
STATUTORY INSTRUMENTS

2016 No. 274

The Utilities Contracts Regulations 2016

PART 1

GENERAL

CHAPTER 3

MATERIAL SCOPE

SECTION 2

*Excluded contracts and design contests; special provisions
for procurement involving defence and security aspects*

SUB-SECTION 1 Exclusions applicable to all utilities and special exclusions for the water and energy sectors

Contracts awarded for the purpose of resale or lease to third parties

18.—(1) Subject to paragraph (3), these Regulations do not apply to contracts awarded for purposes of resale or lease to third parties, provided that the utility enjoys no special or exclusive right to sell or lease the subject-matter of such contracts, and other entities are free to sell or lease it under the same conditions as the utility.

(2) Utilities shall notify the Commission, if so requested, of all the categories of products or activities which they regard as excluded under paragraph (1).

(3) Paragraph (1) does not apply to procurement carried out by a central purchasing body in order to perform centralised purchasing activities.

Contracts and design contests awarded or organised for purposes other than the pursuit of a covered activity or for the pursuit of such an activity in a third country

19.—(1) These Regulations do not apply to contracts awarded or design contests organised by utilities—

- (a) for purposes other than the pursuit of their activities as described in regulations 9 to 15; or
- (b) for the pursuit of such activities in a third country, in conditions not involving the physical use of a network or geographical area within the EU.

(2) Utilities shall notify the Commission, if so requested, of any activities which they regard as excluded under paragraph (1).

Contracts awarded and design contests organised pursuant to international rules

20.—(1) These Regulations do not apply to contracts or design contests which the utility is obliged to award or organise in accordance with procurement procedures which are different from those laid down in these Regulations and are established by any of the following—

- (a) a legal instrument creating international law obligations, such as an international agreement, concluded in accordance 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) These Regulations do not apply to contracts, or design contests, which the utility awards or organises in accordance with procurement rules provided by an international organisation or international financing institution where the contracts or design contests concerned are fully financed by that organisation or institution.

(3) In the case of 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 27 applies instead of paragraphs (1) to (3) of this regulation.

Specific exclusions for service contracts

21.—(1) These Regulations do not apply to 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 arbitration or conciliation services;
- (c) 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](#)(1), 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
 - (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;
- (d) for—

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

- (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⁽²⁾ as amended from time to time, or
 - (ii) operations conducted with the European Financial Stability Facility and the European Stability Mechanism;
 - (e) for loans, whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments;
 - (f) which are employment contracts;
 - (g) for public passenger transport services by rail or metro;
 - (h) for civil defence, civil protection, and danger prevention 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; or
 - (i) for broadcasting time or programme provision that are awarded to audiovisual or radio media service providers.
- (2) In this regulation—
- (a) “media service providers” has the meaning given by Article 1(1)(d) of [Directive 2010/13/EU](#) of the European Parliament and of the Council⁽³⁾ 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

22. These Regulations do not apply to service contracts awarded to a contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a law, regulation or published administrative provision which is compatible with TFEU.

Contracts awarded by certain utilities for the purchase of water and for the supply of energy or of fuels for the production of energy

- 23.** These Regulations do not apply to contracts—
- (a) for the purchase of water if awarded by utilities engaged in one or both of the activities relating to drinking water referred to in regulation 11(1);
 - (b) awarded by utilities which are active in the energy sector by engaging in an activity referred to in regulation 9(1), regulation 10(1) or regulation 15 for the supply of—
 - (i) energy; or
 - (ii) fuels for the production of energy.

SUB-SECTION 2 Procurement involving defence and security aspects

Defence and security

- 24.—(1)** These Regulations do not apply to—
- (a) contracts falling within the scope of the Defence and Security Regulations;

(2) OJ No L 145, 30.04.2004, p1, last amended by [Directive 2010/78/EU](#) of the European Parliament and of the Council (OJ No L 331, 15.12.2010, p120).

(3) OJ No L 95, 15.4.2010, p1.

- (b) contracts to which those Regulations do not apply by virtue of regulations 7 or 9 of those Regulations.
- (2) These Regulations do not apply to contracts and design contests not otherwise exempted by paragraph (1) to the extent that—
 - (a) 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 utility makes available in a contract award procedure as provided for in these Regulations; or
 - (b) the application of these Regulations 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 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, these Regulations do not apply provided that the United Kingdom has determined that the essential interests concerned cannot be guaranteed by less intrusive measures, such as those referred to in paragraph (2)(a).

