
SCOTTISH STATUTORY INSTRUMENTS

2012 No. 88

The Public Contracts (Scotland) Regulations 2012

PART 1

GENERAL

Citation, commencement and extent

1.—(1) These Regulations may be cited as the Public Contracts (Scotland) Regulations 2012 and come into force on 1st May 2012.

(2) These Regulations extend to Scotland only.

Interpretation

2.—(1) in these Regulations—

“buyer profile” means a page on the internet set up by a contracting authority containing one or more of the following: prior information notices, information on ongoing invitations to tender, prospective and concluded contracts, cancelled procedures and any useful general information such as a contact point, a telephone number, a facsimile number, a postal address or an e-mail address;

“candidate” means an economic operator (other than a tenderer) which applied to be amongst the economic operators to be selected to tender for or to negotiate a contract or framework agreement, or applied to be included amongst the economic operators to be selected to participate in a dialogue in relation to a contract or framework agreement;

“candidate concerned” means a candidate which has not been informed that they have been unsuccessful;

“carrying out” in relation to a work or works means the construction or the design and construction of that work or those works;

“central purchasing body” means a contracting authority which—

- (a) acquires goods or services intended for one or more contracting authorities;
- (b) awards public contracts intended for one or more contracting authorities; or
- (c) concludes framework agreements for work, works, goods or services intended for one or more contracting authorities;

“the Commission” means the European Commission;

“[Commission Regulation \(EC\) No 1564/2005](#)” means Commission Regulation (EC) No 1564/2005 of 7th September 2005 establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives [2004/17/EC](#) and [2004/18/EC](#) of the European Parliament and of the Council⁽¹⁾ as amended by

(1) OJ L 257, 1.10.05, p.1. The annex to [Commission Regulation \(EC\) No 1564/2005](#) was amended by Commission Regulation [\(EC\) 1150/2009](#), OJ L 313, 29.11.2009, p.3.

Commission Regulation (EC) No 1792/2006 of 23rd October 2006 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement of persons, competition policy, agriculture (veterinary and phytosanitary legislation), fisheries, transport policy, taxation, statistics, social policy and employment, environment, customs union, and external relations by reason of the accession of Bulgaria and Romania⁽²⁾ and as amended from time to time;

“Common Procurement Vocabulary” means the reference nomenclature applicable to public contracts as adopted by Regulation (EC) No 2195/2002 of 5th November 2002 of the European Parliament and of the Council on the Common Procurement Vocabulary as amended by Commission regulation (EC) No 213/2008 amending Regulation (EC) No 2195/2002 of the European Parliament and of the Council on the Common Procurement Vocabulary (CPV) and Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council on public procurement procedures, as regards the revision of the CPV⁽³⁾;

“competitive dialogue procedure” means a procedure—

- (a) in which any economic operator may make a request to participate; and
- (b) whereby a contracting authority conducts a dialogue with the economic operators admitted to that procedure with the aim of developing one or more suitable alternative solutions capable of meeting its requirements and on the basis of which the economic operators chosen by the contracting authority are invited to tender;

“concessionaire” means a person who has entered into a public works concession contract with a contracting authority;

“contract documents” means the invitation to tender for or to negotiate a contract, the descriptive document (if any), the proposed conditions of contract, the specifications or descriptions of the goods, services, work or works required by the contracting authority and of the materials or goods to be used in or for such work or works, and all documents supplementary thereto;

“contract notice” means, except in regulation 52, a notice sent to the Official Journal in accordance with these Regulations;

“contracting authority” has the meaning given to it by regulation 3;

“contractor” means a person who offers on the market work or works and—

- (a) who sought, who seeks, or would have wished, to be the person to whom a public works contract is awarded; and
- (b) who is a national of a relevant State or established in a relevant State

“CPC” means Central Product Classification of the United Nations⁽⁴⁾;

“CPV” means Common Procurement Vocabulary;

“design contest” means a competition, particularly in the fields of planning, architecture, civil engineering and data processing—

- (a) which is conducted by or on behalf of a contracting authority and in which that contracting authority invites the entry by economic operators of plans and designs;
- (b) under the rules of which the plans or designs entered will be judged by a jury;
- (c) under which prizes may or may not be awarded; and
- (d) which enables the contracting authority to acquire the use or ownership of plans or designs selected by the jury;

(2) OJ L 362, 20.12.2006, p.1.

(3) OJ L 74, 15.3.2008, p.1.

(4) CPC Version 2 (December 2008). Further information may be obtained from the United Nations website at <http://unstats.un.org/unsd/cr/registry/cpc-2.asp>.

