authorities
14. Research and development services
15. Defence and security
16. Mixed procurement involving defence or security aspects
17. Public contracts and design contests involving defence or security aspects which are awarded or organised pursuant to international rules

SECTION 2  
*General Rules*

- 18. Principles of procurement
- 19. Economic operators
- 20. Reserved contracts
- 21. Confidentiality
- 22. Rules applicable to communication
- 23. Nomenclatures
- 24. Conflicts of interest

CHAPTER 2  
RULES ON PUBLIC CONTRACTS

SECTION 3  
*Procedures*

- 25. Conditions relating to the GPA and other international agreements
- 26. Choice of procedures
- 27. Open procedure
- 28. Restricted procedure
- 29. Competitive procedure with negotiation
- 30. Competitive dialogue
- 31. Innovation partnership
- 32. Use of the negotiated procedure without prior publication

SECTION 4

*Techniques and Instruments for Electronic and Aggregated Procurement*

- 33. Framework agreements
- 34. Dynamic purchasing systems
- 35. Electronic auctions
- 36. Electronic catalogues
- 37. Centralised purchasing activities and central purchasing bodies
- 38. Occasional joint procurement
- 39. Procurement involving contracting authorities from other member States

SECTION 5

*Conduct of the Procedure*

- 40. Preliminary market consultations
- 41. Prior involvement of candidates or tenderers
- 42. Technical specifications
- 43. Labels
- 44. Test reports, certificates and other means of proof
- 45. Variants
- 46. Division of contracts into lots
- 47. Setting time limits
- 48. Prior information notices
- 49. Contract notices
- 50. Contract award notices
- 51. Form and manner of sending notices for publication at EU level
- 52. Publication at national level
- 53. Electronic availability of procurement documents
- 54. Invitations to candidates

55. Informing candidates and tenderers
56. General principles in awarding contracts etc
57. Exclusion grounds
58. Selection criteria
59. European Single Procurement Document
60. Means of proof
61. Recourse to e-Certis
62. Quality assurance standards and environmental management standards
63. Reliance on the capacities of other entities
64. Recognition of official lists of approved economic operators and certification by certification bodies
65. Reduction of the number of otherwise qualified candidates to be invited to participate
66. Reduction of the number of tenders and solutions
67. Contract award criteria
68. Life-cycle costing
69. Abnormally low tenders

#### SECTION 6

##### *Contract Performance*

70. Conditions for performance of contracts
71. Subcontracting
72. Modification of contracts during their term
73. Termination of contracts

#### CHAPTER 3

##### PARTICULAR PROCUREMENT REGIMES

#### SECTION 7

##### *Social and Other Specific Services*

74. Award of contracts for social and other specific services
75. Publication of notices
76. Principles of awarding contracts
77. Reserved contracts for certain services

#### SECTION 8

##### *Rules Governing Design Contests*

78. Scope of Section 8
79. Notices
80. Rules on the organisation of design contests and the selection of participants
81. Composition of the jury
82. Decisions of the jury

#### CHAPTER 4

##### RECORDS AND REPORTS

83. Retention of contract copies
84. Reporting and documentation requirements

PART 3  
REMEDIES  
CHAPTER 5

FACILITATION OF REMEDIES

- 85. Scope of Chapter 5
- 86. Notices of decisions to award a contract or conclude a framework agreement
- 87. Standstill period

CHAPTER 6

APPLICATIONS TO THE COURT

- 88. Interpretation of Chapter 6
- 89. Duty owed to economic operators from EEA states
- 90. Duty owed to economic operators from certain other states
- 91. Enforcement of duties through the Court
- 92. General time limits for starting proceedings
- 93. Special time limits for seeking a declaration of ineffectiveness
- 94. Starting proceedings
- 95. Contract-making suspended by challenge to award decision
- 96. Interim orders
- 97. Remedies where the contract has not been entered into
- 98. Remedies where the contract has been entered into
- 99. Grounds for ineffectiveness
- 100. General interest grounds for not making a declaration of ineffectiveness
- 101. The consequences of ineffectiveness
- 102. Penalties in addition to, or instead of, ineffectiveness
- 103. Ineffectiveness etc. in relation to specific contracts based on a framework agreement
- 104. Injunctions against the Crown

PART 4

MISCELLANEOUS OBLIGATIONS

CHAPTER 7

ADDITIONAL RULES FOR PART 2 PROCUREMENTS

- 105. Scope of Chapter 7
- 106. Publication of information on Contracts Finder where contract notices are used
- 107. Qualitative selection
- 108. Publication of information on Contracts Finder about contracts awarded

CHAPTER 8

BELOW-THRESHOLD PROCUREMENTS

- 109. Scope of Chapter 8
- 110. Publication of contract opportunities on Contracts Finder
- 111. Assessing suitability etc
- 112. Publication of information on Contracts Finder about contracts awarded

CHAPTER 9

MISCELLANEOUS PROVISIONS

- 113. Payment of undisputed invoices within 30 days by contracting authorities, contractors and subcontractors
- 114. General provisions applicable to Part 4

PART 5  
REVOCATIONS, CONSEQUENTIAL AMENDMENTS, SAVINGS AND  
TRANSITIONAL PROVISIONS

- 115. Interpretation of Part 6
- 116. Revocation and amendments
- 117. General saving in respect of certain concession contracts
- 118. General transitional provision and saving where procurement procedure commenced before 26th February 2015
- 119. Transitional provision and saving where utilities procurement procedure commenced before 26th February 2015
- 120. Temporary exemption and saving for certain NHS procurements
- 121. Transitory provision prior to full commencement of regulation 22(1) to (7)
- 122. Complying with regulation 113 before 1st April 2016

- 
- SCHEDULE 1 — CENTRAL GOVERNMENT AUTHORITIES
  - SCHEDULE 2 — ACTIVITIES CONSTITUTING WORKS
  - SCHEDULE 3 — SOCIAL AND OTHER SPECIFIC SERVICES
  - SCHEDULE 4 — LIST OF PRODUCTS RELEVANT TO THRESHOLDS
  - SCHEDULE 5 — PROFESSIONAL AND TRADE REGISTERS ETC.
  - SCHEDULE 6 — CONSEQUENTIAL AND MISCELLANEOUS AMENDMENTS
  - PART 1 — Consequential amendments to Acts of Parliament
  - PART 2 — Consequential and miscellaneous amendments to other legislation

The Minister for the Cabinet Office is designated for the purposes of section 2(2) of the European Communities Act 1972<sup>(a)</sup> in relation to public procurement<sup>(b)</sup> and in relation to the combating of late payment in commercial transactions<sup>(c)</sup>.

The Minister for the Cabinet Office makes these Regulations in exercise of the powers conferred by section 2(2) of, as read with paragraph 1A<sup>(d)</sup> of Schedule 2 to, that Act.

These Regulations make provision for a purpose mentioned in section 2(2) of that Act, and it appears to the Minister for the Cabinet Office that it is expedient for certain references to provisions of EU instruments to be construed as references to those provisions as amended from time to time.

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(a) 1972 c.68; section 2(2) was amended by the European Union (Amendment) Act 2008 (c.7), Part 1 of the Schedule.  
(b) S.I. 2010/2473.  
(c) S.I. 2014/2705.  
(d) Paragraph 1A was inserted by the Legislative and Regulatory Reform Act 2006 (c.51), section 28, and was amended by the European Union (Amendment) Act 2008, Part 1 of the Schedule.

# PART 1

## GENERAL

### Citation, commencement, extent and application

1.—(1) These Regulations may be cited as the Public Contracts Regulations 2015.

#### *Commencement*

(2) Except for the provisions mentioned in paragraphs (3) to (6), these Regulations come into force on 26th February 2015.

(3) Paragraphs (1) to (7) of Regulation 22 come into force—

- (a) for the purposes of regulations 27(6), 28(9), 34(13), 36(4), 53(3) and 121(2)(a), on 26th February 2015;
- (b) for the purposes of regulation 37(7), on 18th April 2017;
- (c) for all other purposes, on 18th October 2018.

(4) Regulations 37(7) and 59(7) come into force on 18th April 2017.

(5) Regulation 61 comes into force on 18th October 2018.

(6) Regulations 106, 108, 110 and 112 come into force—

- (a) in relation to contracting authorities which perform their functions on behalf of the Crown, on 26th February 2015;
- (b) in relation to other contracting authorities, on 1st April 2015.

#### *Extent and application*

(7) Except for paragraph 19 of Schedule 6, these Regulations do not extend to Scotland.

(8) Part 4 does not apply to a contracting authority if its functions are wholly or mainly—

- (a) Northern Ireland devolved functions, that is to say functions which could be conferred by provision included in an Act of the Northern Ireland Assembly made without the consent of the Secretary of State (see sections 6 to 8 of the Northern Ireland Act 1998(a)); or
- (b) Welsh devolved functions, that is to say functions which could be conferred by provision falling within the legislative competence of the National Assembly for Wales (as defined in section 108 of the Government of Wales Act 2006(b)).

### Definitions

2.—(1) In these Regulations, except where the context otherwise requires,—

“Academy” means a person who is the proprietor, within the meaning of section 579(1) of the Education Act 1996(c), of an Academy within the meaning of that section;

“accelerated procedure” means any of the following:—

- (a) an open procedure in which the contracting authority has exercised the power conferred by regulation 27(5) to fix a time limit for the receipt of tenders that is shorter than the minimum specified in regulation 27(2);
- (b) a restricted procedure in which the contracting authority has exercised the power conferred by regulation 28(10) to fix a time limit—

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(a) 1998 c.47; section 6 was amended by S.I. 2011/1053, article 6(2)(a); section 7 was amended by the Justice (Northern Ireland) Act 2002 (c.26), section 84(1) and Schedule 13 and by the Northern Ireland (Miscellaneous Provisions) Act 2006 (c.33), Schedule 4, paragraph 10; section 7A was inserted by the Northern Ireland (Miscellaneous Provisions) Act 2014, section 6(1) and (3).

(b) 2006 c.32; section 108 was amended by S.I. 2011/1053, article 6(2)(a).

(c) 1996 c.56; the definition of ‘Academy’ was inserted by the Academies Act 2010 (c.32), Schedule 2, paragraphs 1 and 6. That definition, and the definition of ‘proprietor’, were amended by the Education Act 2011 (c.21), Schedule 13, paragraphs 9(1) and (17).

- (i) for the receipt of requests to participate that is shorter than the minimum specified in regulation 28(2), or
- (ii) for the receipt of tenders that is shorter than the minimum specified in regulation 28(5);
- (c) a competitive procedure with negotiation in which the contracting authority has exercised the power conferred by regulation 29(10) to fix a time limit—
  - (i) for the receipt of requests to participate that is shorter than the minimum specified in regulation 29(4); or
  - (ii) for the receipt of initial tenders that is shorter than the minimum specified in regulation 29(5).

“ancillary purchasing activities” means activities consisting of the provision of support to purchasing activities, in particular in the following forms:—

- (a) technical infrastructure enabling contracting authorities to award public contracts or to conclude framework agreements for works, supplies or services;
- (b) advice on the conduct or design of public procurement procedures;
- (c) preparation and management of procurement procedures on behalf and for the account of the contracting authority concerned;

“bodies governed by public law” means bodies that have all of the following characteristics:—

- (a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- (b) they have legal personality; and
- (c) they have any of the following characteristics:—
  - (i) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law;
  - (ii) they are subject to management supervision by those authorities or bodies; or
  - (iii) they have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;

“call for competition” means a call for competition made in a manner required or permitted by regulation 26(8) to (9) or, where relevant, one of the notices referred to in regulation 75(1) or a contest notice;

“candidate” means an economic operator that has sought an invitation or has been invited to take part in a restricted procedure, a competitive procedure with negotiation, a negotiated procedure without prior publication, a competitive dialogue or an innovation partnership;

“central government authorities” means the Crown and all the bodies listed in Schedule 1 (whether or not they perform their functions on behalf of the Crown), but does not include Her Majesty in her private capacity;

“central purchasing body” means a contracting authority which provides centralised purchasing activities and which may also provide ancillary purchasing activities;

“centralised purchasing activities” has the meaning given by regulation 37(10);

“the Commission” means the European Commission;

“common technical specification” means a technical specification in the field of information and communication technology laid down in accordance with Articles 13 and 14 of Regulation (EU) No 1025/2012 of the European Parliament and of the Council<sup>(a)</sup> as amended from time to time;

“contest notice” means the notice referred to in regulation 79(1);

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(a) OJ No L 316, 14.11.2012, p12.

“contract notice” means the notice referred to in regulation 49 or, where relevant, 75(1)(a);

“contracting authorities” means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law, and includes central government authorities, but does not include Her Majesty in her private capacity;

“Contracts Finder” means a web-based portal provided for the purposes of Part 4 by or on behalf of the Cabinet Office;

“CPV” means the Common Procurement Vocabulary as adopted by Regulation (EC) No 2195/2002 of the European Parliament and of the Council(a) as amended from time to time;

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

“design contests” means those procedures which enable a contracting authority to acquire, mainly in the fields of town and country planning, architecture and engineering or data processing, a plan or design selected by a jury after being put out to competition with or without the award of prizes;

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

“dynamic purchasing system” means the system referred to in regulation 34;

“economic operator” means any person or public entity or group of such persons and entities, including any temporary association of undertakings, which offers the execution of works or a work, the supply of products or the provision of services on the market;

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

“ESPD” means the European Single Procurement Document referred to in regulation 59(1);

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

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

“European Technical Assessment” means the documented assessment of the performance of a construction product, in relation to its essential characteristics, in accordance with the relevant European Assessment Document as defined in point 12 of Article 2 of Regulation (EU) No 305/2011 of the European Parliament and of the Council(d) as amended from time to time;

“framework agreement” has the meaning given by regulation 33(2);

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

“innovation” means the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations, including with the purpose of helping to solve societal challenges or to support the Europe 2012 strategy for smart, sustainable and inclusive growth;

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

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- (a) OJ No L 340, 16.12.2002, p1, last amended by Commission Regulation (EC) No 213/2008 (OJ No L 74, 15.3.2008, p1).
- (b) S.I. 2011/1848, amended by S.S.I. 2012/88, 2012/89; there are other amending instruments but none is relevant.
- (c) 2010 c.15.
- (d) OJ No L 88, 4.4.2011, p5, last amended by Commission Delegated Regulation (EU) No 574/2014 (OJ No L 159, 28.5.2014, p41).
- (e) All the substantive provisions of the Agreement were substituted by the Protocol which was approved, on behalf of the EU, by Council Decision 2014/115/EU (OJ No L 68, 7.3.2014, p1), to which the text of the Protocol is attached (at OJ No L 68, 7.3.2014, p2). In accordance with Article 3 of the Protocol, the Protocol has entered into force for the EU.



“invitation to confirm interest” means, except in regulation 31(18), an invitation which a contracting authority sends in order to comply with regulation 54(2);

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

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

“legal person” means a person, whether governed by private law or public law, other than a natural person;

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

“maintained school” means the governing body of a maintained school within the meaning of section 19(1) of the Education Act 2002(a);

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

“NHS Trust” means a trust established under section 25 of the National Health Service Act 2006(b);

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

“prior information notice” means the notice referred to in regulation 48 or, where relevant, regulation 75(1)(b);

“prior publication” means prior publication of a call for competition;

“procurement” means the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose;

“procurement document” means any document produced or referred to by the contracting authority to describe or determine elements of the procurement or the procedure, including the contract notice, the prior information notice where it is used as a means of calling for competition, the technical specifications, the descriptive document, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents;

“public contracts” means contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services;

“Public Contracts Directive” means Directive 2014/24/EU of the European Parliament and of the Council(c);

“public service contracts” means public contracts which have as their object the provision of services other than those referred to in the definition of “public works contracts”;

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

“public works contracts” means public contracts which have as their object any of the following:—

- (a) the execution, or both the design and execution, of works related to one of the activities listed in Schedule 2;

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(a) 2002 c.32.

(b) 2006 c.41.

(c) OJ No L 94, 28.3.2014, p65.

- (b) the execution, or both the design and execution, of a work;
- (c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work;

“selection criteria” means, except in regulation 80, selection criteria set out by a contracting authority in accordance with regulation 58;

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

“sub-central contracting authorities” means all contracting authorities which are not central government authorities;

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

“technical specifications” means the matters referred to in regulation 42(2) to (7);

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

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

“the Treaties” means the Treaty on European Union(b) and TFEU;

“VAT” means value added tax;

“a work”, means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function; but “works” is to be interpreted in accordance with paragraph (2);

“working day” means a day other than a Saturday, Sunday, Christmas Day, Good Friday or bank holiday within the meaning of the Banking and Financial Dealings Act 1971(c); and

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

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

(3) In Part 2 (except regulation 52(4)), any reference to a period of time, however expressed, is to be interpreted subject to the following requirements:—

- (a) the period must include at least 2 working days; and
- (b) where the period is to be calculated from the moment at which an action takes place or other event occurs, the day during which that action takes place or that event occurs is not to be counted in the calculation of that period.

(4) In Parts 2 and 3, any reference to a period of time which is expressed otherwise than in hours is to be interpreted subject to the requirement that where the period—

- (a) is to be calculated by counting forwards in time from a given date or event, and
  - (b) would (but for this paragraph) have ended on a day which is not a working day,
- the period is to end at the end of the next working day.

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(a) OJ No C 115, 9.5.2008, p47.

(b) OJ No C 115, 9.5.2008, p13.

(c) 1971 c.80.

**PART 2**  
**RULES IMPLEMENTING THE PUBLIC CONTRACTS DIRECTIVE**

**CHAPTER 1**

**SCOPE AND GENERAL PRINCIPLES**

**SECTION 1**

*Scope*

**SUB-SECTION 1**

*Subject-matter and mixed procurement*

**Subject-matter and scope of Part 2**

**3.**—(1) This Part establishes rules on the procedures for procurement by contracting authorities with respect to public contracts and design contests which—

- (a) have a value estimated to be not less than the relevant threshold mentioned in regulation 5, and
- (b) are not excluded from the scope of this Part by any other provision in this Section.

(2) This Part is subject to Article 346 of TFEU.

**Mixed procurement**

**4.**—(1) In the case of mixed contracts which have as their subject-matter different types of procurement all of which are covered by this Part—

- (a) contracts which have as their subject-matter two or more types of procurement (works, services or supplies) shall be awarded in accordance with the provisions applicable to the type of procurement that characterises the main subject-matter of the contract in question; and

(b) in the case of—

- (i) mixed contracts consisting partly of services to which Section 7 applies and partly of other services, or

(ii) mixed contracts consisting partly of services and partly of supplies,

the main subject-matter shall be determined in accordance with which of the estimated values of the respective services, or of the respective services and supplies, is the highest.

(2) In the case of contracts which have as their subject-matter procurement covered by this Part and procurement not covered by this Part—

(a) where the different parts of a given contract are objectively separable—

- (i) contracting authorities may choose to award separate contracts for the separate parts or to award a single contract;

(ii) where contracting authorities choose to award separate contracts for separate parts, the decision as to which legal regime applies to any one of such separate contracts shall be taken on the basis of the characteristics of the separate part concerned; and

(iii) where contracting authorities choose to award a single contract, this Part applies to the ensuing mixed contract, irrespective of—

(aa) the value of the parts that would otherwise fall under a different legal regime, and

(bb) which legal regime those parts would otherwise have been subject to;

(b) where the different parts of a given contract are objectively not separable, the applicable legal regime shall be determined on the basis of the main subject-matter of that contract.

(3) But where part of a given contract is covered by Article 346 of TFEU or the Defence and Security Regulations, regulation 16 applies instead of paragraph (1) or (2).

## SUB-SECTION 2

### *Thresholds*

#### **Threshold amounts**

**5.**—(1) This Part applies to procurements with a value net of VAT estimated to be equal to or greater than the following thresholds:—

- (a) for public works contracts, the sum specified in Article 4(a) of the Public Contracts Directive;
  - (b) for public supply contracts and public service contracts awarded by central government authorities, and design contests organised by such authorities, the sum specified in Article 4(b) of the Public Contracts Directive, subject to paragraph (2);
  - (c) for public supply contracts and public service contracts awarded by sub-central contracting authorities, and design contests organised by such authorities, the sum specified in Article 4(c) of the Public Contracts Directive;
  - (d) for public service contracts for social and other specific services listed in Schedule 3, the sum specified in Article 4(d) of the Public Contracts Directive.
- (2) Where public supply contracts are—
- (a) awarded by central government authorities operating in the field of defence, and
  - (b) concern products not covered by Schedule 4,

the applicable threshold for the purposes of paragraph (1) is the sum specified in Article 4(c) of the Public Contracts Directive.

(3) References in paragraphs (1) and (2) to the Public Contracts Directive are references to that Directive as amended from time to time.

(4) The value in pounds sterling of any amount expressed in euro in any of the provisions of the Public Contracts Directive mentioned in this regulation shall be taken to be the value for the time being determined by the Commission for the purpose of that provision and published from time to time in the Official Journal in accordance with Article 6 of the Public Contracts Directive.

#### **Methods for calculating the estimated value of procurement**

##### *General rules*

**6.**—(1) The calculation of the estimated value of a procurement shall be based on the total amount payable, net of VAT, as estimated by the contracting authority, including any form of option and any renewals of the contracts as explicitly set out in the procurement documents.

(2) Where the contracting authority provides for prizes or payments to candidates or tenderers it shall take them into account when calculating the estimated value of the procurement.

(3) Where a contracting authority is comprised of separate operational units, account shall be taken of the total estimated value for all those units.

(4) But where a separate operational unit is independently responsible for its procurement, or certain categories of its procurement, the values may be estimated at the level of the unit in question.

(5) The choice of the method used to calculate the estimated value of a procurement shall not be made with the intention of excluding it from the scope of this Part.

(6) A procurement shall not be subdivided with the effect of preventing it from falling within the scope of this Part, unless justified by objective reasons.

(7) The estimated value shall be calculated as at the moment at which the call for competition is sent or, in cases where a call for competition is not foreseen, at the moment at which the contracting authority commences the procurement procedure (for example, where appropriate, by contacting economic operators in relation to the procurement).

(8) In the case of framework agreements and dynamic purchasing systems, the value to be taken into consideration shall be the maximum estimated value, net of VAT, of all the contracts envisaged for the total term of the framework agreement or the dynamic purchasing system.

(9) In the case of innovation partnerships, the value to be taken into consideration shall be the maximum estimated value, net of VAT, of the research and development activities to take place during all stages of the envisaged partnership as well as of the supplies, services or works to be developed and procured at the end of the envisaged partnership.

(10) In the case of public works contracts, the calculation of the estimated value shall take account of both the cost of the works and the total estimated value of the supplies and services that are made available to the contractor by the contracting authority provided that they are necessary for executing the works.

#### *Treatment of lots*

(11) Where a proposed work or a proposed provision of services may result in contracts being awarded in the form of separate lots, account shall be taken of the total estimated value of all such lots.

(12) Where a proposal for the acquisition of similar supplies may result in contracts being awarded in the form of separate lots, account shall be taken of the total estimated value of all such lots when applying regulation 5(1)(b) and (c) (read with regulation 5(2)).

(13) For the purposes of paragraphs (11) and (12), where the aggregate value of the lots is equal to or greater than the relevant threshold mentioned in regulation 5, this Part applies to the awarding of each lot.

(14) Despite paragraphs (11) to (13), contracting authorities may, subject to paragraph (15), award contracts for individual lots without applying the procedures provided for by this Part, but only if the estimated value, net of VAT, of the lot concerned is less than—

- (a) 80,000 euro for supplies or services, or
- (b) 1 million euro for works.

(15) The aggregate value of the lots awarded in reliance on paragraph (14) shall not exceed 20% of the aggregate value of all the lots into which the proposed work, the proposed acquisition of similar supplies, or the proposed provision of services, has been divided.

#### *Other specific rules*

(16) In the case of public supply or service contracts which are regular in nature or which are intended to be renewed within a given period, the calculation of the estimated contract value shall be based on either of the following:—

- (a) the total actual value of the successive contracts of the same type awarded during the preceding 12 months or financial year adjusted, where possible, to take account of the changes in quantity or value which would occur in the course of the 12 months following the initial contract;
- (b) the total estimated value of the successive contracts awarded during the 12 months following the first delivery, or during the financial year where that is longer than 12 months.

(17) In the case of public supply contracts relating to the leasing, hire, rental or hire purchase of products, the value to be taken as a basis for calculating the estimated contract value shall be as follows:—

- (a) in the case of fixed-term public contracts, where that term is less than or equal to 12 months, the total estimated value for the term of the contract or, where the term of the contract is greater than 12 months, the total value including the estimated residual value;
- (b) in the case of public contracts without a fixed term, or public contracts the term of which cannot be defined, the monthly value multiplied by 48.

(18) In the case of public service contracts, the basis for calculating the estimated contract value shall, where relevant be the following:—

- (a) in the case of insurance services, the premium payable and other forms of remuneration;

- (b) in the case of banking and other financial services, the fees, commissions payable, interest and other forms of remuneration;
- (c) in the case of design contracts, the fees, commissions payable and other forms of remuneration.

(19) In the case of public service contracts which do not indicate a total price, the basis for calculating the estimated contract value shall be the following:—

- (a) in the case of fixed-term contracts where that term is less than or equal to 48 months, the total value for their full term;
- (b) in the case of contracts without a fixed term or with a term greater than 48 months, the monthly value multiplied by 48.

### SUB-SECTION 3

#### *Exclusions*

#### **Utilities**

7. This Part does not apply to the seeking of offers in relation to a proposed public contract, framework agreement or dynamic purchasing system where the contracting authority is a utility within the meaning of regulation 3 of the Utilities Contracts Regulations 2006(a) and—

- (a) that contract is for the purposes of carrying out an activity listed in any Part of Schedule 1 to those Regulations in which the utility is specified;
- (b) that contract is for the provision of bus services to the public where other entities are free to provide those services, either in general or in a particular geographical area, under the same conditions as the utility;
- (c) that contract is for the purpose of acquiring goods, work, 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, work, works or services or other persons are not free to sell, hire or provide them under the same conditions;
- (d) that contract is for the purchase of water, where that utility is engaged in the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transportation or distribution of drinking water or the supply of drinking water to such networks;
- (e) that contract is for the supply of energy or of fuels for the production of energy, where that utility is engaged in—
  - (i) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas or heat or the supply of gas or heat to such networks,
  - (ii) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity or the supply of electricity to such networks, or
  - (iii) exploring for or extracting oil, gas, coal or other solid fuels; or
- (f) where that utility is engaged in an activity excluded from the Utilities Contracts Regulations 2006 by virtue of regulation 9 of those Regulations.

#### **Specific exclusions in the field of electronic communications**

8.—(1) This Part does not apply to public contracts, or design contests, for the principal purpose of permitting contracting authorities to provide or exploit public communications networks or to provide to the public one or more electronic communications services.

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(a) S.I. 2006/6, amended by S.I. 2008/2848, 2011/1043, 2053, 2012/1659, 2013/610; there are other amending instruments but none is relevant.

(2) In this regulation, “public communications network” and “electronic communications service” have the same meanings as in Directive 2002/21/EC of the European Parliament and of the Council<sup>(a)</sup> as amended from time to time.

### **Public contracts awarded, and design contests organised, pursuant to international rules**

**9.**—(1) This Part does not apply to public contracts, or design contests, which the contracting authority is obliged to award or organise in accordance with procurement procedures which are different from those laid down by this Part and are established by any of the following:—

- (a) a legal instrument creating international law obligations, such as an international agreement, concluded in conformity with the Treaties, between a member State and one or more third countries (or subdivisions of such countries) and covering works, supplies or services intended for the joint implementation or exploitation of a project by its signatories;
- (b) an international organisation.

(2) This Part does not apply to public contracts, or design contests, which the contracting authority awards or organises in accordance with procurement rules provided by an international organisation or international financing institution where the public contracts or design contests concerned are fully financed by that organisation or institution.

(3) In the case of public contracts, or design contests, co-financed for the most part by an international organisation or international financing institution, the parties shall agree on applicable procurement procedures.

(4) In the case of contracts and design contests involving defence or security aspects which are awarded or organised pursuant to international rules, regulation 17 applies instead of paragraphs (1) to (3) of this regulation.

### **Specific exclusions for service contracts**

**10.**—(1) This Part does not apply to public service contracts—

- (a) for the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property, or which concern interests in or rights over any of them;
- (b) for—
  - (i) the acquisition, development, production or co-production of programme material intended for audiovisual media services or radio media services, that are awarded by audiovisual or radio media service providers, or
  - (ii) broadcasting time or programme provision that are awarded to audiovisual or radio media service providers;
- (c) for arbitration or conciliation services;
- (d) for any of the following legal services:—
  - (i) legal representation of a client by a lawyer within the meaning of Article 1 of Council Directive 77/249/EEC<sup>(b)</sup>, as amended from time to time, in—
    - (aa) an arbitration or conciliation held in a member State, a third country or before an international arbitration or conciliation instance, or
    - (bb) judicial proceedings before the courts, tribunals or public authorities of a member State or a third country or before international courts, tribunals or institutions;
  - (ii) legal advice given—
    - (aa) in preparation of any of the proceedings referred to in paragraph (i), or

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(a) OJ No L 108, 24.4.2002, p33, last amended by Directive 2009/140/EC of the European Parliament and of the Council (OJ No L 337, 18.12.2009, p37).

(b) OJ No L 78, 26.3.1977, p17, last amended by Council Directive 2013/25/EU (OJ No L 158, 10.6.2013, p368).

- (bb) where there is a tangible indication and high probability that the matter to which the advice relates will become the subject of such proceedings, provided that the advice is given by a lawyer within the meaning of Article 1 of Council Directive 77/249/EEC as amended from time to time;
- (iii) document certification and authentication services which must be provided by notaries;
- (iv) legal services provided by trustees or appointed guardians or other legal services the providers of which are designated by a court or tribunal in the member State concerned or are designated by law to carry out specific tasks under the supervision of such tribunals or courts;
- (v) other legal services which in the member State concerned are connected, even occasionally, with the exercise of official authority;
- (e) for—
  - (i) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council<sup>(a)</sup> as amended from time to time,
  - (ii) central bank services, or
  - (iii) operations conducted with the European Financial Stability Facility and the European Stability Mechanism;
- (f) for loans, whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments;
- (g) which are employment contracts;
- (h) for civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations, and which are covered by CPV codes 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8, 98113100-9 and 85143000-3 except patient transport ambulance services;
- (i) for public passenger transport services by rail or metro; or
- (j) for political campaign services covered by CPV codes 79341400-0, 92111230-3 and 92111240-6, when awarded by a political party in the context of an election campaign.
- (2) In this Regulation—
  - (a) “audiovisual media services” and “media service providers” have, respectively, the meanings given by Articles 1(1)(a) and 1(1)(d) of Directive 2010/13/EU of the European Parliament and of the Council<sup>(b)</sup> as amended from time to time;
  - (b) “programme” has the meaning given by Article 1(1)(b) of that Directive as amended from time to time, but also includes radio programmes and radio programme materials; and
  - (c) “programme material” has the same meaning as “programme”.

### **Service contracts awarded on the basis of an exclusive right**

**11.** This Part does not apply to public service contracts awarded by a contracting authority to another contracting authority on the basis of an exclusive right which the latter enjoys pursuant to a law, regulation or published administrative provision which is compatible with TFEU.

### **Public contracts between entities within the public sector**

#### *Award of contracts to controlled persons*

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(a) OJ No L 145, 30.4.2004, p1, last amended by Directive 2010/78/EU of the European Parliament and of the Council (OJ No L 331, 15.12.2010, p120).

(b) OJ No L 95, 15.3.2010, p1.



12.—(1) A public contract awarded by a contracting authority to a legal person falls outside the scope of this Part where all of the following conditions are fulfilled:—

- (a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;
- (b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and
- (c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

(2) A public contract also falls outside the scope of this Part where a controlled legal person which is a contracting authority awards the contract to—

- (a) its controlling contracting authority, or
- (b) another legal person controlled by the same contracting authority,

provided that there is no direct private capital participation in the legal person being awarded the contract with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the legal person being awarded the contract.

(3) A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of paragraph (1)(a) where—

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

and references to “control”, “controlled” and “controlling” in paragraphs (1) to (3) shall be interpreted accordingly.

*Award of contracts where there is joint control*

(4) A contracting authority which does not exercise over a legal person control within the meaning of paragraph (3) may nevertheless award a public contract to that legal person without applying this Part where all of the following conditions are fulfilled:—

- (a) the contracting authority exercises jointly with other contracting authorities a control over that legal person which is similar to that which they exercise over their own departments;
- (b) more than 80% of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or by other legal persons controlled by the same contracting authorities; and
- (c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

(5) For the purposes of paragraph (4)(a), contracting authorities exercise joint control over a legal person where all of the following conditions are fulfilled:—

- (a) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities;
- (b) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and
- (c) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities.

(6) For the purposes of paragraph (5)(a), individual representatives may represent several or all of the participating contracting authorities.

*Contracts which establish or implement co-operation between contracting authorities*

(7) A contract concluded exclusively between two or more contracting authorities falls outside the scope of this Part where all of the following conditions are fulfilled:—

- (a) the contract establishes or implements a co-operation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;
- (b) the implementation of that co-operation is governed solely by considerations relating to the public interest; and
- (c) the participating contracting authorities perform on the open market less than 20% of the activities concerned by the co-operation.

*Determination of percentages*

(8) For the determination of the percentage of activities referred to in paragraphs (1)(b), (4)(b) and (7)(c), the average total turnover, or an appropriate alternative activity-based measure such as costs incurred by the relevant legal person or contracting authority with respect to services, supplies and works for the 3 years preceding the contract award shall be taken into consideration.

