
STATUTORY INSTRUMENTS

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);

(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;

(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⁽¹¹⁾; 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—

(11) [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.

CHAPTER 2 ACTIVITIES

Common Provisions

8.—(1) For the purposes of regulations 9, 10 and 11, “supply” includes generation, production, wholesale or retail sale.

- (2) But production of gas in the form of extraction falls within the scope of regulation 15.

Gas and heat

9.—(1) In the case of gas and heat, these Regulations apply to the following activities—

- (a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas or heat;
- (b) the supply of gas or heat to such networks.

(2) The supply by a utility, other than one which is a contracting authority, of gas or heat to fixed networks which provide a service to the public shall not be considered a relevant activity within the meaning of paragraph (1) where both of the following conditions are met—

- (a) the production of gas or heat by that utility is the unavoidable consequence of carrying out an activity other than one referred to in paragraph (1) or in regulations 10 to 12;
- (b) the supply to the public network is aimed only at the economic exploitation of such production and amount to not more than 20% of the utility’s turnover, on the basis of the average for the preceding 3 years, including the current year.

Electricity

10.—(1) In the case of electricity, these Regulations apply to the following activities—

- (a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity;
- (b) the supply of electricity to such networks.

(2) The supply by a utility, other than one which is a contracting authority, of electricity to fixed networks which provide a service to the public shall not be considered a relevant activity within the meaning of paragraph (1) where both of the following conditions are met—

- (a) the production of electricity by that utility takes place because its consumption is necessary for carrying out an activity other than one referred to in paragraph (1) or regulations 9, 11 and 12;
- (b) the supply to the public network depends only on that utility’s own consumption and has not exceeded 30% of that utility’s total production of energy, on the basis of the average for the preceding 3 years, including the current year.

Water

11.—(1) In the case of water, these Regulations apply to the following activities—

- (a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water;
- (b) the supply of drinking water to such networks.

(2) These Regulations also apply to contracts or design contests awarded or organised by utilities which pursue an activity referred to in paragraph (1) and which are connected with one of the following—

- (a) hydraulic engineering projects, irrigation or land drainage, provided that the volume of water to be used for the supply of drinking water represents more than 20% of the total volume of water made available by such projects or irrigation or drainage installations;
- (b) the disposal of treatment sewage.

(3) The supply by a utility, other than one which is a contracting authority, of drinking water to fixed networks which provide a service to the public shall not be considered a relevant activity within the meaning of paragraph (1) where both of the following conditions are met—

- (a) the production of drinking water by that utility takes place because its consumption is necessary for carrying out an activity other than one referred to in paragraph (1) and regulations 9 to 12;
- (b) the supply to the public network depends only on that utility's own consumption and has not exceeded 30% of that utility's total production of drinking water, on the basis of the average for the preceding three years, including the current year.

Transport services

12.—(1) These Regulations apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by—

- (a) railway;
- (b) automated systems;
- (c) tramway;
- (d) trolley bus;
- (e) bus; or
- (f) cable

(2) For the purposes of paragraph (1), a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority, such as—

- (a) conditions on the routes to be served;
- (b) the capacity to be made available; or
- (c) the frequency of the service.

Ports and airports

13. These Regulations apply to activities relating to the exploitation of a geographical area for the purpose of the provision of airports or maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway.

Postal services

14.—(1) These Regulations apply to activities relating to the provision of—

- (a) postal services;

- (b) services other than postal services, on condition that such services are provided by an entity which also provides postal services that are not directly exposed to competition within the meaning of regulation 34(2).
- (2) In this regulation—
- “postal item” means an item addressed in the final form in which it is to be carried, irrespective of weight, which includes—
- (a) correspondence;
 - (b) books;
 - (c) catalogues;
 - (d) newspapers;
 - (e) periodicals, and
 - (f) postal packages containing merchandise with or without commercial value;
- “postal services” means services consisting of the clearance, sorting, routing and delivery of postal items, including both services falling within as well as services falling outside the scope of the universal service set up in accordance with the Postal Services Act 2011(12);
- “services other than postal services” means services provided in the following areas—
- (g) mail service management services (services both preceding and subsequent to despatch, including mailroom management services);
 - (h) services concerning items for posting not included in the definition of “postal item” in this paragraph, such as direct mail bearing no address.

Extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels

15. These Regulations apply to activities relating to the exploitation of a geographical area for the purpose of—

- (a) extracting oil or gas;
- (b) exploring for or extracting coal or other solid fuels.

CHAPTER 3

MATERIAL SCOPE

SECTION 1

Thresholds

Threshold amounts

16.—(1) These Regulations apply to procurements with a value net of VAT estimated to be equal to or greater than the following thresholds—

- (a) for supply and service contracts and design contests, the sum specified in Article 15(a) of the Utilities Contracts Directive;
- (b) for works contracts, the sum specified in Article 15(b) of the Utilities Contracts Directive;
- (c) for contracts for social and other specific services listed in Schedule 2, the sum specified in Article 15(c) of the Utilities Contracts Directive.