“disabled person” means any person recognised as disabled within the meaning of the Equality Act 2010⁽⁵⁾;

“disability” has the same meaning as in the Equality Act 2010;

“dynamic purchasing system” means a wholly electronic system of limited duration which is—

- (a) established by a contracting authority to purchase commonly used goods, work, works or services; and
- (b) open throughout its duration for the admission of economic operators which—
 - (i) satisfy the selection criteria specified by the contracting authority; and
 - (ii) submit an indicative tender to the contracting authority or person operating the system on its behalf which complies with the specification required by that contracting authority or person;

“economic operator” has the meaning given to it by regulation 4;

“electronic auction” means a repetitive electronic process for the presentation of prices to be revised downwards or of new and improved values of quantifiable elements of tenders, including price, which—

- (a) takes place after the initial evaluation of tenders; and
- (b) enables tenders to be ranked using automatic evaluation methods;

“electronic means” means using 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;

“established”, unless the context otherwise requires, has the same meaning as in the EU Treaties;

“European standard” has the meaning given to it in regulation 9(1);

“financial year” unless the context otherwise requires, means the period of 12 months ending on the date in any year in respect of which the accounts of any person are prepared;

“framework agreement” means an agreement or other arrangement between one or more contracting authorities and one or more economic operators which establishes the terms (in particular the terms as to price and, where appropriate, quantity) under which the economic operator will enter into one or more contracts with a contracting authority in the period during which the framework agreement applies;

“goods” includes electricity, substances, growing crops and things attached to or forming part of the land which are agreed to be severed before the purchase or hire under a public supply contract and any ship, aircraft or vehicle;

“government department” includes a Northern Ireland department or the head of such department;

“Government Procurement Agreement” means the Agreement on Government Procurement between certain parties to the World Trade Organisation (WTO) Agreement signed in Marrakesh on 15th April 1994⁽⁶⁾;

“GPA” means the Government Procurement Agreement;

“indicative tender” means a tender prepared by an economic operator seeking admission to a dynamic purchasing system which sets out the terms on which it would be prepared to enter

(5) 2010 c.15.

(6) Cmnd 2575. As at 1st January 2012, parties to the Government Procurement Agreement other than member States were Armenia, Aruba, Canada, Chinese Taipei, Hong Kong China, Iceland, Israel, Japan, Republic of Korea, Liechtenstein, Norway, Singapore, Switzerland and the United States of America.

into a contract with a contracting authority should that contracting authority propose to award a contract under the system;

“international standard” has the meaning given to it in regulation 9(1);

“Minister of the Crown” means the holder of an office in Her Majesty’s Government in the United Kingdom and includes the Treasury;

“national of a relevant State” means, in the case of a person who is not an individual, a person formed in accordance with the laws of a relevant State and which has its registered office, central administration or principal place of business in a relevant State;

“negotiated procedure” means a procedure leading to the award of a contract whereby the contracting authority negotiates the terms of the contract with one or more economic operators selected by it;

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

“open procedure” means a procedure leading to the award of a contract whereby all interested economic operators may tender for the contract;

“prior information notice” means a notice sent to the Official Journal in accordance with regulation 11;

“public contract” means a public services contract, a public supply contract or a public works contract;

“Public Sector Directive” means Directive [2004/18/EC](#) of the European Parliament and of the Council of 31st March 2004 in the co-ordination of procedures for the award of public works contracts, public supply contracts and public services contracts, as amended from time to time(7);

“public services contract” means a contract, in writing, for consideration (whatever the nature of the consideration) under which a contracting authority engages a person to provide services but does not include—

- (a) a public works contract; or
- (b) a public supply contract,

but a contract for both goods and services is considered to be a public services contract if the value attributable to those services exceeds that of the goods covered by the contract and a contract for services which includes activities specified in Schedule 2 that are only incidental to the principal object of the contract is considered to be a public services contract.

“public supply contract” means a contract, in writing, for consideration (whatever the nature of the consideration)—

- (a) for the purchase of goods by a contracting authority (whether or not the consideration is given in instalments and whether or not the purchase is conditional upon the occurrence of a particular event), or
- (b) for the hire of goods by a contracting authority (both where the contracting authority becomes the owner of the goods after the end of the period of hire and where it does not); and for any siting or installation of those goods, but where under such a contract services are also to be provided, the contract is only a public supply contract where the value of the consideration attributable to the goods and any siting or installation of the goods is equal to or greater than the value attributable to the services;

“public telecommunications services” means telecommunications services the provision of which the relevant States have specifically assigned, in particular, to one or more telecommunications entities;

(7) OJ L 134, 30.4.04, p.114.

“public works concession contract” means a public works contract under which the consideration given by the contracting authority consists of or includes the grant of a right to exploit the work or works to be carried out under the contract;

“public works contract” means a contract, in writing, for consideration (whatever the nature of the consideration)—

- (a) for the carrying out of a work or works for a contracting authority, or
- (b) under which a contracting authority engages a person to procure by any means the carrying out for the contracting authority of a work corresponding to specified requirements;

“relevant standstill period” means—

- (a) where the notice referred to in regulation 32(1) or 49(9)(a) is sent to all tenderers and all candidates concerned (if any) by facsimile or by electronic means, 10 days from the date on which the last notice is sent to those economic operators; or
- (b) where any such notice is sent to any tenderers or candidates concerned only by other means, 15 days from the date on which the last notice was sent to those economic operators;

“relevant State” has the meaning given to it by regulation 4(4);