(9) Where, because of—

- (a) the date on which the relevant legal person or contracting authority was created or commenced activities, or
- (b) a reorganisation of its activities,

the turnover, or alternative activity-based measure such as costs, are either not available for the preceding 3 years or no longer relevant, it shall be sufficient to show that the measurement of activity is credible, particularly by means of business projections.

SUB-SECTION 4

*Specific situations*

**Contracts subsidised by contracting authorities**

13.—(1) This Part applies to the awarding of the following contracts:—

- (a) works contracts which are subsidised directly by contracting authorities by more than 50% and the estimated value of which, net of VAT, is equal to or greater than the sum specified in Article 13(a) of the Public Contracts Directive, where those contracts involve any of the following activities:—
  - (i) civil engineering activities as listed in Schedule 2;
  - (ii) building work for hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes;
- (b) service contracts which are subsidised directly by contracting authorities by more than 50% and the estimated value of which, net of VAT, is equal to or greater than the sum specified in Article 13(b) of the Public Contracts Directive and which are connected to a works contract as referred to in paragraph (a).

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

(3) The contracting authorities providing the subsidies referred to in paragraph (1) shall ensure compliance with this Part where they do not themselves award the subsidised contract or where they award that contract for and on behalf of other entities.

**Research and development services**

14. This Part applies to public service contracts for research and development services which are covered by CPV codes 73000000-2 to 73120000-9, 73300000-5, 73420000-2 and 73430000-5 only if—

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

### **Defence and security**

**15.**—(1) This Part applies to the awarding of public contracts and to design contests organised in the fields of defence and security, with the exception of the following contracts:—

- (a) contracts falling within the scope of the Defence and Security Regulations;
- (b) contracts to which those Regulations do not apply by virtue of regulations 7 or 9 of those Regulations.

(2) This Part does not apply to public contracts and design contests not otherwise exempted by paragraph (1)—

- (a) to the extent that the protection of the essential security interests of the United Kingdom or another member State cannot be guaranteed by less intrusive measures, for example by imposing requirements aimed at protecting the confidential nature of information which the contracting authority makes available in a contract award procedure as provided for in this Part; or
- (b) to the extent that the application of this Part would oblige the United Kingdom to supply information the disclosure of which it considers contrary to the essential interests of its security.

(3) Where the procurement and performance of the public contract or design contest are classified as secret or must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in any part of the United Kingdom, this Part does not apply provided that the United Kingdom has determined that the essential interests concerned cannot be guaranteed by less intrusive means, such as those referred to in paragraph (2)(a).

### **Mixed procurement involving defence or security aspects**

**16.**—(1) This regulation applies in the case of mixed contracts which have as their subject-matter procurement covered by this Part and procurement covered by Article 346 of TFEU or the Defence and Security Regulations.

(2) Where the different parts of a given public contract are objectively separable, contracting authorities may choose to award separate contracts for the separate parts or to award a single contract.

(3) The decision to award a single contract shall not, however, be taken for the purpose of excluding contracts from the application of either this Part or the Defence and Security Regulations.

(4) Where contracting authorities choose to award separate contracts for separate parts, the decision of which legal regime applies to any one of such separate contracts shall be taken on the basis of the characteristics of the separate part concerned.

(5) Where contracting authorities choose to award a single contract, the following criteria shall apply to determine the applicable legal regime:—

- (a) where part of a given contract is covered by Article 346 of TFEU, the contract may be awarded without applying this Part, provided that the award of a single contract is justified by objective reasons;
- (b) where part of a given contract is covered by the Defence and Security Regulations, the contract may be awarded in accordance with those Regulations, provided that the award of a single contract is justified by objective reasons.

(6) Paragraph (5)(b) is without prejudice to the thresholds and exclusions for which the Defence and Security Regulations provide.

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

(8) Where the different parts of a given contract are objectively not separable, the contract may be awarded without applying this Part where it includes elements to which Article 346 of TFEU applies; otherwise it may be awarded in accordance with the Defence and Security Regulations.

### **Public contracts and design contests involving defence or security aspects which are awarded or organised pursuant to international rules**

**17.**—(1) This Part does not apply to public contracts, or design contests, involving defence or security aspects which the contracting authority is obliged to award or organise in accordance with procurement procedures which are different from those laid down by this Part and are established by any of the following:—

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

(2) This Part does not apply to public contracts, or design contests, involving defence or security aspects which the contracting authority awards in accordance with procurement rules provided by an international organisation or international financing institution where the public contracts or design contests concerned are fully financed by that organisation or institution.

(3) In the case of public contracts, or design contests, co-financed for the most part by an international organisation or international financing institution, the parties shall agree on applicable procurement procedures.

## SECTION 2

### *General Rules*

#### **Principles of procurement**

**18.**—(1) Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

(2) The design of the procurement shall not be made with the intention of excluding it from the scope of this Part or of artificially narrowing competition.

(3) For that purpose, competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

#### **Economic operators**

**19.**—(1) Economic operators that, under the law of the member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of England and Wales or, as the case may be, Northern Ireland, they would be required to be either natural or legal persons.

(2) In the case of—

- (a) public service contracts,
- (b) public works contracts, and
- (c) public supply contracts which cover in addition services or siting and installation operations,

legal persons may be required to indicate, in the tender or the request to participate, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract in question.

#### *Groups of economic operators*

(3) Groups of economic operators, including temporary associations, may participate in procurement procedures and shall not be required by contracting authorities to have a specific legal form in order to submit a tender or a request to participate.

(4) Where necessary, contracting authorities may clarify in the procurement documents how groups of economic operators are to meet the requirements as to economic and financial standing or technical and professional ability referred to in regulation 58 provided that this is justified by objective reasons and is proportionate.

(5) Any conditions for the performance of a contract by such groups of economic operators which are different from those imposed on individual participants shall also be justified by objective reasons and shall be proportionate.

(6) Contracting authorities may require groups of economic operators to assume a specific legal form once they have been awarded the contract, to the extent that such a change is necessary for the satisfactory performance of the contract.

### **Reserved contracts**

**20.**—(1) Contracting authorities may—

- (a) reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons, or
- (b) provide for such contracts to be performed in the context of sheltered employment programmes,

provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.

(2) In such cases, the call for competition shall make reference to Article 20 of the Public Contracts Directive.

### **Confidentiality**

**21.**—(1) A contracting authority shall not disclose information which has been forwarded to it by an economic operator and designated by that economic operator as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.

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

- (a) any other provision of this Part, including the obligations relating to the advertising of awarded contracts and the provision of information to candidates and tenderers set out in regulations 50 and 55 respectively;
- (b) the Freedom of Information Act 2000(a);
- (c) any other requirement, or permission, for the disclosure of information that is applicable under the law of England and Wales or, as the case may be, Northern Ireland.

(3) Contracting authorities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure.

### **Rules applicable to communication**

#### *General principles about the use of electronic and non-electronic means of communication*

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(a) 2000 c.36.

22.—(1) Subject to paragraphs (3), (5), (8) and (10), all communication and information exchange under this Part, including electronic submission, shall be performed using electronic means of communication in accordance with the requirements of this regulation.

(2) Subject to paragraph (13), the tools and devices to be used for communicating by electronic means, and their technical characteristics, shall be non-discriminatory, generally available and interoperable with the information and communication technology products in general use and shall not restrict economic operators' access to the procurement procedure.

(3) Contracting authorities are not obliged to require electronic means of communication in the submission process in the following situations:—

- (a) due to the specialised nature of the procurement, the use of electronic means of communication would require specific tools, devices or file formats that are not generally available or supported by generally available applications;
- (b) the applications supporting file formats that are suitable for the description of the tenders use file formats that cannot be handled by any other open or generally available applications or are under a proprietary licensing scheme and cannot be made available for downloading or remote use by the contracting authority;
- (c) the use of electronic means of communication would require specialised office equipment that is not generally available to contracting authorities; or
- (d) the procurement documents require the submission of physical or scale models which cannot be transmitted using electronic means.

(4) Where, in accordance with paragraph (3), electronic means of communication are not used, communication shall be carried out—

- (a) by post or by other suitable carrier, or
- (b) by a combination of post or other suitable carrier and electronic means.

(5) Contracting authorities are not obliged to require electronic means of communication in the submission process to the extent that the use of means of communication other than electronic means is necessary either—

- (a) because of a breach of security of the electronic means of communication, or
- (b) for the protection of information of a particularly sensitive nature requiring such a high level of protection that it cannot be properly ensured by using electronic tools and devices that are either generally available to economic operators or can be made available to them by alternative means of access within the meaning of paragraph (14).

(6) Where contracting authorities require, in accordance with paragraph (3), means of communication other than electronic means in the submission process, they shall indicate in the report referred to in regulation 84(1) the reasons for that requirement.

(7) Where applicable, contracting authorities shall indicate in that report the reasons why use of means of communication other than electronic means has been considered necessary in accordance with paragraph (5).

(8) Oral communication may be used in respect of communications other than those concerning the essential elements of a procurement procedure, provided that the content of the oral communication is documented to a sufficient degree.

(9) For that purpose, the essential elements of a procurement procedure include the procurement documents, requests to participate, confirmations of interest and tenders.

(10) In particular, oral communications with tenderers which could have a substantial impact on the content and assessment of the tenders shall be documented to a sufficient extent and by appropriate means, such as written or audio records or summaries of the main elements of the communication.

(11) In all communication, exchange and storage of information, contracting authorities shall ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved.

(12) Contracting authorities shall examine the content of tenders and requests to participate only after the time limit set for submitting them has expired.

*Use of tools and devices not generally available*

(13) Contracting authorities may, where necessary, require the use of tools and devices which are not generally available, provided that the contracting authorities offer suitable alternative means of access.

(14) Contracting authorities shall be deemed to offer suitable alternative means of access where they do any of the following:—

- (a) offer unrestricted and full direct access free of charge by electronic means to the tools and devices concerned from the date of publication of the call for competition or from the date when the invitation to confirm interest is sent;
- (b) ensure that tenderers having no access to the tools and devices concerned, or no possibility of obtaining them within the relevant time limits, provided that the lack of access is not attributable to the tenderer concerned, may access the procurement procedure through the use of provisional tokens made available free of charge online; or
- (c) support an alternative channel for electronic submission of tenders.

(15) For the purposes of paragraph (14)(a)—

- (a) “publication of the call for competition” means whichever of the following is relevant (and where both are relevant, the earliest of them):—
  - (i) its publication in the Official Journal after being sent in accordance with regulation 51;
  - (ii) its publication on a buyer profile in accordance with regulation 52; and
- (b) the text of the call for competition notice or the invitation to confirm interest shall specify the internet address at which the tools and devices are accessible.

*Technical etc requirements for tools and devices*

(16) Tools and devices for the electronic receipt of tenders, requests to participate and, in design contests, plans and projects, must at least guarantee, through technical means and appropriate procedures, that—

- (a) the exact time and date of the receipt of tenders, requests to participate and the submission of plans and projects can be determined precisely;
- (b) it may be reasonably ensured that, before the time referred to in paragraph (12), no-one can have access to data transmitted under the requirements in this paragraph;
- (c) only authorised persons may set or change the dates for opening data received;
- (d) during the different stages of the procurement procedure, access to all data submitted, or to part of such data, must be possible only for authorised persons;
- (e) only authorised persons may give access to data transmitted and only after the time referred to in paragraph (12);
- (f) data received and opened in accordance with the requirements in sub-paragraphs (a) to (e) must remain accessible only to persons authorised to acquaint themselves with the data;
- (g) it must be reasonably ensured that any infringement, or attempted infringement, of the access prohibitions or conditions referred to in sub-paragraphs (b) to (f) are clearly detectable.

(17) In addition to those requirements, the following rules apply to tools and devices for the electronic transmission and receipt of tenders and for the electronic receipt of requests to participate:—

- (a) information on specifications for the electronic submission of tenders and requests to participate, including encryption and time-stamping, shall be available to interested parties;
- (b) contracting authorities shall, acting in accordance with paragraphs (18) and (19), specify the level of security required for the electronic means of communication in the various

stages of the specific procurement procedure, and that level shall be proportionate to the risks attached;

- (c) where contracting authorities conclude that the level of risk, assessed in accordance with paragraphs (18) and (19), is such that advanced electronic signatures as defined by Directive 1999/93/EC of the European Parliament and of the Council<sup>(a)</sup> as amended from time to time are required, contracting authorities shall accept advanced electronic signatures supported by a qualified certificate, taking into account whether the certificate is provided by a certificate services provider which is on a trusted list provided for in Commission Decision 2009/767/EC<sup>(b)</sup> as amended from time to time, created with or without a secure signature creation device, subject to compliance with the following conditions:—
- (i) (aa) the contracting authorities shall establish the required advanced signature format on the basis of formats established in Commission Decision 2011/130/EU<sup>(c)</sup> as amended from time to time and put in place necessary measures to be able to process these formats technically;
  - (bb) in case a different format of electronic signature is used, the electronic signature or the electronic document carrier shall include information on existing validation possibilities;
  - (cc) the validation possibilities shall allow the contracting authority to validate online, free of charge and in a way that is understandable for non-native speakers, the received electronic signature as an advanced electronic signature supported by a qualified certificate;
- (ii) where a tender is signed with the support of a qualified certificate that is included on a trusted list, contracting authorities must not apply additional requirements that may hinder the use of those signatures by tenderers.

#### *Security requirements*

(18) In deciding the level of security required at each stage of a procurement procedure, and in concluding whether the level of risk is such that advanced electronic signatures are required, contracting authorities shall assess the risks having regard to both the likelihood that particular risks will materialise and the potential adverse consequences if those risks materialise.

(19) In doing so, contracting authorities shall, in particular, have regard to such of the following matters as are relevant:—

- (a) the risk to the proper functioning and integrity of the specific procurement process, including risks of breach of this Part;
- (b) risks to national security;
- (c) the risk of inadvertent or unauthorised disclosure of, or access to, any economic operator's confidential information;
- (d) the risk of inadvertent or unauthorised disclosure of, or access to, information held by the contracting authority including information relating to the specific procurement;
- (e) the risk that use of electronic communications could provide opportunity for malicious attacks on the electronic systems of, or data held by, the authority, any economic operator or any other person, including introduction of malware or denial of service attacks;
- (f) other material risks relating to the procurement procedure in question;
- (g) the need for consistency as between similar procurements performed by the same contracting authority;
- (h) the need for proportionality between, on the one hand the expected benefits of any particular security requirements (in terms of eliminating or reducing any of the risks

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(a) OJ No L 13, 19.1.2000, p12, amended by Regulation (EC) No 1137/2008 (OJ No L 311, 21.11.2008, p1).

(b) OJ L 274, 20.10.2009, p36, last amended by Commission Decision 2013/662/EU (OJ No L 306, 16.11.2013, p21).

(c) OJ L 53, 26.2.2011, p66, amended by Commission Implementing Decision 2014/148/EU (OJ No L 80, 19.3.2014, p7).



referred to in sub-paragraphs (a) to (g)), and on the other hand the costs, burdens and obligations which those requirements may impose on economic operators.

#### *Electronic signatures*

(20) Paragraph (21) applies where—

- (a) a competent authority of the United Kingdom located in England and Wales or Northern Ireland, or
- (b) another issuing entity so located,

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

(21) The competent authority or issuing entity may establish the required advanced signature format in accordance with the requirements set out in Article 1(2) of Commission Decision 2011/130/EU and, where it does so—

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

#### **Nomenclatures**

**23.** Any references to nomenclatures in the context of public procurement shall be made using the CPV.

#### **Conflicts of interest**

**24.—(1)** Contracting authorities shall take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.

(2) For the purposes of paragraph (1), the concept of conflicts of interest shall at least cover any situation where relevant staff members have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

(3) In paragraph (2)—

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

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

## CHAPTER 2

### RULES ON PUBLIC CONTRACTS

#### SECTION 3

##### *Procedures*

#### **Conditions relating to the GPA and other international agreements**

**25.** In so far as they are covered by Annexes 1, 2 and 4 to 7 and the General Notes to the EU’s Appendix 1 to the GPA and by the other international agreements by which the EU is bound, contracting authorities shall accord to the works, supplies, services and economic operators of the

signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the EU.

## **Choice of procedures**

### *General*

**26.**—(1) When awarding public contracts, contracting authorities shall apply procedures that conform to this Part.

(2) Such contracts may be awarded only if a call for competition has been published in accordance with this Part and the Public Contracts Directive, except where regulation 32 permits contracting authorities to apply a negotiated procedure without prior publication.

(3) Contracting authorities may apply—

- (a) open or restricted procedures as regulated by this Part;
- (b) innovation partnerships as regulated by this Part.

(4) Contracting authorities may apply a competitive procedure with negotiation or a competitive dialogue in the following situations:—

- (a) with regard to works, supplies or services fulfilling one or more of the following criteria:—
  - (i) the needs of the contracting authority cannot be met without adaptation of readily available solutions;
  - (ii) they include design or innovative solutions;
  - (iii) the contract cannot be awarded without prior negotiation because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of risks attaching to them;
  - (iv) the technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, European Technical Assessment, common technical specification or technical reference;
- (b) with regard to works, supplies or services where, in response to an open or a restricted procedure, only irregular or unacceptable tenders are submitted.

### *Irregular and unacceptable tenders*

(5) Where paragraph (4)(b) applies, contracting authorities are not required to publish a contract notice where they include in the procedure all of, and only, the tenderers which satisfy the criteria set out in regulations 57 to 64 and which, during the prior open or restricted procedure, submitted tenders in accordance with the formal requirements of the procurement procedure.

(6) In particular, tenders—

- (a) which do not comply with the procurement documents,
- (b) which were received late,
- (c) where there is evidence of collusion or corruption, or
- (d) which have been found by the contracting authority to be abnormally low,

shall be considered irregular for the purposes of paragraph (4)(b).

(7) In particular,—

- (a) tenders submitted by tenderers which do not have the required qualifications, and
- (b) tenders whose price exceeds the contracting authority's budget as determined and documented prior to the launching of the procurement procedure,

shall be considered unacceptable for the purposes of paragraph (4)(b).

### *Calling for competition etc*

(8) Subject to paragraph (9), the call for competition shall be made by means of a contract notice in accordance with regulation 49.

(9) Where the contract is awarded by restricted procedure or competitive procedure with negotiation, sub-central contracting authorities may make the call for competition by means of a prior information notice in accordance with regulation 48(5) to (7).

(10) Where the call for competition is made by means of such a prior information notice, economic operators which have expressed their interest following the publication of the prior information notice shall subsequently be invited to confirm their interest in writing by means of an invitation to confirm interest in accordance with regulation 54.

### **Open procedure**

**27.**—(1) In open procedures, any interested economic operator may submit a tender in response to a contract notice.

(2) The minimum time limit for the receipt of tenders shall, subject to paragraphs (4) to (6), be 35 days from the date on which the contract notice is sent.

(3) The tender shall be accompanied by the information for qualitative selection that is requested by the contracting authority.

(4) Where contracting authorities have published a prior information notice which was not itself used as a means of calling for competition, the minimum time limit for the receipt of tenders as laid down in paragraph (2) may be shortened to 15 days, provided that both of the following conditions are fulfilled:—

- (a) the prior information notice included all the information required for the contract notice in section I of part B of Annex V to the Public Contracts Directive insofar as that information was available at the time the prior information notice was published;
- (b) the prior information notice was sent for publication between 35 days and 12 months before the date on which the contract notice was sent.

(5) Where a state of urgency duly substantiated by the contracting authority renders impracticable the time limit laid down in paragraph (2), it may fix a time limit which shall be not less than 15 days from the date on which the contract notice is sent.

(6) The contracting authority may reduce by 5 days the time limit for receipt of tenders set out in paragraph (2) where it accepts that tenders may be submitted by electronic means in accordance with regulation 22.

### **Restricted procedure**

**28.**—(1) In restricted procedures, any economic operator may submit a request to participate in response to a call for competition by providing the information for qualitative selection that is requested by the contracting authority.

(2) The minimum time limit for receipt of requests to participate shall, subject to paragraph (10), be 30 days from the date on which—

- (a) the contract notice is sent, or
- (b) where a prior information notice is used as a means of calling for competition, the invitation to confirm interest is sent.

(3) Only those economic operators invited to do so by the contracting authority following its assessment of the information provided may submit a tender.

(4) Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 65.

(5) The minimum time limit for the receipt of tenders shall, subject to paragraphs (6) to (10), be 30 days from the date on which the invitation to tender is sent.

(6) Where contracting authorities have published a prior information notice which was not itself used as a means of calling for competition, the minimum time limit for the receipt of tenders as laid down in paragraph (5) may be shortened to 10 days, provided that both of the following conditions are fulfilled:—

- (a) the prior information notice included all the information required in section I of part B of Annex V to the Public Contracts Directive, insofar as that information was available at the time the prior information notice was published;
- (b) the prior information notice was sent for publication between 35 days and 12 months before the date on which the contract notice was sent.

(7) Sub-central contracting authorities may set the time limit for the receipt of tenders by mutual agreement between the contracting authority and all selected candidates, provided that all selected candidates have the same time to prepare and submit their tenders.

(8) In the absence of such an agreement, the time limit shall be at least 10 days from the date on which the invitation to tender is sent.

(9) The time limit for receipt of tenders provided for by paragraph (5) may be reduced by 5 days where the contracting authority accepts that tenders may be submitted by electronic means in accordance with regulation 22.

(10) Where a state of urgency duly substantiated by the contracting authorities renders impracticable the time limits laid down in this regulation, they may fix—

- (a) a time limit for the receipt of requests to participate which shall not be less than 15 days from the date on which the contract notice is sent, and
- (b) a time limit for the receipt of tenders which shall not be less than 10 days from the date on which the invitation to tender is sent.

## **Competitive procedure with negotiation**

### *Starting the procedure*

**29.—**(1) In competitive procedures with negotiation, any economic operator may submit a request to participate in response to a call for competition by providing the information for qualitative selection that is requested by the contracting authority.

(2) In the procurement documents, contracting authorities shall—

- (a) identify the subject-matter of the procurement by providing a description of their needs and the characteristics required of the supplies, works or services to be procured,
- (b) indicate which elements of the description define the minimum requirements to be met by all tenders, and
- (c) specify the contract award criteria.

(3) The information provided under paragraph (2) shall be sufficiently precise to enable economic operators to identify the nature and scope of the procurement and decide whether to request to participate in the procedure.

### *Time limits*

(4) The minimum time limit for receipt of requests to participate shall, subject to paragraph (6), be 30 days from—

- (a) the date on which the contract notice is sent, or
- (b) where a prior information notice is used as a means of calling for competition, the date on which the invitation to confirm interest is sent.

(5) The minimum time limit for the receipt of initial tenders shall, subject to paragraphs (6) to (10), be 30 days from the date on which the invitation is sent.

(6) Where contracting authorities have published a prior information notice which was not itself used as a means of calling for competition, the minimum time limit for the receipt of initial tenders as laid down in paragraph (5) may be shortened to 10 days, provided that both of the following conditions are fulfilled:—

- (a) the prior information notice included all the information required in section 1 of part B of Annex V to the Public Contracts Directive, insofar as that information was available at the time the prior information notice was published;

(b) the prior information notice was sent for publication between 35 days and 12 months before the date on which the contract notice was sent.

(7) Sub-central contracting authorities may set the time limit for the receipt of initial tenders by mutual agreement between the contracting authority and all selected candidates, provided that all selected candidates have the same time to prepare and submit their tenders.

(8) In the absence of such an agreement, the time limit shall be at least 10 days from the date on which the invitation to tender is sent.

(9) The time limit for receipt of initial tenders provided for by paragraph (5) may be reduced by 5 days where the contracting authority accepts that tenders may be submitted by electronic means in accordance with regulation 22.

(10) Where a state of urgency duly substantiated by the contracting authorities renders impracticable the time limits laid down in this regulation, they may fix—

- (a) a time limit for the receipt of requests to participate which shall not be less than 15 days from the date on which the contract notice is sent, and
- (b) a time limit for the receipt of initial tenders which shall not be less than 10 days from the date on which the invitation to tender is sent.

#### *Tenders and negotiations*

(11) Only those economic operators invited by the contracting authority following its assessment of the information provided may submit an initial tender which shall be the basis for the subsequent negotiations.

(12) Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 65.

(13) Subject to paragraphs (15) and (19), contracting authorities shall negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve their content.

(14) The minimum requirements and the award criteria shall not be subject to negotiation.

(15) Contracting authorities may award contracts on the basis of the initial tenders without negotiation where they have indicated, in the contract notice or in the invitation to confirm interest, that they reserve the possibility of doing so.

(16) During the negotiations, contracting authorities shall ensure equal treatment of all tenderers and, to that end —

- (a) they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others;
- (b) they shall inform all tenderers whose tenders have not been eliminated under paragraph (19), in writing, of any changes to the technical specifications or other procurement documents, other than those setting out the minimum requirements; and
- (c) following any such changes, they shall provide sufficient time for tenderers to modify and re-submit amended tenders, as appropriate.

(17) In accordance with regulation 21, contracting authorities shall not reveal to the other participants confidential information communicated by a candidate or tenderer participating in the negotiations without its agreement.

(18) Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

(19) Competitive procedures with negotiation may take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria specified in the contract notice, in the invitation to confirm interest or in another procurement document.

(20) In the contract notice, the invitation to confirm interest or in another procurement document, the contracting authority shall indicate whether it will use the option described in paragraph (19).

### *Concluding the procedure*

- (21) Where the contracting authority intends to conclude the negotiations, it shall—
- (a) inform the remaining tenderers and set a common deadline to submit any new or revised tenders,
  - (b) verify that the final tenders are in conformity with the minimum requirements and comply with regulation 56(1),
  - (c) assess the final tenders on the basis of the award criteria, and
  - (d) award the contract in accordance with regulations 66 to 69.

## **Competitive dialogue**

### *General and selection of participants*

**30.**—(1) In competitive dialogues, any economic operator may submit a request to participate in response to a contract notice by providing the information for qualitative selection that is requested by the contracting authority.

(2) The minimum time limit for receipt of requests to participate shall be 30 days from the date on which the contract notice is sent.

(3) Only those economic operators invited by the contracting authority following the assessment of the information provided may participate in the dialogue.

(4) Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 65.

(5) The contract shall be awarded on the sole basis of the award criterion of the best price-quality ratio in accordance with regulation 67.

(6) Contracting authorities shall set out their needs and requirements in the contract notice and they shall define those needs and requirements in that notice or in a descriptive document, or in both.

(7) At the same time and in the same documents, contracting authorities shall also set out and define the chosen award criteria and set out an indicative timeframe.

### *Conduct of the dialogue*

(8) Contracting authorities—

- (a) shall open, with the participants selected in accordance with the relevant provisions of regulations 56 to 66, a dialogue the aim of which shall be to identify and define the means best suited to satisfying their needs, and
- (b) may discuss all aspects of the procurement with the chosen participants during this dialogue.

(9) During the dialogue, contracting authorities shall ensure equality of treatment among all participants and, to that end, they shall not provide information in a discriminatory manner which may give some participants an advantage over others.

(10) In accordance with regulation 21, contracting authorities shall not reveal to the other participants solutions proposed or other confidential information communicated by a candidate or tenderer participating in the dialogue without its agreement.

(11) Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

(12) Competitive dialogues may take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria laid down in the contract notice or in the descriptive document.

(13) In the contract notice or the descriptive document, the contracting authority shall indicate whether it will use the option described in paragraph (12).

(14) The contracting authority shall continue the dialogue until it can identify the solution or solutions which are capable of meeting its needs.

### *Final tenders*

(15) Having declared that the dialogue is concluded and having so informed the remaining participants, contracting authorities shall ask each of them to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue.

(16) Those tenders shall contain all the elements required and necessary for the performance of the project.

(17) Those tenders may be clarified, specified and optimised at the request of the contracting authority.

(18) But such clarifications, specification or optimisation, or any additional information, may not involve changes to the essential aspects of the tender or of the public procurement, including the needs and requirements set out in the contract notice or in the descriptive document, where variations to those aspects, needs and requirements are likely to distort competition or have a discriminatory effect.

(19) Contracting authorities shall assess the tenders received on the basis of the award criteria laid down in the contract notice or in the descriptive document.

(20) At the request of the contracting authority, negotiations with the tenderer identified as having submitted the tender presenting the best price-quality ratio in accordance with regulation 67 may be carried out to confirm financial commitments or other terms contained in the tender by finalising the terms of the contract, provided this—

- (a) does not have the effect of materially modifying essential aspects of the tender or of the public procurement, including the needs and requirements set out in the contract notice or in the descriptive document, and
- (b) does not risk distorting competition or causing discrimination.

### *Prizes and payments*

(21) Contracting authorities may specify prizes or payments to the participants in the dialogue.

## **Innovation partnership**

**31.**—(1) In innovation partnerships, any economic operator may submit a request to participate in response to a contract notice by providing the information for qualitative selection that is requested by the contracting authority.

(2) In the procurement documents, the contracting authority shall—

- (a) identify the need for an innovative product, service or works that cannot be met by purchasing products, services or works already available on the market, and
- (b) indicate which elements of this description define the minimum requirements to be met by all tenders.

(3) The information provided under paragraph (2) shall be sufficiently precise to enable economic operators to identify the nature and scope of the required solution and decide whether to request to participate in the procedure.

(4) The contracting authority may decide to set up the innovation partnership with one partner or with several partners conducting separate research and development activities.

(5) The minimum time limit for receipt of requests to participate shall be 30 days from the date on which the contract notice is sent.

(6) Only those economic operators invited by the contracting authority following the assessment of the information provided may participate in the procedure.

(7) Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 65.

(8) The contracts shall be awarded on the sole basis of the award criterion of the best price-quality ratio in accordance with regulation 67.

(9) The innovation partnership shall aim at the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works, provided that they

correspond to the performance levels and maximum costs agreed between the contracting authority and the participants.

(10) The innovation partnership shall be structured in successive phases following the sequence of steps in the research and innovation process, which may include the manufacturing of the products, the provision of the services or the completion of the works.

(11) The innovation partnership shall set intermediate targets to be attained by the partners and provide for payment of the remuneration in appropriate instalments.

(12) Based on those targets, the contracting authority may decide after each phase to—

- (a) terminate the innovation partnership, or
- (b) in the case of an innovation partnership with several partners, reduce the number of partners by terminating individual contracts,

provided that the contracting authority has indicated in the procurement documents those possibilities and the conditions for their use.

(13) Subject to the following provisions of this regulation, contracting authorities shall negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve their content.

(14) The minimum requirements and the award criteria shall not be subject to negotiation.

(15) During the negotiations, contracting authorities shall ensure equal treatment of all tenderers and, to that end—

- (a) they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others;
- (b) they shall inform all tenderers whose tenders have not been eliminated under paragraph (18), in writing, of any changes to the technical specifications or other procurement documents, other than those setting out the minimum requirements; and
- (c) following any such changes, contracting authorities shall provide sufficient time for tenderers to modify and re-submit amended tenders, as appropriate.

(16) In accordance with regulation 21, contracting authorities shall not reveal to the other participants confidential information communicated by a candidate or tenderer participating in the negotiations without its agreement.

(17) Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

(18) Negotiations during innovation partnership procedures may take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria specified in the contract notice, in the invitation to confirm interest or in another procurement document.

(19) In the contract notice, the invitation to confirm interest or in another procurement document, the contracting authority shall indicate whether it will use the option described in paragraph (18).

(20) In selecting candidates, contracting authorities shall in particular apply criteria concerning the candidates' capacity in the field of research and development and of developing and implementing innovative solutions.

(21) Only those economic operators invited by the contracting authority following its assessment of the requested information may submit research and innovation projects aimed at meeting the needs identified by the contracting authority that cannot be met by existing solutions.

(22) In the procurement documents, the contracting authority shall define the arrangements applicable to intellectual property rights.

(23) In the case of an innovation partnership with several partners, the contracting authority shall not, in accordance with regulation 21, reveal to the other partners solutions proposed or other confidential information communicated by a partner in the framework of the partnership without that partner's agreement.



(24) Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

(25) The contracting authority shall ensure that the structure of the partnership and, in particular, the duration and value of the different phases reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities required for the development of an innovative solution not yet available on the market.

(26) The estimated value of supplies, services or works shall not be disproportionate in relation to the investment required for their development.

### **Use of the negotiated procedure without prior publication**

**32.—**(1) In the specific cases and circumstances laid down in this regulation, contracting authorities may award public contracts by a negotiated procedure without prior publication.

#### *General grounds*

(2) The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:—

- (a) where no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Commission where it so requests;
- (b) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons:—
  - (i) the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance,
  - (ii) competition is absent for technical reasons,
  - (iii) the protection of exclusive rights, including intellectual property rights, but only, in the case of paragraphs (ii) and (iii), where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement;
- (c) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with.

(3) For the purposes of paragraph (2)(a)—

- (a) a tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority's needs and requirements as specified in the procurement documents;
- (b) a request to participate shall be considered not to be suitable where the economic operator concerned—
  - (i) is to be or may be excluded under regulation 57, or
  - (ii) does not meet the selection criteria.

(4) For the purposes of paragraph (2)(c), the circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority.

#### *Additional grounds relevant to public supply contracts*

(5) The negotiated procedure without prior publication may be used for public supply contracts—

- (a) where the products involved are manufactured purely for the purpose of research, experimentation, study or development, but contracts awarded in reliance on this subparagraph shall not include quantity production to establish commercial viability or to recover research and development costs;

- (b) for additional deliveries by the original supplier which are intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire supplies having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance;
- (c) for supplies quoted and purchased on a commodity market;
- (d) for the purchase of supplies or services on particularly advantageous terms, from either a supplier which is definitively winding up its business activities, or the liquidator in an insolvency procedure, an arrangement with creditors, or a similar procedure under national laws or regulations.

(6) In the case of paragraph (5)(b), the duration of the contract, as well as that of recurrent contracts, shall not, save in exceptional circumstances, exceed 3 years.

