

2009 No. 3100

PUBLIC PROCUREMENT, ENGLAND AND WALES

PUBLIC PROCUREMENT, NORTHERN IRELAND

The Utilities Contracts (Amendment) Regulations 2009

Made - - - - - *26th November 2009*

Laid before Parliament *27th November 2009*

Coming into force - - - *20th December 2009*

The Treasury are designated^(a) for the purposes of section 2(2) of the European Communities Act 1972^(b) in relation to public procurement.

The Treasury make these Regulations in exercise of the powers conferred by section 2(2) of, as read with paragraph 1A^(c) 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 Treasury that it is expedient for certain references to provisions of Community instruments to be construed as references to those provisions as amended from time to time.

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Utilities Contracts (Amendment) Regulations 2009 and come into force on 20th December 2009.

(2) In these Regulations, “the principal Regulations” means the Utilities Contracts Regulations 2006^(d).

Amendment of the principal Regulations

2. The principal Regulations are amended as follows.

3. In the Arrangement of Regulations—

(a) after the entry relating to regulation 29, insert—

“29A. Notification”;

(b) after the entry relating to regulation 33, insert—

“33A. Standstill period”;

(a) S.I.1991/755.

(b) 1972 c. 68.

(c) Paragraph 1A was inserted by the Legislative and Regulatory Reform Act 2006 (c. 51), section 28.

(d) S.I. 2006/6, amended by S.I. 2007/3542; there are other amending instruments but none is relevant.

- (c) omit the entry relating to regulation 44;
- (d) for the entries relating to regulations 45 and 46 substitute—

“45. Interpretation of Part 9

45A. Duty owed to economic operators

45B. Duty owed to GPA economic operators

45C. Enforcement of duties through the Court

45D. General time limits for starting proceedings

45E. Special time limits for seeking a declaration of ineffectiveness

45F. Starting proceedings

45G. Contract-making suspended by challenge to award decision

45H. Interim orders

45I. Remedies where the contract has not been entered into

45J. Remedies where the contract has been entered into

45K. Grounds for ineffectiveness

45L. General interest grounds for not making a declaration of ineffectiveness

45M. The consequences of ineffectiveness

45N. Penalties in addition to, or instead of, ineffectiveness

45O. Ineffectiveness etc. in relation to specific contracts under a framework agreement

45P. Injunctions against the Crown”.

4. In regulation 2—

(a) in paragraph (1)—

- (i) omit the definitions of “attestation system” and “Utilities Remedies Directive”;
- (ii) in the definition of “contract”, at the end insert “, and includes a framework agreement where required by regulation 18(1) (utility’s choice to regard a framework agreement as a contract)”; and
- (iii) in the definition of “working day”, after “Sunday” insert “, Christmas Day, Good Friday”; and

(b) in paragraph (4)—

- (i) at the beginning, for “Where” substitute “Except in Part 9, where”; and
- (ii) in sub-paragraph (c), omit “except for regulation 33(3),”.

5. In regulation 16(3)(d), for “with sub-paragraph (b)” substitute “with sub-paragraph (c)”.

6. In regulation 19(9), at the end insert “and shall do so in writing if requested by the economic operator”.

7. After regulation 29, insert—

“Notification

29A.—(1) Where a utility decides, prior to the stage at which it makes a decision to which regulation 33(1) (award decision) applies, to exclude an applicant, the utility shall notify the applicant of that exclusion.

(2) In this regulation, “applicant” means an economic operator which submitted an offer or applied to be included amongst the economic operators to be selected to tender for or to negotiate the contract.

(3) For the purposes of this regulation, an applicant is excluded if the applicant—

- (a) is not invited to tender for, or to negotiate, the contract; or
- (b) having been so invited, is excluded from consideration prior to the stage mentioned in paragraph (1).

(4) This regulation does not apply in relation to a procedure for the award of a contract—

- (a) under a dynamic purchasing system; or
- (b) which is permitted by these Regulations to be awarded without a call for competition.”.