“restricted procedure” means a procedure leading to the award of a contract whereby only economic operators selected by the contracting authority may submit tenders for the contract;

“Schedule 1 entity” means an entity specified in Schedule 1 pursuant to its inclusion in the list of central government bodies in Annex I to the GPA, and for which these Regulations make particular provision;

“services concession contract” means a public services contract under which the consideration given by the contracting authority consists of or includes the right to exploit the service or services to be provided under the contract;

“services provider” means a person who offers on the market, services and—

- (a) who either sought, seeks, or would have wished—
 - (i) to be the person to whom a public services contract is awarded, or
 - (ii) to participate in a design contest, and
- (b) who is a national of a relevant State or established in a relevant State;

“ship” includes any boat and other description of a vessel used in navigation;

“substance” means any natural or artificial substance, whether in solid, liquid or gaseous form or in the form of vapour;

“supplier” means a person who offers on the market goods for purchase or hire and—

- (a) who either sought, seeks, or would have wished, to be the person to whom a public supply contract is awarded, and
- (b) who is a national of a relevant State or established in a relevant State;

“telecommunications services” means services the provision of which consists wholly or partly in the transmission and routing of signals on the public telecommunications network by means of telecommunications processes, with the exception of broadcasting and television;

“tenderer” means an economic operator which has submitted an offer to perform a contract or to be party to a framework agreement, or participated in a dialogue in relation to a contract or framework agreement;

“tenderer concerned” means a tenderer which—

- (a) has not been informed that they have been excluded from the competition; or

- (b) has been informed that they have been excluded from the competition and where—
- (i) that exclusion is not prevented from being the subject of proceedings under Part 9 by virtue of regulation 47(6)(b); and
 - (ii) no such proceedings have been brought, or such proceedings have been brought and it has not been determined that the exclusion was lawful;

“TFEU” means the Treaty on the Functioning of the European Union⁽⁸⁾;

“Utilities Directive” means Directive 2004/17/EC of the European Parliament and of the Council of 31st March 2004 co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, as amended from time to time⁽⁹⁾;

“work” means the outcome of any works which is sufficient of itself to fulfil an economic and technical function;

“working day” means a day other than a Saturday, Sunday or Bank Holiday within the meaning of the Banking and Financial Dealings Act 1971⁽¹⁰⁾;

“works” means any of the activities specified in Schedule 2;

“written” or “in writing” means any expression consisting of words or figures that can be read, reproduced and subsequently communicated and it may include information transmitted and stored by electronic means; and

“year” means a calendar year.

(2) In these Regulations references to Article 7, 56 or 67 are references to Article 7, 56 or, as the case may be, 67 of the Public Sector Directive as amended from time to time.

(3) In these Regulations, unless the context otherwise requires, any reference to a numbered Part, regulation, paragraph or Schedule is a reference to the Part, regulation, paragraph or Schedule bearing that number in these Regulations.

(4) Subject to paragraph (5), in these Regulations—

- (a) “a Part A services contract” is a contract under which services specified in Part A of Schedule 3 are to be provided;
- (b) “a Part B services contract” is a contract under which services specified in Part B of Schedule 3 are to be provided.

(5) Where services specified in both Parts A and B of Schedule 3 are to be provided under a single contract, then the contract is treated as—

- (a) a Part A services contract if the value of the consideration attributable to the services specified in Part A is greater than that attributable to those specified in Part B; and
- (b) a Part B services contract if the value of the consideration attributable to the services specified in Part B is equal to or greater than that attributable to those specified in Part A.

(6) Except in regulation 47(7)(b), where these Regulations refer to a period of time—

- (a) where the period follows an action taken, the day on which the action is taken is not counted in the calculation of the period; and
- (b) where the last day of the period is not a working day, the period is extended to include the next working day.

Contracting authorities

3.—(1) For the purposes of these Regulations each of the following is a contracting authority—

⁽⁸⁾ OJ C 115, 9.5.2008, p.47.

⁽⁹⁾ OJ L 134, 30.4.04, p.1.

⁽¹⁰⁾ 1971 c.80. There are amendments to this Act which are not relevant to these Regulations.

- (a) a Minister of the Crown;
- (b) a government department;
- (c) the House of Commons;
- (d) the House of Lords;
- (e) the Scottish Ministers;
- (f) the Scottish Parliamentary Corporate Body;
- (g) the National Assembly for Wales;
- (h) the Northern Ireland Assembly Commission;
- (i) a local authority, which for the purposes of these Regulations, means—
 - (i) a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994⁽¹¹⁾;
 - (ii) a county council, a district council, a London borough council, a parish council, a community council, the Council of the Isles of Scilly, a county borough council or the Common Council of the City of London in its capacity as local authority or police authority; or
 - (iii) a district council within the meaning of the Local Government Act (Northern Ireland) 1972⁽¹²⁾;
- (j) a fire authority constituted by a combination scheme or administration scheme under the Fire Services Act 1947⁽¹³⁾ and continued under section 5 of the Fire (Scotland) Act 2005⁽¹⁴⁾;
- (k) a fire and rescue authority—
 - (i) within the meaning of section 1 of the Fire and Rescue Services Act 2004⁽¹⁵⁾;
 - (ii) constituted by a scheme under section 2 of that Act;
 - (iii) to which a scheme under section 4 of that Act applies; or
 - (iv) within the meaning of section 1 of the Fire (Scotland) Act 2005;
- (l) a joint fire board constituted by an administration scheme under section 147 of the Local Government (Scotland) Act 1973⁽¹⁶⁾ and continued under section 5 of the Fire (Scotland) Act 2005;
- (m) a joint fire and rescue board within the meaning of section 2 of the Fire (Scotland) Act 2005;
- (n) the Fire Authority for Northern Ireland;
- (o) a police authority established under section 3 of the Police Act 1996⁽¹⁷⁾;
- (p) the Metropolitan Police Authority established under section 5B of the Police Act 1996⁽¹⁸⁾;
- (q) a police authority established under section 2 of the Police (Scotland) Act 1967⁽¹⁹⁾;