*Additional ground relevant to public service contracts that follow a design contest*

(7) The negotiated procedure without prior publication may be used for public service contracts where the contract concerned—

- (a) follows a design contest organised in accordance with this Part, and
- (b) is to be awarded, under the rules provided for in the design contest, to—
  - (i) the winner of the design contest, or
  - (ii) one of the winners of the design contest.

(8) Where paragraph (7)(b)(ii) applies, all winners must be invited to participate in the negotiation.

*Additional ground relevant to new works or services which repeat similar ones*

(9) The negotiated procedure without prior publication may be used for new works and services consisting of the repetition of similar works or services entrusted to the economic operator to which the same contracting authority awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded following a procedure in accordance with regulation 26(1) and (2).

(10) The basic project shall indicate the extent of possible additional works or services and the conditions under which they will be awarded.

(11) As soon as the first project is put up for tender, the possible use of this procedure shall be disclosed and the total estimated cost of subsequent works or services shall be taken into consideration by the contracting authority when it applies regulation 5.

(12) This procedure may be used only during the 3 years following the conclusion of the original contract.

## SECTION 4

### *Techniques and Instruments for Electronic and Aggregated Procurement*

#### **Framework agreements**

**33.**—(1) Contracting authorities may conclude framework agreements, provided that they apply the procedures provided for in this Part.

(2) In these regulations, “framework agreement” means an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

(3) The term of a framework agreement shall not exceed 4 years, save in exceptional cases duly justified, in particular by the subject-matter of the framework agreement.

(4) Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in this regulation.

(5) Those procedures may be applied only between those contracting authorities clearly identified for that purpose in the call for competition or the invitation to confirm interest and those economic operators party to the framework agreement as concluded.

(6) Contracts based on a framework agreement may under no circumstances entail substantial modifications to the terms laid down in that framework agreement, in particular in the case referred to in paragraph (7).

*Awarding contracts based on a framework agreement*

(7) Where a framework agreement is concluded with a single economic operator—

- (a) contracts based on that agreement shall be awarded within the limits laid down in the framework agreement; and
- (b) for the award of those contracts, contracting authorities may consult the economic operator which is party to the framework agreement in writing, requesting it to supplement its tender as necessary.

(8) Where a framework agreement is concluded with more than one economic operator, that framework agreement shall be performed in one of the following ways:—

- (a) following the terms and conditions of the framework agreement, without reopening competition, where it sets out—
  - (i) all the terms governing the provision of the works, services and supplies concerned, and
  - (ii) the objective conditions for determining which of the economic operators that are party to the framework agreement shall perform them, which conditions shall be indicated in the procurement documents for the framework agreement;
- (b) where the framework agreement sets out all the terms governing the provision of the works, services and supplies concerned—
  - (i) partly without reopening competition in accordance with sub-paragraph (a), and
  - (ii) partly through reopening competition amongst the economic operators which are party to the framework agreement,

where this possibility has been stipulated by the contracting authorities in the procurement documents for the framework agreement;

- (c) where not all the terms governing the provision of the works, services and supplies concerned are laid down in the framework agreement, through reopening competition amongst the economic operators which are party to the framework agreement.

(9) For the purposes of paragraph (8)(b)—

- (a) the choice of whether specific works, supplies or services shall be acquired following a reopening of competition or directly on the terms set out in the framework agreement shall be made pursuant to objective criteria, which shall be set out in the procurement documents for the framework agreement;
- (b) those procurement documents shall also specify which terms may be subject to reopening of competition.

(10) The possibilities provided for in paragraph (8)(b) shall also apply to any lot of a framework agreement for which all the terms governing the provision of the works, services and supplies concerned are set out in the framework agreement, regardless of whether all the terms governing the provision of the works, services and supplies concerned under other lots have been set out.

(11) The competitions referred to in paragraph (8)(b) and (c) shall be based on the same terms as applied for the award of the framework agreement and, where necessary, more precisely formulated terms and, where appropriate, other terms referred to in the procurement documents for the framework agreement, in accordance with the following procedure:—

- (a) for every contract to be awarded, contracting authorities shall consult in writing the economic operators capable of performing the contract;

- (b) contracting authorities shall fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject-matter of the contract and the time needed to send in tenders;
- (c) tenders shall be submitted in writing, and their content shall not be opened until the stipulated time limit for reply has expired;
- (d) contracting authorities shall award each contract to the tenderer that has submitted the best tender on the basis of the award criteria set out in the procurement documents for the framework agreement.

## **Dynamic purchasing systems**

### *General features*

**34.**—(1) Contracting authorities may use a dynamic purchasing system for commonly used purchases the characteristics of which, as generally available on the market, meet their requirements.

(2) The dynamic purchasing system shall be operated as a completely electronic process, and shall be open throughout the period of validity of the purchasing system to any economic operator that satisfies the selection criteria.

(3) The dynamic purchasing system may be divided into categories of products, works or services that are objectively defined on the basis of characteristics of the procurement to be undertaken under the category concerned.

(4) Such characteristics may include reference to the maximum allowable size of the subsequent specific contracts or to a specific geographic area in which subsequent specific contracts will be performed.

(5) In order to procure under a dynamic purchasing system, contracting authorities shall follow the rules of the restricted procedure, subject to the following provisions of this regulation.

(6) All the candidates satisfying the selection criteria shall be admitted to the system, and the number of candidates to be admitted to the system shall not be limited in accordance with regulations 28(4) and 65.

(7) Where contracting authorities have divided the system into categories of products, works or services in accordance with paragraph (3), they shall specify the applicable selection criteria for each category.

### *Time limits*

(8) The following provisions about time limits shall apply instead of those provided for in regulation 28(2) and (5) to (10).

(9) The minimum time limit for receipt of requests to participate shall be 30 days from the date on which—

- (a) the contract notice is sent, or
- (b) where a prior information notice is used as a means of calling for competition, the invitation to confirm interest is sent.

(10) No further time limits for receipt of requests to participate shall apply once the invitation to tender for the first specific procurement under the dynamic purchasing system has been sent.

(11) The minimum time limit for receipt of tenders shall, subject to paragraph (12), be at least 10 days from the date on which the invitation to tender is sent.

(12) Sub-central contracting authorities may set the time limit for the receipt of tenders by mutual agreement between the contracting authority and all selected candidates, provided that all selected candidates have the same time to prepare and submit their tenders.

### *Requirement to use electronic communication*

(13) All communications in the context of a dynamic purchasing system shall only be made by electronic means in accordance with regulation 22(1) to (7) and (11) to (20).

*The call for competition etc*

(14) For the purposes of awarding contracts under a dynamic purchasing system, contracting authorities shall—

- (a) publish a call for competition making it clear that a dynamic purchasing system is involved;
- (b) indicate in the procurement documents at least the nature and estimated quantity of the purchases envisaged, as well as all the necessary information concerning the dynamic purchasing system, including how the dynamic purchasing system operates, the electronic equipment used and the technical connection arrangements and specifications;
- (c) indicate in the procurement documents any division into categories of products, works or services and the characteristics defining them;
- (d) offer unrestricted and full direct access, as long as the system is valid, to the procurement documents in accordance with regulation 53.

*Requests to participate and their evaluation*

(15) Contracting authorities shall give any economic operator, throughout the entire period of validity of the dynamic purchasing system, the possibility of requesting to participate in the system under the conditions referred to in paragraphs (5) to (12).

(16) Contracting authorities shall finalise their evaluation of such requests in accordance with the selection criteria within 10 working days following their receipt.

(17) That period may be prolonged to 15 working days in individual cases where justified, in particular because of the need to examine additional documentation or to otherwise verify whether the selection criteria are met.

(18) Despite paragraphs (16) and (17), as long as the invitation to tender for the first specific procurement under the dynamic purchasing system has not been sent, contracting authorities may extend the evaluation period provided that no invitation to tender is issued during the extended evaluation period.

(19) Where contracting authorities intend to extend the evaluation period in accordance with paragraph (18), they shall indicate in the procurement documents the length of the extended period that they intend to apply.

(20) Contracting authorities shall inform the economic operator concerned at the earliest possible opportunity of whether or not it has been admitted to the dynamic purchasing system.

*Tendering and the award of the contract*

(21) Contracting authorities shall invite all admitted participants to submit a tender for each specific procurement under the dynamic purchasing system, in accordance with regulation 54.

(22) Where the dynamic purchasing system has been divided into categories of works, products or services, contracting authorities shall invite all participants having been admitted to the category corresponding to the specific procurement concerned to submit a tender.

(23) Contracting authorities shall award the contract to the tenderer that submitted the best tender on the basis of the award criteria set out in the contract notice for the dynamic purchasing system or in the invitation to confirm interest.

(24) Those criteria may, where appropriate, be formulated more precisely in the invitation to tender.

*Means of proof*

(25) Contracting authorities may, at any time during the period of validity of the dynamic purchasing system, require admitted participants to submit a renewed ESPD within 5 working days from the date on which that request is transmitted.

(26) Regulation 59(8) to (11) shall apply throughout the entire period of validity of the dynamic purchasing system.

*Period of validity of the system*

(27) Contracting authorities shall indicate the period of validity of the dynamic purchasing system in the call for competition.

(28) Contracting authorities shall notify the Commission of any change in the period of validity, using the following standard forms:—

- (a) where the period of validity is changed without terminating the system, the form used initially for the call for competition for the dynamic purchasing system;
- (b) where the system is terminated, a contract award notice under regulation 50.

*Charges*

(29) No charges may be billed, prior to or during the period of validity of the dynamic purchasing system, to the economic operators which are interested in or party to the dynamic purchasing system.

**Electronic auctions**

**35.**—(1) Contracting authorities may use electronic auctions, in which—

- (a) new prices, revised downwards, or
- (b) new values concerning certain elements of tenders,

or both, are presented.

(2) Contracting authorities shall structure the electronic auction as a repetitive electronic process, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.

*When electronic auctions may and may not be used*

(3) Public service contracts, and public works contracts, which have as their subject-matter intellectual performances (such as the design of works) which cannot be ranked using automatic evaluation methods, shall not be the subject of electronic auctions.

(4) In open or restricted procedures or competitive procedures with negotiation, contracting authorities may decide that the award of a public contract shall be preceded by an electronic auction when the content of the procurement documents, in particular the technical specifications, can be established with precision.

(5) In procurements where the content of the procurement documents, in particular the technical specifications, can be established with precision, an electronic auction may be held—

- (a) on the reopening of competition among the parties to a framework agreement as provided for in regulation 33(8)(b) or (c), and
- (b) on the opening for competition of contracts to be awarded under a dynamic purchasing system.

(6) The electronic auction shall be based on one of the following elements of the tenders:—

- (a) solely on prices where the contract is awarded on the basis of price only;
- (b) on prices or on the new values of the features of the tenders indicated in the procurement documents, or on both, where the contract is awarded—
  - (i) on the basis of the best price-quality ratio, or
  - (ii) to the tender with the lowest cost using a cost-effectiveness approach.

*Preliminary requirements*

(7) Contracting authorities which decide to hold an electronic auction shall state that fact in the contract notice or in the invitation to confirm interest.

(8) Where contracting authorities have decided to hold an electronic auction, the procurement documents shall include at least the following details:—

- (a) the features, the values for which will be the subject of electronic auction, provided that such features are quantifiable and can be expressed in figures or percentages;

- (b) any limits on the values which may be submitted, as they result from the specifications relating to the subject-matter of the contract;
- (c) the information which will be made available to tenderers in the course of the electronic auction and, where appropriate, when it will be made available to them;
- (d) the relevant information concerning the electronic auction process;
- (e) the conditions under which the tenderers will be able to bid and, in particular, the minimum differences which will, where appropriate, be required when bidding;
- (f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.

*Admissibility of tenders*

(9) Before proceeding with an electronic auction, contracting authorities shall make a full initial evaluation of the tenders in accordance with the award criteria and with the weighting fixed for them.

(10) A tender shall be considered admissible where—

- (a) it has been submitted by a tenderer which has not been excluded under regulation 57 and which meets the selection criteria; and
- (b) it is in conformity with the technical specifications without being irregular, unacceptable or unsuitable.

(11) In particular, tenders—

- (a) which do not comply with the procurement documents,
- (b) which were received late,
- (c) where there is evidence of collusion or corruption, or
- (d) which have been found by the contracting authority to be abnormally low,

shall be considered irregular for the purposes of paragraph (10)(b).

(12) In particular—

- (a) tenders submitted by tenderers which do not have the required qualifications, and
- (b) tenders whose price exceeds the contracting authority's budget as determined and documented prior to the launching of the procurement procedure,

shall be considered unacceptable for the purposes of paragraph (10)(b).

(13) For the purposes of paragraph (10)(b)—

- (a) a tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority's needs and requirements as specified in the procurement documents; and
- (b) a request to participate shall be considered not to be suitable where the economic operator concerned—
  - (i) is to be or may be excluded under regulation 57, or
  - (ii) does not meet the selection criteria.

*Commencement and structure of the auction*

(14) All tenderers that have submitted admissible tenders shall be invited simultaneously to participate in the electronic auction using, as of the date and time specified in the invitation, the connections in accordance with the instructions set out in the invitation.

(15) The electronic auction may take place in a number of successive phases.

(16) The electronic auction shall not start sooner than 2 working days after the date on which invitations are sent out.

(17) The invitation shall be accompanied by the outcome of a full evaluation of the relevant tender, carried out in accordance with the weighting provided for in regulation 67(9).

*The formula to be used*

(18) The invitation shall also state the mathematical formula to be used in the electronic auction to determine the automatic re-rankings on the basis of the new prices or new values submitted, or both.

(19) Except where the most economically advantageous offer is identified on the basis of price alone, that formula shall incorporate the weighting of all the criteria established to determine the most economically advantageous tender, as indicated in the notice used as a means of calling for competition or in other procurement documents.

(20) For the purposes of paragraph (19), any ranges of weightings shall be reduced beforehand to a specified value.

(21) Where variants are authorised in accordance with regulation 45, a separate formula shall be provided for each variant.

*Communication of information*

(22) Throughout each phase of an electronic auction the contracting authorities shall instantaneously communicate to all tenderers at least sufficient information to enable them to ascertain their relative rankings at any moment.

(23) Contracting authorities may, where this has been previously indicated, communicate other information concerning other prices or values submitted.

(24) Contracting authorities may also at any time announce the number of participants in the current phase of the auction.

(25) In no case, however, may contracting authorities disclose the identities of the tenderers during any phase of an electronic auction.

*Closing the auction and awarding the contract*

(26) Contracting authorities shall close an electronic auction in one or more of the following manners:—

- (a) at the previously indicated date and time;
- (b) when they receive no more new prices or new values which meet the requirements concerning minimum differences, provided that they have previously stated the time which they will allow to elapse after receiving the last submission before they close the electronic auction; or
- (c) when the previously indicated number of phases in the auction has been completed.

(27) Where contracting authorities intend to close an electronic auction in accordance with paragraph (26)(c), whether or not in combination with paragraph (26)(b), the invitation to take part in the auction shall indicate the timetable for each phase of the auction.

(28) After closing an electronic auction, contracting authorities shall award the contract in accordance with regulation 67 on the basis of the results of the electronic auction.

**Electronic catalogues**

*Generally*

**36.**—(1) Where the use of electronic means of communication is required, contracting authorities may require tenders to be presented in the format of an electronic catalogue or to include an electronic catalogue.

(2) Tenders presented in the form of an electronic catalogue may be accompanied by other documents, completing the tender.

(3) Electronic catalogues shall be established by the candidates or tenderers with a view to participating in a given procurement procedure in accordance with the technical specifications and format established by the contracting authority.



(4) Electronic catalogues shall also comply with the requirements for electronic communication tools set out in regulation 22 as well as with any additional requirements set by the contracting authority in accordance with that regulation.

(5) Where the presentation of tenders in the form of electronic catalogues is accepted or required, contracting authorities shall—

- (a) state so in the contract notice or in the invitation to confirm interest; and
- (b) indicate in the procurement documents all the necessary information relating to the matters covered by regulation 22(16) to (20) so far as they concern the format, the electronic equipment used and the technical connection arrangements and specifications for the catalogue.

#### *Framework agreements*

(6) Where a framework agreement has been concluded with more than one economic operator following the submission of tenders in the form of electronic catalogues, contracting authorities may provide that the reopening of competition for specific contracts is to take place on the basis of updated catalogues.

(7) In such a case, contracting authorities shall use one of the following methods:—

- (a) invite tenderers to resubmit their electronic catalogues, adapted to the requirements of the contract in question; or
- (b) notify tenderers that they intend to collect from the electronic catalogues which have already been submitted the information needed to constitute tenders adapted to the requirements of the contract in question, provided that the use of that method has been indicated in the procurement documents for the framework agreement.

(8) Where contracting authorities reopen competition for specific contracts in accordance with paragraph (7)(b), they shall—

- (a) notify tenderers of the date and time at which they intend to collect the information needed to constitute tenders adapted to the requirements of the specific contract in question; and
- (b) give tenderers the possibility to refuse such collection of information.

(9) Contracting authorities shall allow for an adequate period between the notification and the actual collection of information.

(10) Before awarding the contract, contracting authorities shall present the collected information to the tenderer concerned so as to give it the opportunity to contest or confirm that the tender thus constituted does not contain any material errors.

#### *Dynamic purchasing systems*

(11) Contracting authorities may award contracts based on a dynamic purchasing system by requiring that offers for a specific contract are to be presented in the format of an electronic catalogue.

(12) Contracting authorities may also award contracts based on a dynamic purchasing system in accordance with paragraphs (7)(b) and (8) to (10) provided that the request to participate in the dynamic purchasing system is accompanied by an electronic catalogue in accordance with the technical specifications and format established by the contracting authority.

(13) For the purposes of paragraph (12), the catalogue shall be completed subsequently by the candidates, when they are informed of the contracting authority's intention to constitute tenders by means of the procedure set out in paragraph (7)(b).

### **Centralised purchasing activities and central purchasing bodies**

**37.—**(1) Contracting authorities may acquire supplies or services, or both, from a central purchasing body offering the centralised purchasing activity referred to in paragraph (10)(a).

(2) Contracting authorities may acquire works, supplies and services, or any one or more of them, by—

- (a) using contracts awarded by a central purchasing body;
- (b) using dynamic purchasing systems operated by a central purchasing body; or
- (c) to the extent set out in regulation 33(5), by using a framework agreement concluded by a central purchasing body offering the centralised purchasing activity referred to in paragraph (10)(b).

(3) Where a dynamic purchasing system which is operated by a central purchasing body may be used by other contracting authorities, this shall be mentioned in the call for competition setting up that dynamic purchasing system.

(4) A contracting authority fulfils its obligations under this Part when it acquires supplies or services from a central purchasing body offering the centralised purchasing activity referred to in paragraph (10)(a).

(5) A contracting authority also fulfils its obligations under this Part where it acquires works, supplies or services by—

- (a) using contracts awarded by the central purchasing body;
- (b) using dynamic purchasing systems operated by the central purchasing body; or
- (c) to the extent set out in regulation 33(5), by using a framework agreement concluded by the central purchasing body offering the centralised purchasing activity referred to in paragraph (10)(b).

(6) However, the contracting authority concerned shall be responsible for fulfilling the obligations imposed by this Part in respect of any parts of the procedure that it conducts itself, such as—

- (a) awarding a contract under a dynamic purchasing system which is operated by a central purchasing body;
- (b) conducting a reopening of competition under a framework agreement that has been concluded by a central purchasing body;
- (c) determining, under regulation 33(8)(a) or (b), which of the economic operators, party to the framework agreement, shall perform a given task under a framework agreement that has been concluded by a central purchasing body.

(7) All procurement procedures conducted by a central purchasing body shall be performed using electronic means of communication, in accordance with the requirements set out in regulation 22.

(8) Contracting authorities may, without applying the procedures provided for in this Part, award a public service contract for the provision of centralised purchasing activities to a central purchasing body.

(9) Such public service contracts may also include the provision of ancillary purchasing activities.

(10) In these Regulations, “centralised purchasing activities” means activities conducted on a permanent basis in one of the following forms:—

- (a) the acquisition of supplies or services, or both, intended for contracting authorities;
- (b) the award of public contracts or the conclusion of framework agreements for works, supplies or services intended for contracting authorities.

### **Occasional joint procurement**

**38.—**(1) Two or more contracting authorities may agree to perform certain specific procurements jointly.

(2) Where the conduct of a procurement procedure in its entirety is carried out jointly in the name and on behalf of all the contracting authorities concerned, they shall be jointly responsible for fulfilling their obligations under this Part.

(3) Such joint responsibility applies also in cases where one contracting authority manages the procedure, acting on its own behalf and on the behalf of the other contracting authorities concerned.

(4) Where the conduct of a procurement procedure is not in its entirety carried out in the name and on behalf of the contracting authorities concerned—

- (a) they shall be jointly responsible only for those parts carried out jointly, and
- (b) each contracting authority shall have sole responsibility for fulfilling its obligations under this Part in respect of the parts it conducts in its own name and on its own behalf.

### **Procurement involving contracting authorities from other member States**

**39.**—(1) Without prejudice to regulation 12, contracting authorities may act jointly with contracting authorities from other member States in the award of public contracts by using one of the means provided for in this regulation.

(2) Contracting authorities shall not use the means provided for in this regulation for the purpose of avoiding the application of mandatory public law provisions in the law of the jurisdiction to which they are subject, where those provisions are in conformity with EU law.

#### *Centralised purchasing*

(3) Contracting authorities shall be free to use centralised purchasing activities offered by central purchasing bodies located in another member State.

(4) The provision of centralised purchasing activities by a central purchasing body located in another member State shall be conducted in accordance with the national provisions of the member State where the central purchasing body is located.

(5) The national provisions of the member State where the central purchasing body is located shall also apply to the following:—

- (a) the award of a contract under a dynamic purchasing system;
- (b) the conduct of a reopening of competition under a framework agreement;
- (c) the determination, for the purposes of points (a) or (b) of Article 33(4) of the Public Contracts Directive (to which effect is given in these Regulations by regulation 33(8)(a) and (b)), of which of the economic operators that are party to the framework agreement shall perform a given task.

#### *Joint procurement*

(6) In the circumstances set out in paragraph (7), contracting authorities may—

- (a) award a public contract, conclude a framework agreement or operate a dynamic purchasing system jointly with contracting authorities from other member States; and
- (b) to the extent set out in regulation 33(5), award contracts based on the framework agreement or on the dynamic purchasing system.

(7) The circumstances are that—

- (a) there is an agreement that determines—
  - (i) the responsibilities of the parties and the applicable national provisions, and
  - (ii) the internal organisation of the procurement procedure, including the management of the procedure, the distribution of the works, supplies or services to be procured, and the conclusion of contracts; and
- (b) the allocation of responsibilities and the applicable national law were referred to in the procurement documents.

(8) For the purposes of paragraph (7)(a)—

- (a) the agreement may be—
  - (i) an agreement made between the participating contracting authorities, or
  - (ii) an international agreement concluded between the member States concerned; and

(b) the agreement may have allocated specific responsibilities among the participating contracting authorities and determined the applicable provisions of the national laws of any of their respective member States.

(9) In procurements under paragraph (6)—

(a) the other provisions of this Part apply only where they are the applicable national provisions determined by an agreement referred to in paragraph (7)(a); and

(b) where provisions of this Part do apply, a contracting authority fulfils its obligations under this Part when it purchases works, supplies or services from a contracting authority which is responsible for the procurement procedure.

#### *Joint entities*

(10) Contracting authorities may, with contracting authorities from other member States, set up joint entities for the purposes of paragraph (1), subject to compliance with paragraph (11).

(11) This paragraph is complied with if, before undertaking any given procurement, the participating contracting authorities, by a decision of the competent body of the joint entity, have agreed on the applicable national procurement provisions of one of the following member States:—

(a) the member State where the joint entity has its registered office;

(b) the member State where the joint entity is carrying out its activities.

(12) The agreement may either apply for an undetermined period, when fixed in the constitutive act of the joint entity, or may be limited to a certain period of time, certain types of contracts or to one or more individual contract awards.

(13) The other provisions of this Part apply to procurement by the joint entity only where they are the national provisions applicable in accordance with paragraphs (11) and (12).

(14) In this regulation, “joint entity” includes European groupings of territorial cooperation established under Regulation (EC) No 1082/2006 of the European Parliament and of the Council(a) and other entities established under EU law.

#### *Meaning of certain expressions in relation to other member States*

(15) In this regulation—

“central purchasing body located in another member State” means any person which is a central purchasing body for the purposes of the Public Contracts Directive in the member State in which it is located;

“contracting authority from another member State” means any person which is a contracting authority for the purposes of the Public Contracts Directive in a member State other than the United Kingdom; and references to “participating contracting authorities” shall, to the extent that they are from another member State, be interpreted accordingly.

### SECTION 5

#### *Conduct of the Procedure*

##### SUB-SECTION 5

#### *Preparation*

### **Preliminary market consultations**

**40.**—(1) Before commencing a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements.

(2) For this purpose, contracting authorities may, for example, seek or accept advice from independent experts or authorities or from market participants.

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(a) OJ No L 210, 31.7.2006, p19, amended by Regulation (EU) No 1302/2013 of the European Parliament and of the Council (OJ No L 347, 20.12.2013, p303).

(3) Such advice may be used in the planning and conduct of the procurement procedure, provided that it does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.

#### **Prior involvement of candidates or tenderers**

**41.**—(1) Where a candidate or tenderer, or an undertaking related to a candidate or tenderer—

- (a) has advised the contracting authority, whether in the context of regulation 40 or not, or
- (b) has otherwise been involved in the preparation of the procurement procedure,

the contracting authority shall take appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer.

(2) Such measures shall include—

- (a) the communication to the other candidates and tenderers of relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure; and
- (b) the fixing of adequate time limits for the receipt of tenders.

(3) The candidate or tenderer concerned shall only be excluded from the procedure where there are no other means to ensure compliance with the duty to treat economic operators equally in accordance with regulation 18(1).

(4) Prior to any such exclusion, candidates or tenderers shall be given the opportunity to prove that their involvement in preparing the procurement procedure is not capable of distorting competition.

(5) The measures taken under this regulation shall be documented in the report referred to in regulation 84(1).

#### **Technical specifications**

**42.**—(1) The technical specifications shall be set out in the procurement documents.

##### *Scope of the technical specifications*

(2) The technical specifications shall lay down the characteristics required of works, services or supplies.

(3) In the case of a public works contract, the technical specifications shall define any characteristics required of a material, product or supply so that it fulfils the use for which it is intended by the contracting authority.

(4) The characteristics referred to in paragraph (3) may include—

- (a) levels of environmental and climate performance, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions and production processes and methods at any stage of the life cycle of the works;
- (b) rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve.

(5) In the case of public supply or service contracts, the required characteristics may include quality levels, environmental and climate performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods at any stage of the life cycle of the supply or service and conformity assessment procedures.

- (6) In the case of any public contract, the required characteristics may also refer to—
- (a) the specific process or method of production or provision of the requested works, supplies or services, or
  - (b) a specific process for another stage of its life cycle,

even where such factors do not form part of the characteristics' material substance provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.

(7) The technical specifications may also specify whether the transfer of intellectual property rights will be required.

*Formulating the technical specifications*

(8) For all procurement which is intended for use by natural persons, whether the general public or staff of the contracting authority, the technical specifications shall, except in duly justified cases, be drawn up so as to take into account accessibility criteria for disabled persons or design for all users.

(9) Where mandatory accessibility requirements are adopted by a legal act of the EU, technical specifications shall, as far as accessibility criteria for disabled persons or design for all users are concerned, be defined by reference thereto.

(10) Technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

(11) Without prejudice to mandatory national technical rules, to the extent that they are compatible with EU law, the technical specifications shall be formulated in one of the following ways:—

- (a) in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract;
- (b) by reference to technical specifications and, in order of preference, to—
  - (i) national standards transposing European standards,
  - (ii) European Technical Assessments,
  - (iii) common technical specifications,
  - (iv) international standards,
  - (v) other technical reference systems established by the European standardisation bodies, or
  - (vi) when none of the above exist, national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies,but each reference shall be accompanied by the words 'or equivalent';
- (c) in terms of performance or functional requirements as referred to in sub-paragraph (a), with reference to the technical specifications referred to in sub-paragraph (b) as a means of presuming conformity with such performance or functional requirements;
- (d) by reference to the technical specifications referred to in sub-paragraph (b) for certain characteristics, and by reference to the performance or functional requirements referred to in sub-paragraph (a) for other characteristics.

(12) Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products.

(13) But such reference is permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract in accordance with paragraph (11) is not possible, in which case the reference shall be accompanied by the words “or equivalent”.

*Applying the technical specifications*

(14) Where a contracting authority uses the option of referring to the technical specifications referred to in paragraph (11)(b), it shall not reject a tender on the grounds that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred, once the tenderer proves in its tender by any appropriate means, including the means of proof referred to in regulation 44, that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications.

(15) Where a contracting authority uses the option laid down in paragraph (11)(a) to formulate technical specifications in terms of performance or functional requirements, it shall not reject a tender for works, supplies or services which comply with a national standard transposing a European standard, a European technical approval, a common technical specification, an international standard or a technical reference system established by a European standardisation body, where those address the performance or functional requirements which it has laid down.

(16) In its tender, the tenderer shall prove by any appropriate means, including those referred to in regulation 44, that the work, supply or service in compliance with the standard meets the performance or functional requirements of the contracting authority.

## **Labels**

**43.—**(1) Where contracting authorities intend to purchase works, supplies or services with specific environmental, social or other characteristics they may, in the technical specifications, the award criteria or the contract performance conditions, require a specific label as means of proof that the works, services or supplies correspond to the required characteristics, provided that all of the following conditions are fulfilled:—

- (a) the label requirements only concern criteria which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract;
- (b) the label requirements are based on objectively verifiable and non-discriminatory criteria;
- (c) the labels are established in an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate;
- (d) the labels are accessible to all interested parties;
- (e) the label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.

(2) Where contracting authorities do not require the works, supplies or services to meet all of the label requirements, they shall indicate which label requirements are required.

(3) Contracting authorities requiring a specific label shall accept all labels that confirm that the works, supplies or services meet equivalent label requirements.

(4) Where an economic operator had demonstrably no possibility of obtaining the specific label indicated by the contracting authority, or an equivalent label, within the relevant time limits for reasons that are not attributable to that economic operator, the contracting authority shall accept other appropriate means of proof, which may include a technical dossier from the manufacturer, provided that the economic operator concerned proves that the works, supplies or services to be provided by it fulfil the requirements of the specific label or the specific requirements indicated by the contracting authority.

(5) Where a label fulfils the conditions mentioned in paragraph (1)(b), (c), (d) and (e) but also sets out requirements not linked to the subject-matter of the contract, contracting authorities shall not require the label as such but may define the technical specification by reference to those of the detailed specifications of that label, or, where necessary, parts of it, that are linked to the subject-matter of the contract and are appropriate to define characteristics of that subject-matter.

### **Test reports, certificates and other means of proof**

**44.**—(1) Contracting authorities may require that economic operators provide a test report from a conformity assessment body or a certificate issued by such a body as means of proof of conformity with requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

(2) Where contracting authorities require the submission of certificates drawn up by a specific conformity assessment body, certificates from equivalent other conformity assessment bodies shall also be accepted by the contracting authorities.

(3) In paragraphs (1) and (2), “conformity assessment body” means a body that performs conformity assessment activities including calibration, testing, certification and inspection accredited in accordance with Regulation (EC) No 765/2008 of the European Parliament and of the Council<sup>(a)</sup>.

(4) Contracting authorities shall accept appropriate means of proof other than those referred to in paragraphs (1) and (2), such as a technical dossier of the manufacturer, where the economic operator concerned had no access to the certificates or test reports referred to in paragraphs (1) and (2), or no possibility of obtaining them within the relevant time limits, provided that—

- (a) the lack of access is not attributable to the economic operator concerned, and
- (b) the economic operator concerned thereby proves that the works, supplies or services provided by it meet the requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

### **Variants**

**45.**—(1) Contracting authorities may authorise or require tenderers to submit variants.

(2) Contracting authorities shall indicate, in the contract notice or in the invitation to confirm interest, whether or not they authorise or require variants.

(3) Variants shall not be authorised or required without such an indication and shall be linked to the subject-matter of the contract.

(4) Contracting authorities authorising or requiring variants shall state in the procurement documents the minimum requirements to be met by the variants and any specific requirements for their presentation, in particular whether variants may be submitted only where a tender which is not a variant has also been submitted.

(5) Contracting authorities shall ensure that the chosen award criteria can be applied to variants meeting those minimum requirements as well as to conforming tenders which are not variants.

(6) Only variants meeting the minimum requirements laid down by the contracting authorities shall be taken into consideration.

(7) In procedures for awarding public supply or service contracts, contracting authorities that have authorised or required variants shall not reject a variant on the sole ground that it would, where successful, lead to either a public service contract rather than a public supply contract or a public supply contract rather than a public service contract.

### **Division of contracts into lots**

**46.**—(1) Contracting authorities may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots.

(2) Contracting authorities shall provide an indication of the main reasons for their decision not to subdivide into lots, which shall be included in the procurement documents or the report referred to in regulation 84(1).

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(a) OJ No L 218, 13.8.2008, p30.



(3) Contracting authorities shall indicate, in the contract notice or in the invitation to confirm interest, whether tenders may be submitted for one, for several or for all of the lots.

(4) Contracting authorities may, even where tenders may be submitted for several or all lots, limit the number of lots that may be awarded to one tenderer, provided that the maximum number of lots per tenderer is stated in the contract notice or in the invitation to confirm interest.

(5) Contracting authorities shall indicate in the procurement documents the objective and non-discriminatory criteria or rules they intend to apply for determining which lots will be awarded where the application of the award criteria would result in one tenderer being awarded more lots than the maximum number.