Mixed procurement covering the same activity and involving defence or security aspects

- 25.**—(1) This regulation applies in the case of mixed contracts covering the same activity, which have as their subject-matter procurement covered by these Regulations and procurement or other elements covered by Article 346 of TFEU or the Defence and Security Regulations.
- (2) Where the different parts of a given contract are objectively separable, utilities 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 these Regulations or the Defence and Security Regulations.
 - (4) Where utilities 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 utilities choose to award a single contract, the following criteria 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 these Regulations, 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 for 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 paragraphs (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 these Regulations where it includes elements to which Article 346 of TFEU applies; otherwise it may be awarded in accordance with the Defence and Security Regulations.

Procurement covering several activities and involving defence or security aspects

26.—(1) This regulation applies in the case of contracts intended to cover several activities where one of those activities involves defence or security aspects.

(2) Utilities may choose to award separate contracts for the purposes of each separate activity or to award a single contract.

(3) Where utilities choose to award separate contracts for separate activities, 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 activity concerned.

(4) The choice between awarding a single contract and 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 the Defence and Security Regulations.

(5) Where utilities choose to award a single contract, the following shall apply—

(a) in the case of a contract intended to cover an activity which is covered by these Regulations and another which is covered by the Defence and Security Regulations, the utility may award the contract in accordance with the Defence and Security Regulations.

(b) in the case of a contracts intended to cover an activity which is covered by these Regulations and another which is covered by Article 346 of TFEU, the utility may award the contract without applying these Regulations.

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

(7) Contracts referred to in paragraph (5)(a), which also includes procurement or other elements which are covered by Article 346 of TFEU may be awarded without applying these Regulations.

(8) Paragraphs (5) to (7) apply provided that the award of a single contract is justified by objective reasons and the decision to award a single contract is not taken for the purpose of excluding contracts from the application of these Regulations.

Contracts and design contests involving defence or security aspects which are awarded or organised pursuant to international rules

27.—(1) These Regulations do not apply to contracts or design contests involving defence or security aspects which the utility is obliged to award or organise in accordance with procurement procedures which are different from those laid down in these Regulations and are established by any of the following—

(a) an international agreement or arrangement, concluded in accordance 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) These Regulations do not apply to contracts or design contests involving defence or security aspects which the utility awards or organises in accordance with procurement rules provided by an international organisation or international financing institution where the contracts or design contests concerned are fully financed by that organisation or institution.

(3) In the case of 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.

SUB-SECTION 3Special relations (cooperation, affiliated undertakings and joint ventures)

Contracts between contracting authorities*Award of contracts to controlled persons**Award of contracts to controlled persons*

28.—(1) A contract awarded by a utility that is a contracting authority to a legal person falls outside the scope of these Regulations 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 contract also falls outside the scope of these Regulations where a controlled legal person which is a contracting authority awards a 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 contract to that legal person without applying these Regulations 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 shall be deemed to 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 these Regulations 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 cooperation.

Determination of percentages

(8) For the determination of the percentage of activities referred to in paragraph (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 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 three years or no longer relevant, it shall be sufficient to show that the measurement of activity is credible, particularly by means of business projections.

Contracts awarded to an affiliated undertaking

29.—(1) These Regulations do not apply to contracts awarded—

- (a) by a utility to an affiliated undertaking; or
- (b) by a joint venture, formed exclusively by a number of utilities for the purpose of carrying out activities described in regulations 9 to 15, to an affiliated undertaking of one of its members,

provided that the conditions in paragraph (2) are fulfilled.

(2) The conditions are that—

- (a) in respect of service contracts, at least 80% of the average total turnover of the affiliated undertaking over the preceding 3 years, taking into account all services provided by that undertaking, derives from the provision of services to the utility or one or more of its affiliated undertakings;

- (b) in respect of supply contracts, at least 80% of the average total turnover of the affiliated undertaking over the preceding 3 years, taking into account all supplies provided by that undertaking, derives from the provision of supplies to the utility or one or more of its affiliated undertakings;
- (c) in respect of works contracts, at least 80% of the average total turnover of the affiliated undertaking over the preceding 3 years, taking into account all works provided by that undertaking, derives from the provision of works to the utility or one or more of its affiliated undertakings.