8. In regulation 32(1), (7) and (8), after “1564/2005” insert “as amended from time to time”.

9. In regulation 33—

(a) For paragraphs (1) and (2) substitute—

“Award decision notice

(1) Subject to paragraph (13), a utility shall, as soon as possible after the decision has been made, inform the tenderers and candidates of its decision to award the contract, and shall do so by notice in writing by the most rapid means of communication practicable.

(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 economic operator which is to receive the notice; and
 - (ii) the economic operator to be awarded the contract,and anything required by paragraph (10);
- (c) the name of the economic operator to be awarded the contract; and
- (d) a precise statement of either—
 - (i) when, in accordance with regulation 33A, 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 utility will not, in conformity with regulation 33A, enter into the contract.

(2A) 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).”;

(b) omit paragraphs (3) to (6);

(c) immediately before paragraph (7), insert

“(6A) Where the contract is permitted by these Regulations to be awarded without a call for competition, the utility need not comply with paragraph (1).

(6B) Where the only tenderer is the one who is to be awarded the contract, and there are no candidates, the utility need not comply with paragraph (1).”.

(d) in paragraph (7), after “agreement”, insert “or a dynamic purchasing system”;

(e) omit paragraph (8);

- (f) immediately before paragraph (9), insert the following heading—
“Reasons to be given on request to unsuccessful economic operators”;
- (g) in paragraph (9)—
 - (i) at the beginning, for “Except for a request made in accordance with paragraph (4) which shall be dealt with in accordance with paragraphs (4) to (5)” substitute “Except to the extent that the utility has already informed the economic operator (whether by notice under paragraph (1) or otherwise),”; and
 - (ii) in sub-paragraph (b), omit paragraph (ii), move “or” from the end of that paragraph to the end of paragraph (i), and renumber the existing paragraph (iii) as “(ii)”;
- (h) in paragraph (10), for “paragraph (9)(a) substitute “paragraphs (2)(b) and (9)(a)”;
- (i) immediately before paragraph (11) insert the following heading—
“Abandonment or recommencement of procedure”;
- (j) in paragraph (11)—
 - (i) for the words from “economic operator which” to “admitted to a dynamic purchasing system,” substitute “candidates and tenderers”; and
 - (ii) omit sub-paragraph (b), move “or” from the end of that sub-paragraph to the end of sub-paragraph (a), and reletter the existing paragraph (c) as “(b)”;
- (k) immediately before paragraph (13), insert the following heading—
“Grounds for withholding information”;
- (l) in paragraph (13), omit “(4), (8),”; and
- (m) after paragraph (13), insert—
“Definitions
 (14) For the purposes of this regulation—
 - (a) “candidate” means an economic operator (other than a tenderer) which applied to be included amongst the economic operators to be selected to tender or to negotiate the contract, but does not include any economic operator which has been informed of the rejection of its application, and the reasons for it; and
 - (b) “tenderer” means an economic operator which submitted an offer.”.

10. After regulation 33, insert—

“Standstill period

33A.—(1) Where regulation 33(1) applies, the utility must not enter into the contract before the end of the standstill period.

(2) Subject to paragraph (6), where the utility sends a regulation 33(1) 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) Subject to paragraph (6), where the utility sends a regulation 33(1) 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 33(1) notices are 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) Subject to paragraph (6), where the utility sends a regulation 33(1) 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) Where the last day of the standstill period reckoned in accordance with paragraphs (2) to (5) is not a working day, the standstill period is extended to midnight at the end of the next working day.

(7) In this regulation—

“regulation 33(1) notice” means a notice given in accordance with regulation 33(1); and
“relevant economic operators” means economic operators to which regulation 33(1) requires information to be given.”.