(6) Where more than one lot may be awarded to the same tenderer, contracting authorities may award contracts combining several or all lots where they have specified in the contract notice or in the invitation to confirm interest that they reserve the possibility of doing so and indicate the lots or groups of lots that may be combined.

### **Setting time limits**

**47.**—(1) When fixing the time limits for the receipt of tenders and requests to participate, contracting authorities shall take account of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set out in regulations 27 to 31.

(2) Where tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the procurement documents, the time limits for the receipt of tenders, which shall be longer than the minimum time limits set out in regulations 27 to 31, shall be fixed so that all economic operators concerned may be aware of all the information needed to produce tenders.

(3) Contracting authorities shall extend the time limits for the receipt of tenders so that all economic operators concerned may be aware of all the information needed to produce tenders in the following cases:—

- (a) where, for whatever reason, additional information, although requested by the economic operator in good time, is not supplied at the latest 6 days before the time limit fixed for the receipt of tenders;
- (b) where significant changes are made to the procurement documents.

(4) The length of the extension shall be proportionate to the importance of the information or change.

(5) In the case of an accelerated procedure, the period mentioned in paragraph (3)(a) shall be 4 days.

(6) Where additional information has either not been requested in good time or its importance with a view to preparing responsive tenders is insignificant, contracting authorities are not required to extend the time limits.

### SUB-SECTION 6

#### *Publication and transparency*

### **Prior information notices**

**48.**—(1) Contracting authorities may make known their intentions of planned procurements through the publication of a prior information notice.

(2) Such notices shall contain the information set out in section I of part B of Annex V to the Public Contracts Directive.

(3) A contracting authority wishing to publish a prior information notice shall—

- (a) send it for publication in accordance with regulation 51; or
- (b) publish it on the contracting authority's buyer profile in accordance with regulation 52.

(4) Where the prior information notice is published by the contracting authority on its buyer profile—

- (a) the prior information notice shall contain the information set out in part A of Annex V to the Public Contracts Directive, and
- (b) the contracting authority shall send for publication, in accordance with regulation 51, a notice of the publication on its buyer profile.

(5) Where sub-central contracting authorities use a prior information notice as a call for competition in accordance with regulation 26(9), the notice shall fulfil all of the following conditions:—

- (a) it refers specifically to the supplies, works or services that will be the subject-matter of the contract to be awarded;
- (b) it indicates that the contract will be awarded by restricted procedure or competitive procedure with negotiation without further publication of a call for competition and invites interested economic operators to express their interest;
- (c) it contains, in addition to the information set out in section 1 of part B of Annex V to the Public Contracts Directive, the information set out in section 2 of that part;
- (d) it has been sent for publication between 35 days and 12 months prior to the date on which an invitation is sent for the purposes of regulation 54(1) or (2).

(6) Where paragraph (5) applies, paragraph (3)(b) shall not apply to the notice, but additional publication at national level under regulation 52, if any, may be made on a buyer profile.

(7) The period covered by the prior information notice shall be a maximum of 12 months from the date on which the notice is transmitted for publication.

(8) In the case of public contracts for social and other specific services, the prior information notice referred to in regulation 75(1)(b) may cover a period which is longer than 12 months.

### **Contract notices**

**49.** Contract notices shall contain the information set out in part C of Annex 5 to the Public Contracts Directive and shall be sent for publication in accordance with regulation 51.

### **Contract award notices**

**50.—**(1) Not later than 30 days after the award of a contract or the conclusion of a framework agreement, following the decision to award or conclude it, contracting authorities shall send for publication a contract award notice on the results of the procurement procedure.

(2) Such notices shall contain the information set out in part D of Annex 5 to the Public Contracts Directive and shall be sent for publication in accordance with regulation 51.

(3) Where the call for competition for the contract concerned has been made in the form of a prior information notice and the contracting authority has decided that it will not award further contracts during the period covered by the prior information notice, the contract award notice shall contain a specific indication to that effect.

(4) In the case of framework agreements, contracting authorities shall not be bound to send a notice of the results of the procurement procedure for each contract based on such an agreement.

(5) In the case of dynamic purchasing systems, contracting authorities shall either—

- (a) send a contract award notice within 30 days after the award of each contract based on a dynamic purchasing system, or
- (b) group such notices on a quarterly basis, in which case they shall send the grouped notices within 30 days of the end of each quarter.

(6) Certain information on the award of the contract or the conclusion of the framework agreement may be withheld from publication where its release—

- (a) would impede law enforcement or would otherwise be contrary to the public interest,
- (b) would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or

- (c) might prejudice fair competition between economic operators.

### **Form and manner of sending notices for publication at EU level**

**51.**—(1) The notices required by regulations 48, 49, 50, 72, 75 and 79 to be sent for publication in accordance with this regulation shall be sent by electronic means to the EU Publications Office for publication.

(2) Contracting authorities shall ensure that they are able to supply proof of the dates on which notices are sent to the EU Publications Office for publication.

(3) Where the EU Publications Office has given the contracting authority confirmation of the receipt of the notice and of the publication of the information sent, indicating the date of that publication, that confirmation shall constitute proof of publication.

(4) Contracting authorities may send notices in respect of public contracts to the EU Publications Office for publication even where they are not required by this Part to do so, provided that the notices are sent by electronic means.

### **Publication at national level**

#### *Publication on buyer profiles*

**52.**—(1) In addition to the publication of the notices referred to in regulations 48, 49, 50, 75 and 79 by the EU Publications Office, contracting authorities may publish the information contained in them on the internet on a buyer profile.

(2) A buyer profile may also include (in addition to the prior information notices referred to in regulation 48(3)(b))—

- (a) information on ongoing invitations to tender, scheduled purchases, contracts concluded, procedures cancelled; and
- (b) any useful general information, such as a contact point, a telephone and a fax number, a postal address and an e-mail address.

#### *Timing and content of publication at national level*

(3) The notices referred to in regulations 48, 49, 50, 72 and 79, and the information contained in them, shall not be published at national level before they are published by the EU Publications Office.

(4) But publication may in any event take place at national level where contracting authorities have not been notified of the publication by the EU Publications Office within 48 hours after confirmation of the receipt of the notice in accordance with Article 51(5) of the Public Contracts Directive.

(5) Notices published at national level shall not contain information other than that contained in the notices sent to the EU Publications Office or published on a buyer profile, but shall indicate the date of sending of the notice to the EU Publications Office or its publication on the buyer profile.

(6) Where a prior information notice is to be published on a buyer profile for the purposes of regulation 48(3)(b)—

- (a) the prior information notice may not be so published before the notice referred to in regulation 48(4)(b) is sent to the EU Publications Office; and
- (b) the prior information notice shall indicate the date of that sending.

### **Electronic availability of procurement documents**

**53.**—(1) Contracting authorities shall, by means of the internet, offer unrestricted and full direct access free of charge to the procurement documents from the date of the publication in the Official Journal of a notice sent in accordance with regulation 51 or the date on which an invitation to confirm interest is sent.

(2) The text of the notice or the invitation to confirm interest shall specify the internet address at which the procurement documents are accessible.

(3) Where unrestricted and full direct access free of charge to certain procurement documents cannot be offered by means of the internet for one of the reasons set out in regulation 22(3), contracting authorities may indicate in the notice or the invitation to confirm interest that the procurement documents concerned will be transmitted by means other than the internet in accordance with paragraphs (6) and (7).

(4) Where unrestricted and full direct access free of charge to certain procurement documents cannot be offered by means of the internet because contracting authorities intend to apply regulation 21(3), contracting authorities shall indicate in the notice or the invitation to confirm interest which measures aimed at protecting the confidential nature of the information they require and how access can be obtained to the documents concerned.

(5) In the cases referred to in paragraphs (3) and (4), the time limit for the submission of tenders shall be prolonged by 5 days, except in the cases of duly substantiated urgency referred to in regulations 27(5), 28(10) and 29(10).

(6) Provided that it has been requested in good time, contracting authorities shall supply to all tenderers taking part in the procurement procedure additional information relating to the specifications and any supporting documents not later than 6 days before the time limit fixed for the receipt of tenders.

(7) In the case of an accelerated procedure, the period mentioned in paragraph (6) shall be 4 days.

### **Invitations to candidates**

**54.**—(1) In restricted procedures, competitive dialogue procedures, innovation partnerships and competitive procedures with negotiation, contracting authorities shall simultaneously and in writing invite the selected candidates to submit their tenders or, in the case of a competitive dialogue, to take part in the dialogue.

(2) Where a prior information notice is used as a call for competition in accordance with regulation 26(9), contracting authorities shall simultaneously and in writing invite the economic operators which have expressed their interest to confirm their continuing interest.

(3) The invitations required by paragraphs (1) and (2) shall—

- (a) include a reference to the electronic address at which the procurement documents have been made directly available by electronic means, and
- (b) be accompanied by the procurement documents, where those documents have not been the subject of unrestricted and full direct access, free of charge, for the reasons referred to in regulation 53(3) or (4) and have not already been made otherwise available.

(4) The invitations required by paragraph (1) shall also contain at least the following information:—

- (a) a reference to the call for competition published;
- (b) the deadline for the receipt of the tenders, the address to which the tenders must be sent and the language or languages in which the tenders must be drawn up;
- (c) in the case of competitive dialogue, the date and the address set for the start of consultation and the language or languages to be used;
- (d) a reference to any documents to be submitted, either in support of verifiable declarations by the tenderer in accordance with regulations 59 and 60 and, where appropriate, 62 or to supplement the information referred to in those regulations, and under the conditions laid down in regulations 59, 60 and 62;
- (e) the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance for such criteria, where they are not given in the contract notice, in the invitation to confirm interest, in the technical specifications or the descriptive document.

(5) But in the case of contracts awarded through a competitive dialogue or an innovation partnership, the information referred to in paragraph (4)(b) shall not appear in the invitation to participate in the dialogue or to negotiate but it shall appear in the invitation to submit a tender.

(6) The invitations required by paragraph (2) shall also contain at least the following information:—

- (a) nature and quantity, including all options concerning complementary contracts and, where possible, the estimated time available for exercising these options for renewable contracts, the nature and quantity and, where possible, the estimated publication dates of future notices of competition for works, supplies or services to be put out to tender;
- (b) type of procedure, namely restricted procedure or competitive procedure with negotiation;
- (c) where applicable, the date on which the delivery of supplies or the execution of works or services is to commence or terminate;
- (d) where electronic access cannot be offered, the address and closing date for the submission of requests for procurement documents and the language or languages in which they are to be drawn up;
- (e) the address of the contracting authority which is to award the contract;
- (f) economic and technical conditions, financial guarantees and information required from economic operators;
- (g) the form of the contract which is the subject of the invitation to tender, namely purchase, lease, hire or hire-purchase, or any combination of these; and
- (h) the contract award criteria and their weighting or, where appropriate, the order of importance of such criteria, where this information is not given in the prior information notice or the technical specifications or in the invitation to tender or to negotiate.

### **Informing candidates and tenderers**

**55.**—(1) Contracting authorities shall as soon as possible inform each candidate and tenderer of decisions reached concerning the conclusion of a framework agreement, the award of a contract or admittance to a dynamic purchasing system, including the grounds for any decision—

- (a) not to conclude a framework agreement,
- (b) not to award a contract for which there has been a call for competition,
- (c) to recommence the procedure, or
- (d) not to implement a dynamic purchasing system.

(2) On request from the candidate or tenderer concerned, the contracting authority shall as quickly as possible, and in any event within 15 days from receipt of a written request, inform—

- (a) any unsuccessful candidate of the reasons for the rejection of its request to participate;
- (b) any unsuccessful tenderer of the reasons for the rejection of its tender, including, for the cases referred to in regulation 42(14) and (15), the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements;
- (c) any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement;
- (d) any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.

(3) Contracting authorities may decide to withhold certain information referred to in paragraphs (1) and (2) where the release of such information—

- (a) would impede law enforcement or would otherwise be contrary to the public interest;
- (b) would prejudice the legitimate commercial interests of a particular economic operator, whether public or private; or

- (c) might prejudice fair competition between economic operators.

#### SUB-SECTION 7

#### *Choice of participants and award of contracts*

### **General principles in awarding contracts etc**

**56.**—(1) Contracts shall be awarded on the basis of criteria laid down in accordance with regulations 67 to 69, provided that the contracting authority has verified in accordance with regulations 59 to 61 that all of the following conditions are fulfilled:—

- (a) the tender complies with the requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents, taking into account, where applicable, regulation 45;
- (b) the tender comes from a tenderer that—
  - (i) is not excluded in accordance with regulation 57, and
  - (ii) meets—
    - (aa) the selection criteria, and
    - (bb) where applicable, the non-discriminatory rules and criteria referred to in regulation 65.

(2) Contracting authorities may decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with applicable obligations in the fields of environmental, social and labour law established by EU law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X to the Public Contracts Directive as amended from time to time.

(3) In open procedures—

- (a) contracting authorities may decide to examine tenders before verifying the absence of grounds for exclusion and the fulfilment of the selection criteria in accordance with regulations 57 to 64; and
- (b) where contracting authorities make use of that possibility, they shall ensure that the verification of absence of grounds for exclusion and of fulfilment of the selection criteria is carried out in an impartial and transparent manner so that no contract is awarded to a tenderer that—
  - (i) should have been excluded under regulation 57, or
  - (ii) does not meet the selection criteria set out by the contracting authority.

(4) Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous, or where specific documents are missing, contracting authorities may request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.

### **Exclusion grounds**

#### *Mandatory exclusions*

**57.**—(1) Contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established, by verifying in accordance with regulations 59, 60 and 61, or are otherwise aware, that that economic operator has been convicted of any of the following offences:—

- (a) conspiracy within the meaning of section 1 or 1A of the Criminal Law Act 1977(a) or article 9 or 9A of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983(b) where that conspiracy relates to participation in a criminal organisation as defined in Article 2 of Council Framework Decision 2008/841/JHA on the fight against organised crime(c);
- (b) corruption within the meaning of section 1(2) of the Public Bodies Corrupt Practices Act 1889(d) or section 1 of the Prevention of Corruption Act 1906(e);
- (c) the common law offence of bribery;
- (d) bribery within the meaning of sections 1, 2 or 6 of the Bribery Act 2010(f), or section 113 of the Representation of the People Act 1983(g);
- (e) where the offence relates to fraud affecting the European Communities' financial interests as defined by Article 1 of the Convention on the protection of the financial interests of the European Communities(h):—
  - (i) the common law offence of cheating the Revenue;
  - (ii) the common law offence of conspiracy to defraud;
  - (iii) fraud or theft within the meaning of the Theft Act 1968(i), the Theft Act (Northern Ireland) 1969(j), the Theft Act 1978(k) or the Theft (Northern Ireland) Order 1978(l);
  - (iv) fraudulent trading within the meaning of section 458 of the Companies Act 1985(m), article 451 of the Companies (Northern Ireland) Order 1986(n) or section 993 of the Companies Act 2006(o);
  - (v) fraudulent evasion within the meaning of section 170 of the Customs and Excise Management Act 1979(p) or section 72 of the Value Added Tax Act 1994(q);
  - (vi) an offence in connection with taxation in the European Union within the meaning of section 71 of the Criminal Justice Act 1993(r);
  - (vii) destroying, defacing or concealing of documents or procuring the execution of a valuable security within the meaning of section 20 of the Theft Act 1968(s) or section 19 of the Theft Act (Northern Ireland) 1969(t);
  - (viii) fraud within the meaning of section 2, 3 or 4 of the Fraud Act 2006(u); or

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- (a) 1977 c.45; section 1 was amended by the Criminal Attempts Act 1981 (c.47), section 5(1), by the Criminal Justice (Terrorism and Conspiracy) Act 1998 (c.40), Schedule 2, Part 2, and by the Trade Union and Labour Relations (Consolidation) Act 1992 (c.52), Schedule 1; section 1A was inserted by the Criminal Justice (Terrorism and Conspiracy) Act 1998, section 5(1), and was amended by the Coroners and Justice Act 2009 (c.25), section 72(1)(a).
  - (b) S.I. 1983/1120 (N.I.13); article 9 was amended by Part 2 of Schedules 1 and 2 to the Criminal Justice (Terrorism and Conspiracy) Act 1998 (c.40), and article 9A was inserted by section 6(1) of that Act; there are other amendments but none is relevant.
  - (c) OJ No L 300, 11.11.2008, p42.
  - (d) 1889 c.69; this Act was repealed by the Bribery Act 2010 (c.23), Schedule 2.
  - (e) 1906 c.34; this Act was repealed by the Bribery Act 2010 (c.23), Schedule 2.
  - (f) 2010 c.23.
  - (g) 1983 c.2; section 113 was amended by the Greater London Authority Act 1999 (c.29), Schedule 3, paragraph 30(2).
  - (h) OJ No C 316, 27.11.1995, p48.
  - (i) 1968 c.60.
  - (j) 1969 c.16 (N.I.).
  - (k) 1978 c.31.
  - (l) S.I. 1978/1407 (N.I.23).
  - (m) 1985 c.6; section 458 was modified by S.I. 2001/1090 and repealed by the Companies Act 2006 (c.46), Schedule 16.
  - (n) S.I. 1986/1032 (N.I.6), amended by S.R. (NI) 2004/307 (and other instruments that were not relevant) and revoked by the Companies Act 2006 (c.46), Schedule 16.
  - (o) 2006 c.46; section 993 is applied (with modifications) by S.I. 2009/1804, regulation 47, and by S.I. 2009/2436, regulation 3 and Schedule 1.
  - (p) 1979 c.2.
  - (q) 1994 c.23.
  - (r) 1993 c.36.
  - (s) 1968 c.60; section 20 was amended by the Fraud Act 2006 (c.35), Schedules 1 and 3.
  - (t) 1969 c.16 (N.I.); section 19 was amended by the Fraud Act 2006 (c.35), Schedules 1 and 3.
  - (u) 2006 c.35.

- (ix) the possession of articles for use in frauds within the meaning of section 6 of the Fraud Act 2006, or the making, adapting, supplying or offering to supply articles for use in frauds within the meaning of section 7 of that Act;
- (f) any offence listed—
  - (i) in section 41 of the Counter Terrorism Act 2008(a); or
  - (ii) in Schedule 2 to that Act where the court has determined that there is a terrorist connection;
- (g) any offence under sections 44 to 46 of the Serious Crime Act 2007(b) which relates to an offence covered by subparagraph (f);
- (h) money laundering within the meaning of sections 340(11) and 415 of the Proceeds of Crime Act 2002(c);
- (i) an offence in connection with the proceeds of criminal conduct within the meaning of section 93A, 93B or 93C of the Criminal Justice Act 1988(d) or article 45, 46 or 47 of the Proceeds of Crime (Northern Ireland) Order 1996(e);
- (j) an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004(f);
- (k) an offence under section 59A of the Sexual Offences Act 2003(g);
- (l) an offence under section 71 of the Coroners and Justice Act 2009(h);
- (m) an offence in connection with the proceeds of drug trafficking within the meaning of section 49, 50 or 51 of the Drug Trafficking Act 1994(i); or
- (n) any other offence within the meaning of Article 57(1) of the Public Contracts Directive—
  - (i) as defined by the law of any jurisdiction outside England and Wales and Northern Ireland; or
  - (ii) created, after the day on which these Regulations were made, in the law of England and Wales or Northern Ireland.

(2) The obligation to exclude an economic operator also applies where the person convicted is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control in the economic operator.

*Mandatory and discretionary exclusions for non-payment of taxes etc*

(3) An economic operator shall be excluded from participation in a procurement procedure where—

- (a) the contracting authority is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions; and
- (b) the breach has been established by a judicial or administrative decision having final and binding effect in accordance with the legal provisions of the country in which it is established or with those of any of the jurisdictions of the United Kingdom.

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(a) 2008 c.28.  
 (b) 2007 c.27.  
 (c) 2002 c.29; sections 340(11) and 415 were modified by the Serious Crime Act 2007 (c.27), section 63(1) and Schedule 6, paragraph 44(a); section 415 was amended by the Serious Organised Crime and Police Act 2005 (c.15), section 107(4).  
 (d) 1988 c.33; sections 93A, 93B and 93C were inserted by sections 29, 30 and 31 of the Criminal Justice Act 1993 (c.36) and repealed by the Proceeds of Crime Act 2002 (c.29), Schedule 11, paragraph 17(2).  
 (e) S.I. 1996/1299 (N.I.9); articles 45, 46 and 47 were repealed by the Proceeds of Crime Act 2002 (c.29), Schedule 11, paragraph 31(2).  
 (f) 2004 c.19; section 4 was amended by the Human Tissue Act 2004 (c.30), Schedule 6, paragraph 7, by the UK Borders Act 2007 (c.30), section 31(1), by the Borders, Citizenship and Immigration Act 2009 (c.11), section 54, by the Protection of Freedoms Act 2012 (c.9), section 110, and by the Criminal Justice Act (Northern Ireland) 2013 (c.7 (N.I.)), section 7(2) to (5) and Schedule 4, Part 2, and extended to the Isle of Man with modifications by S.I. 2008/680, article 18 and Schedule 8.  
 (g) 2003 c.37; section 59A was inserted by the Protection of Freedoms Act 2012 (c.9), section 109(2).  
 (h) 2009 c.25.  
 (i) 1994 c.37; sections 49, 50 and 51 were repealed by the Proceeds of Crime Act 2002 (c.29), Schedule 11, paragraphs 1 and 25(1) and (2)(a), and by Schedule 12.



(4) Contracting authorities may exclude an economic operator from participation in a procurement procedure where the contracting authority can demonstrate by any appropriate means that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions.

(5) Paragraphs (3) and (4) cease to apply when the economic operator has fulfilled its obligations by paying, or entering into a binding arrangement with a view to paying, the taxes or social security contributions due, including, where applicable, any interest accrued or fines.

*Exceptions to mandatory exclusion*

(6) A contracting authority may disregard any of the prohibitions imposed by paragraphs (1) to (3), on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment.

(7) A contracting authority may also disregard the prohibition imposed by paragraph (3) where an exclusion would be clearly disproportionate, in particular—

- (a) where only minor amounts of taxes or social security contributions are unpaid; or
- (b) where the economic operator was informed of the exact amount due following its breach of its obligations relating to the payment of taxes or social security contributions at such time that it did not have the possibility of fulfilling its obligations in a manner described in paragraph (5) before expiration of the deadline for requesting participation or, in open procedures, the deadline for submitting its tender.

*Discretionary exclusions*

(8) Contracting authorities may exclude from participation in a procurement procedure any economic operator in any of the following situations:—

- (a) where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in regulation 56(2);
- (b) where the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it is in an arrangement with creditors, where its business activities are suspended or it is in any analogous situation arising from a similar procedure under the laws and regulations of any State;
- (c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;
- (d) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;
- (e) where a conflict of interest within the meaning of regulation 24 cannot be effectively remedied by other, less intrusive, measures;
- (f) where a distortion of competition from the prior involvement of the economic operator in the preparation of the procurement procedure, as referred to in regulation 41, cannot be remedied by other, less intrusive, measures;
- (g) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity, or a prior concession contract, which led to early termination of that prior contract, damages or other comparable sanctions;
- (h) where the economic operator—
  - (i) has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria; or
  - (ii) has withheld such information or is not able to submit supporting documents required under regulation 59; or
- (i) where the economic operator has—

- (i) undertaken to—
  - (aa) unduly influence the decision-making process of the contracting authority, or
  - (bb) obtain confidential information that may confer upon it undue advantages in the procurement procedure; or
- (ii) negligently provided misleading information that may have a material influence on decisions concerning exclusion, selection or award.

*Exclusion during procedure*

(9) Contracting authorities shall exclude an economic operator where they become aware, at any time during a procurement procedure, that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs (1) to (3).

(10) Contracting authorities may exclude an economic operator where they become aware, at any time during a procurement procedure, that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs (4) or (8).

*Duration of exclusion*

(11) In the cases referred to in paragraphs (1) to (3), the period during which the economic operator shall (subject to paragraphs (6), (7) and (14)) be excluded is 5 years from the date of the conviction.

(12) In the cases referred to in paragraphs (4) and (8), the period during which the economic operator may (subject to paragraph (14)) be excluded is 3 years from the date of the relevant event.

*Self-cleaning*

(13) Any economic operator that is in one of the situations referred to in paragraph (1) or (8) may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion.

(14) If the contracting authority considers such evidence to be sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

(15) For that purpose, the economic operator shall prove that it has—

- (a) paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct;
- (b) clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; and
- (c) taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

(16) The measures taken by the economic operator shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct.

(17) Where the contracting authority considers such measures to be insufficient, the contracting authority shall give the economic operator a statement of the reasons for that decision.

**Selection criteria**

*General principles*

**58.**—(1) — Selection criteria may relate to—

- (a) suitability to pursue a professional activity;
- (b) economic and financial standing;
- (c) technical and professional ability.

(2) Contracting authorities may impose on economic operators as requirements for participation only the criteria referred to in paragraphs (5) to (18).

(3) Contracting authorities shall limit any requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded.

(4) All requirements shall be related and proportionate to the subject-matter of the contract.

(5) With regard to suitability to pursue a professional activity, contracting authorities may require economic operators to be enrolled in one of the professional or trade registers kept in their member State of establishment, as described in Schedule 5, or to comply with any other request set out in that Schedule.

(6) In procurement procedures for services, in so far as economic operators have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, contracting authorities may require them to prove that they hold such authorisation or membership.

*Economic and financial standing*

(7) With regard to economic and financial standing, contracting authorities may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract.

(8) In particular, contracting authorities may require that economic operators—

- (a) have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract;
- (b) provide information on their annual accounts showing the ratios, for example, between assets and liabilities; and
- (c) have an appropriate level of professional risk indemnity insurance.

(9) The minimum yearly turnover that economic operators are required to have shall not exceed twice the estimated contract value, except in duly justified cases, such as by reference to special risks attached to the nature of the works, services or supplies, in which case the contracting authority shall indicate their main reasons in the procurement documents or in the report referred to in regulation 84(1).

(10) Ratios, for example that between assets and liabilities, may be taken into consideration where the contracting authority specifies the methods and criteria for such consideration in the procurement documents, but such methods and criteria shall be transparent, objective and non-discriminatory.

*Application to lots, framework agreements and dynamic purchasing systems*

(11) Where a contract is divided into lots this regulation shall apply in relation to each individual lot.

(12) But the contracting authority may set the minimum yearly turnover that economic operators are required to have by reference to groups of lots in the event that the successful tenderer is awarded several lots to be executed at the same time.

(13) Where contracts based on a framework agreement are to be awarded following a reopening of competition, the maximum yearly turnover requirement referred to in paragraph (9) shall be calculated on the basis of the expected maximum size of specific contracts that will be performed at the same time, or, where it is not known, on the basis of the estimated value of the framework agreement.

(14) In the case of a dynamic purchasing system, the maximum yearly turnover requirement referred to in paragraph (9) shall be calculated on the basis of the expected maximum size of specific contracts to be awarded under that system.

*Technical and professional ability*

(15) With regard to technical and professional ability, contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard.

(16) Contracting authorities may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past.

(17) A contracting authority may assume that an economic operator does not possess the required professional abilities where the contracting authority has established that the economic operator has conflicting interests which may negatively affect the performance of the contract.

(18) In procurement procedures for supplies requiring siting or installation work, or for services or works, the professional ability of economic operators to provide the service or to execute the installation or the work may be evaluated with regard to their skills, efficiency, experience and reliability.

*Indicating requirements for participation*

(19) Contracting authorities shall indicate the requirements for participation, which may be expressed as minimum levels of ability, together with the appropriate means of proof, in the contract notice or in the invitation to confirm interest.

## **European Single Procurement Document**

*Use, content and form of the ESPD*

**59.**—(1) At the time of submission of requests to participate or of tenders, contracting authorities shall accept the European Single Procurement Document, consisting of an updated self-declaration as preliminary evidence instead of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfils the following conditions:—

- (a) it is not in one of the situations referred to in regulation 57 in which economic operators shall or may be excluded;
- (b) it meets the relevant selection criteria that have been set out under regulation 58;
- (c) where applicable, it fulfils the objective rules and criteria that have been set out under regulation 65.

(2) Where the economic operator relies on the capacities of other entities under regulation 63, the ESPD shall also contain the information referred to in paragraph (1) in respect of such entities.

(3) The ESPD shall consist of a formal statement by the economic operator that the relevant ground for exclusion does not apply and, or alternatively, that the relevant selection criterion is fulfilled and shall provide the relevant information as required by the contracting authority.

(4) The ESPD shall further identify the public authority or third party responsible for establishing the supporting documents and contain a formal statement to the effect that the economic operator will be able, upon request and without delay, to provide those supporting documents.

(5) Where the contracting authority can obtain the supporting documents directly by accessing a database as mentioned in paragraph (11), the ESPD shall also contain the information required for this purpose, such as the internet address of the database, any identification data and, where applicable, the necessary declaration of consent.

(6) Economic operators may reuse an ESPD which has already been used in a previous procurement procedure, provided that they confirm that the information contained in it continues to be correct.

(7) The ESPD shall be provided exclusively in electronic form.

*Supporting documentation*

(8) A contracting authority may require candidates and tenderers at any moment during the procedure to submit all or any of the supporting documents where this is necessary to ensure the proper conduct of the procedure.

(9) Before awarding the contract, the contracting authority shall, except in respect of contracts based on framework agreements where such contracts are concluded in accordance with regulation 33(7) or (8)(a), require the tenderer to which it has decided to award the contract to submit up-to-date supporting documents in accordance with regulation 60 and, where appropriate, regulation 62.

(10) The contracting authority may invite economic operators to supplement or clarify the certificates received under regulations 60 and 62.

(11) Despite paragraphs (8) and (9), economic operators shall not be required to submit—

- (a) supporting documents or other documentary evidence where and in so far as the contracting authority has the possibility of obtaining the certificates or the relevant information directly by accessing a national database in any member State that is available free of charge, such as a national procurement register, a virtual company dossier, an electronic document storage system or a prequalification system; or
- (b) a supporting document which the contracting authority already possesses.

## **Means of proof**

### *General principles*

**60.**—(1) —Contracting authorities may require the certificates, statements and other means of proof referred to in this regulation as evidence for the absence of grounds for exclusion under regulation 57 and for the fulfilment of the selection criteria.

(2) Contracting authorities shall not require from economic operators means of proof other than those referred to in this regulation and in regulations 58(16) and 62.

(3) In respect of regulation 63, economic operators may rely on any appropriate means to prove to the contracting authority that they will have the necessary resources at their disposal.

### *Proving the absence of grounds for exclusion*

(4) Contracting authorities shall accept the following as sufficient evidence that none of the cases specified in regulation 57 apply to the economic operator:—

- (a) as regards regulation 57(1) and (2), the production of an extract from the relevant register, such as judicial records or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the member State or country of origin or the country where the economic operator is established showing that those requirements have been met;
- (b) as regards regulation 57(3) to (5) and (8)(b), a certificate issued by the competent authority in the member State or country concerned.

(5) Where the member State or country in question does not issue such documents or certificates, or to the extent that these do not cover all the cases specified in regulation 57(1) to (5) and (8)(b), they may be replaced by a declaration on oath or, in member States or countries where there is no provision for declarations on oath, by a solemn declaration made by the person concerned before a competent judicial or administrative authority, a notary or a competent professional or trade body, in the member State or country of origin or in the member State or country where the economic operator is established.

### *Proving economic and financial standing*

(6) Proof of the economic operator's economic and financial standing may be provided by one or more of the following references:—

- (a) appropriate statements from banks or, where appropriate, evidence of relevant professional risk indemnity insurance;
- (b) the presentation of financial statements or extracts from the financial statements, where publication of financial statements is required under the law of the country in which the economic operator is established;
- (c) a statement of the undertaking's overall turnover and, where appropriate, of turnover in the area covered by the contract for a maximum of the last 3 financial years available, depending on the date on which the undertaking was set up or the economic operator started trading, as far as the information on those turnovers is available.

(7) Where the references mentioned in paragraph (6) are not appropriate in a particular case, the contracting authority may require the economic operator to provide other information to prove its economic and financial standing.

(8) Where, for any valid reason, the economic operator is unable to provide the references or other information required by the contracting authority, it may prove its economic and financial standing by any other document which the contracting authority considers appropriate.

*Proving technical and professional ability*

(9) Proof of the economic operator's technical and professional ability may, subject to regulation 58(16), be provided by one or more of the following means, in accordance with the nature, quantity or importance, and the use, of the works, supplies or services:—

- (a) the following lists:—
  - (i) a list of the works carried out over at the most the past 5 years, accompanied by certificates of satisfactory execution and outcome for the most important works; but, where necessary in order to ensure an adequate level of competition, contracting authorities may indicate that evidence of relevant works carried out more than 5 years before will be taken into account;
  - (ii) a list of the principal deliveries effected or the main services provided over at the most the past 3 years, with the sums, dates and recipients, whether public or private, involved; but, where necessary in order to ensure an adequate level of competition, contracting authorities may indicate that evidence of relevant supplies or services delivered or performed more than 3 years before will be taken into account;
- (b) an indication of the technicians or technical bodies involved, whether or not belonging directly to the economic operator's undertaking, especially those responsible for quality control and, in the case of public works contracts, those upon whom the contractor can call in order to carry out the work;
- (c) a description of the technical facilities and measures used by the economic operator for ensuring quality and the undertaking's study and research facilities;
- (d) an indication of the supply chain management and tracking systems that the economic operator will be able to apply when performing the contract;
- (e) where the products or services to be supplied are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authority, or on its behalf, by a competent official body of the country in which the supplier or service provider is established, subject to that body's agreement, on the production capacities of the supplier or the technical capacity of the service provider and, where necessary, on the means of study and research which are available to it and the quality control measures it will operate;
- (f) the educational and professional qualifications of the service provider or contractor or those of the undertaking's managerial staff, provided that they are not to be evaluated as an award criterion;
- (g) an indication of the environmental management measures that the economic operator will be able to apply when performing the contract;
- (h) a statement of the average annual manpower of the service provider or contractor and the number of managerial staff for the last 3 years;
- (i) a statement of the tools, plant or technical equipment available to the service provider or contractor for carrying out the contract;
- (j) an indication of the proportion of the contract which the economic operator intends possibly to subcontract;
- (k) with regard to the products to be supplied:—
  - (i) samples, descriptions or photographs, the authenticity of which must be certified where the contracting authority so requests;

- (ii) certificates drawn up by official quality control institutes or agencies of recognised competence attesting the conformity of products clearly identified by references to technical specifications or standards.