⁽¹¹⁾ 1994 c.39.

⁽¹²⁾ 1972 c.9 (N.I.).

⁽¹³⁾ 1947 c.41. This Act, except for sections 26 to 27A, was repealed by section 89(2) of, and schedule 4 to, the Fire (Scotland) Act 2005. Existing fire authorities constituted under a combination scheme under the Fire Services Act 1947 continue to have effect by virtue of section 5 of the Fire (Scotland) Act 2005.

⁽¹⁴⁾ 2005 asp 5.

⁽¹⁵⁾ 2004 c.21.

⁽¹⁶⁾ 1973 c.65. Section 147 of this Act was repealed by section 89(2) of, and schedule 4 to, the Fire (Scotland) Act 2005. Existing administration schemes under section 147 continue to have effect by virtue of section 5 of the Fire (Scotland) Act 2005.

⁽¹⁷⁾ 1996 c.16.

⁽¹⁸⁾ Section 5B of the Police Act 1996 was inserted by the Greater London Authority Act 1999 (c.29).

⁽¹⁹⁾ 1967 c.77.

- (r) a joint police board constituted by an amalgamation scheme made or approved under section 21B of the Police (Scotland) Act 1967⁽²⁰⁾;
- (s) the Northern Ireland Policing Board;
- (t) an authority established under section 10 of the Local Government Act 1985⁽²¹⁾;
- (u) a joint authority established by Part IV of the Local Government Act 1985;
- (v) any body established in accordance with an order under section 67 of the Local Government Act 1985;
- (w) a joint board established by order under the Local Government etc. (Scotland) Act 1994⁽²²⁾;
- (x) the Broads Authority;
- (y) any joint board, the constituent members of which consist of any of the bodies specified in paragraphs (i),(j), (l), (o), (p), (q), (r), (s), (t), (u), (v) and (w);
- (z) a National Park authority established by an Order under section 63 of the Environment Act 1995⁽²³⁾;
- (aa) a National Park authority established by an Order under section 6 of the National Parks (Scotland) Act 2000⁽²⁴⁾;
- (bb) a corporation established, or a group of individuals appointed to act together, for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and—
 - (i) financed wholly or mainly by another contracting authority;
 - (ii) subject to management supervision by another contracting authority; or
 - (iii) more than half of the board of directors or members of which, or, in the case of a group of individuals, more than half of those individuals, being appointed by another contracting authority;
- (cc) an association of, or formed by, one or more of the above; and
- (dd) to the extent not specified in sub-paragraphs (a) to (aa), an entity specified in Schedule 1.

(2) Where an entity specified in paragraph (1) does not have the capacity to enter into a contract, the contracting authority in relation to that entity is a person whose function it is to enter into contracts for that entity.

Economic operators

4.—(1) In these Regulations, an “economic operator” means a contractor, a supplier or a services provider.

(2) When these Regulations apply, a contracting authority must not treat a person who is not a national of a relevant State or is not established in a relevant State more favourably than one who is.

(3) A contracting authority must—

- (a) treat economic operators equally and without discrimination; and
- (b) act in a transparent and proportionate manner.

(4) In these Regulations a relevant State is a Member State or a State listed in column 1 of Schedule 4; the agreements with the European Union by which the provisions in relation to public

⁽²⁰⁾ 1967 c.77. Section 21B was inserted by the Local Government etc. (Scotland) Act 1994 (c.39) section 34.

⁽²¹⁾ 1985 c.51.

⁽²²⁾ 1994 c.39.

⁽²³⁾ 1995 c.25.

⁽²⁴⁾ 2000 asp 10.

procurement are extended to those States are specified in column 2 of that Schedule and the statutory provision designating them as EU Treaties under section 1(3) of the European Communities Act 1972⁽²⁵⁾ are specified in column 3 to that Schedule.

Application

5.—(1) Subject to paragraph (3), these Regulations apply whenever a contracting authority seeks offers in relation to a proposed public supply contract, public works contract, Part A services contract, framework agreement or dynamic purchasing system other than a contract, framework agreement or dynamic purchasing system referred to in paragraph (2) or excluded from the application of these Regulations by regulation 6 or 8.