11. Omit regulation 44 (attestation).

12. For Part 9 substitute—

“PART 9

APPLICATIONS TO THE COURT

Interpretation of Part 9

45.—(1) In this Part, except where the context otherwise requires—

“claim form” includes, in Northern Ireland, the originating process by which the proceedings are commenced;

“contract”, includes a framework agreement which the utility—

- (a) purports to have entered into, or to be intending to enter into, in accordance with these Regulations; and
- (b) has relied on, is relying on, or intends to rely on, for the purposes of regulation 17(1)(i) (award, without a call for competition, of contracts under a framework agreement);

“declaration of ineffectiveness” means a declaration made under regulation 45J(2)(a) or 45O(3);

“economic operator” has the extended meaning given to it by regulation 45B(3);

“grounds for ineffectiveness” has the meaning given to it by regulation 45K;

“proceedings” means court proceedings taken for the purposes of regulation 45C; and

“standstill period”, and references to its end, have the same meaning as in regulation 33A.

(2) In this Part, except in regulation 45D(2), any reference to a period of time, however expressed, is to be interpreted subject to the requirement that, if the period would otherwise have ended on a day which is not a working day, the period is to end at the end of the next working day.

Duty owed to economic operators

- 45A.**—(1) This regulation applies to the obligation on a utility to comply with—
- (a) the provisions of these Regulations, other than regulations 30(9) and 38; and
 - (b) any enforceable Community obligation in respect of a contract or design contest (other than one excluded from the application of these Regulations by regulation 6, 7, 8, 9, 11 or 34).
- (2) That obligation is a duty owed to an economic operator.

Duty owed to GPA economic operators

45B.—(1) Subject to paragraphs (2) and (3), the duty owed to an economic operator in accordance with regulation 45A is a duty owed also to a GPA economic operator.

- (2) The duty is not owed in relation to—
- (a) a Part B services contract; or
 - (b) a contract for research and development services specified in category 8 of Part A of Schedule 3.
- (3) References to an “economic operator” in this Part, except in regulation 45A or in relation to the duty owed in accordance with that regulation, also include a GPA economic operator.
- (4) In this regulation—
- “GPA economic operator” means a person from a GPA State who sought, who seeks, or would have wished, to be the person to whom the contract is awarded;
 - “GPA State” means any country, other than a relevant State, which at the relevant time is a signatory to the GPA and has agreed with the European Community that the GPA shall apply to a contract of the type to be awarded; and
 - “relevant time” means—
- (a) if the utility selects economic operators to tender for or to negotiate the contract in accordance with a qualification system established in accordance with regulation 25, the date on which the selection commences;
 - (b) if the utility satisfies the requirement that there be a call for competition by indicating the intention to award the contract in a periodic indicative notice in accordance with regulation 16(2)(a)(i), the date on which the notice is sent to the Official Journal; or
 - (c) in any other case, the date on which the utility sent a contract notice or design contest notice to the Official Journal or would have done so if the requirement that there be a call for competition applied and the utility decided to satisfy that requirement by sending such a notice.

Enforcement of duties through the Court

45C.—(1) A breach of the duty owed in accordance with regulation 45A or 45B 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 45D to 45P apply to such proceedings.

General time limits for starting proceedings

45D.—(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) and (4), such proceedings must be started promptly and in any event within 3 months beginning with the date when grounds for starting the proceedings first arose.

(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—
 - (aa) 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; 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;
 - (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) The Court may extend the time limits imposed by this regulation (but not the limits imposed by regulation 45E) where the Court considers that there is a good reason for doing so.

(5) For the purposes of this regulation, proceedings are to be regarded as started only when the claim form is served in compliance with regulation 45F(1).

Special time limits for seeking a declaration of ineffectiveness

45E.—(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 other case, 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 utility to award the contract without prior publication of a contract notice.

(5) This paragraph applies where the utility 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 33(9).

(7) In this regulation, “contract award notice” means a notice in accordance with regulation 32(1).

(8) For the purposes of this regulation, proceedings are to be regarded as started only when the claim form is served in compliance with regulation 45F(1).

Starting proceedings

45F.—(1) Where proceedings are to be started, the economic operator must, after filing the claim form, serve it on the utility.