(2) The thresholds referred to in paragraph (1) do not apply to procurements excluded by regulations 18 to 23 or regulation 34.

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

(4) The value in pounds sterling of any amount expressed in euro in any of the provisions of the Utilities Contracts Directive mentioned in paragraph (1) shall be taken to be the value for the time being determined by the Commission for the purpose of that provision and published from time to time in the Official Journal in accordance with Article 17 of the Utilities Contracts Directive.

Methods for calculating the estimated value of the procurement

General rules

General rules

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

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

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

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

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

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

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

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

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

(10) In the case of public works contracts, utilities shall include in the estimated value of a works contract both the cost of the works and the total estimated value of any supplies or services that are made available to the contractor by the utilities provided that they are necessary for the execution of the works.

Treatment of Lots

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

(12) Where a proposal for the acquisition of similar supplies may result in contracts being awarded in the form of separate lots, account shall be taken of the total estimated value of all such lots when applying regulation 16(1)(b) and (c).

(13) For the purposes of paragraphs (11) and (12), where the aggregate value of the lots is equal to or greater than the relevant threshold mentioned in regulation 16, these Regulations apply to the awarding of each lot.

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

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

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

Other specific rules

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

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

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

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

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

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

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

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

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](#)(**13**), 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—
 - (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(**14**) 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

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

(14) 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).

- (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(15) 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;
 - (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).

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

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(16); 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;
 - (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.

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

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\(17\)](#) 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(18) 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;
 - (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

(17) OJ No L 156, 13.6.1997, p55.

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

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](#)(**19**) (electricity generation in England, Scotland and Wales);
 - (ii) Commission [Decision 2007/141/EC](#)(**20**) (supply of electricity and gas in England, Scotland and Wales); and
 - (iii) Commission [Decision 2010/192/EU](#)(**21**) (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;
- (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;

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

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

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

- (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.

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.

Economic operators

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

(2) In the case of—

- (a) 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

(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.

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 Article 38 of the Utilities Contracts Directive.

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⁽²²⁾;
- (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.

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

(22) 2000 c.36.

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

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

- (a) “publication of the call for competition” means whichever of the following is relevant (and where both are relevant, the earliest of them)—
 - (i) its publication in the Official Journal after being sent in accordance with regulation 71; or
 - (ii) its publication on a buyer profile in accordance with regulation 72; and
- (b) the text of the call for competition notice or the invitation to confirm interest 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 [Directive 1999/93/EC](#) of the European Parliament and of the Council⁽²³⁾ as amended from time to time are required, utilities shall accept advanced electronic signatures supported by a qualified certificate, taking into account whether the certificate is provided by a certificate services provider, which is on a trusted list as provided for in Commission [Decision 2009/767/EC](#)⁽²⁴⁾ as amended from time to time, created with or without a secure signature creation device, subject to compliance with the following conditions—
 - (i)
 - (aa) the utilities shall establish the required advanced signature format on the basis of formats established in Commission [Decision 2011/130/EU](#)⁽²⁵⁾ as amended from time to time and put in place necessary measures to be able to process those formats technically;
 - (bb) in case a different format of electronic signature is used, the electronic signature or the electronic document carrier shall include information on existing validation possibilities;
 - (cc) the validation possibilities shall allow the utility to validate online, free of charge and in a way that is understandable for non-native speakers, the received electronic signature as an advanced electronic signature supported by a qualified certificate;
 - (ii) where a tender is signed with the support of a qualified certificate that is included on a trusted list, the utility shall not apply additional requirements that may hinder the use of those signatures by tenderers.

Security requirements

(18) In deciding the level of security required at each stage of a procurement procedure, and in concluding whether the level of risk is such that advanced electronic signatures are required, 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;

⁽²³⁾ OJ No L 13, 19.1.2000, p12, amended by Regulation [\(EC\) No 1137/2008](#) (OJ No L 311, 21.11.2008, p1).

⁽²⁴⁾ OJ No L 274, 20.10.2009, p36, last amended by Commission [Decision 2013/662/EU](#) (OJ No L 306, 16.11.2013, p21).

⁽²⁵⁾ OJ No L 53, 26.2.2011, p66, amended by Commission Implementing [Decision 2014/148/EU](#) (OJ No L 80, 19.3.2014, p7).

- (d) the risk of inadvertent or unauthorised disclosure of, or access to, information held by the utility including information relating to the specific procurement;
- (e) the risk that use of electronic communications could provide opportunity for malicious attacks on the electronic systems of, or data held by, the authority, any economic operator or any other person, including introduction of malware or denial of service attacks;
- (f) other material risks relating to the procurement procedure in question;
- (g) the need for consistency as between similar procurements performed by the same 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 Utilities Contracts Directive, whether the procedure is under these Regulations or under the law of any member State.

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

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

Nomenclatures

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.