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STATUTORY INSTRUMENTS

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**2016 No. 274**

**The Utilities Contracts Regulations 2016**

**PART 1**

**GENERAL**

**CHAPTER 4**

**General Principles**

**Principles of procurement**

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

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

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

[<sup>F1</sup>(4) Utilities <sup>F2</sup>... shall not terminate contracts in a manner that circumvents their obligations under these Regulations.]

**Textual Amendments**

**F1** Reg. 36(4) inserted (25.5.2023) by [The Public Procurement \(International Trade Agreements\) \(Amendment\) Regulations 2023 \(S.I. 2023/484\)](#), regs. 1(2), **4(4)** (with reg. 5);

**F2** Words in reg. 36(4) omitted (W.) (26.5.2023) by virtue of [The Public Procurement \(International Trade Agreements\) \(Amendment\) \(Wales\) \(No. 2\) Regulations 2023 \(S.I. 2023/567\)](#), regs. 1(2), **4(4)** (with reg. 5)

**Economic operators**

**37.**—<sup>F3</sup>(1) .....

(2) In the case of—

(a) service contracts,

(b) works contracts, and

(c) supply contracts which cover in addition services or siting and installation operations,

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

*Groups of economic operators*

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

(4) Where necessary, utilities may clarify in the procurement documents how groups of economic operators are to meet the criteria and requirements for qualification and qualitative selection referred to in regulations 77 to 81 provided that this is justified by objective reasons and is proportionate.

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

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

#### Textual Amendments

**F3** Reg. 37(1) omitted (31.12.2020) by virtue of [The Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(S.I. 2020/1319\)](#), regs. 1(2), **10(24)** (with Sch. paras. 3-5)

#### Reserved contracts

**38.**—(1) Utilities may—

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

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

(2) In such cases, the call for competition shall make reference to [<sup>F4</sup>this regulation].

#### Textual Amendments

**F4** Words in reg. 38(2) substituted (31.12.2020) by [The Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(S.I. 2020/1319\)](#), regs. 1(2), **10(25)** (with Sch. paras. 3-5)

#### Confidentiality

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

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

- (a) any other provision of these Regulations, such as the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in regulations 70 and 75 respectively;
- (b) the Freedom of Information Act 2000 <sup>M1</sup>;
- (c) any other requirement, or permission, for the disclosure of information that is applicable under the law of England and Wales or, as the case may be, Northern Ireland.

(3) Utilities may impose on economic operators requirements aimed at protecting the confidential nature of information which the utilities make available throughout the procurement procedure, including information made available in connection with the operation of a qualification system, whether or not this has been the subject of a notice on the existence of a qualification system used as a means of calling for competition.

**Marginal Citations**

M1 2000 c.36.

**Rules applicable to communication**

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

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

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

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

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

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

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

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

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

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

(6) Where utilities require, in accordance with paragraph (3), means of communication other than electronic means in the submission process, they shall indicate in the documentation referred to in regulation 99 the reasons for this requirement.

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

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

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

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

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

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

*Use of tools and devices not generally available*

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

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

- (a) offer unrestricted and full direct access free of charge by electronic means to the tools and devices from the date of publication of the call for competition <sup>F5</sup>...;
- (b) ensure that tenderers having no access to the tools and devices concerned, or no possibility of obtaining them within the relevant time limits, provided that the lack of access is not attributable to the tenderer concerned, may access the procurement procedure through the use of provisional tokens made available free of charge online; or
- (c) support an alternative channel for electronic submission of tenders.

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

- (a) “publication of the call for competition” means whichever of the following is relevant (and where both are relevant, the earliest of them)—
  - (i) its publication [<sup>F6</sup>on the UK e-notification service] after being [<sup>F7</sup>submitted] in accordance with regulation 71; or
  - (ii) its publication on a buyer profile in accordance with regulation 72; and
- (b) the text of the call for competition notice <sup>F8</sup>... shall specify the internet address at which those tools and devices are accessible.

