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STATUTORY INSTRUMENTS

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**2016 No. 274**

**The Utilities Contracts Regulations 2016**

PART 1

GENERAL

CHAPTER 1

CITATION, COMMENCEMENT, EXTENT, DEFINITIONS AND SUBJECT-MATTER

**Citation, commencement and extent**

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

*Commencement*

(2) Except for the provisions mentioned in paragraphs (3) and (4), these Regulations come into force on 18th April 2016.

(3) Paragraphs (1) to (7) of regulation 40 come into force—

(a) for the purposes of regulations 45(6), 52(13), 54(4), 73(4) and 124(2)(a) on 18th April 2016

(b) for the purposes of regulation 55(7), on 18th April 2017;

(c) for all other purposes, on 18th October 2018.

(4) Regulation 55(7) comes into force on 18th April 2017.

*Extent*

(5) These Regulations do not extend to Scotland.

**Definitions**

2.—(1) In these Regulations—

“accelerated open procedure” means an open procedure in which the utility has exercised the power conferred by regulation 45(5) to fix a time limit for the receipt of tenders which is shorter than the minimum specified in regulation 45(2).

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

(a) technical infrastructure enabling utilities to award public contracts or to conclude framework agreements for works, supplies or services;

(b) advice on the conduct or design of procurement procedures;

(c) preparation and management of procurement procedures on behalf and for the account of the utility concerned;

“call for competition” means a call for competition made in a manner permitted by regulation 44(4) or, where relevant, one of the notices referred to in regulation 91(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 or negotiated procedure, a competitive dialogue or an innovation partnership;

“central purchasing body” means a utility, within the meaning of regulation 5, or a contracting authority, within the meaning of regulation 2(1) of the Public Contracts Regulations, which provides centralised purchasing activities and which may also provide ancillary purchasing activities;

“centralised purchasing activities” has the meaning given by regulation 55(10);

“the Commission” means the European Commission;

“contest notice” means the notice referred to in regulation 95(1);

“contracts”, except as provided for in regulation 122(10), means contracts for pecuniary interest concluded in writing between one or more utilities and one or more economic operators and having as their object the execution of works, the supply of products or the provision of services.

“contract notice” means the notice referred to in regulation 69 or, where relevant, 91(1)(a);

“contracting authorities” has the meaning given to it by regulation 4;

“CPV” means the Common Procurement Vocabulary as adopted by Regulation (EC) No. 2195/2002 of the European Parliament and of the Council(1) as amended from time to time;

“Defence and Security Regulations” means the Defence and Security Public Contracts Regulations 2011(2);

“design contests” except as provided for in regulation 122(10), means those procedures which enable a utility to acquire, mainly in the fields of town and country planning, architecture, engineering or data processing, a plan or design selected by a jury after being put out to competition with or without the award of prizes;

“disabled”, in relation to a person, means a disabled person within the meaning of the Equality Act 2010(3) and, in relation to a worker, means a disabled person who is a worker;

“dynamic purchasing system” except as provided for in regulation 122(10), means the system referred to in regulation 52;

“economic operator” means any person, or a utility, or a group of such persons or utilities or both, including any temporary associations of undertakings, which offers the execution of works or a work, the supply of products or the provision of services on the market;

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

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

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

“framework agreement” except as provided for in regulation 122(10), has the meaning given by regulation 51(2);

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(1) OJ No L 340, 16.12.2002, p1. last amended by [Commission Regulation \(EC\) No 596/2009](#) of the European Parliament and of the Council (OJ No L 188, 18.7.2009, p14).

(2) [S.I. 2011/1848](#), amended by [S.S.I. 2011/2053](#), [2013/1431](#), [2015/102](#).

(3) [2010 c.15](#).

“GPA” means the Agreement on Government Procurement between certain parties to the World Trade Organisation signed in Marrakesh on 15th April 1994 as amended(4);

“innovation” means the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations including with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy(5) for smart, sustainable and inclusive growth;

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

“invitation to confirm interest” means, except in regulation 49(18) and (19), an invitation which a utility sends in order to comply with regulation 74(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 question 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;

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

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

“periodic indicative notice” means the notice referred to in regulation 67, or where relevant, 91(1)(b);

“procurement” means the acquisition by means of a works, supply or service contract of works, supplies or services by one or more utilities from economic operators chosen by those utilities, provided that the works, supplies or services are intended for the pursuit of one of the activities referred to in regulations 9 to 15;

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

“Public Contracts Regulations” means the Public Contracts Regulations 2015(6);

“selection criteria”, means, except in regulation 96, selection criteria set out by the utility in accordance with regulations 78 or 80, or both;

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(4) 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 of 2nd December 2013 (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 in the EU.

(5) The Europe 2020 strategy can be found on the European Commission website at <http://ec.europa.eu/europe2020> or can be obtained from the Crown Commercial Service, Rosebery Court, St Andrews Business Park, Norwich, NR7 0HS.

(6) S.I. 2015/102, as amended by S.I. 2016/275

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

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

“supply contracts” means 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;

“technical specifications” has the meaning given by regulation 60(3);

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

“TFEU” means the Treaty on the Functioning of the European Union(7);

“the Treaties” means the Treaty on the European Union(8) and TFEU;

“Utilities Contracts Directive” means [Directive 2014/25/EU](#) of the European Parliament and of the Council(9);

“utilities” except as provided for in regulation 122(10), has the meaning given to it by regulation 5;

“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(10);

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

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

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

(2) Except in Part 5 any other expression used both in these Regulations and in the Utilities Contracts Directive has the meaning that it bears in that Directive.