(2) Whenever a contracting authority seeks offers in relation to a proposed Part B services contract or a framework agreement or dynamic purchasing system in respect of which only Part B service contracts can be based on or awarded, other than one excluded by virtue of regulation 6 or 8—

- (a) Parts 1, 9 and 10 apply; and
- (b) the following provisions in Parts 2 to 8 apply—
 - (i) regulation 9 (technical specifications in the contract documents);
 - (ii) regulation 31 (contract award notice);
 - (iii) regulation 40(2) (statistical and other reports);
 - (iv) regulation 41 (provision of reports); and
 - (v) regulation 42 (publication of notices).

(3) In these Regulations, a reference to a public works contract does not include a public works concession contract except in—

- (a) Parts 1, 9 and 10; and
- (b) the following provisions in Parts 6, 7 and 8—
 - (i) regulation 34 (subsidised public works contracts and public services contracts);
 - (ii) regulation 36 (public works concession contracts);
 - (iii) regulation 37 (sub-contracting the work or works to be carried out under a public works concession contract);
 - (iv) regulation 39 (conditions for performance of contracts);
 - (v) regulation 41 (provision of reports);
 - (vi) regulation 42 (publication of notices);
 - (vii) regulation 43 (confidentiality of information);
 - (viii) regulation 44 (means of communication);
 - (ix) regulation 45 (sub-contracting); and
 - (x) regulation 46 (public service bodies).

General exclusions

6.—(1) These Regulations do not apply to the seeking of offers in relation to a proposed public contract, framework agreement or dynamic purchasing system where the contracting authority is a utility within the meaning of regulation 3 of the Utilities Contracts (Scotland) Regulations 2012⁽²⁶⁾ and—

⁽²⁵⁾ 1972 c.68.

⁽²⁶⁾ S.S.I. 2012/89.

- (a) that contract is for the purposes of carrying out an activity listed in any Part of Schedule 1 to those Regulations in which the utility is specified;
 - (b) that contract is for the provision of bus services to the public where other entities are free to provide those services, either in general or in a particular geographical area, under the same conditions as the utility;
 - (c) that contract is for the purpose of acquiring goods, work, works or services in order to sell, hire or provide them to another person unless the utility has a special or exclusive right to sell, hire or provide such goods, work, works or services or other persons are not free to sell, hire or provide them under the same conditions;
 - (d) that contract is for the purchase of water, where that utility is engaged in the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transportation or distribution of drinking water or the supply of drinking water to such networks;
 - (e) that contract is for the supply of energy or of fuels for the production of energy, where that utility is engaged in—
 - (i) 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 or the supply of gas or heat to such networks;
 - (ii) 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 or the supply of electricity to such networks; or
 - (iii) exploring for or extracting oil, gas, coal or other solid fuels; or
 - (f) where that utility is engaged in an activity excluded from the Utilities Contract (Scotland) Regulations 2012 by virtue of regulation 9 of those Regulations.
- (2) These Regulations do not apply to the seeking of offers in relation to a proposed public contract, framework agreement or dynamic purchasing system—
- (a) where the principal purpose of the contract is to permit the contracting authority to provide or exploit public telecommunications networks or to provide to the public one or more telecommunications services;
 - (b) which is classified as secret or where the performance of the contract must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions of any part of the United Kingdom or when the protection of the essential interests of the security of the United Kingdom require it;
 - (c) where Article 346 of the TFEU applies to that public contract, framework agreement or dynamic purchasing system;
 - (d) where different procedures govern the procedures leading to the award of the contract and it is to be entered into in accordance with—
 - (i) an international agreement concluded in conformity with the TFEU to which the United Kingdom and a State which is not a relevant State are parties and it relates to goods or the carrying out of a work or works or the provision of services intended for the joint implementation or exploitation of a project related to that agreement;
 - (ii) an international agreement relating to the stationing of troops and concerning the undertakings of a relevant State or a state which is not a relevant State; or
 - (iii) the contract award procedures of an organisation of which only States are members (an “international organisation”) or of which only States or international organisations are members;

- (e) for the acquisition of land, including existing buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land;
- (f) for the acquisition, development, production or co-production of programme material intended for broadcasting by broadcasters or for the purchase of broadcasting time;
- (g) for arbitration or conciliation services;
- (h) for financial services in connection with the issue, purchase, sale or transfer of securities or other financial instruments in particular transactions by the contracting authorities to raise money or capital;
- (i) for central bank services;
- (j) for employment and other contracts of service;
- (k) for research and development services unless—
 - (i) the benefits are to accrue exclusively to the contracting authority for its use in the conduct of its own affairs; and
 - (ii) the services are to be wholly paid for by the contracting authority;
- (l) under which services are to be provided by a contracting authority, or by a person which is a contracting authority in another relevant State for the purposes of the Public Sector Directive, because that contracting authority or person has an exclusive right—
 - (i) to provide the services; or
 - (ii) which is necessary for the provision of the servicesin accordance with any published law, regulation or administrative provision, which is compatible with the TFEU;
- (m) which is a services concession contract awarded by a contracting authority, subject to the application of regulation 46; or
- (n) where—
 - (i) the Defence and Security Public Contracts Regulations 2011(27) apply; or
 - (ii) the application of those Regulations is excluded by regulation 9 (thresholds) or 7 (general exclusions) of those Regulations.