*Technical etc. requirements for tools and devices*

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

- (a) the exact time and date of the receipt of tenders, requests to participate, applications for qualification and the submission of plans and projects can be determined precisely;
  - (b) it may be reasonably ensured that, before the time referred to in paragraph (12), no-one can have access to data transmitted under the requirements in this paragraph;
  - (c) only authorised persons may set or change the dates for opening data received;
  - (d) during the various stages of the qualification procedure, the procurement procedure or design contest, access to all data submitted, or to part of such data, must be possible only for authorised persons;
  - (e) only authorised persons may give access to data transmitted and only after the time referred to in paragraph (12);
  - (f) data received and opened in accordance with the requirements in sub-paragraphs (a) to (e) must remain accessible only to persons authorised to acquaint themselves with the data;
  - (g) it may be reasonably ensured that any infringement, or attempted infringement, of the access prohibitions or conditions referred to in sub-paragraphs (b) to (f) are clearly detectable.
- (17) In addition to those requirements, the following rules shall apply to tools and devices for the electronic transmission and receipt of tenders and for the electronic receipt of requests to participate—
- (a) information on specifications for the electronic submission of tenders and requests to participate, including encryption and time-stamping, shall be available to interested parties;
  - (b) utilities shall, acting in accordance with paragraphs (18) and (19), specify the level of security required for the electronic means of communication to be used in various stages of the specific procurement procedure, and that level shall be proportionate to the risks attached;
  - (c) where utilities conclude that the level of risk, assessed in accordance with paragraphs (18) and (19), is such that advanced electronic signatures as defined by [F9]Regulation (EU) No 910/2014 of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market] as amended from time to time are required, utilities shall [F10]act in accordance with Article 27 of that Regulation (and for this purpose the submission of the tender or request is to be treated as the use of an online service to which that Article applies)].

#### *Security requirements*

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

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

- (a) the risk to the proper functioning and integrity of the specific procurement process, including risks of breach of these Regulations;
- (b) risks to national security;
- (c) the risk of inadvertent or unauthorised disclosure of, or access to, any economic operator's confidential information;
- (d) the risk of inadvertent or unauthorised disclosure of, or access to, information held by the utility including information relating to the specific procurement;

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- (e) the risk that use of electronic communications could provide opportunity for malicious attacks on the electronic systems of, or data held by, the authority, any economic operator or any other person, including introduction of malware or denial of service attacks;
- (f) other material risks relating to the procurement procedure in question;
- (g) the need for consistency as between similar procurements performed by the same utility;
- (h) the need for proportionality between, on the one hand the expected benefits of any particular security requirements (in terms of eliminating or reducing any of the risks referred to in sub-paragraphs (a) to (g)), and on the other hand the costs, burdens and obligations which those requirements may impose on economic operators.

### Electronic signatures

(20) Paragraph (21) applies where—

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

signs and issues a document for use in a procurement procedure within the scope of the [F11 these Regulations].

(21) The competent authority or issuing entity may establish the required advanced signature format [F12 in a format other than those referred to in Article 1 of Commission Implementing Decision (EU) 2015/1506 laying down specifications relating to formats of advanced electronic signatures and advanced seals to be recognised by public sector bodies], and, where it does so—

- (a) it shall put in place the necessary measures to be able to process that format technically by including the information required for the purpose of processing the signature in the document concerned; and
- (b) the document shall contain in the electronic signature or in the electronic document carrier information on existing validation possibilities that [F13 comply with the requirements of Article 2(1)(b) of that Decision (or would comply with those requirements if the person seeking to validate the signature were a public sector body within the meaning of that Article)].

### Textual Amendments

- F5** Words in reg. 40(14)(a) omitted (E. N.I.) (25.5.2023) by virtue of [The Public Procurement \(International Trade Agreements\) \(Amendment\) Regulations 2023 \(S.I. 2023/484\)](#), regs. 1(2), [4\(5\)\(a\)](#) (with regs. 1(4)(b), 5); and omitted (W.) (26.5.2023) by virtue of [The Public Procurement \(International Trade Agreements\) \(Amendment\) \(Wales\) \(No. 2\) Regulations 2023 \(S.I. 2023/567\)](#), regs. 1(2), [4\(5\)\(a\)](#) (with reg. 5)
- F6** Words in reg. 40(15)(a)(i) substituted (31.12.2020) by [The Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(S.I. 2020/1319\)](#), regs. 1(2), [10\(26\)\(a\)\(i\)](#) (with Sch. paras. 3-5)
- F7** Word in reg. 40(15)(a)(i) substituted (31.12.2020) by [The Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(S.I. 2020/1319\)](#), regs. 1(2), [10\(26\)\(a\)\(ii\)](#) (with Sch. paras. 3-5)
- F8** Words in reg. 40(15)(b) omitted (E. N.I.) (25.5.2023) by virtue of [The Public Procurement \(International Trade Agreements\) \(Amendment\) Regulations 2023 \(S.I. 2023/484\)](#), regs. 1(2), [4\(5\)\(b\)](#) (with regs. 1(4)(b), 5); and omitted (W.) (26.5.2023) by virtue of [The Public Procurement \(International Trade Agreements\) \(Amendment\) \(Wales\) \(No. 2\) Regulations 2023 \(S.I. 2023/567\)](#), regs. 1(2), [4\(5\)\(b\)](#) (with reg. 5)
- F9** Words in reg. 40(17)(c) substituted (22.7.2016) by [The Electronic Identification and Trust Services for Electronic Transactions Regulations 2016 \(S.I. 2016/696\)](#), reg. 1, [Sch. 3 para. 20\(3\)\(a\)](#)