(3) In these Regulations (except regulation 72(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 be counted in the calculation of that period.

(4) In these Regulations (except regulation 72(4)), any reference to a period of time, however expressed, 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

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

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

(9) OJ No L 94, 28.3.2014, p243.

(10) [1971 c.80](#)

(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.

### **Subject-matter and scope**

3.—(1) Parts 1 to 4 establish rules on the procedures for procurement by utilities with respect to contracts and design contests which—

- (a) have a value estimated to be not less than the threshold mentioned in regulation 16, and
  - (b) are not excluded from the scope of Parts 1 to 4 by any other provision in Chapters 2 and 3 of this Part.
- (2) Parts 1 to 4 are subject to Article 346 of TFEU.
- (3) The scope of Parts 1 to 4 does not include non-economic services of general interest.

### **Contracting authorities**

4.—(1) In these Regulations, “contracting authorities” means State, regional or local authorities (including the Crown, but not including Her Majesty in her private capacity), bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law.

(2) “Bodies governed by public law” means any 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.

### **Utilities**

5.—(1) For the purpose of these Regulations, utilities are entities which—

- (a) are contracting authorities or public undertakings and which pursue one of the activities referred to in regulations 9 to 15;
- (b) are not contracting authorities or public undertakings, but whose activities include an activity referred to in regulations 9 to 15 and operate on the basis of special or exclusive rights granted by a competent authority.

### *Public undertaking*

(2) In this regulation, “public undertaking” means any undertaking over which contracting authorities may exercise directly or indirectly a dominant influence by virtue of—

- (a) their ownership of that undertaking;
- (b) their financial participation in that undertaking; or
- (c) the rules which govern that undertaking.

(3) For the purposes of paragraph (2), a dominant influence on the part of contracting authorities is presumed in any of the following cases in which those authorities, directly or indirectly—

- (a) hold the majority of the undertaking's subscribed capital;
- (b) control the majority of the votes attaching to shares issued by the undertaking;
- (c) can appoint more than half of the undertaking's administrative, management or supervisory body.

*Special or exclusive rights*

(4) In this regulation, “special or exclusive rights” mean rights granted by a competent authority by way of any legislative, regulatory or administrative provision, the effect of which is to limit the exercise of activities referred to in regulations 9 to 15 to one or more utilities, and which substantially affects the ability of other entities to carry out such activity.

(5) For the purposes of paragraph (4), rights which have been granted by means of a procedure in which—

- (a) adequate publicity has been ensured; and
- (b) where the granting of those rights was based on objective criteria

shall not constitute “special or exclusive rights”.

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

- (a) procurement procedures with a prior call for competition in accordance with—
  - (i) these Regulations;
  - (ii) the Public Contracts Regulations;
  - (iii) the Concessions Contracts Regulations 2016<sup>(11)</sup>; or
  - (iv) the Defence and Security Regulations;
- (b) procedures pursuant to other legal acts of the EU listed in Annex II of the Utilities Contracts Directive as amended from time to time, ensuring adequate prior transparency for granting authorisations on the basis of objective criteria.

**Mixed procurement covering the same activity**

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

- (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 Chapter 1 of Part 3 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 according to 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 these Regulations and procurement not covered by these Regulations—

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

<sup>(11)</sup> S.I. 2016/273

- (i) utilities may choose to award separate contracts for the separate parts or to award a single contract;
  - (ii) where utilities choose to award separate contracts for the 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 utilities choose to award a single contract, these Regulations apply 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;
  - (iv) where the decision is taken to award a single contract then that mixed contract will, where it contains elements of supply, works and service contracts and of concessions, be awarded in accordance with these Regulations, provided that the estimated value of the part of the contract which constitutes a contract covered by these Regulations, calculated in accordance with regulation 17, is equal to or greater than the relevant threshold mentioned in regulation 16.
- (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 25 applies instead of paragraph (1) or (2).

#### **Procurement covering several activities**

7.—(1) In the case of contracts intended to cover several activities, utilities may choose to award separate contracts for the purposes of each separate activity or to award a single contract.

(2) Where utilities choose to award separate contracts, the decision as to which rules apply to any one of such separate contracts shall be taken on the basis of the characteristics of the separate activity concerned.

(3) Despite regulation 6 and subject to paragraph (5), where utilities choose to award a single contract paragraphs (6) and (7) apply.

(4) But where one of the activities concerned is covered by the Defence and Security Regulations or Article 346 of TFEU, regulation 26 applies instead of paragraphs (6) and (7).

(5) The choice between awarding a single contract or awarding a number of separate contracts shall not be made with the objective of excluding the contract or contracts from the scope of these Regulations or, where applicable, the Public Contracts Regulations or the Concession Contracts Regulations 2016.

(6) A contract which is intended to cover several activities shall be subject to the rules applicable to the activity for which it is principally intended.

(7) In the case of contracts where it is objectively impossible to determine for which activity the contract is principally intended, the applicable rules shall be determined in accordance with the following—

- (a) the contract shall be awarded in accordance with the Public Contracts Regulations, if one of the activities for which the contract is intended is subject to these Regulations and the other to the Public Contracts Regulations;
- (b) the contract shall be awarded in accordance with these Regulations, if one of the activities for which the contract is intended is subject to these Regulations and the other to the Concessions Contracts Regulations 2016;

- (c) the contract shall be awarded in accordance with these Regulations, if one of the activities for which the contract is intended is subject to these Regulations and the other is not subject to either these Regulations, the Public Contracts Regulations or the Concessions Contracts Regulations 2016.