(2) Paragraph (3) applies where proceedings are started—

- (a) seeking a declaration of ineffectiveness; or
- (b) alleging a breach of regulation 33A, 45G or 45H(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 utility, who is a party to the contract in question.

(4) The utility 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

45G.—(1) Where—

- (a) proceedings are started in respect of a utility’s decision to award the contract; and
- (b) the contract has not been entered into,

the starting of the proceedings requires the utility 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 45H(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) For the purposes of paragraph (1), proceedings are to be regarded as started only when the claim form is served in compliance with regulation 45F(1).

(4) This regulation does not affect the obligations imposed by regulation 33A.

Interim orders

45H.—(1) In proceedings, the Court may, where relevant, make an interim order—

- (a) bringing to an end the requirement imposed by regulation 45G(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 45A or 45B is alleged;
 - (d) suspending the implementation of any decision or action taken by the utility 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 45G(1) were not applicable, it would be appropriate to make an interim order requiring the utility 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 45G(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

- 45I.**—(1) This regulation applies where—
- (a) the Court is satisfied that a decision or action taken by a utility was in breach of the duty owed in accordance with regulation 45A or 45B; 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 utility to amend any document;
 - (c) award damages to an economic operator which has suffered loss or damage as a consequence of the breach.
- (3) Where the Court is satisfied that an economic operator would have had a real chance of being awarded the contract if that chance had not been affected by the breach mentioned in paragraph (1)(a), the economic operator is entitled to damages amounting to its costs in preparing its tender and in participating in the procedure leading to the award of the contract.
- (4) Paragraph (3)—
- (a) does not affect a claim by an economic operator that it has suffered other loss or damage or that it is entitled to relief other than damages; and
 - (b) is without prejudice to the matters on which an economic operator may be required to satisfy the Court in respect of any such other claim.
- (5) This regulation does not prejudice any other powers of the Court.

Remedies where the contract has been entered into

- 45J.**—(1) Paragraph (2) applies if—
- (a) the Court is satisfied that a decision or action taken by a utility was in breach of the duty owed in accordance with regulation 45A or 45B; 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 45L requires the Court not to do so;
 - (b) must, where required by regulation 45N, 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 sub-paragraphs (a) and (b);
 - (d) must not order any other remedies.

(3) Paragraph (2)(d) is subject to regulation 45O(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 45M(3) or 45N(10) (orders which supplement a declaration of ineffectiveness or a contract-shortening order).

(4) Regulation 45I(3) and (4) (entitlement to tendering costs etc. as damages for loss of a real chance of being awarded the contract) apply for the purposes of this paragraph.

Grounds for ineffectiveness

45K.—(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 notice in the Official Journal in any case in which these Regulations required the prior publication of such a notice.

(3) The first ground does not apply if all the following apply—

- (a) the utility considered the award of the contract without prior publication of such a notice to be permitted by these Regulations;
- (b) the utility 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—

- (a) which contains the following information—
 - (i) the name and contact details of the utility;
 - (ii) a description of the object of the contract;
 - (iii) a justification of the decision of the utility to award the contract without prior publication of a notice in the Official Journal;
 - (iv) the name and contact details of the economic operator to be awarded the contract; and
 - (v) where appropriate, any other information which the utility considers it useful to include; and
- (b) which, if Commission Regulation (EC) No 1564/2005 as amended from time to time sets out a form to be used for the purposes of paragraph (3), is in that form.

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 33A (the standstill period);
 - (ii) regulation 45G (contract-making suspended by challenge to award); or

- (iii) regulation 45H(1)(b) (interim order restoring or modifying a suspension originally imposed by regulation 45G);
- (b) there has also been a breach of the duty owed to the economic operator in accordance with regulation 45A or 45B in respect of obligations other than those imposed by regulation 33A (the standstill period) and this Part;
- (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 was awarded under a dynamic purchasing system;
 - (b) the contract was awarded in breach of any requirement imposed by regulation 19(11) to (14) (award of contracts under dynamic purchasing systems); and
 - (c) the estimated value of the contract exceeds the relevant threshold for the purposes of regulation 11.
- (7) The third ground does not apply if all the following apply—
 - (a) the utility considered the award of the contract to be in accordance with regulation 19(11) to (14);
 - (b) the utility has, despite regulation 33(7), voluntarily complied with the requirements set out in regulation 33(1) to (2A); 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

45L.—(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 utility 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 45N(3)(a).