### **Recourse to e-Certis**

**61.**—(1) Contracting authorities shall have recourse to e-Certis and shall require primarily such types of certificates or forms of documentary evidence as are covered by e-Certis.

(2) In this regulation, “e-Certis” means the online repository established by the Commission and referred to as “e-Certis” in the Public Contracts Directive.

### **Quality assurance standards and environmental management standards**

**62.**—(1) —Contracting authorities shall, where they require the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain quality assurance standards, including on accessibility for disabled persons, refer to quality assurance systems based on the relevant European standards series certified by accredited bodies.

(2) Contracting authorities shall recognise equivalent certificates from bodies established in other member States.

(3) Contracting authorities shall also accept other evidence of equivalent quality assurance measures where the economic operator concerned had no possibility of obtaining such certificates within the relevant time limits for reasons that are not attributable to that economic operator, provided that the economic operator proves that the proposed quality assurance measures comply with the required quality assurance standards.

(4) Where contracting authorities require the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain environmental management systems or standards, they shall refer to—

- (a) the Eco-Management and Audit Scheme of the EU,
- (b) other environmental management systems as recognised in accordance with Article 45 of Regulation (EC) No 1221/2009(a), or
- (c) other environmental management standards based on the relevant European or international standards by accredited bodies,

and shall recognise equivalent certificates from bodies established in other member States.

(5) Where an economic operator had demonstrably no access to the certificates referred to in paragraph (4), or no possibility of obtaining them within the relevant time limits for reasons that are not attributable to that economic operator, the contracting authority shall accept other evidence of environmental management measures, provided that the economic operator proves that these measures are equivalent to those required under the applicable environmental management system or standard.

### **Reliance on the capacities of other entities**

**63.**—(1) With regard to—

- (a) criteria relating to economic and financial standing as set out under regulation 58(7) to (14), and
- (b) criteria relating to technical and professional ability as set out under regulation 58(15) to (18),

an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them, subject to the following provisions of this regulation.

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(a) OJ No L 342, 22.12.2009, p1, amended by Council Regulation (EU) No 517/2013 (OJ No L 158, 10.6.2013, p1).

(2) With regard to criteria relating to the educational and professional qualifications mentioned in regulation 60(9)(f), or to relevant professional experience, economic operators may however only rely on the capacities of other entities where those entities will perform the works or services for which these capacities are required.

(3) Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example by producing a commitment by those entities to that effect.

(4) The contracting authority shall, in accordance with regulations 59 to 61, verify whether the entities on whose capacity the economic operator intends to rely fulfil the relevant selection criteria and whether there are grounds for exclusion under regulation 57, and—

- (a) the contracting authority shall require that the economic operator replaces an entity which does not meet a relevant selection criterion, or in respect of which there are compulsory grounds for exclusion; and
- (b) the contracting authority may require that the economic operator substitutes an entity in respect of which there are non-compulsory grounds for exclusion.

(5) Where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the contracting authority may require that the economic operator and those entities be jointly liable for the execution of the contract.

(6) A group of economic operators within the meaning of regulation 19(3) may rely on the capacities of participants in the group or of other entities, and paragraphs (1) to (5) apply in relation to such a group in the same way that they apply in relation to an economic operator.

(7) In the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators within the meaning of regulation 19(3), by a participant in that group.

#### **Recognition of official lists of approved economic operators and certification by certification bodies**

**64.**—(1) Economic operators registered on an official list or having a certificate issued by a certification body may, for each contract, submit to the contracting authority a certificate of registration issued by the competent authority or the certificate issued by the certification body.

(2) A certificate of either kind shall constitute a presumption of suitability with regard to requirements for qualitative selection encompassed by the certificate or the official list to which it relates.

(3) Information that can be deduced from registration on official lists or certification by certification bodies shall not be questioned without justification.

(4) With regard to the payment of social security contributions and taxes, an additional certificate may be required of any registered economic operator whenever a contract is to be awarded.

(5) In relation to an official list established or maintained by a member State other than the United Kingdom, paragraphs (1) and (3) apply only in favour of economic operators established in the member State holding the official list.

(6) The requirements of proof for the criteria for qualitative selection encompassed by the official list or certificate shall comply with regulation 60 and, where appropriate, regulation 62.

(7) Economic operators shall not be obliged to be registered on an official list or to provide a certificate issued by a certification body in order to participate in a public contract.

(8) Contracting authorities shall—

- (a) recognise equivalent certificates from bodies established in other member States, and
- (b) accept other equivalent means of proof.

(9) In this regulation—



“official list” means an official list of approved contractors, suppliers or service providers established or maintained by a member State under to Article 64 of the Public Contracts Directive; and

“certification body” means a certification body complying with European standards of certification, and “certificate issued by a certification body” means a certificate issued by such a body in accordance with certification arrangements for which a member State has provided for the purposes of Article 64 of the Public Contracts Directive.

(10) For the purposes of this regulation, no official list or certification arrangements are established, maintained or provided for in relation to the jurisdictions to which this Part extends and, accordingly, in paragraph (9), “member State” includes the United Kingdom only insofar as the official list or the certification arrangements are established, maintained or provided for in respect of any other jurisdiction.

### **Reduction of the number of otherwise qualified candidates to be invited to participate**

**65.**—(1) In restricted procedures, competitive procedures with negotiation, competitive dialogue procedures and innovation partnerships, contracting authorities may limit the number of candidates meeting the selection criteria that they will invite to tender or to conduct a dialogue, provided that the minimum number of qualified candidates is available, in accordance with the following paragraphs of this regulation.

(2) Contracting authorities shall indicate, in the contract notice or in the invitation to confirm interest, the objective and non-discriminatory criteria or rules they intend to apply, the minimum number of candidates they intend to invite and, where applicable the maximum number.

(3) In the restricted procedure, the minimum number of candidates shall be 5.

(4) In the competitive procedure with negotiation, the competitive dialogue procedure and the innovation partnership procedure, the minimum number of candidates shall be 3.

(5) In any event the number of candidates invited shall be sufficient to ensure genuine competition.

(6) Contracting authorities shall invite a number of candidates at least equal to the minimum number indicated in accordance with paragraph (2).

(7) But where the number of candidates meeting the selection criteria and the minimum levels of ability as referred to in regulation 58(19) is below that minimum number, the contracting authority may continue the procedure by inviting the candidates with the required capabilities.

(8) In the context of the same procedure, the contracting authority shall not include economic operators that did not request to participate, or candidates that do not have the required capabilities.

### **Reduction of the number of tenders and solutions**

**66.**—(1) Where contracting authorities exercise the option of reducing the number of tenders to be negotiated in accordance with regulation 29(19) and (20) or of solutions to be discussed in accordance with regulation 30(12) and (13), they shall do so by applying the award criteria stated in the procurement documents.

(2) In the final stage, the number arrived at shall make for genuine competition in so far as there are enough tenders, solutions or qualified candidates.

### **Contract award criteria**

**67.**—(1) Contracting authorities shall base the award of public contracts on the most economically advantageous tender assessed from the point of view of the contracting authority.

(2) That tender shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with regulation 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, such as qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question.

- (3) Such criteria may comprise, for example—
- (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;
  - (b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or
  - (c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

(4) The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.

(5) Award criteria shall be considered to be linked to the subject-matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in—

- (a) the specific process of production, provision or trading of those works, supplies or services, or
- (b) a specific process for another stage of their life cycle,

even where those factors do not form part of their material substance.

(6) Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority.

(7) Award criteria shall—

- (a) ensure the possibility of effective competition; and
- (b) be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria.

(8) In case of doubt, contracting authorities shall verify effectively the accuracy of the information and proof provided by the tenderers.

#### *Weighting*

(9) The contracting authority shall specify, in the procurement documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender, except where this is identified on the basis of price alone.

(10) Those weightings may be expressed by providing for a range with an appropriate maximum spread.

(11) Where weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in decreasing order of importance.

#### **Life-cycle costing**

**68.**—(1) Life-cycle costing shall, to the extent relevant, cover part or all of the following costs over the life cycle of a product, service or works:—

- (a) costs, borne by the contracting authority or other users, such as—
  - (i) costs relating to acquisition,
  - (ii) costs of use, such as consumption of energy and other resources,
  - (iii) maintenance costs,
  - (iv) end of life costs, such as collection and recycling costs;
- (b) costs imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified.

(2) The costs mentioned in paragraph (1)(b) may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

(3) The method used for the assessment of costs imputed to environmental externalities shall fulfil all of the following conditions:—

- (a) it is based on objectively verifiable and non-discriminatory criteria and, in particular, where it has not been established for repeated or continuous application, it shall not unduly favour or disadvantage certain economic operators;
- (b) it is accessible to all interested parties;
- (c) the data required can be provided with reasonable effort by normally diligent economic operators, including economic operators from third countries party to the GPA or other international agreements by which the EU is bound.

(4) Where contracting authorities assess costs using a life-cycle costing approach, they shall indicate in the procurement documents—

- (a) the data to be provided by the tenderers, and
- (b) the method which the contracting authority will use to determine the life-cycle costs on the basis of those data.

(5) Whenever a common method for the calculation of life-cycle costs has been made mandatory by a legislative act of the EU, that common method shall be applied for the assessment of life-cycle costs.

(6) A list of such legislative acts, and where necessary the delegated acts supplementing them, is set out in Annex XIII to the Public Contracts Directive as amended from time to time.

### **Abnormally low tenders**

**69.**—(1) Contracting authorities shall require tenderers to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.

(2) The explanations given in accordance with paragraph (1) may in particular relate to—

- (a) the economics of the manufacturing process, of the services provided or of the construction method;
- (b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work;
- (c) the originality of the work, supplies or services proposed by the tenderer;
- (d) compliance with applicable obligations referred to in regulation 56(2);
- (e) compliance with obligations referred to in regulation 71;
- (f) the possibility of the tenderer obtaining State aid.

(3) The contracting authority shall assess the information provided by consulting the tenderer.

(4) The contracting authority may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph (2).

(5) The contracting authority shall reject the tender where it has established that the tender is abnormally low because it does not comply with applicable obligations referred to in regulation 56(2).

(6) Where the contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only—

- (a) after consultation with the tenderer, and
- (b) where the tenderer is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 of TFEU.

(7) Where the contracting authority rejects a tender in the circumstances referred to in paragraph (6), it shall inform the Commission.

SECTION 6  
*Contract Performance*

**Conditions for performance of contracts**

**70.**—(1) Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are—

- (a) linked to the subject-matter of the contract within the meaning of regulation 67(5), and
- (b) indicated in the call for competition or in the procurement documents.

(2) Those conditions may include economic, innovation-related, environmental, social or employment-related considerations.

**Subcontracting**

*Giving information to contracting authorities*

**71.**—(1) In the procurement documents, the contracting authority may ask the tenderer to indicate in its tender any share of the contract that it may intend to subcontract to third parties and any proposed subcontractors.

(2) Paragraph (1) is without prejudice to the main contractor's liability.

(3) In the case of works contracts and in respect of services to be provided at a facility under the direct oversight of the contracting authority, after the award of the contract and at the latest when the performance of the contract commences, the contracting authority shall require the main contractor to notify to the contracting authority the name, contact details and legal representatives of its subcontractors, involved in such works or services, in so far as known at the time.

(4) The contracting authority shall require the main contractor to notify the contracting authority of—

- (a) any changes to the information notified under paragraph (3) during the course of the contract; and
- (b) the name, contact details and legal representatives of any new subcontractors which the main contractor subsequently involves in such works or services.

(5) Where necessary for the purposes of paragraph (8), the required information shall be accompanied by ESPDs in respect of the subcontractors.

(6) Paragraphs (3) and (4) do not apply to suppliers.

(7) Contracting authorities may extend the obligations provided for in paragraphs (3) and (4) to, for example—

- (a) supply contracts, services contracts (other than those concerning services to be provided at the facilities under the direct oversight of the contracting authority) or suppliers involved in works or services contracts;
- (b) subcontractors of the main contractor's subcontractors or subcontractors further down the subcontracting chain.

*Excluding subcontractors*

(8) Contracting authorities may, in accordance with regulations 59, 60 and 61, verify whether there are grounds for exclusion of subcontractors under regulation 57.

(9) In such cases, the contracting authority—

- (a) shall require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion; and
- (b) may require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.

## **Modification of contracts during their term**

**72.**—(1) Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Part in any of the following cases:—

- (a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses or options, provided that such clauses—
  - (i) state the scope and nature of possible modifications or options as well as the conditions under which they may be used, and
  - (ii) do not provide for modifications or options that would alter the overall nature of the contract or the framework agreement;
- (b) for additional works, services or supplies by the original contractor that have become necessary and were not included in the initial procurement, where a change of contractor—
  - (i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement, or
  - (ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority,

provided that any increase in price does not exceed 50% of the value of the original contract;

- (c) where all of the following conditions are fulfilled:—
  - (i) the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen;
  - (ii) the modification does not alter the overall nature of the contract;
  - (iii) any increase in price does not exceed 50% of the value of the original contract or framework agreement.
- (d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of—
  - (i) an unequivocal review clause or option in conformity with sub-paragraph (a), or
  - (ii) universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Part;
- (e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph (8); or
- (f) where paragraph (5) applies.

(2) Where several successive modifications are made:—

- (a) the limitations imposed by the proviso at the end of paragraph (1)(b) and by paragraph (c)(iii) shall apply to the value of each modification; and
- (b) such successive modifications shall not be aimed at circumventing this Part.

(3) Contracting authorities which have modified a contract in either of the cases described in paragraph (1)(b) and (c) shall send a notice to that effect, in accordance with regulation 51, for publication.

(4) Such a notice shall contain the information set out in part G of Annex 5 to the Public Contracts Directive.

(5) This paragraph applies where the value of the modification is below both of the following values:—

- (a) the relevant threshold mentioned in regulation 5, and

- (b) 10% of the initial contract value for service and supply contracts and 15% of the initial contract value for works contracts,

provided that the modification does not alter the overall nature of the contract or framework agreement.

(6) For the purposes of paragraph (5), where several successive modifications are made, the value shall be the net cumulative value of the successive modifications.

(7) For the purpose of the calculation of—

- (a) the price mentioned in paragraph (1)(b) and (c), and
- (b) the values mentioned in paragraph (5)(b),

the updated figure shall be the reference figure when the contract includes an indexation clause.

(8) A modification of a contract or a framework agreement during its term shall be considered substantial for the purposes of paragraph (1)(e) where one or more of the following conditions is met:—

- (a) the modification renders the contract or the framework agreement materially different in character from the one initially concluded;
- (b) the modification introduces conditions which, had they been part of the initial procurement procedure, would have—
  - (i) allowed for the admission of other candidates than those initially selected,
  - (ii) allowed for the acceptance of a tender other than that originally accepted, or
  - (iii) attracted additional participants in the procurement procedure;
- (c) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;
- (d) the modification extends the scope of the contract or framework agreement considerably;
- (e) a new contractor replaces the one to which the contracting authority had initially awarded the contract in cases other than those provided for in paragraph (1)(d).

(9) A new procurement procedure in accordance with this Part shall be required for modifications of the provisions of a public contract or a framework agreement during its term other than those provided for in this regulation.

### **Termination of contracts**

**73.—**(1) Contracting authorities shall ensure that every public contract which they award contains provisions enabling the contracting authority to terminate the contract where—

- (a) the contract has been subject to a substantial modification which would have required a new procurement procedure in accordance with regulation 72(9);
- (b) the contractor has, at the time of contract award, been in one of the situations referred to in regulation 57(1), including as a result of the application of regulation 57(2), and should therefore have been excluded from the procurement procedure; or
- (c) the contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and the Public Contracts Directive that has been declared by the Court of Justice of the European Union in a procedure under Article 258 of TFEU.

(2) Those provisions may address the basis on which the power is to be exercisable in those circumstances, for example by providing for notice of termination to be given and by addressing consequential matters that will or might arise from the termination.

(3) To the extent that a public contract does not contain provisions enabling the contracting authority to terminate the contract on any of the grounds mentioned in paragraph (1), a power for the contracting authority to do so on giving reasonable notice to the contractor shall be an implied term of that contract.

CHAPTER 3  
PARTICULAR PROCUREMENT REGIMES  
SECTION 7  
*Social and Other Specific Services*

**Award of contracts for social and other specific services**

74. Public contracts for social and other specific services listed in Schedule 3 shall be awarded in accordance with this Section.

**Publication of notices**

75.—(1) Contracting authorities intending to award a public contract for the services referred to in regulation 74 shall make known their intention by any of the following means:—

- (a) by means of a contract notice, which shall contain the information referred to in part H of Annex V to the Public Contracts Directive; or
- (b) by means of a prior information notice, which shall—
  - (i) be published continuously,
  - (ii) contain the information set out in part I of Annex V to the Public Contracts Directive,
  - (iii) refer specifically to the types of services that will be the subject-matter of the contracts to be awarded, and
  - (iv) indicate that the contracts will be awarded without further publication and invite interested economic operators to express their interest in writing.

(2) Paragraph (1) shall not apply where a negotiated procedure without prior publication could have been used, in accordance with regulation 32, for the award of a public service contract.

(3) Contracting authorities that have awarded a public contract for the services referred to in regulation 74 shall make known the results of the procurement procedure by means of a contract award notice, which shall contain the information referred to in part J of Annex V to the Public Contracts Directive.

(4) Contracting authorities may group contract award notices on a quarterly basis, in which case they shall comply with paragraph (5) by sending the grouped notices within 30 days of the end of each quarter.

(5) Contracting authorities shall send the notices referred to in this regulation for publication in accordance with regulation 51.

**Principles of awarding contracts**

76.—(1) Contracting authorities shall determine the procedures that are to be applied in connection with the award of contracts subject to this Section, and may take into account the specificities of the services in question.

(2) Those procedures shall be at least sufficient to ensure compliance with the principles of transparency and equal treatment of economic operators.

(3) In particular, where, in accordance with regulation 75, a contract notice or prior information notice has been published in relation to a given procurement, the contracting authority shall, except in the circumstances mentioned in paragraph (4), conduct the procurement, and award any resulting contract, in conformity with the information contained in the notice about—

- (a) conditions for participation,
- (b) time limits for contacting the contracting authority, and
- (c) the award procedure to be applied.

(4) The contracting authority may, however, conduct the procurement, and award any resulting contract, in a way which is not in conformity with that information, but only if all the following conditions are met:—

- (a) the failure to conform does not, in the particular circumstances, amount to a breach of the principles of transparency and equal treatment of economic operators;
- (b) the contracting authority has, before proceeding in reliance on sub-paragraph (a)—
  - (i) given due consideration to the matter,
  - (ii) concluded that sub-paragraph (a) is applicable,
  - (iii) documented that conclusion and the reasons for it in accordance with regulation 84(7) and (8), and
  - (iv) informed the participants of the respects in which the contracting authority intends to proceed in a way which is not in conformity with the information contained in the notice.

(5) In paragraph (4)(b)(iv), “participants” means any economic operators which have responded to the notice and have not been informed by the contracting authority that they are no longer under consideration for the award of a contract within the scope of the procurement concerned.

(6) All time limits imposed on economic operators for the purposes of this regulation, whether for responding to a contract notice or taking any other steps in the relevant procedure, shall be reasonable and proportionate.

(7) Without prejudice to the generality of paragraph (1), and subject to the other requirements of this Chapter, contracting authorities may apply procedures for the purposes of this regulation which correspond (with or without variations) to procedures, techniques or other features provided for in Chapter 2, as well as procedures which do not.

(8) In relation to the award of contracts subject to this Section, contracting authorities may take into account any relevant considerations, including —

- (a) the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services;
- (b) the specific needs of different categories of users, including disadvantaged and vulnerable groups;
- (c) the involvement and empowerment of users; and
- (d) innovation.

### **Reserved contracts for certain services**

**77.**—(1) Contracting authorities may reserve to qualifying organisations the right to participate in procedures for the award of reservable public contracts.

(2) For that purpose, a contract is a reservable public contract only if it is exclusively for one or more of the services which are covered by CPV codes 75121000-0, 75122000-7, 75123000-4, 79622000-0, 79624000-4, 79625000-1, 80110000-8, 80300000-7, 80420000-4, 80430000-7, 80511000-9, 80520000-5, 80590000-6, from 85000000-9 to 85323000-9, 92500000-6, 92600000-7, 98133000-4, and 98133110-8.

(3) In this regulation, “qualifying organisation” means an organisation which fulfils all of the following conditions:—

- (a) its objective is the pursuit of a public service mission linked to the delivery of services referred to in paragraph (2);
- (b) profits are reinvested with a view to achieving the organisation’s objective, and any distribution of profits is based on participatory considerations;
- (c) the structures of management or ownership of the organisation are (or will be, if and when it performs the contract) —
  - (i) based on employee ownership or participatory principles, or



- (ii) require the active participation of employees, users or stakeholders; and
  - (d) the organisation has not been awarded, pursuant to this regulation, a contract for the services concerned by the contracting authority concerned within the past 3 years.
- (4) The maximum duration of a contract awarded under this regulation shall not be longer than 3 years.
- (5) Where a contracting authority exercises the power of reservation conferred by paragraph (1), the call for competition shall make reference to Article 77 of the Public Contracts Directive.
- (6) This regulation does not apply in relation to the procurement of health care services for the purposes of the NHS within the meaning and scope of the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013(a).

## SECTION 8

### *Rules Governing Design Contests*

#### **Scope of Section 8**

**78.**—(1) This Section applies to—

- (a) design contests organised as part of a procedure leading to the award of a public service contract;
- (b) design contests with prizes or payments to participants.

(2) In the cases referred to in paragraph (1)(a), the threshold mentioned in regulation 5 shall be calculated on the basis of the estimated value net of VAT of the public service contract, including any possible prizes or payments to participants.

(3) In the cases referred to in paragraph (1)(b), the threshold mentioned in regulation 5 shall be calculated on the basis of the total amount of the prizes and payments, including the estimated value net of VAT of the public services contract which might subsequently be concluded following a negotiated procedure without prior publication in accordance with regulation 32(7) and (8) if the contracting authority has announced its intention to award such a contract in the contest notice.

#### **Notices**

**79.**—(1) Contracting authorities that intend to carry out a design contest shall make known their intention by means of a contest notice.

(2) Contest notices shall—

- (a) include the information set out in part E of Annex V to the Public Contracts Directive; and
- (b) be sent for publication in accordance with regulation 51.

(3) Contracting authorities that have held a design contest shall send for publication in accordance with regulation 51 a notice of the results of the contest, and must be able to prove the date of dispatch.

(4) A notice of the results of the contest shall include the information set out in part F of Annex V to the Public Contracts Directive.

(5) But where the release of information on the outcome of the contest—

- (a) would impede law enforcement or would otherwise be contrary to the public interest,
- (b) would prejudice the legitimate commercial interests of a particular enterprise, whether public or private, or
- (c) might prejudice fair competition between service providers,

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(a) S.I. 2013/500.

such information may be withheld from publication.

### **Rules on the organisation of design contests and the selection of participants**

**80.**—(1) When organising design contests, contracting authorities shall apply procedures which are adapted to the provisions of Chapter 1 and this Section.

(2) The admission of participants to design contests shall not be limited—

- (a) by reference to the territory or part of the territory of a member State;
- (b) on the grounds that, under the law of the member State in which the contest is organised, they would be required to be either natural or legal persons.

(3) Where design contests are restricted to a limited number of participants, the contracting authorities shall lay down clear and non-discriminatory selection criteria.

(4) In any event, the number of candidates invited to participate shall be sufficient to ensure genuine competition.

### **Composition of the jury**

**81.**—(1) The jury shall be composed exclusively of natural persons who are independent of participants in the contest.

(2) Where a particular professional qualification is required from participants in a contest, at least a third of the members of the jury shall have that qualification or an equivalent qualification.

### **Decisions of the jury**

**82.**—(1) The jury shall be autonomous in its decisions and opinions.

(2) The jury shall examine the plans and projects submitted by the candidates anonymously and solely on the basis of the criteria indicated in the contest notice.

(3) The jury shall record its ranking of projects in a report, signed by its members, made according to the merits of each project, together with its remarks and any points that may need clarification.

(4) Anonymity shall be observed until the jury has reached its opinion or decision.

(5) Candidates may be invited, if need be, to answer questions that the jury has recorded in the minutes to clarify any aspect of the projects.

(6) Complete minutes shall be drawn up of the dialogue between jury members and candidates.

## **CHAPTER 4**

### **RECORDS AND REPORTS**

#### **Retention of contract copies**

**83.**—(1) Contracting authorities shall, at least for the duration of the contract, keep copies of all concluded contracts with a value equal to or greater than—

- (a) 1,000,000 EUR in the case of public supply contracts or public service contracts;
- (b) 10,000,000 EUR in the case of public works contracts.

(2) Contracting authorities shall grant access to those contracts, but access to specific documents or items of information may be denied to the extent and on the conditions provided for in the applicable EU or national rules on access to documents and data protection.

#### **Reporting and documentation requirements**

##### *Individual reports*

**84.**—(1) For every contract or framework agreement covered by this Part, and every time a dynamic purchasing system is established, contracting authorities shall draw up a written report which shall include at least the following:—

- (a) the name and address of the contracting authority, the subject-matter and value of the contract, framework agreement or dynamic purchasing system;
- (b) where applicable, the results of the qualitative selection and reduction of numbers pursuant to regulations 65 and 66, namely:—
  - (i) the names of the selected candidates or tenderers and the reasons for their selection;
  - (ii) the names of the rejected candidates or tenderers and the reasons for their rejection;
- (c) the reasons for the rejection of tenders found to be abnormally low;
- (d) the name of the successful tenderer and the reasons why its tender was selected and, where known—
  - (i) the share (if any) of the contract or framework agreement which the successful tenderer intends to subcontract to third parties, and
  - (ii) the names of the main contractor's subcontractors (if any);
- (e) for competitive procedures with negotiation and competitive dialogues, the circumstances as laid down in regulation 26 which justify the use of those procedures;
- (f) for negotiated procedures without prior publication, the circumstances referred to in regulation 32 which justify the use of this procedure;
- (g) where applicable, the reasons why the contracting authority has decided not to award a contract or framework agreement or to establish a dynamic purchasing system;
- (h) where applicable, the reasons why means of communication other than electronic means have been used for the submission of tenders;
- (i) where applicable, conflicts of interests detected and subsequent measures taken.

(2) But such a report is not required in respect of contracts based on framework agreements where these are concluded in accordance with regulation 33(7) or (8)(a).

(3) To the extent that the contract award notice drawn up in accordance with regulation 50 or 75(3) contains the information required in this paragraph, contracting authorities may refer to that notice.

(4) Where the Commission so requests, a contracting authority shall communicate the report, or its main elements, to the Commission.

(5) Where the Cabinet Office so requests, a contracting authority shall communicate the report, or its main elements, to the Cabinet Office or to such other body as the Cabinet Office may direct in connection with any functions which that body exercises for the purposes of Article 83 of the Public Contracts Directive.

*Reporting other information required by the Cabinet Office*

(6) Contracting authorities shall send to the Cabinet Office a report containing such other information as the Cabinet Office may from time to time request in respect of procurements—

- (a) within the scope of this Part, or
- (b) which would have been within the scope of this Part if their value had exceeded the relevant threshold mentioned in regulation 5,

for the purpose of enabling the Cabinet Office to provide the Commission with information.

*Documentation of progress and decisions*

(7) Contracting authorities shall document the progress of all procurement procedures, whether or not they are conducted by electronic means.

(8) To that end, contracting authorities shall ensure that they keep sufficient documentation to justify decisions taken in all stages of the procurement procedure, such as documentation on —

- (a) communications with economic operators and internal deliberations,

- (b) preparation of the procurement documents,
- (c) dialogue or negotiation if any,
- (d) selection and award of the contract.

(9) The documentation shall be kept for a period of at least 3 years from the date of award of the contract.

**PART 3**  
**REMEDIES**  
**CHAPTER 5**  
**FACILITATION OF REMEDIES**

**Scope of Chapter 5**

**85.** This Chapter applies to contracts and framework agreements falling within the scope of Part 2.

**Notices of decisions to award a contract or conclude a framework agreement**

**86.**—(1) Subject to paragraphs (5) and (6), a contracting authority shall send to each candidate and tenderer a notice communicating its decision to award the contract or conclude the framework agreement.

*Content of notices*

(2) Where it is to be sent to a tenderer, the notice referred to in paragraph (1) shall include—

- (a) the criteria for the award of the contract;
- (b) the reasons for the decision, including the characteristics and relative advantages of the successful tender, the score (if any) obtained by—
  - (i) the tenderer which is to receive the notice; and
  - (ii) the tenderer—
    - (aa) to be awarded the contract, or
    - (bb) to become a party to the framework agreement,and anything required by paragraph (3);
- (c) the name of the tenderer—
  - (i) to be awarded the contract, or
  - (ii) to become a party to the framework agreement; and
- (d) a precise statement of either—
  - (i) when, in accordance with regulation 87, the standstill period is expected to end and, if relevant, how the timing of its ending might be affected by any and, if so what, contingencies, or
  - (ii) the date before which the contracting authority will not, in conformity with regulation 87 enter into the contract or conclude the framework agreement.

(3) The reasons referred to in paragraph (2)(b) shall include the reason for any decision by the contracting authority that the economic operator did not meet the technical specifications—

- (a) in an equivalent manner as mentioned in regulation 42(14); or
- (b) because compliance with a standard, approval, specification or system mentioned in regulation 42(15) does not address the performance or functional requirements laid down by the contracting authority.

(4) Where it is to be sent to a candidate, the notice referred to in paragraph (1) shall include—

- (a) the reasons why the candidate was unsuccessful; and
- (b) the information mentioned in paragraph (2), but as if the words “and relative advantages” were omitted from sub-paragraph (b).

*Exemptions*

- (5) A contracting authority need not comply with paragraph (1) in any of the following cases:—
- (a) where the contract or framework agreement is permitted by Part 2 to be awarded or concluded without prior publication of a contract notice;
  - (b) where the only tenderer is the one who is to be awarded the contract or who is to become a party to the framework agreement, and there are no candidates;
  - (c) where the contracting authority awards a contract under a framework agreement or a dynamic purchasing system.
- (6) A contracting authority may withhold any information to be provided in accordance with the preceding requirements of this regulation where the release of such information—
- (a) would impede law enforcement or would otherwise be contrary to the public interest;
  - (b) would prejudice the legitimate commercial interests of a particular economic operator, whether public or private; or
  - (c) might prejudice fair competition between economic operators.

*Meaning of “candidate” and “tenderer”*

- (7) In this regulation,—
- (a) “candidate” means a candidate, as defined in regulation 2(1), which—
    - (i) is not a tenderer, and
    - (ii) has not been informed of the rejection of its application and the reasons for it;
  - (b) “tenderer” means a tenderer, as defined in regulation 2(1), which has not been definitively excluded.
- (8) For the purposes of paragraph (7)(b), an exclusion is definitive if, and only if, the tenderer has been notified of the exclusion and either—
- (a) the exclusion has been held to be lawful in proceedings under Chapter 6; or
  - (b) the time limit for starting such proceedings has expired even on the assumption that the Court would have granted the maximum extension permitted by regulation 92(4) and (5).

**Standstill period**

**87.—**(1) Where regulation 86(1) applies, the contracting authority must not enter into the contract or conclude the framework agreement before the end of the standstill period.

(2) Where the contracting authority sends a regulation 86 notice to all the relevant economic operators by facsimile or electronic means, the standstill period ends at midnight at the end of the 10th day after the relevant sending date.

(3) Where the contracting authority sends a regulation 86 notice to all the relevant economic operators only by other means, the standstill period ends at whichever of the following occurs first:—

- (a) midnight at the end of the 15th day after the relevant sending date;
- (b) midnight at the end of 10th day after the date on which the last of the economic operators to receive such a notice receives it.

(4) In paragraphs (2) and (3), “the relevant sending date” means the date on which the regulation 86 notice is sent to the relevant economic operators, and if the notices are sent to different relevant economic operators on different dates, the relevant sending date is the date on which the last of the notices is sent.

(5) Where the contracting authority sends the regulation 86 notice to one or more of the relevant economic operators by facsimile or electronic means and to the others by other means, the standstill period ends at whichever of the following two times occurs latest:—

- (a) midnight at the end of the 10th day after the date on which the last notice is sent by facsimile or electronic means;
- (b) the time when whichever of the following occurs first:—
  - (i) midnight at the end of the 15th day after the date on which the last notice is sent by other means;
  - (ii) midnight at the end of the 10th day after the date on which the last of the economic operators to receive a notice sent by any such other means receives it.

(6) In this regulation—

“regulation 86 notice” means a notice given in accordance with regulation 86; and

“relevant economic operators” means economic operators to which regulation 86 requires a notice to be sent.