(3) Where, because of the date on which an affiliated undertaking was created or commenced activities, the turnover referred to in paragraph (2) is not available for the preceding 3 years, it shall be sufficient for that undertaking to show that the turnover is credible, in particular by means of business projections.

(4) Where more than one undertaking affiliated with the utility with which they form an economic group provides the same or similar services, supplies or works, the percentages referred to in paragraph (2) shall be calculated taking into account the total turnover deriving respectively from the provision of services, supplies or works by those affiliated undertakings.

(5) In this regulation, “affiliated undertaking” and any similar expression means—

- (a) any undertaking the annual accounts of which are consolidated with those of the utility in accordance with the requirements of [Directive 2013/34/EU](#) of the European Parliament and of the Council⁽⁴⁾; and
- (b) in the case of an undertaking which is not subject to that Directive, any undertaking that:—
 - (i) may be, directly or indirectly, subject to a dominant influence by the utility;
 - (ii) may exercise a dominant influence over the utility; or
 - (iii) in common with the utility, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it.

(6) For the purposes of paragraph (5)(b), a “dominant influence” shall be presumed on the part of a utility or, as the case may be, an undertaking, in the same circumstances in which it is, in accordance with regulation 5(3), presumed on the part of a contracting authority.

(7) This regulation applies despite the provisions of regulation 28.

Contracts awarded to a joint venture or to a utility forming part of a joint venture

30.—(1) These Regulations do not apply to contracts awarded—

- (a) by a joint venture, formed exclusively by a number of utilities for the purpose of carrying out activities within the meaning of regulations 9 to 15, to one of those utilities; or
- (b) by a utility to such a joint venture of which it forms part,

provided that the joint venture has been set up in order to carry out the activity concerned over a period of at least 3 years and the instrument setting up the joint venture stipulates that the utilities which form it will be part of the joint venture for at least the same period.

(2) This regulation applies despite the provisions of regulation 28.

Notification of information

31. Utilities shall notify to the Commission, if it so requests, the following information—

- (a) the names of the undertakings or joint ventures referred to in regulation 29 or 30;

(4) OJ No L 182, 29.6.2013, p19, last amended by Council [Directive 2014/102/EU](#) (OJ No L 334, 21.11.2014, p86).

- (b) the nature and value of the contracts referred to in those regulations;
- (c) proof, as considered necessary by the Commission, that the relationship between the undertaking or joint venture, to which the contracts are awarded, and the utility complies with the requirements of those regulations.

SUB-SECTION 4 Specific situations

Research and development services

32. These Regulations apply to 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 utility for its use in the conduct of its own affairs; and
- (b) the service provided is wholly remunerated by the utility.

Contracts subject to special arrangements

33. Without prejudice to regulation 34, a utility carrying out one or more of the activities referred to in Commission [Decision 97/367/EC](#)⁽⁵⁾ relating to the exploitation of geographical areas for the purpose of extracting oil or gas in Northern Ireland shall—

- (a) observe the principles of non-discrimination and competitive procurement in respect of the award of supplies, works and service contracts, in particular as regards the information which the utility makes available to economic operators concerning its procurement intentions;
- (b) in respect of a contract it awards whose value (determined in accordance with Regulations 17) exceeds EUR 5,000,000, send the following information to the Commission within 48 days of the award—
 - (i) the name and address of the utility;
 - (ii) the nature of the contract, namely whether it is a supply contract, a service contract or a works contract and whether it is a framework agreement;
 - (iii) a clear indication of the nature (for example, by using the Classification of Products by Activity⁽⁶⁾ of the product, work or service provided);
 - (iv) whether the contract was advertised and, if so, in which newspaper or trade journal and if not, the tendering procedure used;
 - (v) the number of tenders received;
 - (vi) the date of the award of the contract;
 - (vii) the name and address of the successful supplier or contractor;
 - (viii) the value of the contract;
 - (ix) the expected duration of the contract;
 - (x) any share of the contract which has been, or may be, sub-contracted, to which over 10% of the value of the consideration to be given under the contract is attributable;
 - (xi) the country of origin of the product or service;
 - (xii) the main award criteria chosen for identifying the most economically advantageous tender;

⁽⁵⁾ OJ No L 156, 13.6.1997, p55.