The consequences of ineffectiveness

45M.—(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

45N.—(1) Where the Court makes a declaration of ineffectiveness, it must also order that the utility 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 45L 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 33A, 45G or 45H(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 utility 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 45A or 45B;
- (b) the behaviour of the utility;
- (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) Where a utility 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 Treasury;
- (b) the Court must send a copy of the order to the Office of Government Commerce;
- (c) the utility must pay the penalty to the Treasury through the Office of Government Commerce; and
- (d) the Treasury must, when they receive the penalty, pay it into the Consolidated Fund.

(8) Where a utility 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 utility 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.

(9) Where a utility is a non-Crown body—

- (a) any payment due under paragraph (7) may be enforced by the Treasury as a judgment debt due to them; and
- (b) any payment due under paragraph (8) may be enforced by the Department of Finance and Personnel as a judgment debt due to it.

Contract shortening

(10) 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.

(11) 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.

(12) Paragraph (13) 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.

(13) In those circumstances, the Court must not exercise its power to make an order under paragraph (10) 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).

(14) 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 under a framework agreement

450.—(1) In this regulation, "specific contract" means a contract which—

- (a) was awarded under a framework agreement;
- (b) was awarded without a call for competition in reliance on regulation 17(1)(i) (framework concluded in accordance with these Regulations); and
- (c) 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 45E 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 45L (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 these Regulations on the basis of the second ground of ineffectiveness set out in regulation 45K(5), where—

- (a) the relevant breach of the kind mentioned in regulation 45K(5)(a) is entering into the specific contract in breach of regulation 45G or 45H(1)(b); and
- (b) the relevant breach of the kind mentioned in regulation 45K(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 the 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 45M (the consequences of ineffectiveness) applies;
- (b) regulation 45N(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 specific contract be shortened to the extent specified in the order.

(10) The extent by which the duration of the specific 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 specific contract” refers only to its prospective duration as from the time when the Court makes the order.

Injunctions against the Crown

45P. In proceedings against the Crown, the Court has power to grant an injunction despite section 21 of the Crown Proceedings Act 1947(a).”.

Transitional provisions

13.—(1) Nothing in these Regulations affects any contract award procedure commenced before 20th December 2009.

(a) 1947 c.44

(2) For that purpose, a contract award procedure has been commenced before 20th December 2009 if, before that date—

- (a) a contract notice has been sent to the Official Journal in accordance with the principal Regulations 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 these Regulations 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 principal Regulations 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) Nothing in these Regulations affects the award of a specific contract under a framework agreement where the framework agreement was concluded—

- (a) before 20th December 2009; or
- (b) on or after that date 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 20th December 2009; 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) In this regulation—

- (a) “contract”, “dynamic purchasing system” and “periodic indicative notice” have the same meanings as in the principal Regulations; and
- (b) “these Regulations” does not include regulations 4(a)(i), 4(a)(iii), 5, 11 or, to the extent that it revokes regulation 46 of the principal Regulations, 12.

Frank Roy
Bob Blizzard

26th November 2009

Two of the Lords Commissioners of Her Majesty’s Treasury

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Utilities Contracts Regulations 2006 (SI 2006/06) (“the principal Regulations”). The principal Regulations implemented, for England, Wales and Northern Ireland, Directive 2004/17/EC of the European Parliament and Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p1) (“the 2004 Directive”) and Council Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76, 23.3.1992, p14) (“the principal Remedies Directive”).

Except where otherwise stated below, these Regulations implement, for England, Wales and Northern Ireland article 2 of 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) (“the amending Remedies Directive”), which amends the principal Remedies Directive.