## CHAPTER 6

### APPLICATIONS TO THE COURT

#### **Interpretation of Chapter 6**

**88.**—(1) In this Chapter—

“claim form” includes, in Northern Ireland, the originating process by which the proceedings are commenced;

“contract”, except in regulation 103, means a public contract or a framework agreement;

“declaration of ineffectiveness” means a declaration made under regulation 98(2)(a) or 103(3);

“economic operator” has the meanings given by paragraph (2);

“grounds for ineffectiveness” has the meaning given to it by regulation 99;

“proceedings” means court proceedings taken for the purposes of regulation 91; and

“standstill period”, and references to its end, have the same meaning as in regulation 87.

(2) In regulations 89 and 90, “economic operator” has its usual meaning (in accordance with regulation 2(1)), but in the other provisions of this Part “economic operator” has the narrower meaning of an economic operator (as defined by regulation 2(1)) to which a duty is owed in accordance with regulation 89 or 90

#### **Duty owed to economic operators from EEA states**

**89.**—(1) This regulation applies to the obligation on a contracting authority to comply with—

- (a) the provisions of Part 2; and
- (b) any enforceable EU obligation in the field of public procurement in respect of a contract or design contest falling within the scope of Part 2.

(2) That obligation is a duty owed to an economic operator from the United Kingdom or from another EEA state.

#### **Duty owed to economic operators from certain other states**

**90.**—(1) The duty owed in accordance with regulation 89 is a duty owed also to—

- (a) an economic operator from a GPA state, but only where the GPA applies to the procurement concerned; and
- (b) an economic operator which is not from an EEA state or a GPA state, but only if a relevant bilateral agreement applies.

- (2) For the purposes of paragraph (1)(a), the GPA applies to a procurement if—
- (a) the procurement may result in the award of a contract of any description; and
  - (b) at the relevant time—
    - (i) a GPA State has agreed with the EU that the GPA shall apply to a contract of that description, and
    - (ii) the economic operator is from that GPA state.
- (3) For the purposes of paragraph (1)(b), a relevant bilateral agreement applies if—
- (a) there is an international agreement, other than the GPA, by which the EU is bound; and
  - (b) in accordance with that agreement, the economic operator is, in respect of the procurement concerned, to be accorded remedies no less favourable than those accorded to economic operators from the EU in respect of matters falling within the scope of the duty owed in accordance with regulation 89.
- (4) In this regulation—
- “GPA state” means any country, other than an EEA state, which at the relevant time is a signatory to the GPA; and
- “relevant time” means the date on which the contracting authority sent a call for competition in respect of the contract to the EU Publications Office or would have done so if it had been required by Part 2 to do so.

### **Enforcement of duties through the Court**

**91.**—(1) A breach of the duty owed in accordance with regulation 89 or 90 is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage.

(2) Proceedings for that purpose must be started in the High Court, and regulations 92 to 104 apply to such proceedings.

### **General time limits for starting proceedings**

**92.**—(1) This regulation limits the time within which proceedings may be started where the proceedings do not seek a declaration of ineffectiveness.

(2) Subject to paragraphs (3) to (5), such proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.

(3) Paragraph (2) does not require proceedings to be started before the end of any of the following periods:—

- (a) where the proceedings relate to a decision which is sent to the economic operator by facsimile or electronic means, 10 days beginning with—
  - (i) the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;
  - (ii) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;
- (b) where the proceedings relate to a decision which is sent to the economic operator by other means, whichever of the following periods ends first:—
  - (i) 15 days beginning with the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;
  - (ii) 10 days beginning with—
    - (aa) the day after the date on which the decision is received, if the decision is accompanied by a summary of the reasons for the decision; or
    - (bb) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;

(c) where sub-paragraphs (a) and (b) do not apply but the decision is published, 10 days beginning with the day on which the decision is published.

(4) Subject to paragraph (5), the Court may extend the time limits imposed by this regulation (but not any of the limits imposed by regulation 93) where the Court considers that there is a good reason for doing so.

(5) The Court must not exercise its power under paragraph (4) so as to permit proceedings to be started more than 3 months after the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.

(6) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is issued.

### **Special time limits for seeking a declaration of ineffectiveness**

**93.**—(1) This regulation limits the time within which proceedings may be started where the proceedings seek a declaration of ineffectiveness.

(2) Such proceedings must be started—

(a) where paragraph (3) or (5) applies, within 30 days beginning with the relevant date mentioned in that paragraph;

(b) in any event, within 6 months beginning with the day after the date on which the contract was entered into.

(3) This paragraph applies where a relevant contract award notice has been published in the Official Journal, in which case the relevant date is the day after the date on which the notice was published.

(4) For that purpose, a contract award notice is relevant if, and only if—

(a) the contract was awarded without prior publication of a contract notice; and

(b) the contract award notice includes justification of the decision of the contracting authority to award the contract without prior publication of a contract notice.

(5) This paragraph applies where the contracting authority has informed the economic operator of—

(a) the conclusion of the contract, and

(b) a summary of the relevant reasons,

in which case the relevant date is the day after the date on which the economic operator was informed of the conclusion or, if later, was informed of a summary of the relevant reasons.

(6) In paragraph (5), “the relevant reasons” means the reasons which the economic operator would have been entitled to receive in response to a request under regulation 55(2).

(7) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is issued.

### **Starting proceedings**

**94.**—(1) Where proceedings are started, the economic operator must serve the claim form on the contracting authority within 7 days after the date of issue.

(2) Paragraph (3) applies where proceedings are started—

(a) seeking a declaration of ineffectiveness; or

(b) alleging a breach of regulation 87, 95 or 96(1)(b) where the contract has not been fully performed.

(3) In those circumstances, the economic operator must, as soon as practicable, send a copy of the claim form to each person, other than the contracting authority, who is a party to the contract in question.



(4) The contracting authority must, as soon as practicable, comply with any request from the economic operator for any information that the economic operator may reasonably require for the purpose of complying with paragraph (3).

(5) In this regulation, “serve” means serve in accordance with rules of court, and for the purposes of this regulation a claim form is deemed to be served on the day on which it is deemed by rules of court to be served.

### **Contract-making suspended by challenge to award decision**

**95.**—(1) Where—

- (a) a claim form has been issued in respect of a contracting authority’s decision to award the contract,
- (b) the contracting authority has become aware that the claim form has been issued and that it relates to that decision, and
- (c) the contract has not been entered into,

the contracting authority is required to refrain from entering into the contract.

(2) The requirement continues until any of the following occurs—

- (a) the Court brings the requirement to an end by interim order under regulation 96(1)(a);
- (b) the proceedings at first instance are determined, discontinued or otherwise disposed of and no order has been made continuing the requirement (for example in connection with an appeal or the possibility of an appeal).

(3) This regulation does not affect the obligations imposed by regulation 87.

### **Interim orders**

**96.**—(1) In proceedings, the Court may, where relevant, make an interim order—

- (a) bringing to an end the requirement imposed by regulation 95(1);
- (b) restoring or modifying that requirement;
- (c) suspending the procedure leading to—
  - (i) the award of the contract, or
  - (ii) the determination of the design contest,in relation to which the breach of the duty owed in accordance with regulation 89 or 90 is alleged;
- (d) suspending the implementation of any decision or action taken by the contracting authority in the course of following such a procedure.

(2) When deciding whether to make an order under paragraph (1)(a)—

- (a) the Court must consider whether, if regulation 95(1) were not applicable, it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract; and
- (b) only if the Court considers that it would not be appropriate to make such an interim order may it make an order under paragraph (1)(a).

(3) If the Court considers that it would not be appropriate to make an interim order of the kind mentioned in paragraph (2)(a) in the absence of undertakings or conditions, it may require or impose such undertakings or conditions in relation to the requirement in regulation 95(1).

(4) The Court may not make an order under paragraph (1)(a) or (b) or (3) before the end of the standstill period.

(5) This regulation does not prejudice any other powers of the Court.

### **Remedies where the contract has not been entered into**

**97.**—(1) Paragraph (2) applies where—

- (a) the Court is satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with regulation 89 or 90; and
- (b) the contract has not yet been entered into.

(2) In those circumstances, the Court may do one or more of the following—

- (a) order the setting aside of the decision or action concerned;
- (b) order the contracting authority to amend any document;
- (c) award damages to an economic operator which has suffered loss or damage as a consequence of the breach.

(3) This regulation does not prejudice any other powers of the Court.

### **Remedies where the contract has been entered into**

**98.**—(1) Paragraph (2) applies if—

- (a) the Court is satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with regulation 89 or 90; and
- (b) the contract has already been entered into.

(2) In those circumstances, the Court—

- (a) must, if it is satisfied that any of the grounds for ineffectiveness applies, make a declaration of ineffectiveness in respect of the contract unless regulation 100 requires the Court not to do so;
- (b) must, where required by regulation 102, impose penalties in accordance with that regulation;
- (c) may award damages to an economic operator which has suffered loss or damage as a consequence of the breach, regardless of whether the Court also acts as described in subparagraphs (a) and (b);
- (d) must not order any other remedies.

(3) Paragraph (2)(d) is subject to regulation 103(3) and (9) (additional relief in respect of specific contracts where a framework agreement is ineffective) and does not prejudice any power of the Court under regulation 101(3) or 102(12) (orders which supplement a declaration of ineffectiveness or a contract-shortening order).

### **Grounds for ineffectiveness**

**99.**—(1) There are three grounds for ineffectiveness.

#### *The first ground*

(2) Subject to paragraph (3), the first ground applies where the contract has been awarded without prior publication of a contract notice in any case in which Part 2 required the prior publication of a contract notice.

(3) The first ground does not apply if all the following apply:—

- (a) the contracting authority considered the award of the contract without prior publication of a contract notice to be permitted by Part 2;
- (b) the contracting authority has had published in the Official Journal a voluntary transparency notice expressing its intention to enter into the contract; and
- (c) the contract has not been entered into before the end of a period of at least 10 days beginning with the day after the date on which the voluntary transparency notice was published in the Official Journal.

(4) In paragraph (3), “voluntary transparency notice” means a notice which contains the following information—

- (a) the name and contact details of the contracting authority;
- (b) a description of the object of the contract;
- (c) a justification of the decision of the contracting authority to award the contract without prior publication of a contract notice;
- (d) the name and contact details of the economic operator to be awarded the contract; and
- (e) where appropriate, any other information which the contracting authority considers it useful to include.

*The second ground*

(5) The second ground applies where all the following apply—

- (a) the contract has been entered into in breach of any requirement imposed by—
  - (i) regulation 87 (the standstill period),
  - (ii) regulation 95 (contract-making suspended by challenge to award), or
  - (iii) regulation 96(1)(b) (interim order restoring or modifying a suspension originally imposed by regulation 95);
- (b) there has also been a breach of the duty owed to the economic operator in accordance with regulation 89 or 90 in respect of obligations other than those imposed by regulation 87 (the standstill period) and this Chapter;
- (c) the breach mentioned in sub-paragraph (a) has deprived the economic operator of the possibility of starting proceedings in respect of the breach mentioned in sub-paragraph (b), or pursuing them to a proper conclusion, before the contract was entered into; and
- (d) the breach mentioned in sub-paragraph (b) has affected the chances of the economic operator obtaining the contract.

*The third ground*

(6) Subject to paragraph (7), the third ground applies where all the following apply—

- (a) the contract is based on a framework agreement or was awarded under a dynamic purchasing system;
- (b) the contract was awarded in breach of any requirement imposed by—
  - (i) regulation 33(11) (award of contracts based on framework agreements through re-opening of competition), or
  - (ii) regulation 34(21) to (24) (award of contracts under dynamic purchasing systems);and
- (c) the estimated value of the contract is equal to or greater than the relevant threshold mentioned in regulation 5.

(7) The third ground does not apply if all the following apply—

- (a) the contracting authority considered the award of the contract to be in accordance with the provisions mentioned in paragraph (6)(b)(i) or (ii);
- (b) the contracting authority has, despite regulation 86(5)(c), voluntarily complied with the requirements set out in regulation 86(1) to (4); and
- (c) the contract has not been entered into before the end of the standstill period.

**General interest grounds for not making a declaration of ineffectiveness**

**100.**—(1) Where the Court is satisfied that any of the grounds for ineffectiveness applies, the Court must not make a declaration of ineffectiveness if—

- (a) the contracting authority or another party to the proceedings raises an issue under this regulation; and

(b) the Court is satisfied that overriding reasons relating to a general interest require that the effects of the contract should be maintained.

(2) For that purpose, economic interests in the effectiveness of the contract may be considered as overriding reasons only if in exceptional circumstances ineffectiveness would lead to disproportionate consequences.

(3) However, economic interests directly linked to the contract cannot constitute overriding reasons relating to a general interest.

(4) For that purpose, economic interests directly linked to the contract include—

- (a) the costs resulting from the delay in the execution of the contract;
- (b) the costs resulting from the commencement of a new procurement procedure;
- (c) the costs resulting from change of the economic operator performing the contract; and
- (d) the costs of legal obligations resulting from the ineffectiveness.

(5) For the purposes of paragraph (1)(b), overriding reasons may be taken to require that the effects of the contract should be maintained even if they do not require the Court to refrain from shortening the duration of the contract by an order under regulation 102(3)(a).

### **The consequences of ineffectiveness**

**101.**—(1) Where a declaration of ineffectiveness is made, the contract is to be considered to be prospectively, but not retrospectively, ineffective as from the time when the declaration is made and, accordingly, those obligations under the contract which at that time have yet to be performed are not to be performed.

(2) Paragraph (1) does not prevent the exercise of any power under which the orders or decisions of the Court may be stayed, but at the end of any period during which a declaration of ineffectiveness is stayed, the contract is then to be considered to have been ineffective as from the time when the declaration had been made.

(3) When making a declaration of ineffectiveness, or at any time after doing so, the Court may make any order that it thinks appropriate for addressing—

- (a) the implications of paragraph (1) or (2) for the particular circumstances of the case;
- (b) any consequential matters arising from the ineffectiveness.

(4) Such an order may, for example, address issues of restitution and compensation as between those parties to the contract who are parties to the proceedings so as to achieve an outcome which the Court considers to be just in all the circumstances.

(5) Paragraph (6) applies where the parties to the contract have, at any time before the declaration of ineffectiveness is made, agreed by contract any provisions for the purpose of regulating their mutual rights and obligations in the event of such a declaration being made.

(6) In those circumstances, the Court must not exercise its power to make an order under paragraph (3) in any way which is inconsistent with those provisions, unless and to the extent that the Court considers that those provisions are incompatible with the requirement in paragraph (1) or (2).

### **Penalties in addition to, or instead of, ineffectiveness**

**102.**—(1) Where the Court makes a declaration of ineffectiveness, it must also order that the contracting authority pay a civil financial penalty of the amount specified in the order.

(2) Paragraph (3) applies where—

- (a) in proceedings for a declaration of ineffectiveness, the Court is satisfied that any of the grounds for ineffectiveness applies but does not make a declaration of ineffectiveness because regulation 100 requires it not to do so; or
- (b) in any proceedings, the Court is satisfied that the contract has been entered into in breach of any requirement imposed by regulation 87, 95 or 96(1)(b), and does not make a

declaration of ineffectiveness (whether because none was sought or because the Court is not satisfied that any of the grounds for ineffectiveness applies).

(3) In those circumstances, the Court must order at least one, and may order both, of the following penalties:—

- (a) that the duration of the contract be shortened to the extent specified in the order;
- (b) that the contracting authority pay a civil financial penalty of the amount specified in the order.

(4) When the Court is considering what order to make under paragraph (1) or (3), the overriding consideration is that the penalties must be effective, proportionate and dissuasive.

(5) In determining the appropriate order, the Court must take account of all the relevant factors, including—

- (a) the seriousness of the relevant breach of the duty owed in accordance with regulation 89 or 90;
- (b) the behaviour of the contracting authority;
- (c) where the order is to be made under paragraph (3), the extent to which the contract remains in force.

(6) Where more than one economic operator starts proceedings in relation to the same contract, paragraph (4) applies to the totality of penalties imposed in respect of the contract.

#### *Civil financial penalties*

(7) Subject to paragraph (8), where a contracting authority is ordered by the High Court of England and Wales to pay a civil financial penalty under this regulation—

- (a) the Court's order must state that the penalty is payable to the Minister for the Cabinet Office;
- (b) the Court must send a copy of the order to the Minister;
- (c) the contracting authority must pay the penalty to the Minister; and
- (d) the Minister must, on receipt of the penalty, pay it into the Consolidated Fund.

(8) Where the Minister for the Cabinet Office, or the Cabinet Office, is ordered to pay a civil financial penalty under this Chapter—

- (a) paragraph (7) does not apply; and
- (b) the Minister for the Cabinet Office must pay the penalty into the Consolidated Fund.

(9) Subject to paragraph (10), where a contracting authority is ordered by the High Court of Northern Ireland to pay a civil financial penalty under this regulation—

- (a) the Court's order must state that the penalty is payable to the Department of Finance and Personnel;
- (b) the Court must send a copy of the order to the Department;
- (c) the contracting authority must pay the penalty to the Department; and
- (d) the Department must, when it receives the penalty, pay it into the Consolidated Fund of Northern Ireland.

(10) Where the Department of Finance and Personnel is ordered to pay a civil financial penalty under this Chapter—

- (a) paragraph (9) does not apply; and
- (b) the Department must pay the penalty into the Consolidated Fund of Northern Ireland.

(11) Where a contracting authority is a non-Crown body—

- (a) any payment due under paragraph (7) may be enforced by the Minister for the Cabinet Office as a judgment debt due to the Minister; and
- (b) any payment due under paragraph (9) may be enforced by the Department of Finance and Personnel as a judgment debt due to it.

### *Contract shortening*

(12) When making an order under paragraph (3)(a), or at any time after doing so, the Court may make any order that it thinks appropriate for addressing the consequences of the shortening of the duration of the contract.

(13) Such an order may, for example, address issues of restitution and compensation as between those parties to the contract who are parties to the proceedings so as to achieve an outcome which the Court considers to be just in all the circumstances.

(14) Paragraph (15) applies where the parties to the contract have, at any time before the order under paragraph (3)(a) is made, agreed by contract any provisions for the purpose of regulating their mutual rights and obligations in the event of such an order being made.

(15) In those circumstances, the Court must not exercise its power to make an order under paragraph (12) in any way which is inconsistent with those provisions, unless and to the extent that the Court considers that those provisions are incompatible with the primary order that is being made, or has been made, under paragraph (3)(a).

(16) In paragraph (3)(a), “duration of the contract” refers only to its prospective duration as from the time when the Court makes the order.

### **Ineffectiveness etc. in relation to specific contracts based on a framework agreement**

**103.**—(1) In this regulation, “specific contract” means a contract which—

- (a) is based on the terms of a framework agreement; and
- (b) was entered into before a declaration of ineffectiveness (if any) was made in respect of the framework agreement.

(2) A specific contract is not to be considered to be ineffective merely because a declaration of ineffectiveness has been made in respect of the framework agreement.

(3) Where a declaration of ineffectiveness has been made in respect of the framework agreement, the Court must, subject to paragraph (5), make a separate declaration of ineffectiveness in respect of each relevant specific contract.

(4) For that purpose, a specific contract is relevant only if a claim for a declaration of ineffectiveness in respect of that specific contract has been made—

- (a) within the time limits mentioned in regulation 93 as applicable to the circumstances of the specific contract;
- (b) regardless of whether the claim was made at the same time as any claim for a declaration of ineffectiveness in respect of the framework agreement.

(5) Regulation 100 (general interest grounds for not making a declaration of ineffectiveness) applies for the purposes of paragraph (3), insofar as the overriding reasons relate specifically to the circumstances of the specific contract.

(6) This regulation does not prejudice the making of a declaration of ineffectiveness in relation to a specific contract in accordance with other provisions of this Part on the basis of—

- (a) the third ground of ineffectiveness set out in regulation 99(6) and (7); or
- (b) the second ground of ineffectiveness set out in regulation 99(5), where—
  - (i) the relevant breach of the kind mentioned in regulation 99(5)(a) is entering into the specific contract in breach of regulation 95 or 96(1)(b), and
  - (ii) the relevant breach of the kind mentioned in regulation 99(5)(b) relates specifically to the award of the specific contract and the procedure relating to that award, rather than to the award of the framework agreement and the procedure relating to it.

(7) A declaration of ineffectiveness must not be made in respect of a specific contract otherwise than in accordance with paragraph (3) or on a basis mentioned in paragraph (6).

(8) Where a declaration of ineffectiveness is made in respect of a specific contract in accordance with paragraph (3)—

- (a) regulation 101 (the consequences of ineffectiveness) applies;
- (b) regulation 102(1) (requirement to impose a civil financial penalty) does not apply.

(9) Where the Court refrains, by virtue of paragraph (5), from making a declaration of ineffectiveness which would otherwise have been required by paragraph (3), the Court must, subject to paragraph (10), order that the duration of the contract be shortened to the extent specified in the order.

(10) The extent by which the duration of the contract is to be shortened under paragraph (9) is the maximum extent, if any, which the Court considers to be possible having regard to what is required by the overriding reasons mentioned in paragraph (5).

(11) In paragraphs (9) and (10), “duration of the contract” refers only to its prospective duration as from the time when the Court makes the order.

### **Injunctions against the Crown**

**104.** In proceedings against the Crown, the Court has power to grant an injunction despite section 21 of the Crown Proceedings Act 1947(a).

## **PART 4**

### **MISCELLANEOUS OBLIGATIONS**

#### **CHAPTER 7**

#### **ADDITIONAL RULES FOR PART 2 PROCUREMENTS**

### **Scope of Chapter 7**

**105.**—(1) This Chapter applies to procurements within the scope of Part 2.

(2) But—

- (a) this Chapter does not apply to the procurement of health care services for the purposes of the NHS within the meaning and scope of the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013(b);
- (b) regulations 106 and 108 do not apply where the contracting authority is a maintained school or an Academy.

### **Publication of information on Contracts Finder where contract notices are used**

**106.**—(1) Where a contracting authority sends a contract notice to the EU Publications Office for publication, the contracting authority shall cause information to be published on Contracts Finder within 24 hours of the time when the contracting authority becomes entitled, in accordance with regulation 52(3) and (4), to publish the notice at national level.

(2) The information to be published on Contracts Finder shall include at least the following:—

- (a) the internet address at which the procurement documents are accessible;
- (b) the time by which any interested economic operator must respond if it wishes to be considered;
- (c) how and to whom such an economic operator is to respond; and
- (d) any other requirements for participating in the procurement.

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(a) 1947 c.44  
(b) S.I. 2013/500.

(3) In complying with this regulation, contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office in relation to the form and manner in which information is to be published on Contracts Finder.

(4) Paragraph (5) applies if such guidance confirms that, for the time being, arrangements have been put in place by or on behalf of the Cabinet Office under which the information referred to in paragraph (2) will, without further action by contracting authorities, be extracted and published on Contracts Finder following the publication of contract notices by the EU Publications Office.

(5) In those circumstances, contracting authorities shall be deemed to have complied with paragraph (1) by virtue of sending the contract notice to the EU Publications Office for publication in accordance with regulation 51.

### **Qualitative selection**

**107.**—(1) Contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office in relation to the qualitative selection of economic operators.

(2) In this regulation, “qualitative selection” means the processes by which, in accordance with regulations 57 to 65, contracting authorities—

- (a) select economic operators to participate in procurement procedures; and
- (b) decide whether to exclude economic operators from such participation.

(3) Such guidance may, in particular, relate to—

- (a) the use of questionnaires for the purposes of qualitative selection, including the avoidance of burdensome, excessive or disproportionate questions;
- (b) the assessment of information relevant to qualitative assessment.

(4) Where a contracting authority conducts a procurement in a way which represents a reportable deviation from the guidance issued under this regulation, the contracting authority shall send to the Cabinet Office a report explaining the deviation.

(5) For that purpose, something is a reportable deviation only if it falls within criteria laid down for that purpose in guidance issued under this regulation.

### **Publication of information on Contracts Finder about contracts awarded**

**108.**—(1) Paragraph (2) applies where a contracting authority—

- (a) sends a contract award notice to the EU Publications Office for publication; or
- (b) awards a contract based on a framework agreement.

(2) In those circumstances, the contracting authority shall cause at least the following information to be published on Contracts Finder:—

- (a) the name of the contractor;
- (b) the date on which the contract was entered into;
- (c) the value of the contract.

(3) But the contracting authority may withhold information from publication where its release—

- (a) would impede law enforcement or would otherwise be contrary to the public interest,
- (b) would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or
- (c) might prejudice fair competition between economic operators.

(4) Contracting authorities shall comply with paragraph (2) within a reasonable time.

(5) But where a contracting authority sends, or intends to send, a contract award notice to the EU Publications Office for publication, the contracting authority shall not cause the information to be published on Contracts Finder earlier than the time at which the contracting authority becomes entitled, in accordance with regulation 52(3) and (4), to publish the notice at national level.



(6) In complying with this regulation, contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office on—

- (a) the form and manner in which the information is to be published on Contracts Finder; and
- (b) what is a reasonable time (having regard, where relevant, to paragraph (5)) for the purposes of paragraph (4).

(7) Paragraph (8) applies if such guidance confirms that, for the time being, arrangements have been put in place by or on behalf of the Cabinet Office under which the information referred to in paragraph (2) will, without further action by contracting authorities, be extracted and published on Contracts Finder following the publication of contract notices by the EU Publications Office.

(8) In those circumstances, contracting authorities shall be deemed to have complied with paragraph (2) by virtue of sending a contract award notice to the EU Publications Office for publication in accordance with regulation 51.

(9) In this regulation, “contract award notice” means a contract award notice referred to in regulation 50 or 75(3).

## CHAPTER 8

### BELOW-THRESHOLD PROCUREMENTS

#### Scope of Chapter 8

**109.**—(1) Subject to paragraphs (2) and (5), this Chapter applies to procurements by contracting authorities with respect to public contracts where Part 2 does not apply because the estimated value of the procurement is less than the relevant threshold mentioned in regulation 5.

(2) This Chapter does not apply in any of the following cases:—

- (a) where Part 2 would not have applied even if the estimated value of the procurement had been equal to or greater than the relevant threshold mentioned in regulation 5;
- (b) where the contracting authority is a central government authority and the procurement has a value net of VAT estimated to be less than £10,000;
- (c) where the contracting authority is—
  - (i) a sub-central contracting authority or an NHS Trust, and
  - (ii) the procurement has a value net of VAT estimated to be less than £25,000;
- (d) the procurement of health care services for the purposes of the NHS within the meaning and scope of the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013(a).

(3) For the purposes of paragraph (2)(b) and (c) and regulation 111(2), the estimated value of the procurement shall be calculated on the basis set out in regulation 6(1) to (5), (7) to (10) and (16) to (19), but as if the reference to a call for competition in regulation 6(7) were a reference to the publication of information on Contracts Finder in accordance with regulation 110.

(4) A procurement shall not be subdivided with the effect of preventing it from falling within the scope of this Chapter, unless justified by objective reasons.

(5) Regulations 110 and 112 do not apply where the contracting authority is a maintained school or an Academy.

#### Publication of contract opportunities on Contracts Finder

**110.**—(1) Paragraph (2) applies where a contracting authority advertises a contract award opportunity.

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(a) S.I. 2013/500.

(2) In those circumstances, the contracting authority shall publish information about the opportunity on Contracts Finder, regardless of what other means it uses to advertise the opportunity.

(3) Where a contracting authority is required by paragraph (2) to publish information on Contracts Finder, it shall do so within 24 hours of the time when it first advertises the contract award opportunity in any other way.

(4) A contracting authority may publish on Contracts Finder information about a contract award opportunity even if the contracting authority does not advertise the opportunity in any other way.

(5) For the purposes of this regulation—

- (a) a contracting authority advertises an opportunity if it does anything to put the opportunity in the public domain or bring the opportunity to the attention of economic operators generally or to any class or description of economic operators which is potentially open-ended, with a view to receiving responses from economic operators who wish to be considered for the award of the contract; and
- (b) accordingly, a contracting authority does not advertise an opportunity where it makes the opportunity available only to a number of particular economic operators who have been selected for that purpose (whether ad hoc or by virtue of their membership of some closed category such as a framework agreement), regardless of how it draws the opportunity to the attention of those economic operators.

(6) In this regulation, “contract award opportunity” means the opportunity to be awarded a public contract by a contracting authority, regardless of how specific the opportunity is.

(7) For example, advertising by means of techniques similar to prior information notices used to call for competition under Part 2 amounts to the advertising of contract award opportunities even though the specific contracts that may in due course be awarded within the scope of such procurements are not identified individually in the advertising.

(8) The information to be published on Contracts Finder shall include at least the following:—

- (a) the time by which any interested economic operator must respond if it wishes to be considered;
- (b) how and to whom such an economic operator is to respond; and
- (c) any other requirements for participating in the procurement.

(9) For the purposes of paragraph (8)(a), the time shall be such as to allow the economic operators a sufficient but not disproportionate period of time within which to respond.

(10) The contracting authority shall ensure that the information remains published on Contracts Finder until the time mentioned in paragraph (8)(a).

(11) Paragraph (10) does not apply where the procedure is, for any reason, abandoned before that time.

(12) Where a contracting authority publishes information on Contracts Finder under this regulation, the contracting authority shall—

- (a) by means of the internet, offer unrestricted and full direct access free of charge to any relevant contract documents; and
- (b) specify in the information published on Contracts Finder the internet address at which those documents are accessible.

(13) But paragraph (12)(a) does not require a contracting authority to provide such access where the access cannot be offered for a relevant reason.

(14) In paragraph (13), “relevant reason” means any reason which, in accordance with regulation 53(3) and (4), would have applied if the procurement had been covered by Part 2 and the relevant contract documents had been procurement documents.

(15) For the purposes of this regulation, a document is a relevant contract document if—

- (a) it contains information about the opportunity which goes beyond the information published on Contracts Finder, and

- (b) that information is intended by the contracting authority to be taken into account by those responding to the advertisement.

(16) In complying with this regulation, contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office in relation to—

- (a) the form and manner in which information is to be published on Contracts Finder;
- (b) what is a sufficient but not disproportionate period of time for the purposes of paragraph (9).

### **Assessing suitability etc**

**111.**—(1) A contracting authority shall not include a pre-qualification stage in a procurement.

(2) Where the relevant threshold for the purposes of regulation 109(1) is that mentioned in regulation (5)(1)(a) or (d), paragraph (1) of this regulation applies only if the estimated value of the procurement is less than the lower threshold mentioned in paragraph (3).

(3) The lower threshold is the threshold mentioned in—

- (a) regulation 5(1)(b) where the contracting authority is a central government authority;
- (b) regulation 5(1)(c) where the contracting authority is a sub-central contracting authority.

(4) In paragraph (1), “pre-qualification stage” means a stage in the procurement process during which the contracting authority assesses the suitability of candidates to perform a public contract for the purpose of reducing the number of candidates to a smaller number who are to proceed to a later stage of the process.

(5) In any event, contracting authorities may ask candidates to answer suitability assessment questions only if each such question is—

- (a) relevant to the subject-matter of the procurement; and
- (b) proportionate.

(6) In paragraph (5), “suitability assessment question” means a question which relates to information or evidence which the contracting authority requires for the purpose of assessing whether candidates meet requirements or minimum standards of suitability, capability, legal status or financial standing.

(7) In complying with this regulation, contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office, which may include guidance on how to establish and assess, without infringing paragraph (5), whether candidates meet requirements or minimum standards relating to suitability, capability, legal status and financial standing.

(8) Where a contracting authority conducts a procurement in a way which represents a reportable deviation from the guidance issued under paragraph (7), the contracting authority shall send to the Cabinet Office a report explaining the deviation.

(9) For that purpose, something is a reportable deviation only if it falls within criteria laid down for that purpose in guidance issued under paragraph (7).

(10) In this regulation, “candidate” means an economic operator that wishes to be considered for the award of a public contract.

### **Publication of information on Contracts Finder about contracts awarded**

**112.**—(1) Where a public contract is awarded, the contracting authority shall, within a reasonable time, publish on Contracts Finder at least the following information:—

- (a) the name of the contractor;
- (b) the date on which the contract was entered into;
- (c) the value of the contract;
- (d) whether the contractor is a SME or VCSE.

(2) But the contracting authority may withhold information from publication where its release—

- (a) would impede law enforcement or would otherwise be contrary to the public interest,
- (b) would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or
- (c) might prejudice fair competition between economic operators.

(3) In complying with this regulation, contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office in relation to—

- (a) the form and manner in which the information is to be published on Contracts Finder; and
- (b) what is a reasonable time for the purposes of paragraph (1).

(4) In paragraph (1)(d)—

“SME” means an enterprise falling within the category of micro, small and medium-sized enterprises defined by the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises<sup>(a)</sup>; and

“VCSE” means a non-governmental organisation that is value-driven and which principally reinvests its surpluses to further social, environmental or cultural objectives.

## CHAPTER 9

### MISCELLANEOUS PROVISIONS

#### **Payment of undisputed invoices within 30 days by contracting authorities, contractors and subcontractors**

**113.**—(1) This regulation applies to all public contracts except the following:—

- (a) contracts for the procurement of health care services for the purposes of the NHS within the meaning and scope of the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013<sup>(b)</sup>;
- (b) contracts awarded by a contracting authority which is a maintained school or an Academy.

(2) Contracting authorities shall ensure that every public contract which they award contains suitable provisions to require the following:—

- (a) that any payment due from the contracting authority to the contractor under the contract is to be made no later than the end of a period of 30 days from the date on which the relevant invoice is regarded as valid and undisputed;
- (b) that any invoices for payment submitted by the contractor are considered and verified by the contracting authority in a timely fashion and that undue delay in doing so is not to be sufficient justification for failing to regard an invoice as valid and undisputed; and
- (c) that any subcontract awarded by the contractor contains suitable provisions to impose, as between the parties to the subcontract—
  - (i) requirements to the same effect as those which sub-paragraphs (a) and (b) require to be imposed as between the parties to the public contract; and
  - (ii) a requirement for the subcontractor to include in any subcontract which it in turn awards suitable provisions to impose, as between the parties to that subcontract, requirements to the same effect as those required by this sub-paragraph (c).