Reserved contracts

7.—(1) In this regulation—

“supported business” means a service where more than 50% of the workers are disabled persons who by reason of the nature or severity of their disability are unable to take up work in the open labour market;

“supported employment programme” means a scheme under which work is provided for disabled persons and where more than 50% of the workers so supported are disabled persons who by reason of the nature or severity of their disability are unable to take up work in the open labour market; and

“supported factory” means an establishment where more than 50% of the workers are disabled persons who by reason of the nature or severity of their disability are unable to take up work in the open labour market.

(2) A contracting authority may reserve the right to participate in a public contract award procedure, framework agreement or dynamic purchasing system to economic operators which operate supported businesses, supported employment programmes or supported factories.

(3) Where a contracting authority has reserved the right to participate in a public contract, framework agreement or dynamic purchasing system, in accordance with paragraph (2), it must follow the contract award procedures set out in these Regulations.

(4) When seeking offers in relation to a public contract, a framework agreement or dynamic purchasing system, a contracting authority must specify in the contract notice if it is using the approach referred to in paragraph (2).

Thresholds

8.—(1) These Regulations, except paragraph (21) of this regulation, do not apply to the seeking of offers in relation to a proposed public contract, framework agreement or dynamic purchasing system, where the estimated value of the contract (net of value added tax) at the relevant time is less than the relevant threshold.

(2) For the purposes of paragraph (1), the relevant threshold is the amount set out in Article 7(c) in the case of a public works contract and a public works contract subsidised as referred to in regulation 34.

(3) Subject to paragraph (4), the relevant threshold for the purposes of paragraph (1) in the case of a Part A public services contract is—

- (a) the amount set out in Article 7(a) where offers are sought by Schedule 1 entities; and
- (b) the amount set out in Article 7(b) where offers are sought by any other contracting authority.

(4) For the purposes of paragraph (1), the relevant threshold is the amount set out in Article 7(b) in the case of a public services contract which is—

- (a) subsidised as referred to in regulation 34;
- (b) for telecommunications services specified under CPV references 64221000-1, 64227000-3, 64228000-0, 64228100-1 and 64228200-2 within category 5 of Part A of Schedule 3;
- (c) for research and development services specified in category 8 of Part A of Schedule 3; or
- (d) a Part B services contract.

(5) For the purposes of paragraph (1), the relevant threshold in the case of a public supply contract is—

- (a) the amount set out in Article 7(a) where offers are sought by—
 - (i) Schedule 1 entities; and
 - (ii) the Secretary of State for Defence, but only in relation to a contract for the purchase or hire of goods specified in Schedule 5; and
- (b) the amount set out in Article 7(b) in relation to all other contracts.

(6) The value in pounds sterling of any amount expressed in these Regulations in euro must be calculated by reference to the rate for the time being applying for the purposes of the Public Sector Directive as published from time to time in the Official Journal.

(7) For the purposes of paragraph (1), the estimated value of a public contract is the value of the total consideration payable, net of value added tax (calculated in accordance with this regulation), which the contracting authority expects to be payable under the contract.

(8) In determining the value of the total consideration which the contracting authority expects to be payable under a public contract it must, where appropriate, take account of—

- (a) any form of option;
- (b) any renewal of the contract;

- (c) any prize or payment awarded by the contracting authority to the economic operator;
- (d) the premium payable and other forms of remuneration for insurance services;
- (e) fees, commission, interest or other forms of remuneration payable for banking and other financial services; and
- (f) fees, commission or other forms of remuneration payable for design services.

(9) For the purposes of paragraph (1), the estimated value of a public supply contract for the hire of goods is—

- (a) the value of the consideration which the contracting authority expects to be payable under the contract if the term of the contract is of fixed duration; or
- (b) the value of the monthly consideration payable under the contract multiplied by 48 if the term of the contract is indefinite or uncertain at the time the contract is entered into.

(10) For the purposes of paragraph (1), the estimated value of a public services contract which does not indicate a total price is—

- (a) the aggregate of the value of the consideration which the contracting authority expects to be payable under the contract if the term of the contract is fixed for 48 months or less; or
- (b) the value of the consideration which the contracting authority expects to be payable in respect of each month of the period multiplied by 48 if the term of the contract is fixed for more than 48 months, or over an indefinite period.

(11) Subject to paragraphs (12) and (15), where a contracting authority has a single requirement for goods or services or for the carrying out of a work or works and a number of contracts have been entered into or are to be entered into to fulfil that requirement, the estimated value for the purposes of paragraph (1) of each of those contracts is the aggregate of the value of the consideration which the contracting authority expects to be payable under each of those contracts.