⁽⁶⁾ The Classification of Products by Activity is the official product classification by activity which is used by the EU for statistical purposes.

- (xiii) whether the contract was awarded to a bidder which submitted a variant from the utility's initial specifications; and
 - (c) in respect of a contract it awards whose value (calculated in accordance with regulation 17) equals or exceeds 400,000 euro but does not exceed 5,000,000 euro—
 - (i) retain in respect of each contract the information referred to in sub-paragraphs (b)(i) to (ix) for not less than 4 years from the date on which the contract is awarded; and
 - (ii) supply this information, either immediately upon request by the Commission, or not later than 48 days after the end of the period of 3 months ending on the last day of March, June, September or December in which the contract was awarded.
- SUB-SECTION 5 Activities directly exposed to competition and related procedural provisions

Activities directly exposed to competition

34.—(1) These Regulations do not apply to contracts or design contests intended to enable an activity mentioned in regulations 9 to 15 to be carried out where that activity is directly exposed to competition on markets to which access is not restricted.

(2) For the purposes of paragraph (1), the activity is directly exposed to competition on markets to which access is not restricted only if—

- (a) the activity is covered by the following Commission Decisions:—
 - (i) Commission [Decision 2006/211/EC](#)(7) (electricity generation in England, Scotland and Wales);
 - (ii) Commission [Decision 2007/141/EC](#)(8) (supply of electricity and gas in England, Scotland and Wales); and
 - (iii) Commission [Decision 2010/192/EU](#)(9) (exploration for and exploitation of oil and gas in England, Scotland and Wales); or
- (b) the procedure specified in regulation 35(1) is followed and regulation 35(2) applies.

(3) The activity referred to in paragraph (1) may form a part of a larger sector or be exercised only in certain parts of the United Kingdom.

Procedure for establishing whether regulation 34(2)(b) is applicable

35.—(1) The procedure referred to in regulation 34(2)(b) is as follows—

- (a) the Minister for the Cabinet Office or a utility submits a request to the Commission, where appropriate together with the position adopted by an independent national authority that is competent in relation to the activity concerned, demonstrating that the activity in question is directly exposed to competition on markets to which access is not restricted on the basis of criteria that are in conformity with the provisions on competition of TFEU which may include—
 - (i) the characteristics of the products or services concerned;
 - (ii) the existence of alternative products or services considered to be substitutable on the supply side or demand side;
 - (iii) the prices; and
 - (iv) the actual or potential presence of more than one supplier of the products or provider of the services in question;

(7) OJ No L 76, 15.3.2006, p6.

(8) OJ No L 62, 1.3.2007, p23.

(9) OJ No L 84, 31.3.2010, p52.

- (b) the request specifies—
 - (i) all the relevant facts and in particular, any law, regulation, administrative provision or agreement concerning compliance with the condition that the activity is directly exposed to competition on markets to which access is not restricted;
 - (ii) whether the activity concerned is—
 - (aa) subject to the EU legislation listed in Annex III to the Utilities Contracts Directive as amended from time to time, and where it is, the relevant implementing legislation applied in the United Kingdom, or
 - (bb) if free access to a given market cannot be presumed on the basis of subparagraph (aa), it must be demonstrated that access to the market in question is free as a matter of fact and of law;
- (2) This paragraph applies if the Commission has—
 - (i) adopted an implementing act establishing that the activity is directly exposed to competition on markets to which access is not restricted within the periods specified in Annex IV to the Utilities Contracts Directive; or
 - (ii) subject to paragraph (5), not adopted the implementing act within the period provided for in Annex IV to the Utilities Contracts Directive
- (3) The request referred to in paragraph (1) may concern activities which are part of a larger sector or which are exercised in certain parts of the United Kingdom.
- (4) After the submission of a request, the Minister for the Cabinet Office or the utility may, with the Commission's agreement, substantially modify its request, in particular as regards the activities or the geographical area concerned.
- (5) Where a request has been modified, a new period for the adoption of the implementing act shall be calculated in accordance with paragraph 1 of Annex IV to the Utilities Contracts Directive unless a shorter period is agreed on by the Commission and the Minister for the Cabinet Office or the utility which has submitted the request.