(3) Paragraph (2) is without prejudice to any contractual or statutory provision under which any payment is to be made earlier than the time required by that paragraph.

(4) In complying with paragraph (2), contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office.

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(a) OJ No L 124, 20.5.2003, p.36.

(b) S.I. 2013/500.

(5) Such guidance may, in particular, recommend model provisions, including provisions defining the circumstances in which an invoice is to be regarded as being, or as having become, valid and undisputed including, for example—

- (a) provisions deeming an invoice to have become valid and undisputed if not considered and verified in a timely manner; and
- (b) addressing what is to be considered, for that purpose, to be a timely manner in various circumstances.

(6) To the extent that a public contract does not contain express provisions dealing with any of the matters which, in accordance with paragraph (2), should have been contained in that contract or subcontract, it shall be an implied term of the contract that—

- (a) any payment due under it from the contracting authority to the contractor is to be made no later than the end of a period of 30 days from the date on which the contracting authority completes any process of verification that the invoice is valid and undisputed;
- (b) the contracting authority is to consider and verify any invoice submitted by the contractor in a timely manner with a view to ascertaining whether the invoice is valid and undisputed; and
- (c) the contractor will include in any subcontract which it awards provisions—
  - (i) imposing, as between the parties to that subcontract, requirements to the same effect as those which sub-paragraphs (a) and (b) refer to as between the parties to the public contract, and
  - (ii) requiring the subcontractor party to that subcontract to include in any subcontract which it in turn awards provisions imposing, as between the parties to that subcontract, requirements to the same effect as those referred to in paragraphs (i) and (ii) of this sub-paragraph.

(7) Every financial year, each contracting authority shall publish on the internet statistics showing, for the preceding financial year, how far the contracting authority has actually complied with its obligations under this regulation to make payments within 30 days, including—

- (a) the proportion of invoices that were paid in accordance with those obligations, expressed as a percentage of the total number of invoices that were, or should have been, paid in accordance with those obligations;
- (b) the total amount of any liability (whether statutory or otherwise) to pay interest which accrued by virtue of circumstances amounting to a breach of those obligations; and
- (c) the total amount of interest actually paid in discharge of any such liability (including any which had accrued before the beginning of the period to which the statistics relate).

(8) In paragraph (7), “publish on the internet” means—

- (a) make freely available on the internet; and
- (b) maintain such availability, subject to temporary interruptions for technical reasons, until the publication under paragraph (7) of the statistics for the following financial year.

(9) In complying with paragraph (7), contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office.

(10) Such guidance may, in particular, recommend model templates for presenting the statistics.

(11) In this regulation—

“financial year” means the period in respect of which the accounts of the contracting authority are prepared;

“subcontract” means a contract between two or more suppliers (at any stage of remoteness from the contracting authority in a subcontracting chain) made wholly or substantially for the purpose of performing (or contributing to the performance of) the whole or any part of a public contract; and

“supplier” means a party to a contract or subcontract under which that party is to execute any works, supply any products or provide any services.

#### **General provisions applicable to Part 4**

**114.**—(1) A material failure to comply with any requirement of this Part does not, of itself, affect the validity of a public contract that has been entered into.

(2) Nothing in this Part requires a contracting authority to disclose any information if it considers that the disclosure would be contrary to the security interests of the United Kingdom.

## **PART 5**

### **REVOCATIONS, CONSEQUENTIAL AMENDMENTS, SAVINGS AND TRANSITIONAL PROVISIONS**

#### **Interpretation of Part 6**

**115.** In this Part, “the 2006 Regulations” means the Public Contracts Regulations 2006(a).

#### **Revocation and amendments**

**116.** Subject to the other provisions of this Part—

- (a) the 2006 Regulations are revoked; and
- (b) the consequential and miscellaneous amendments set out in Schedule 6 have effect.

#### **General saving in respect of certain concession contracts**

**117.** Nothing in these Regulations affects—

- (a) public works concession contracts within the meaning of the 2006 Regulations, or
- (b) services concession contracts within the meaning of the 2006 Regulations,

or procedures for the award of such contracts.

#### **General transitional provision and saving where procurement procedure commenced before 26th February 2015**

**118.**—(1) Nothing in these Regulations affects any contract award procedure commenced before 26th February 2015.

(2) For that purpose, a contract award procedure has been commenced before 26th February 2015 if, before that date—

- (a) a contract notice has been sent to the Official Journal in accordance with the 2006 Regulations in order to invite offers or requests to be selected to tender for or to negotiate in respect of a proposed public contract, framework agreement or dynamic purchasing system;
- (b) the contracting authority has had published any form of advertisement seeking offers or expressions of interest in a proposed public contract, framework agreement or dynamic purchasing system; or
- (c) the contracting authority has contacted any economic operator in order to—
  - (i) seek expressions of interest or offers in respect of a proposed public contract, framework agreement or dynamic purchasing system, or

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(a) S.I. 2006/5, amended by S.I. 2007/3542, 2008/2256, 2683, 2848, 2009/1307, 2992, 2010/133, 976, 2011/1043, 1848, 2053, 2581, 3058, 2013/252, 1431, 2014/834 and by the Enterprise and Regulatory Reform Act 2013 (c.24), Schedule 20, paragraph 2.

- (ii) respond to an unsolicited expression of interest or offer received from that economic operator in relation to a proposed public contract, framework agreement or dynamic purchasing system.

(3) Nothing in these Regulations affects the award of a specific contract based on a framework agreement where the framework agreement was concluded—

- (a) before 26th February 2015; or
- (b) on or after 26th February 2015 following a contract award procedure which, by virtue of paragraph (1), was not affected by these Regulations.

(4) Nothing in these Regulations affects the award of a specific contract under a dynamic purchasing system where the system was established—

- (a) before 26th February 2015; or
- (b) on or after that date following a contract award procedure which, by virtue of paragraph (1), was not affected by these Regulations.

(5) Nothing in these Regulations affects a contract awarded—

- (a) before 26th February 2015; or
- (b) after that date but where the award itself was not, by virtue of paragraphs (1) to (4), affected by these Regulations.

(6) In this regulation, “dynamic purchasing system”, “framework agreement” and “public contract” have the same meanings as in the 2006 Regulations.

#### **Transitional provision and saving where utilities procurement procedure commenced before 26th February 2015**

**119.**—(1) The Utilities amendments do not affect any contract award procedure commenced before 26th February 2015.

(2) For that purpose, a contract award procedure has been commenced before 26th February 2015 if, before that date—

- (a) a contract notice has been sent to the Official Journal in accordance with the UCR in order to invite offers or requests to be selected to tender for or to negotiate in respect of a proposed contract or dynamic purchasing system;
- (b) a periodic indicative notice has been sent to the Official Journal, in which case the contract award procedure that is not affected by the Utilities amendments is the procedure for the award of any proposed contract the intention to award which was indicated in the notice, but only if the requirements in regulation 16(3)(a) and (b) of the UCR are satisfied;
- (c) the utility has had published any form of advertisement seeking offers or expressions of interest in a proposed contract or dynamic purchasing system; or
- (d) the utility has contacted any economic operator in order to—
  - (i) seek expressions of interest or offers in respect of a proposed contract or dynamic purchasing system, or
  - (ii) respond to an unsolicited expression of interest or offer received from that economic operator in relation to a proposed contract or dynamic purchasing system.

(3) The Utilities amendments do not affect the award of a specific contract under a framework agreement where the framework agreement was concluded—

- (a) before 26th February 2015; or
- (b) on or after 26th February 2015 following a contract award procedure which, by virtue of paragraph (1), was not affected by the Utilities amendments.

(4) The Utilities amendments do not affect the award of a specific contract under a dynamic purchasing system where the system was established—

- (a) before 26th February 2015; or

- (b) on or after that date following a contract award procedure which, by virtue of paragraph (1), was not affected by the Utilities amendments.

(5) In this regulation—

- (a) “contract”, “dynamic purchasing system”, “economic operator”, “framework agreement” and “periodic indicative notice” have the same meanings as in the UCR;
- (b) “the UCR” means the Utilities Contracts Regulations 2006(a); and
- (c) “the Utilities amendments” means the amendments made to the UCR by paragraph 15 of Schedule 7.

### **Temporary exemption and saving for certain NHS procurements**

**120.**—(1) Nothing in these Regulations affects—

- (a) any contract award procedure that—
  - (i) relates to the procurement of health care services for the purposes of the NHS within the meaning and scope of the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013(b), and
  - (ii) is commenced before 18th April 2016; or
- (b) any contract awarded as a result of such a procedure.

(2) For that purpose, a contract award procedure has been commenced before 18th April 2016 if, before that date, any of the events mentioned in regulation 118(2)(a) to (c) has occurred.

### **Transitory provision prior to full commencement of regulation 22(1) to (7)**

**121.**—(1) This regulation applies during the period beginning on the date mentioned in regulation 1(3)(a) and ending immediately before the date mentioned in regulation 1(3)(c).

(2) During that period, contracting authorities may choose between the following means of communication for the purposes mentioned in paragraph (3):—

- (a) electronic means in accordance with regulation 22;
- (b) post or other suitable carrier;
- (c) fax;
- (d) a combination of those means.

(3) That choice is available for all communication and information exchange in respect of which both the following criteria are met:—

- (a) the use of electronic means would, in accordance with regulation 22(1) to (5), have been required if those provisions had been in force;
- (b) the use of electronic means is not required by any other provision of these Regulations that is in force.

### **Complying with regulation 113 before 1st April 2016**

**122.** In relation to any financial year ending before 1st April 2016, a contracting authority may comply with regulation 113(7) as if sub-paragraph (b) referred to the total amount of interest actually paid instead of the total amount of liability accrued.

*Francis Maude*  
Minister for the Cabinet Office

4th February 2015

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(a) S.I. 2006/6, amended by S.I. 2008/2848, 2011/1043, 2053, 2012/1659, 2013/610; there are other amending instruments but none is relevant.  
(b) S.I. 2013/500.



## SCHEDULE 1

Regulation 2(1)

### CENTRAL GOVERNMENT AUTHORITIES

Where an entity listed in this Schedule is succeeded by another entity, which is itself a contracting authority, the successor entity shall be deemed to be included in this Schedule.

#### Cabinet Office

Office of the Parliamentary Counsel

Crown Commercial Service

#### Charity Commission

Crown Estate Commissioners (Vote Expenditure Only)

#### Crown Prosecution Service

#### Department for Business, Innovation and Skills

Competition and Markets Authority

Higher Education Funding Council for England

Intellectual Property Office

Met Office

National Measurement Office

Office of Manpower Economics

#### Department of Communities and Local Government

Rent Assessment Panels

#### Department for Culture, Media and Sport

British Library

British Museum

Commission for Architecture and the Built Environment

The Gambling Commission

Historic Buildings and Monuments Commission for England (English Heritage)

Imperial War Museum

Museums, Libraries and Archives Council

National Gallery

National Maritime Museum

National Portrait Gallery

Natural History Museum

Science Museum

Tate Gallery  
Victoria and Albert Museum  
Wallace Collection  
Department for Education  
Department for Energy and Climate Change  
Department for Environment, Food and Rural Affairs  
Agricultural Dwelling House Advisory Committees  
Agricultural Land Tribunals  
Cattle Breeding Centre  
Countryside Agency  
Plant Variety Rights Office  
Royal Botanic Gardens, Kew  
Royal Commission on Environmental Pollution  
Department of Health  
NHS Business Services Authority  
NHS Trusts  
Department for International Development  
Department of the Procurator General and Treasury Solicitor  
Legal Secretariat to the Law Officers  
Department for Transport  
Maritime and Coastguard Agency  
Department for Work and Pensions  
Health and Safety Executive  
Independent Tribunal Service  
Industrial Injuries Advisory Council  
Medical Boards and Examining Medical Officers (War Pensions)  
Occupational Pensions Regulatory Authority  
Pensions Ombudsman  
Pensions Protection Fund Ombudsman  
Regional Medical Service  
Social Security Advisory Committee  
Foreign and Commonwealth Office  
Wilton Park Conference Centre  
Government Actuary's Department  
GCHQ

Home Office

HM Inspectorate of Constabulary

House of Commons

House of Lords

Ministry of Defence

Defence Equipment & Support

Defence Infrastructure Organisation

Defence Science and Technology Laboratories

Ministry of Justice

Boundary Commission for England

Combined Tax Tribunal

Council on Tribunals

Court of Appeal — Criminal

Employment Appeals Tribunal

Employment Tribunals

HMCS Regions, Crown, County and Combined Courts (England and Wales)

Immigration Appellate Authorities

Immigration Adjudicators

Immigration Appeals Tribunal

Lands Tribunal

Law Commission

Legal Aid Agency (England and Wales)

Office of the Social Security Commissioners

Parole Board and Local Review Committees

Pensions Appeal Tribunals

Public Trust Office

Supreme Court Group (England and Wales)

Transport Tribunal

The National Archives

National Audit Office

National Savings and Investments

Public Prosecution Service for Northern Ireland

Office of Fair Trading

Office for National Statistics

National Health Service Central Register

Parliamentary and Health Service Ombudsman  
Paymaster General's Office  
Privy Council Office  
HM Revenue and Customs  
Royal Hospital, Chelsea  
Royal Mint  
Rural Payments Agency  
HM Treasury  
    United Kingdom Debt Management Office  
Northern Ireland, Department of Agriculture and Rural Development  
    Agri-Food and Biosciences Institute  
    Livestock and Meat Commission for Northern Ireland  
    Northern Ireland Fishery Harbour Authority  
Northern Ireland, Department of Culture, Arts and Leisure  
    Armagh Observatory  
    Armagh Planetarium  
    Arts Council of Northern Ireland  
    Northern Ireland Library Authority  
    Northern Ireland Screen  
    Northern Ireland Museums Council  
    National Museums Northern Ireland  
    Sport NI  
Northern Ireland, Department of Education  
    Council for Catholic Maintained Schools  
    Comhairle na Gaelscolaiochta  
    Council for the Curriculum, Examinations and Assessment  
    Education and Library Boards  
    Exceptional Circumstances Body  
    General Teaching Council for Northern Ireland  
    Middletown Centre for Autism  
    Northern Ireland Council for Integrated Education  
    Staff Commission for Education and Library Boards  
    Youth Council for Northern Ireland  
Northern Ireland, Department for Employment and Learning  
    Belfast Metropolitan College

Construction Industry Training Board - ConstructionSkills NI  
Labour Relations Agency  
Northern Regional College  
North West Regional College  
South Eastern Regional College  
Southern Regional College  
South West College  
Stranmillis University College  
Ulster Supported Employment Limited  
Northern Ireland, Department of Enterprise, Trade and Investment  
Consumer Council for Northern Ireland  
Health and Safety Executive for Northern Ireland  
Invest Northern Ireland  
Northern Ireland Tourist Board  
Northern Ireland, Department of the Environment  
Northern Ireland Local Government Officers' Superannuation Committee  
Local Government Staff Commission  
Northern Ireland Environment Agency  
Northern Ireland, Department of Finance and Personnel  
Northern Ireland Building Regulations Advisory Committee  
Statistics Advisory Committee  
Public service Commission for Northern Ireland  
Lay Observer for Northern Ireland  
Northern Ireland, Department of Health, Social Services and Public Safety  
Belfast Health and Social Care Trust  
Regional Business Services Organisation  
Regional Health and Social Care Board  
Northern Health and Social Care Trust  
Northern Ireland Ambulance Service Trust  
Northern Ireland Blood Transfusion Service  
Northern Ireland Fire and Rescue Service  
Northern Ireland Guardian Ad Litem Agency  
Northern Ireland Medical and Dental Training Agency  
Northern Ireland Practice and Education Council for Nursing and Midwifery  
Northern Ireland Social Care Council

Patient and Client Council  
Regional Agency for Public Health and Social Well Being  
Health and Social care Regulation and Quality Improvement Authority  
South Eastern Health and Social Care Trust  
Southern Health and Social Care Trust  
Western Health and Social Care Trust  
Northern Ireland, Department of Justice  
Chief Inspector of Criminal Justice  
Northern Ireland Law Commission  
Northern Ireland Legal Services Commission  
Northern Ireland Policing Board  
Northern Ireland Policing Fund  
Northern Ireland Prisoner Ombudsman  
Probation Board for Northern Ireland  
Police Ombudsman Northern Ireland  
Police Retraining and Rehabilitation Trust  
Police Service of Northern Ireland  
RUC George Cross Foundation  
Northern Ireland, Department for Regional Development  
Northern Ireland, Department for Social Development  
Northern Ireland Housing Executive  
The Charity Commission for Northern Ireland  
Northern Ireland, Office of the First Minister and Deputy First Minister  
Attorney General for Northern Ireland  
Commissioner for Children and Young People for Northern Ireland  
Commissioner for Older People for Northern Ireland  
Commissioner for Public Appointments for Northern Ireland  
Commissioner for Victims and Survivors  
Community Relations Council  
Equality Commission for Northern Ireland  
ILEX Urban Regeneration Company Limited  
Maze Long Kesh Development Corporation  
Northern Ireland Judicial Appointments Commission  
Strategic Investment Board  
Planning and Water Appeals Commission

Victims and Survivors Service Ltd  
Scotland, Auditor-General  
Scotland, Crown Office and Procurator Fiscal Service  
Scotland, General Register Office  
Scotland, Queen's and Lord Treasurer's Remembrancer  
Scotland, Registers of Scotland  
The Scotland Office  
The Scottish Ministers  
    Architecture and Design Scotland  
    Community Health Partnerships  
    Court of Session  
    Crofting Commission  
    Health Boards  
    High Court of Justiciary  
    HM Inspectorate of Constabulary  
    Keeper of the Records of Scotland  
    Lands Tribunal for Scotland  
    National Galleries of Scotland  
    National Library of Scotland  
    National Museums of Scotland  
    Office of the Social Security Commissioners  
    Parole Board for Scotland  
    Pensions Appeal Tribunals  
    Revenue Scotland  
    Royal Botanic Garden, Edinburgh  
    Royal Commission on the Ancient and Historical Monuments of Scotland  
    Scottish Further and Higher Education Funding Council  
    Scottish Land Court  
    Scottish Law Commission  
    Sheriff Courts  
    Scottish Police Agency  
    Special Health Boards  
    The Office of the Accountant of Court  
    The Private Rented Housing Panel and Private Rented Housing Committees  
The Scottish Parliamentary Body Corporate

UK Export Finance  
 Higher Education Funding Council Wales  
 Local Democracy and Boundary Commission for Wales  
 Rent Assessment Committees  
 The Wales Assembly Parliamentary Service  
 Welsh Language Commissioner  
 The Wales Office (Office of the Secretary of State for Wales)  
 The Welsh Ministers  
   Arts Council of Wales  
   Care Council for Wales  
   National Museum Wales  
   National Library of Wales  
   Natural Resources Wales  
   Royal Commission on the Ancient and Historical Monuments of Wales  
   Sport Wales  
 Welsh NHS Bodies

## SCHEDULE 2      Regulations 2(1) and 13(1)(a)(i)

### ACTIVITIES CONSTITUTING WORKS

In this Schedule, 'NACE Rev.1' has the same meaning as in Council Regulation (EEC) No 3037/90 on the classification of economic activities in the European Community<sup>(a)</sup>, and numerical references in the columns relating to the NACE Rev.1 relate to the Annex to that Regulation. In the event of any difference of interpretation between the CPV and the NACE Rev.1, the CPV nomenclature shall apply.

NACE Rev. 1					CPV Code
SECTION F			CONSTRUCTION		
Division	Group	Class	Subject	Notes	
45			Construction	This division includes: —construction of new buildings and works, restoring and common repairs.	45000000
	45.1		Site preparation		45100000
		45.11	Demolition and wrecking of buildings; earth moving	This class includes: —demolition of buildings and other structures, —clearing of building	45110000

(a) OJ No L 293, 24.10.1990, p.1; last amended by Regulation (EC) No 1893/2006 of the European Parliament and of the Council (OJ No L 393, 30.12.2006, p1).



				<p>sites,  —earth moving:  excavation, landfill,  levelling and grading of  construction sites, trench  digging, rock removal,  blasting, etc  —site preparation for  mining:  —overburden removal  and other development  and preparation of  mineral properties and  sites.  This class also includes:  —building site drainage.  —drainage of  agricultural or forestry  land.</p>	
		45.12	Test drilling and boring	<p>This class includes:  —test drilling, test  boring and core  sampling for  construction,  geophysical, geological  or similar purposes.  This class excludes:  —drilling of production  oil or gas wells, see  11.20.  —water well drilling,  see 45.25,  —shaft sinking, see  45.25,  —oil and gas field  exploration,  geophysical, geological  and seismic surveying,  see 74.20.</p>	45120000
	45.2		Building of complete constructions or parts thereof; civil engineering		45200000
		45.21	General construction of buildings and civil engineering works	<p>This class includes:  —construction of all  types of buildings  construction of civil  engineering  constructions,  —bridges, including  those for elevated  highways, viaducts,  tunnels and subways,  —long-distance</p>	45210000 Except: —45213316 45220000 45231000 45232000

				<p>pipelines, communication and power lines,  —urban pipelines, urban communication and power lines,  —ancillary urban works,  —assembly and erection of prefabricated constructions on the site.  This class excludes:  —service activities incidental to oil and gas extraction, see 11.20,  —erection of complete prefabricated constructions from self-manufactured parts not of concrete, see divisions 20, 26 and 28,  —construction work, other than buildings, for stadiums, swimming pools, gymnasiums, tennis courts, golf courses and other sports installations, see 45.23,  —building installation, see 45.3,  —building completion, see 45.4,  —architectural and engineering activities, see 74.20,  —project management for construction, see 74.20.</p>	
		45.22	Erection of roof covering and frames	<p>This class includes:  —erection of roofs,  —roof covering,  —waterproofing.</p>	45261000
		45.23	Construction of highways, roads, airfields and sport facilities	<p>This class includes:  —construction of highways, streets, roads, other vehicular and pedestrian ways,  —construction of railways,  —construction of airfield runways,  —construction work, other than buildings, for stadiums, swimming pools, gymnasiums, tennis courts, golf</p>	45212212 and DA03 45230000 except: —45231000 —45232000 —45234115

				<p>courses and other sports installations, —painting of markings on road surfaces and car parks. This class excludes: —preliminary earth moving, see 45.11.</p>	
		45.24	Construction of water projects	<p>This class includes —construction of: —waterways, harbour and river works, pleasure ports (marinas), locks etc.; —dams and dykes, —dredging, —subsurface work.</p>	45240000
		45.25	Other construction work involving special trades	<p>This class includes: —construction activities specialising in one aspect common to different kinds of structures, requiring specialised skill or equipment, —construction of foundations, including pile driving, —water well drilling and construction, shaft sinking, —erection of non-self-manufactured steel elements, —steel bending, —bricklaying and stone setting, —scaffolds and work platform erecting and dismantling, including renting of scaffolds and work platforms, —erection of chimneys and industrial ovens. This class excludes: —renting of scaffolds without erection and dismantling, see 71.32</p>	45250000 45262000
	45.3		Building installation		45300000
		45.31	Installation of electrical wiring and fittings	<p>This class includes: installation in buildings or other construction projects of: —electrical wiring and</p>	45213316 45310000 Except: —45316000

				fittings, —telecommunications systems, —electrical heating systems, —residential antennas and aerials, —fire alarms, —burglar alarm systems, —lifts and escalators, —lightning conductors, etc	
		45.32	Insulation work activities	This class includes: —installation in buildings or other construction projects of thermal, sound or vibration insulation. This class excludes: —waterproofing, see 45.22.	45320000
		45.33	Plumbing	This class includes: —installation in buildings or other construction projects of: —plumbing and sanitary equipment, —gas fittings, —heating, ventilation, refrigeration or air-conditioning equipment and ducts, —sprinkler systems This class excludes: —installation of electrical heating systems, see 45.31.	45330000
		45.34	Other building installation	This class includes: —installation of illumination and signalling systems for roads, railways, airports and harbours, —installation in buildings or other construction projects of fittings and fixtures n.e.c.	45234115 45316000 45340000
	45.4		Building completion		45400000
		45.41	Plastering	This class includes: —application in buildings or other	45410000

				construction projects of interior and exterior plaster or stucco, including related lathing materials.	
		45.42	Joinery installation	This class includes: —installation of not self-manufactured doors, windows, door and window frames, fitted kitchens, staircases, shop fittings and the like, of wood or other materials, —interior completion such as ceilings, wooden wall coverings, movable partitions, etc. This class excludes: —laying of parquet and other wood floor coverings, see 45.43	45420000
		45.43	Floor and wall covering	This class includes: —laying, tiling, hanging or fitting in buildings or other construction projects of: —ceramic, concrete or cut stone wall or floor tiles, —parquet and other wood floor coverings carpets and linoleum floor coverings, —including of rubber or plastic, —terrazzo, marble, granite or slate floor or wall coverings, —wallpaper.	45430000
		45.44	Painting and glazing	This class includes: —interior and exterior painting of buildings, —painting of civil engineering structures, —installation of glass, mirrors, etc This class excludes: —installation of windows, see 45.42,	45440000
		45.45	Other building completion	This class includes: —installation of private swimming pools, —steam cleaning, sand	45212212 and DA04 45450000

				blasting and similar activities for building exteriors, —other building completion and finishing work n.e.c. This class excludes: —interior cleaning of buildings and other structures see 74.70.	
	45.5		Renting of construction or demolition equipment with operator		45500000
		45.50	Renting of construction or demolition equipment with operator	This class excludes: —renting of construction or demolition machinery and equipment without operators, see 71.32.	45500000

### SCHEDULE 3

Regulations 5(1)(d) and 74

### SOCIAL AND OTHER SPECIFIC SERVICES

CPV Code	Description
75200000-8; 75231200-6; 75231240-8; 79611000-0; 79622000-0 (Supply services of domestic help personnel); 79624000-4 (Supply services of nursing personnel) and 79625000-1 (Supply services of medical personnel) from 85000000-9 to 85323000-9; 98133100-5, 98133000-4; 98200000-5; 98500000-8 (Private households with employed persons) and 98513000-2 to 98514000-9 (Manpower services for households, Agency staff services for households, Clerical staff services for households, Temporary staff for households, Home-help services and Domestic services)	Health, social and related services
85321000-5 and 85322000-2, 75000000-6 (Administration, defence and social security services), 75121000-0, 75122000-7, 75124000-1; from 79995000-5 to 79995200-7; from 80000000-4 Education and training services to 80660000-8; from 92000000-1 to 92700000-8; 79950000-8 (Exhibition, fair and congress organisation services), 79951000-5 (Seminar organisation services), 79952000-2 (Event services), 79952100-3 (Cultural event organisation services), 79953000-9 (Festival organisation services), 79954000-6 (Party organisation services), 79955000-3 (Fashion	Administrative social, educational, healthcare and cultural services

shows organisation services), 79956000-0 (Fair and exhibition organisation services)	
75300000-9	Compulsory social security services
75310000-2, 75311000-9, 75312000-6, 75313000-3, 75313100-4, 75314000-0, 75320000-5, 75330000-8, 75340000-1	Benefit services
98000000-3; 98120000-0; 98132000-7; 98133110-8 and 98130000-3	Other community, social and personal services including services furnished by trade unions, political organisations, youth associations and other membership organisation services
98131000-0	Religious services
55100000-1 to 55410000-7; 55521000-8 to 55521200-0 (55521000-8 Catering services for private households, 55521100-9 Meals-on-wheels services, 55521200-0 Meal delivery service) 55520000-1 Catering services, 55522000-5 Catering services for transport enterprises, 55523000-2 Catering services for other enterprises or other institutions, 55524000-9 School catering services 55510000-8 Canteen services, 55511000-5 Canteen and other restricted-clientele cafeteria services, 55512000-2 Canteen management services, 55523100-3 School-meal services	Hotel and restaurant services
79100000-5 to 79140000-7; 75231100-5;	Legal services, to the extent not excluded by regulation 10(1)(d)
75100000-7 to 75120000-3; 75123000-4; 75125000-8 to 75131000-3	Other administrative services and government services
75200000-8 to 75231000-4	Provision of services to the community
75231210-9 to 75231230-5; 75240000-0 to 75252000-7; 794300000-7; 98113100-9	Prison related services, public security and rescue services to the extent not excluded by regulation 10(1)(h)
79700000-1 to 79721000-4 (Investigation and security services, Security services, Alarm-monitoring services, Guard services, Surveillance services, Tracing system services, Absconder-tracing services, Patrol services, Identification badge release services, Investigation services and Detective agency services) 79722000-1 (Graphology services), 79723000-8 (Waste analysis services)	Investigation and security services
98900000-2 (Services provided by extra-territorial organisations and bodies) and 98910000-5 (Services specific to international organisations and bodies)	International services
64000000-6 (Postal and telecommunications services), 64100000-7 (Post and courier services), 64110000-0 (Postal services), 64111000-7 (Postal services related to newspapers and periodicals), 64112000-4 (Postal services related to letters), 64113000-1 (Postal services related to parcels), 64114000-8 (Post office counter services), 64115000-5 (Mailbox rental), 64116000-2 (Post-restante services), 64122000-7 (Internal office mail and	Postal services

messenger services)	
50116510-9 (Tyre-remoulding services), 71550000-8 (Blacksmith services)	Miscellaneous services

## SCHEDULE 4

Regulation 5(2)(b)

### LIST OF PRODUCTS RELEVANT TO THRESHOLDS

The products covered by this Schedule are those specified in the following chapters of the Combined Nomenclature (CN)(a):

Chapter 25:	Salt, sulphur, earths and stone, plastering materials, lime and cement
Chapter 26:	Metallic ores, slag and ash
Chapter 27:	Mineral fuels, mineral oils and products of their distillation, bituminous substances, mineral waxes  except:  ex 27.10: special engine fuels
Chapter 28:	Inorganic chemicals, organic and inorganic compounds of precious metals, of rare-earth metals, of radioactive elements and isotopes  except:  ex 28.09: explosives  ex 28.13: explosives  ex 28.14: tear gas  ex 28.28: explosives  ex 28.32: explosives  ex 28.39: explosives  ex 28.50: toxic products  ex 28.51: toxic products  ex 28.54: explosives
Chapter 29:	Organic chemicals  except:  ex 29.03: explosives  ex 29.04: explosives  ex 29.07: explosives  ex 29.08: explosives  ex 29.11: explosives

(a) The references in this Schedule are derived from Annex 4 to the EU's Appendix 1 to the GPA (for which see the footnote to the definition of 'GPA' in regulation 2(1)).