(12) Paragraph (11) does not apply to any contract (unless the contracting authority chooses to apply that paragraph to a contract) if the contract has an estimated value of less than—

- (a) 80,000 euro for a public services contract or a public supply contract; or
- (b) 1,000,000 euro for a public works contract;

and the aggregate value of that contract and any other such contract is less than 20% of the aggregate value of the consideration which the contracting authority has given or expects to be payable under all the contracts entered into or to be entered into to fulfil the single requirement for goods, services or for the carrying out of work or works.

(13) Subject to paragraph (15), where a contracting authority has a requirement over a period for goods or services and for that purpose enters into—

- (a) a series of contracts, or
- (b) a contract which under its terms is renewable,

the estimated value for the purposes of paragraph (1) of the contract is the amount calculated under paragraph (14).

(14) The contracting authority must calculate the amount referred to in paragraph (13) either—

- (a) by taking the aggregate of the value of the consideration payable under the contracts which—
 - (i) have similar characteristics; and
 - (ii) are for the same type of goods or services,

during the last financial year of the contracting authority ending before, or the period of 12 months ending immediately before, the relevant time, and by adjusting that amount to take account of any expected changes in quantity and cost of the goods to be purchased or

hired or services to be provided in the period of 12 months commencing with the relevant time; or

- (b) by estimating the aggregate of the value of the consideration which the contracting authority expects to be payable under contracts which have similar characteristics, and which are for the same type of goods or services during—
 - (i) in the case of public supply contracts, the period of 12 months from the first date of the delivery of the goods to be purchased or hired, or in the case of public services contracts, from the first date on which the services will be performed; or
 - (ii) the financial year, where the end of that financial year is later than 12 months after the first date of the delivery of the goods or the first date on which the services will be performed, as the case may be.

(15) Notwithstanding paragraphs (11) and (13), in relation to a public supply contract or a public services contract, when the goods or services are required for the sole purpose of a discrete operational unit within the organisation of a contracting authority and—

- (a) the decision whether to procure those goods or services has been devolved to such a unit; and
- (b) that decision is taken independently of any other part of the contracting authority;

the valuation methods described in paragraphs (11) and (14) must be adapted by aggregating only the value of the consideration which was payable or which the contracting authority expects to be payable, as the case may be, under a public supply contract or a public services contract which was or is required for the sole purpose of that unit.

(16) Where a contracting authority intends to provide any goods to the economic operator awarded a public works contract for the purpose of carrying out that contract, the value of the consideration of the public works contract for the purposes of paragraphs (7) and (11) is taken to include the estimated value at the relevant time of those goods.

(17) The relevant threshold for the purposes of paragraph (1) for a framework agreement or dynamic purchasing system is the threshold for—

- (a) a public works contract, where the framework agreement or dynamic purchasing system relates to the carrying out of work or works;
- (b) a public services contract, where the framework agreement or dynamic purchasing system relates to the provision of services; or
- (c) a public supply contract, where the framework agreement or dynamic purchasing system relates to the purchase or hire of goods.

(18) The estimated value of a framework agreement or dynamic purchasing system is the aggregate of the values estimated in accordance with this regulation of all the contracts which could be entered into under the framework agreement or dynamic purchasing system.

(19) A contracting authority must not enter into separate contracts nor exercise a choice under a valuation method with the intention of avoiding the application of these Regulations to those contracts.

(20) The relevant time for the purposes of paragraphs (1), (14) and (16) means the date on which a contract notice would be sent to the Official Journal if the requirement to send such a notice applied to that contract in accordance with these Regulations.

(21) When a contracting authority proposes to award a public contract which has an estimated value for the purpose of paragraph (1) which is below the relevant threshold, or where a proposed public contract is otherwise exempt from the requirement for prior publication of a contract notice, the contracting authority must, if required by its general EU obligations, for the benefit of any potential economic operator, ensure a degree of advertising and follow a procedure leading to the

award of the contract which is sufficient to enable open competition and meet the requirements of the principles of equal treatment, non-discrimination and transparency.

PART 2

TECHNICAL SPECIFICATIONS

Technical specifications in the contract documents

9.—(1) In this regulation—

“common technical specification” means a technical specification drawn up in accordance with a procedure recognised by the member States with a view to uniform application in all member States and which has been published in the Official Journal;

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

“European technical approval” means an approval of the fitness for use of a product, issued by an approval body designated for the purpose by a member State, following a technical assessment of whether the product fulfils the essential requirements for building works, having regard to the inherent characteristics of the product and the defined conditions of application and use;

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

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

“recognised bodies” means test and calibration laboratories and certification and inspection bodies which comply with applicable European standards and “recognised body” is interpreted accordingly;

“standard” means a technical specification approved by a recognised standardisation body for repeated or continuous application, compliance with which is not compulsory and which is an international standard, a European standard, or a British standard;

“technical reference” means any product produced by European standardisation bodies, other than official standards, according to procedures adopted for the development of market needs; and

“technical specifications” means—

- (a) in the case of a public services contract or a public supply contract, a specification in a document defining the required characteristics of materials, goods or services, such as quality levels, environmental performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of a product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods and conformity assessment procedures; and
- (b) in the case of a public works contract, the totality of the technical prescriptions contained, in particular, in the contract documents, defining the characteristics required of the work, works, materials or goods, which permits the work, works, materials or goods to be described in a manner such that it fulfils the use for which it is intended by the contracting authority and these characteristics include—

- (i) levels of environmental performance, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions and production processes and methods;
- (ii) rules relating to design and costing, the test, inspection and acceptance conditions for work or works and methods or techniques of construction; and
- (iii) all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished work or works and to the materials or parts which they involve.