- F10** Words in reg. 40(17)(c) substituted (31.12.2020) by [The Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(S.I. 2020/1319\)](#), regs. 1(2), **10(26)(b)** (with Sch. paras. 3-5)
- F11** Words in reg. 40(20) substituted (31.12.2020) by [The Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(S.I. 2020/1319\)](#), regs. 1(2), **10(26)(d)** (with Sch. paras. 3-5)
- F12** Words in reg. 40(21) substituted (31.12.2020) by [The Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(S.I. 2020/1319\)](#), regs. 1(2), **10(26)(c)(i)** (with Sch. paras. 3-5)
- F13** Words in reg. 40(21)(b) substituted (31.12.2020) by [The Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(S.I. 2020/1319\)](#), regs. 1(2), **10(26)(c)(ii)** (with Sch. paras. 3-5)

## [<sup>F14</sup>Powers to amend regulation 40

*Exceptions to obligation to require use of electronic means of communication*

*Exceptions to obligation to require use of electronic means of communication*

**40A.**—(1) The Minister for the Cabinet Office may make regulations amending paragraph (3) of regulation 40 by—

- (a) omitting any of the situations described in that paragraph where the Minister considers that technological developments render it inappropriate for that situation to continue to be an exception from the obligation to require electronic means of communication, or
- (b) inserting a description of a new situation where, exceptionally, the Minister considers that it must become a new exception because of technological developments.

(2) Where the Minister considers that technological developments render it inappropriate for there to continue to be any exceptions from the obligation to require electronic means of communication, the Minister may make regulations omitting paragraph (3) from regulation 40.

(3) Where regulations have been made under paragraph (2) and, exceptionally, the Minister considers that a new exception must be provided for because of technological developments, the Minister may make regulations re-inserting paragraph (3) into regulation 40 in terms which give effect to that new exception (and the powers conferred by paragraphs (1) and (2) of this regulation may subsequently be exercised in relation to paragraph (3) as re-inserted).

*Requirements relating to tools and devices for electronic receipt of documents*

(4) The Minister for the Cabinet Office may make regulations amending the technical details and characteristics set out in regulation 40(16) if the Minister considers it appropriate to do so to take account of technical developments.]

### Textual Amendments

- F14** [Reg. 40A](#) inserted (31.12.2020) by [The Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(S.I. 2020/1319\)](#), regs. 1(2), **10(27)** (with Sch. paras. 3-5)

## Nomenclatures

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

## Conflicts of interest

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

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

(3) For the purposes of—

- (a) paragraph (2), “relevant staff members” means staff members of the contracting authority, or of a procurement service provider acting on behalf of the contracting authority, who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure;
- (b) sub-paragraph (a), “procurement service provider” means a public or private body which offers ancillary purchasing activities on the market.



**Changes to legislation:**

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**Changes and effects yet to be applied to :**

- Regulations revoked by [2023 c. 54 Sch. 11 para. 7](#)

**Changes and effects yet to be applied to the whole Instrument associated Parts and Chapters:**

Whole provisions yet to be inserted into this Instrument (including any effects on those provisions):

- reg. 20(2)(2A) substituted for reg. 20(2) by [2024 c. 6 Sch. para. 9\(3\)](#)
- reg. 20(5) inserted by [2024 c. 6 Sch. para. 9\(6\)](#)
- reg. 21(1)(c)(i)(aa) words substituted by [S.I. 2019/560 reg. 9\(12\)\(a\)\(i\)](#) (This amendment not applied to legislation.gov.uk. Affecting Regulations revoked (20.11.2020) by S.I. 2020/1319, regs. 1(3), 2(a))
- reg. 21(1)(c)(i)(bb) words substituted by [S.I. 2019/560 reg. 9\(12\)\(a\)\(ii\)](#) (This amendment not applied to legislation.gov.uk. Affecting Regulations revoked (20.11.2020) by S.I. 2020/1319, regs. 1(3), 2(a))
- reg. 70(2)(a)(iiia) inserted by [2024 c. 6 Sch. para. 10](#)