	<p>ex 29.12: explosives</p> <p>ex 29.13: toxic products</p> <p>ex 29.14: toxic products</p> <p>ex 29.15: toxic products</p> <p>ex 29.21: toxic products</p> <p>ex 29.22: toxic products</p> <p>ex 29.23: toxic products</p> <p>ex 29.26: explosives</p> <p>ex 29.27: toxic products</p> <p>ex 29.29: explosive</p>
Chapter 30:	Pharmaceutical products
Chapter 31:	Fertilisers
Chapter 32:	Tanning and dyeing extracts, tanning and their derivatives, dyes, colours, paints and varnishes, putty, fillers and stoppings, inks
Chapter 33:	Essential oils and resinoids, perfumery, cosmetic or toilet preparations
Chapter 34:	Soap, organic surface-active agents, washing preparations, lubricating preparations, artificial waxes, prepared waxes, polishing and scouring preparations, candles and similar articles, modelling pastes and 'dental waxes'
Chapter 35:	Albuminoidal substances, glues, enzymes
Chapter 37:	Photographic and cinematographic goods
Chapter 38:	Miscellaneous chemical products, except: ex 38.19: toxic products
Chapter 39:	Artificial resins and plastic materials, celluloses esters and ethers, articles thereof, except: ex 39.03: explosives
Chapter 40:	Rubber, synthetic rubber, factice, and articles thereof, except: ex 40.11: bullet-proof tyres
Chapter 41:	Raw hides and skins (other than fur skins) and leather
Chapter 42:	Articles of leather, saddlery and harness, travel goods, handbags and similar containers, articles of animal gut (other than silk-worm gut)
Chapter 43:	Fur skins and artificial fur, manufacturers thereof
Chapter 44:	Wood and articles of wood, wood charcoal
Chapter 45:	Cork and articles of cork
Chapter 46:	Manufactures of straw of esparto and of other plaiting materials, basketware and

	wickerwork
Chapter 47:	Paper-making material
Chapter 48:	Paper and paperboard, articles or paper pulp, of paper or of paperboard
Chapter 49:	Printed books, newspapers, pictures and other products of the printing industry, manuscripts, typescripts and plans
Chapter 65:	Headgear and parts thereof
Chapter 66:	Umbrellas, sunshades, walking-sticks, whips, riding-crops and parts thereof
Chapter 67:	Prepared feathers and down and articles made of feathers or of down, artificial flowers, articles of human hair
Chapter 68:	Articles of stone, of plaster, of cement, of asbestos, of mica and of similar materials
Chapter 69:	Ceramic products
Chapter 70:	Glass and glassware
Chapter 71:	Pearls, precious and semi-precious stones, precious metals, rolled precious metals, and articles thereof; imitation jewellery
Chapter 73:	Iron and steel and articles thereof
Chapter 74:	Copper and articles thereof
Chapter 75:	Nickel and articles thereof
Chapter 76:	Aluminium and articles thereof
Chapter 77:	Magnesium and beryllium and articles thereof
Chapter 78:	Lead and articles thereof
Chapter 79:	Zinc and articles thereof
Chapter 80:	Tin and articles thereof
Chapter 81:	Other base metals employed in metallurgy and articles thereof
Chapter 82:	Tools, implements, cutlery, spoons and forks, of base metal, parts thereof, except: ex 82.05: tools ex 82.07: tools, parts
Chapter 83:	Miscellaneous articles of base metal
Chapter 84:	Boilers, machinery and mechanical appliances, parts thereof, except: ex 84.06: engines ex 84.08: other engines ex 84.45: machinery ex 84.53: automatic data-processing machines ex 84.55: parts of machines under heading No 84.53 ex 84.59: nuclear reactors

Chapter 85:	Electrical machinery and equipment, parts thereof, except: ex 85.13: telecommunication equipment ex 85.15: transmission apparatus
Chapter 86:	Railway and tramway locomotives, rolling-stock and parts thereof, railway and tramway tracks fixtures and fittings, traffic signalling equipment of all kinds (not electrically powered), except ex 86.02: armoured locomotives, electric ex 86.03: other armoured locomotives ex 86.05: armoured wagons ex 86.06: repair wagons ex 86.07: wagons
Chapter 87:	Vehicles, other than railway or tramway rolling-stock, and parts thereof, except: ex 87.08: tanks and other armoured vehicles ex 87.01: tractors ex 87.02: military vehicles ex 87.03: breakdown lorries ex 87.09: motorcycles ex 87.14: trailers
Chapter 89:	Ships, boats and floating structures, except: ex 89.01A: warships
Chapter 90:	Optical, photographic, cinematographic, measuring, checking, precision, medical and surgical instruments and apparatus, parts thereof, except: ex 90.05: binoculars ex 90.13: miscellaneous instruments, lasers ex 90.14: telemeters ex 90.28: electrical and electronic measuring instruments ex 90.11: microscopes ex 90.17: medical instruments ex 90.18: mechano-therapy appliances ex 90.19: orthopaedic appliances ex 90.20: X-ray apparatus

Chapter 91:	Manufacture of watches and clocks
Chapter 92:	Musical instruments, sound recorders and reproducers, television image and sound recorders or reproducers, parts and accessories of such articles
Chapter 94:	Furniture and parts thereof, bedding, mattresses, mattress supports, cushions and similar stuffed furnishings,  except:  ex 94.01A: aircraft seats
Chapter 95:	Articles and manufactures of carving or moulding material
Chapter 96:	Brooms, brushes, powder-puffs and sieves
Chapter 98:	Miscellaneous manufactured articles

## SCHEDULE 5

Regulation 58(5)

### PROFESSIONAL AND TRADE REGISTERS ETC.

The registers and other requests referred to in regulation 58(5) are the following and, where changes have been made at national level, the references to particular registers, declarations and certificates shall include those which have replaced them:

in Belgium the ‘Registre du Commerce’/‘Handelsregister’, and, in the case of service contracts, the ‘Ordres professionnels/Beroepsorden’;

in Bulgaria, the ‘Търговски регистър’;

in the Czech Republic, the ‘obchodní rejstřík’;

in Denmark, the ‘Erhvervsstyrelsen’;

in Germany, the ‘Handelsregister’, the ‘Handwerksrolle’, and, in the case of service contracts, the ‘Vereinsregister’, the ‘Partnerschaftsregister’ and the ‘Mitgliedsverzeichnisse der Berufskammern der Länder’;

in Estonia, the ‘Registrite ja Infosüsteemide Keskus’;

in Ireland, the economic operator may be requested to provide a certificate from the Registrar of Companies or the Registrar of Friendly Societies or, where he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established, in a specific place under a given business name;

in Greece, the ‘Μητρώο Εργοληπτικών Επιχειρήσεων — ΜΕΕΠ’ of the Ministry for Environment, Town and Country Planning and Public Works (Υ.ΠΕ.ΧΩ.Δ.Ε) in respect of works contracts; the ‘Βιοτεχνικό ή Εμπορικό ή Βιομηχανικό Επιμελητήριο’ and the ‘Μητρώο Κατασκευαστών Αμυντικού Υλικού’ in the case of supplies contracts; in the case of service contracts, the service provider may be asked to provide a declaration on the exercise of the profession concerned made on oath before a notary; in the cases provided for by existing national legislation, for the provision of research services, the professional register ‘Μητρώο Μελετητών’ and the ‘Μητρώο Γραφείων Μελετών’;

in Spain, the ‘Registro Oficial de Licitadores y Empresas Clasificadas del Estado’ in respect of works and services contracts, and, in the case of supplies contracts, the ‘Registro Mercantil’ or, in the case of non-registered individuals, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question;

in France, the ‘Registre du commerce et des sociétés’ and the ‘Répertoire des métiers’;

in Croatia, the ‘Sudski registrar’ and the ‘Obrtni registrar’ or, in the case of some activities, a certificate stating that the person concerned is authorised to be engaged in the commercial activity or profession in question;

in Italy, the ‘Registro della Camera di commercio, industria, agricoltura e artigianato’; in the case of supplies and services contracts also the ‘Registro delle commissioni provinciali per l’artigianato’ or, in addition to the already mentioned registers, the ‘Consiglio nazionale degli ordini professionali’ in respect of services contracts; in respect of works or services contracts, the ‘Albo nazionale dei gestori ambientali’ in addition to the already mentioned registers;

in Cyprus, the contractor may be requested to provide a certificate from the ‘Council for the Registration and Audit of Civil Engineering and Building Contractors (Συμβούλιο Εγγραφής και Ελέγχου Εργοληπτών Οικοδομικών και Τεχνικών Έργων)’ in accordance with the Registration and Audit of Civil Engineering and Building Contractors Law in respect of works contracts; in the case of supplies and services contracts the supplier or service provider may be requested to provide a certificate from the ‘Registrar of Companies and Official Receiver (Εφορος Εταιρειών και Επίσημος Παραλήπτης)’ or, where this is not the case, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in the country in which he is established, in a specific place and under a given business name;

in Latvia, the ‘Uzņēmumu reģistrs’;

in Lithuania, the ‘Juridinių asmenų registras’;

in Luxembourg, the ‘Registre aux firmes’ and the ‘Rôle de la Chambre des métiers’;

in Hungary, the ‘Cégnyilvántartás’, the ‘egyéni vállalkozók jegyzői nyilvántartása’ and, in the case of service contracts, some ‘szakmai kamarák nyilvántartása’ or, in the case of some activities, a certificate stating that the person concerned is authorised to be engaged in the commercial activity or profession in question;

in Malta, the economic operator obtains his ‘numru ta’ registrazzjoni tat-Taxxa tal-Valur Miżjud (VAT) u n-numru tal-licenzja ta’ kummerc’, and, in the case of a partnership or company, the relevant registration number as issued by the Malta Financial Services Authority;

in the Netherlands, the ‘Handelsregister’;

in Austria, the ‘Firmenbuch’, the ‘Gewerberegister’, the ‘Mitgliederverzeichnisse der Landeskammern’;

in Poland, the ‘Krajowy Rejestr Sądowy’;

in Portugal, the ‘Instituto da Construção e do Imobiliário’ (INCI) in respect of works contracts; the ‘Registro Nacional das Pessoas Colectivas’ in the case of supplies and services contracts;

in Romania, the ‘Registrul Comerțului’;

in Slovenia, the ‘sodni register’ and the ‘obrotni register’;

in Slovakia, the ‘Obchodný register’;

in Finland, the ‘Kaupparekisteri’/‘Handelsregistret’;

in Sweden, the ‘aktiebolags-, handels- eller föreningsregistren’;

in the United Kingdom, the economic operator may be requested to provide a certificate from the Registrar of Companies stating that he is certified as incorporated or registered or, where he is not so certified, a certificate stating that the person concerned has declared on oath that he is engaged in the profession in a specific place under a given business name.

## CONSEQUENTIAL AND MISCELLANEOUS AMENDMENTS

## PART 1

## Consequential amendments to Acts of Parliament

**Late Payment of Commercial Debts (Interest) Act 1998**

1. In section 4 of the Late Payment of Commercial Debts (Interest) Act 1998(a) (period for which statutory interest runs), in subsection (8), in the definition of “public authority” for “regulation 3 of the Public Contracts Regulations 2006(b)” substitute “regulation 2(1) of the Public Contracts Regulations 2015”.

**Greater London Authority Act 1999**

2. The Greater London Authority Act 1999(c) is amended as follows.

3.—(1) Section 355(d) (duties of waste collection authorities etc.) is amended as follows.

(2) In subsection (7)(a) for “the public procurement regulations” substitute “the Utilities Contracts Regulations 2006(e)”.

(3) After subsection (7) insert—

“(8) In any case where—

- (a) an authority is required to comply with the Public Contracts Regulations 2015 in the awarding of a waste contract,
- (b) in compliance with those regulations the authority sends the contract notice relating to the awarding of that contract to the Publications Office of the European Union, and
- (c) after the authority sends that notice, the Mayor revises the provisions of the London Environment Strategy dealing with municipal waste management,”

this section, and any guidance issued under it, are to have effect in relation to the awarding of that contract as if the revision had not been made.

4.—(1) Section 356 (directions by the Mayor) is amended as follows.

(2) In subsection (3)(a) for “the public procurement regulations” substitute “the Utilities Contracts Regulations 2006”.

(3) After subsection (3) insert—

“(3A) The Mayor may not give to an authority a direction under subsection (1) above requiring the authority to exercise a function in relation to the awarding of a waste contract if—

- (a) the authority is required to comply with the Public Contracts Regulations 2015 in awarding that contract, and

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(a) 1998 c.20; section 4(8) was amended by regulation 2(1) and (6) of S.I. 2013/395 and regulation 2(1) and (6) of S.S.I. 2013/77.

(b) S.I. 2006/5, amended by S.I. 2007/3542, 2008/2256, 2683, 2848, 2009/1307, 2992, 2010/133, 976, 2011/1043, 1848, 2053, 2581, 3058, 2013/252, 1431, 2014/834 and by the Enterprise and Regulatory Reform Act 2013 (c.24), Schedule 20, paragraph 2.

(c) 1999 c.29.

(d) Section 355(7) was amended by paragraphs 1, 6(a) and 7 of Schedule 23 and Part 33 of Schedule 25 to the Localism Act 2011 (c.20).

(e) S.I. 2006/6, amended by S.I. 2008/2848, 2011/1043, 2053, 2012/1659, 2013/610; there are other amending instruments but none is relevant.

- (b) in compliance with those regulations the authority has sent the contract notice relating to the awarding of that contract to the Publications Office of the European Union.”.

**5.—**(1) Section 358(a) (information about new waste contracts) is amended as follows.

(2) In subsection (1) for “the public procurement regulations” substitute “the Utilities Contracts Regulations 2006”.

(3) After subsection (1) insert—

“(1ZA) If, in the awarding of a waste contract, a waste authority in compliance with the Public Contracts Regulations 2015 has decided—

- (a) to send to the Publications Office of the European Union a prior information notice relating to the awarding of the contract, or
- (b) to publish such a notice on the authority’s buyer profile, subsection (1A) below applies.”.

(4) In subsection (1A) for “that notice” substitute “the notice in question”.

(5) In subsection (1B) for “the public procurement regulations” substitute “the Utilities Contracts Regulations 2006”.

(6) After subsection (1B) insert—

“(1BA) If, in the awarding of a waste contract, a waste authority in compliance with Public Contracts Regulations 2015—

- (a) has decided not to send or publish a prior information notice, but
- (b) decides to send to the Publications Office of the European Union a contract notice relating to the awarding of the contract, subsection (1C) below applies.”.

(7) In subsection (1C) for “that notice” substitute “the notice in question”.

(8) In subsection (2) for “the public procurement regulations” substitute “the Utilities Contracts Regulations 2006 or the Public Contracts Regulations 2015”.

**6.** In section 359 (confidential information about waste contracts) in subsection (1)(c) for “the public procurement regulations” substitute “the Utilities Contracts Regulations 2006 or the Public Contracts Regulations 2015”.

**7.—**(1) Section 360(b) (interpretation) is amended as follows.

(2) In subsection (2)—

- (a) in the definition of “buyer profile” for “the public procurement regulations” substitute “the Utilities Contracts Regulations 2006 or the Public Contracts Regulations 2015”,
- (b) omit the definition of “the public procurement regulations”, and
- (c) insert in the appropriate place—
  - (i) ““contract notice” has the same meaning as in regulation 49 of the Public Contracts Regulations 2015,”, and
  - (ii) ““prior information notice” has the same meaning as in regulation 48 of the Public Contracts Regulations 2015,”.

(3) In subsection (3)—

- (a) after “waste authority” insert “in compliance with the Utilities Contracts Regulations 2006”,
- (b) omit paragraph (a) (and the “or” immediately following it), and
- (c) in paragraph (b) omit the words from “in a case” to “2006,”.

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(a) Section 358(1), (1A), (1B) and (1C) were amended by s.39(1) to (3) of the Greater London Authority Act 2007 (c.24)

(b) Section 360 was amended by section 39(6) to (8) of the Greater London Authority Act 2007 and regulation 48(a) of and paragraph 1 of Schedule 7 to S.I. 2006/5.

(4) In subsection (4)—

- (a) after “waste authority” insert “in compliance with the Utilities Contracts Regulations 2006”,
- (b) omit paragraph (a) (and the “or” immediately following it), and
- (c) omit the words from “in a case” to “2006.”.

### **Public Services (Social Value) Act 2012**

**8.**—(1) Section 1 of the Public Services (Social Value) Act 2012(a) (contracts of relevant authorities) is amended as follows.

(2) In subsection (2)(a) for “the Official Journal of the European Union” substitute “the Publications Office of the European Union”.

(3) Subsection (13) is omitted.

(4) In subsection (15)—

- (a) in the definition of “framework agreement” after “Regulations” insert “(whether or not the Regulations apply)”,
- (b) the definition of “public services contract” is omitted,
- (c) in the definition of “the Regulations” for “Public Contracts Regulations 2006 (S.I. 2006/5)” substitute “Part 2 of the Public Contracts Regulations 2015 (S.I. 2015/102)”, and
- (d) in the definition of “relevant authority” for “for the purposes of the Regulations” substitute “within the meaning of the Regulations (whether or not the Regulations apply)”.

(5) After subsection (15) insert—

“(16) For the purposes of this section references to a public services contract are to—

- (a) a public service contract to which the Regulations apply (or which is treated as such a contract by the Regulations), or
- (b) any contract, not being a contract falling within paragraph (a), which would have been a public services contract to which the Public Contracts Regulations 2006 would have applied (or which would have been treated by those Regulations as such a contract) if those Regulations had not been revoked”.

### **Health and Social Care Act 2012**

**9.** In section 76 of the Health and Social Care Act 2012(b) (regulations under section 75), in subsection (8)(b) for “the Public Contracts Regulations 2006 (S.I. 2006/5)” substitute “the Public Contracts Regulations 2015 (S.I. 2015/102)”.

## **PART 2**

### **Consequential and miscellaneous amendments to other legislation**

#### **Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975**

**10.** For article 3(1)(j) of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975(c) substitute—

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(a) 2012 c.3.  
(b) 2012 c.7.  
(c) S.I. 1975/1023 amended by S.I. 2006/2143; there are other amending instruments but none is relevant.



“(j) any question asked by or on behalf of a contracting authority in relation to a conviction for an offence listed in regulation 57(1) of the Public Contracts Regulations 2015 which is a spent conviction (or any circumstances ancillary to such a conviction) for the purpose of determining whether or not a person is excluded—

- (i) for the purposes of regulation 57 of the Public Contracts Regulations 2015, or
- (ii) from participation in a design contest for the purposes of regulation 80 of the Public Contracts Regulations 2015,

where the person questioned is informed at the time the question is asked that, by virtue of this Order, spent convictions for such offences are to be disclosed;

(ja) any question asked by or on behalf of a contracting authority in relation to a conviction for an offence listed in regulation 26(1) of the Utilities Contracts Regulations 2006(a) which is a spent conviction (or any circumstances ancillary to such a conviction) for the purpose of determining whether or not a person is ineligible—

- (i) for the purposes of regulation 26 of the Utilities Contracts Regulations 2006, or
- (ii) to participate in a design contest for the purposes of regulation 34 of the Utilities Contracts Regulation 2006,

where the person questioned is informed at the time the question is asked that, by virtue of this Order, spent convictions for such offences are to be disclosed;”.

### **Civil Procedure Rules 1998**

**11.**—(1) Rule 54.5 of the Civil Procedure Rules 1998(b) is amended as follows.

(2) In paragraph (A1)—

- (a) for the definition of “decision governed by the Public Contracts Regulations 2006(c)” substitute—

““decision governed by the Public Contracts Regulations 2015” means any decision the legality of which is or may be affected by a duty owed to an economic operator by virtue of regulations 89 or 90 of those Regulations (and for this purpose it does not matter that the claimant is not an economic operator); and”,

- (b) in the definition of “economic operator” for “regulation 4 of the Public Contracts Regulations 2006” substitute “regulation 2(1) of the Public Contracts Regulations 2015”.

(3) In paragraph (6)—

- (a) for “the Public Contracts Regulations 2006” substitute “the Public Contracts Regulations 2015”,
- (b) for “regulation 47D(2)” substitute “regulation 92”.

### **Service Charges (Consultation Requirements) (England) Regulations 2003**

**12.** In regulation 2(1) of the Service Charges (Consultation Requirements) (England) Regulations 2003(d) in the definition of “public notice” for “in the Official Journal of the European Union pursuant to the Public Contracts Regulations 2006” substitute “by the Publications Office of the EU pursuant to the Public Contracts Regulations 2015”.

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(a) S.I. 2006/6, amended by S.I. 2008/2848, 2011/1043, 2053, 2012/1659, 2013/610; there are other amending instruments but none is relevant.

(b) S.I. 1998/3132; relevant amending instruments are S.I. 2013/1412 and 2000/2092.

(c) S.I. 2006/5, amended by S.I. 2007/3542, 2008/2256, 2683, 2848, 2009/1307, 2992, 2010/133, 976, 2011/1043, 1848, 2053, 2581, 3058, 2013/252, 1431, 2014/834 and by the Enterprise and Regulatory Reform Act 2013 (c.24), Schedule 20, paragraph 2.

(d) S.I. 2003/1987, amended by S.I. 2006/5; there are other amending instruments but none is relevant.

### **Schools Forums (Wales) Regulations 2003**

**13.** In regulation 9(1) of the Schools Forums (Wales) Regulations 2003(a) for “regulation 8 of the Public Contracts Regulations 2006” substitute “regulation 5 of the Public Contracts Regulations 2015”.

### **Service Charges (Consultation Requirements) (Wales) Regulations 2004**

**14.** In regulation 2(1) of the Service Charges (Consultation Requirements) (Wales) Regulations 2004(b) in the definition of “public notice” for “in the Official Journal of the European Union pursuant to the Public Contracts Regulations 2006” substitute “by the Publications Office of the EU pursuant to the Public Contracts Regulations 2015”.

### **Utilities Contracts Regulations 2006**

**15.**—(1) The Utilities Contracts Regulations 2006 are amended as follows.

(2) In regulation 2, in the definition of “contracting authority” for “regulation 3 of the Public Contracts Regulations 2006” substitute “regulation 2(1) of the Public Contracts Regulations 2015”.

(3) In regulation 3(2) for the definition of “local authority” substitute—

““local authority” means—

(a) in relation to a local authority in England—

(i) a county council, a district council, a London borough council, a parish council, the Council of the Isles of Scilly;

(ii) the Common Council of the City of London in its capacity as local authority or police authority; or

(iii) the Greater London Authority or a functional body within the meaning of the Greater London Authority Act 1999(c);

(b) in relation to a local authority in Wales, a county council, a county borough council or a community council;

(c) in relation to Scotland, a local authority within the meaning of section 235(1) of the Local Government (Scotland) Act 1973(d) and also includes a joint board or joint committee within the meaning of section 235(1) of that Act;

(d) in relation to a local authority in Northern Ireland, a district council within the meaning of the Local Government Act (Northern Ireland) 1972(e).”.

(4) In regulations 5 and 21 for “the Public Contracts Regulations 2006”, in each place it occurs, substitute “Part 2 of the Public Contracts Regulations 2015”.

### **Provision of Services Regulations 2009**

**16.** In regulation 31(5)(g) of the Provision of Services Regulations 2009(f) for “regulations 23(5), 24(1) and 25 of the Public Contracts Regulations 2006” substitute “regulations 60(1) (read with regulation 58(5)), 60(4) and (5) and 62 of the Public Contracts Regulations 2015”.

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(a) S.I. 2003/2909, amended by S.I. 2006/5; there are other amending instruments but none is relevant.

(b) S.I. 2004/684, amended by S.I. 2006/5; there are other amending instruments but none is relevant.

(c) 1999 (c.29), the definition of “functional body” in section 424 was amended by section 3(9) of the Police Reform and Social Responsibility Act 2011 (c.13) and paragraphs 44 and 52 of Schedule 22 and Part 32 of Schedule 25 to the Localism Act 2011 (c.20).

(d) 1973 c.65; section 235(1) was amended by the Local Government etc (Scotland) Act 1994 (c.39), section 180(1), (2) and Schedule 13, paragraph 92(66)(c).

(e) 1972 c.9; section 1 was amended by S.I. 1985/454.

(f) S.I. 2009/2999, to which there are amendments not relevant to these Regulations.

## **Quality Contracts Schemes (Tendering Requirements) (England) Regulations 2009**

17. In regulation 9 of the Quality Contracts Tendering Schemes (Tendering Requirements) (England) Regulations 2009(a) for “the Public Contracts Regulations 2006, the Utilities Contracts Regulations 2006 or the Defence and Security Public Contracts Regulations 2011(b)” substitute “the Utilities Contracts Regulations 2006, the Defence and Security Public Contracts Regulations 2011 or Part 2 or 3 of the Public Contracts Regulations 2015”.

## **Cleaner Road Transport Vehicle Regulations 2011**

18.—(1) The Cleaner Road Transport Vehicle Regulations 2011(c) are amended as follows.

(2) In regulation 2(1)—

- (a) omit the definitions of “contracting authority”, “established”, “national of a relevant State” and “relevant State”,
- (b) in the appropriate place insert ““contracting authority” has the meaning given to “contracting authorities” in regulation 2(1) of the Public Contracts Regulations 2015,”,
- (c) in the definition of “contract notice” for “the Public Contracts Regulations 2006” substitute “Part 2 of the Public Contracts Regulations 2015”,
- (d) in the definition of “declaration of ineffectiveness” for “regulation 47(1) of the Public Contracts Regulations 2006” substitute “regulation 88(1) of the Public Contracts Regulations 2015”,
- (e) in the definition of “economic operator” for “Public Contracts Regulations 2006” substitute “Public Contracts Regulations 2015”, and
- (f) in the definition of “procurement procedure” for sub-paragraph (a) substitute—  
“the open procedure, the restricted procedure, the competitive procedure with negotiation, competitive dialogue, the negotiated procedure without prior publication or an innovation partnership within the meaning of the Public Contracts Regulations 2015;”.

(3) In regulation 3—

- (a) in paragraph (3)(a) for “the Public Contracts Regulations 2006” substitute “Part 2 of the Public Contracts Regulations 2015”,
- (b) in paragraph (4)(a) for “Public Contracts Regulations 2006 by regulation 8 (thresholds)” substitute “Public Contracts Regulations 2015 by regulation 5 (threshold amounts)”.

(4) In regulation 6—

- (a) in paragraph (2) for “Part 9 of the Public Contracts Regulations 2006” substitute “Part 3 of the Public Contracts Regulations 2015”,
- (b) in paragraph 2(a) for “regulation 47A” substitute “regulation 89”,
- (c) in paragraph (4) for “Part 9 of the Public Contracts Regulations 2006” substitute “Part 3 of the Public Contracts Regulations 2015”,
- (d) in paragraph (4)(a) for “a national of and established in a relevant State” substitute “a national of or established in an EEA state”.

## **Defence and Security Public Contracts Regulations 2011**

19.—(1) The Defence and Security Regulations are amended as follows.

(2) In regulation 2(2) for “will” substitute “must”.

(3) In regulation 3(1)—

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(a) S.I. 2009/3244, amended by S.I. 2011/1848.

(b) S.I. 2011/1848, amended by S.S.I. 2012/88, 2012/89; there are other amending instruments but none is relevant.

(c) S.I. 2011/1631.

- (a) in the definition of “central purchasing body” for “regulation 3 of the Public Contracts Regulations 2006(a)” substitute “regulation 2(1) of the Public Contracts Regulations 2015”,
- (b) in the definition of “disabled person” omit the words “and “disabled person” is to be interpreted accordingly”, and
- (c) in the definition of “supply contract” for—
  - (i) “(c)” substitute “(a)”,
  - (ii) “(d)” substitute “(b)”.

(4) In regulation 4(a) for “a “contracting authority” within the meaning of regulation 3 of the Public Contracts Regulations 2006;” substitute ““contracting authorities” within the meaning of regulation 2(1) of the Public Contracts Regulations 2015;”.

(5) In regulation 6 for “the Public Contracts Regulations 2006”, in each place it occurs, substitute “Part 2 of the Public Contracts Regulations 2015”.

(6) In regulation 7(1)(g) omit “, including existing buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land”.

(7) In regulation 12(1) in the definition of “recognised bodies” omit “and “recognised body” shall be interpreted accordingly”.

(8) In regulations 16(2), 31(9) and 33(14) for sub-paragraph (b), in each place it occurs, substitute—

“(b) where the contracting authority is—

- (i) a “body governed by public law” within the meaning of regulation 2(1) of the Public Contracts Regulations 2015 and the Secretary of State for Defence is the authority referred to in sub-paragraph (c) of that definition for that body or the financing, supervisory or appointing body,
- (ii) an association formed by either the Secretary of State for Defence or one or more bodies governed by public law within the meaning of (i), or
- (iii) a contracting authority within the meaning of regulation 3(1)(bb) of the Public Contracts (Scotland) Regulations 2012(b) and the Secretary of State for Defence is “another contracting authority” within the meaning of that provision,

in which case the contracting authority must submit the report to the Ministry of Defence for onward transmission to the Commission.”.

(9) In regulation 21—

- (a) in paragraph 5(b) for “price or the values” substitute “values, which can include the price,”, and
- (b) omit paragraph (19).

(10) In regulation 46 for paragraph (3) substitute—

“(3) This paragraph applies where the contracting authority is—

- (a) a “body governed by public law” within the meaning of regulation 2(1) of the Public Contracts Regulations 2015 and the Secretary of State for Defence is the authority referred to in sub-paragraph (c) of that definition for that body or the financing, supervisory or appointing body,
- (b) an association formed by either the Secretary of State for Defence or one or more bodies governed by public law within the meaning of (i), or

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(a) S.I. 2006/5, amended by S.I. 2007/3542, 2008/2256, 2683, 2848, 2009/1307, 2992, 2010/133, 976, 2011/1043, 1848, 2053, 2581, 3058, 2013/252, 1431, 2014/834 and by the Enterprise and Regulatory Reform Act 2013 (c.24), Schedule 20, paragraph 2.

(b) S.S.I. 2012/88 amended by S.S.I. 2013/119; there is another amending instrument that is not relevant.

- (b) a contracting authority within the meaning of regulation 3(1)(bb) of the Public Contracts (Scotland) Regulations 2012 and the Secretary of State for Defence is “another contracting authority” within the meaning of that provision.”.

### **Schools Forums (England) Regulations 2012**

**20.** In regulation 9 of the Schools Forum (England) Regulations 2012(**a**) for “regulation 8” of the Public Contracts Regulations 2006” substitute “regulation 5 of the Public Contracts Regulations 2015”.

### **National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013**

**21.** In regulations 13(3) and 17 of the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013(**b**) (and the corresponding entries in the table of contents for those Regulations) for “Public Contracts Regulations 2006”, in each place it occurs, substitute “Public Contracts Regulations 2015”.

### **Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013**

**22.** The Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013(**c**) are amended as follows.

**23.** In regulation 6(2)—

- (a) in sub-paragraph (a) for “the Public Contracts Regulations 2006 nor the Utilities Contracts Regulations 2006(**d**)” substitute “the Utilities Contracts Regulations 2006 nor Part 2 of the Public Contracts Regulations 2015”,
- (b) in sub-paragraph (c) omit sub-paragraph (i),
- (c) in sub-paragraph (d) for “regulation 14 of the Public Contracts Regulations 2006” substitute “regulation 32 of the Public Contracts Regulations 2015”.

**24.** In regulation 8(3)(a) for “the Public Contracts Regulations 2006 or the Utilities Contracts Regulations 2006” substitute “the Utilities Contracts Regulations 2006 or Part 2 of the Public Contracts Regulations 2015”.

**25.** The provisions of the Utilities Contracts Regulations 2006 applied by the Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013 have effect with the amendments of those provisions made by these Regulations.

### **Energy Savings Opportunity Scheme Regulations 2014**

**26.** In regulation 16(2)(b)(i) of the Energy Savings Opportunity Scheme Regulations 2014(**e**) for “a “contracting authority” as defined in regulation 3 of the Public Contracts Regulations 2006” substitute “any of the “contracting authorities” as defined in regulation 2(1) of the Public Contracts Regulations 2015”.

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(a) S.I. 2012/2261, to which there are amendments not relevant to these Regulations.  
(b) S.I. 2013/500.  
(c) S.I. 2013/1582.  
(d) S.I. 2006/6, amended by S.I. 2008/2848, 2011/1043, 2053, 2012/1659, 2013/610; there are other amending instruments but none is relevant.  
(e) S.I. 2014/1643.

## **Tax Relief for Social Investments (Accreditation of Social Impact Contractor) Regulations 2014**

27. In regulation 3(2)(a) of the Tax Relief for Social Investments (Accreditation of Social Impact Contractor) Regulations 2014(a) for “regulation 3(1) of the Public Contracts Regulations 2006” substitute “regulation 2(1) of the Public Contracts Regulations 2015”.

### **EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

These Regulations revoke and replace the Public Contracts Regulations 2006 (“the 2006 Regulations”).

Part 2 implements, for England, Wales and Northern Ireland, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ No L 94, 28.3.2014, p65). The Part imposes obligations on public bodies called contracting authorities in relation to how they award public contracts for the execution of works, the supply of products or the provision of services. In particular

- Chapter 1 sets out the scope of the Part (including by reference to thresholds based on the estimated value of the procurement) and lays down some general rules and principles that apply to procurements within the scope of the Part;
- Chapter 2 sets out detailed rules to be followed in relation to procurement procedures (except where Chapter 3 applies);
- Chapter 3 establishes particular procurement regimes for the procurement of social and other specific services and the use of design contests: these regimes impose less detailed requirements and allow greater flexibilities than under Chapter 2;
- Chapter 4 imposes certain requirements on contracting authorities in relation to records and reports, including requirements about retaining copies of contracts above a certain value, drawing up individual reports about procurements, sending information about procurements to the Cabinet Office and European Commission on request, and documenting the progress of procurement procedures.

Part 3 contains provisions about remedies (and their facilitation) in relation to procurements within the scope of Part 2. These provisions consolidate, with amendments, Part 9 (and some other relevant provisions) of the 2006 Regulations. In so doing, they implement, for England, Wales and Northern Ireland, Council Directive 89/665/EEC on the coordination 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 L 395, 30.12.1989, p33) as amended(b).

Part 4 imposes miscellaneous additional obligations (which do not implement EU obligations(c)) on contracting authorities. This Part extends to England and Wales and Northern Ireland but does not apply to a contracting authority if its functions are wholly or mainly Northern Ireland devolved functions or Welsh devolved functions. The Part includes requirements for contracting authorities, subject to exceptions, to

- cause certain information to be published on a web-based portal provided by or on behalf of the Cabinet Office (“Contracts Finder”) when they send contract notices or contract award notices to the EU Publications Office under Part 2;

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(a) S.I. 2014/3066.

(b) By Council Directive 92/50/EEC relating to the coordination of procedures for the award of public services contracts (OJ L 209, 24.7.1992, p1) and by Directive 2007/66/EC of the European Parliament and Council amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ L 335, 20.12.2007, p31).

(c) Although the provisions arise out of and are related to the Directive that is implemented by Part 2 or, in the case of the late payment provisions, Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, as implemented in the UK by the Late Payments of Commercial Debts (Interest) Act 1998 (c.20) and by SI 2002/1674 and 2013/395.

- publish on Contracts Finder information about advertised contract opportunities, and contracts that are awarded, in certain public procurements which have an estimated value less than procurements to which Part 2 applies, and to comply, in such procurements, with certain requirements in assessing the suitability of candidates;
- have regard to guidance issued by the Minister for the Cabinet Office in complying with certain aspects of Part 4 and in relation to certain aspects of the qualitative selection of economic operators in procurements to which Part 2 applies, and to report to the Cabinet Office certain deviations from such guidance;
- include in public contracts which they award certain provisions relating to the payment of undisputed invoices within 30 days by the awarding contracting authority and its relevant contractors and subcontractors. (Where this requirement is not complied with, regulation 112(6) implies terms into the contract between the contracting authority and its contractor).

Part 5 contains provisions which

- revoke the 2006 Regulations and make consequential and miscellaneous amendments to primary and secondary legislation (so far as they extend to England and Wales and Northern Ireland and, in relation to some amendments, Scotland) including, in paragraph 19 of Schedule 7, some amendments to the Defence and Security Public Contracts Regulations 2011 (S.I. 2011/1848) to correct some minor drafting errors;
- make transitional provision and savings, including
  - provision for pending procurements, and certain concession contracts and the procedures for their award, not to be affected by these Regulations, and
  - a temporary exemption for certain NHS procurements.

A transposition note in relation to Part 2 is available at [www.gov.uk/transposing-eu-procurement-directives](http://www.gov.uk/transposing-eu-procurement-directives). It is also annexed to the Explanatory Memorandum which is available alongside the instrument at [www.legislation.gov.uk](http://www.legislation.gov.uk). An impact assessment has not been produced for this instrument as no significant impact on the private or voluntary sectors is foreseen.

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