Regulation 12 substitutes new provisions for the existing Part 9 in the principal Regulations. Part 9 governs the proceedings that may be taken in the High Court for remedies in respect of breaches of the principal Regulations, and the conciliation procedure provided for by the principal Remedies Directive. In particular, the new provisions—

- change the time limits within which proceedings must be started (the new regulations 45D and 45E);
- change what must be done when proceedings are started (the new regulation 45F);
- require utilities to refrain from entering into a contract where, before it is entered into, proceedings are started in respect of the authority’s decision to award that contract (the new regulation 45G). The Court is given power to terminate this requirement (the new regulation 45H);
- introduce a new remedy of a declaration of ineffectiveness, which must be granted if any of the three grounds for ineffectiveness set out in the new regulation 45K applies, except where the general interest grounds for not making such a declaration set out in the new regulation 45L are met (the new regulations 45J, 45K and 45L);
- address the consequences of a declaration of ineffectiveness, including power for the Court to make orders about consequential matters (the new regulation 45M);
- require the Court to impose a civil financial penalty on the utility where a declaration of ineffectiveness is made (the new regulations 45J and 45N);
- require the Court to impose such a penalty and/or make an order shortening the duration of the contract where a declaration of ineffectiveness is withheld on general interest grounds or where there has been a breach of certain specific requirements (the new regulations 45J and 45N);
- address how these provisions affect framework agreements (the definition of ‘contract’ in the new regulation 45(1));
- address how ineffectiveness and other penalties affect specific contracts awarded under a framework agreement (the new regulation 45O); and
- make no provision for the use of the conciliation procedure (the omission of regulation 46 of the existing principal Regulations from the new Part 9).

Regulations 9 and 10 change requirements about information that must be given by a utility about its decision to award a contract (or, where required by regulation 18(1) of the principal Regulations, to conclude a framework agreement) and modify the obligation on a utility not to enter into a contract within a certain period of time (“the standstill period”) after such information is given to various participants in the procurement process. In particular, the amendments—

- modify the information that must be included in the decision notice, the class of economic operators to which the notice must be sent, and the circumstances in which it must be sent (regulation 9); and
- provide for a standstill period of 10 or 15 days, and for how this is to be calculated depending, in particular, on the means of communication that is used and whether the period is reckoned from the sending or receipt of the notice (regulation 10).

Regulation 7 introduces a specific requirement to notify applicants who are excluded prior to the stage at which the utility makes its contract award decision. This is not required by the amending Remedies Directive, but arises out of the 2004 Directive.

Regulation 11 revokes the provisions of the principal Regulations relating to attestation.

Regulation 8 ensures that the form of contract award notice to be used by utilities reflects amendments to the annex which prescribes that form in Commission Regulation (EC) No 1564/2005.

Regulation 4(a)(iii) amends the definition of “working day” in the principal Regulations to add Christmas Day and Good Friday to the days which are not working days. This affects references throughout the principal Regulations, including provisions which implement the 2004 Directive as well as the principal Remedies Directive as amended.

Regulation 5 corrects a wrong cross-reference in regulation 16(3)(d) of the principal Regulations, which concerns a call for competition via a periodic indicative notice and implements article 42(3)(c) of the 2004 Directive.

Regulation 13 contains transitional provisions. Their effect is that these Regulations (except the omission of the provisions about conciliation and attestation, the amendment of the definition of “working day” and the correction of regulation 16(3)(d)) do not affect contract award procedures commenced before the commencement date of these Regulations, or the award of specific contracts under a dynamic purchasing system that was established before that date.

A transposition note and a full Impact Assessment of the effect that this instrument will have on the costs to business and the voluntary sector are available from the OGC website (www.ogc.gov.uk). They are also annexed to the Explanatory Memorandum which is available alongside the instrument on the OPSI website (www.opsi.gov.uk).

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STATUTORY INSTRUMENTS

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PUBLIC PROCUREMENT, NORTHERN IRELAND

The Utilities Contracts (Amendment) Regulations 2009

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