(2) Where a contracting authority wishes to lay down technical specifications which must be met by—

- (a) the services to be provided under a public services contract and the materials and goods used in or for it;
- (b) the goods to be purchased or hired under a public supply contract; or
- (c) the work or works to be carried out under a public works contract and the materials and goods used in or for it;

it must specify those technical specifications in the contract documents.

(3) When laying down technical specifications in accordance with paragraph (2), a contracting authority must, wherever possible, take into account accessibility criteria for disabled persons or the suitability of the design for all users.

(4) A contracting authority must ensure that technical specifications afford equal access to economic operators and do not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

(5) Subject to technical requirements which are mandatory in the United Kingdom and to the extent that those requirements are compatible with EU obligations, a contracting authority must define the technical specifications required for a contract in accordance with paragraph (6), (7), (8) or (9).

(6) A contracting authority may define the technical specifications referred to in paragraph (5)—

- (a) by reference to technical specifications in the following order of preference—
 - (i) British standards transposing European standards;
 - (ii) European technical approvals;
 - (iii) common technical specifications;
 - (iv) international standards; or
 - (v) other technical reference systems established by the European standardisation bodies; or
- (b) in the absence of the technical specifications referred to in sub-paragraph (a), by reference to the following technical specifications—
 - (i) British standards;
 - (ii) British technical approvals; or
 - (iii) British technical specifications relating to the design, calculation and execution of the work or works and use of the product,

and each reference to a technical specification made in accordance with this paragraph must be accompanied by the words “or equivalent”.

(7) A contracting authority may define the technical specifications referred to in paragraph (5) in terms of performance or functional requirements (which may include environmental characteristics) provided that the requirements are sufficiently precise to allow an economic operator to determine the subject of the contract and a contracting authority to award the contract.

(8) A contracting authority may define the technical specifications referred to in paragraph (5) by defining performance and functional requirements as referred to in paragraph (7) with reference to the technical specifications referred to in paragraph (6) as a means of presuming conformity with such performance or functional requirements.

(9) A contracting authority may define the technical specifications referred to in paragraph (5) by reference to technical specifications referred to in paragraph (6) for certain characteristics and by reference to performance or functional requirements referred to in paragraph (7) for other characteristics.

(10) Where a contracting authority defines technical specifications as referred to in paragraph (6), it must not reject an offer on the basis that the materials, goods or services offered do not comply with those technical specifications if an economic operator proves to the satisfaction of the contracting authority by any appropriate means that the one or more solutions that that economic operator proposes in its tender satisfy the requirements of those technical specifications in an equivalent manner.

(11) Where a contracting authority defines technical specifications in terms of performance or functional requirements as referred to in paragraph (7), it must not reject an offer for materials, goods, services, work or works which complies with—

- (a) a British standard transposing a European standard;
- (b) a European technical approval;
- (c) a common technical specification;
- (d) an international standard; or
- (e) a technical reference system established by a European standardisation body,

if those technical specifications address the performance or functional requirements referred to by the contracting authority and the economic operator proves in its tender to the satisfaction of the contracting authority by any appropriate means that the work, works, materials, goods or services meet the performance or functional requirements of the contracting authority.

(12) Where a contracting authority lays down environmental characteristics in terms of performance or functional requirements as referred to in paragraph (7), it may use the detailed technical specifications, or if necessary, parts thereof, as defined by European, national or multi-national eco-labels or by any other eco-label, provided that—

- (a) those technical specifications are appropriate to define the characteristics of the materials, goods or services that are the object of the contract;
- (b) the eco-label requirements are drawn up on the basis of scientific information;
- (c) the eco-label is adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations, are able to participate; and
- (d) the technical specifications are accessible to any party interested.

(13) A contracting authority may indicate in the contract documents that the materials, goods or services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents and must accept any other appropriate means of proof that the materials, goods or services comply with those technical specifications.

(14) The term “appropriate means” referred to in paragraphs (10), (11) and (13) includes a technical dossier of a manufacturer or a test report from a recognised body.

(15) A contracting authority must accept certificates from recognised bodies established in other member States when considering whether a tender for a contract conforms with the technical specifications laid down by the contracting authority in accordance with paragraph (2).

(16) Subject to paragraph (17), a contracting authority must not lay down technical specifications in the contract documents which refer to—

- (a) materials or goods of a specific make or source or to a particular process; or
- (b) trademarks, patents, types, origin or means of production;

which have the effect of favouring or eliminating particular economic operators.

(17) Notwithstanding paragraph (16), exceptionally, a contracting authority may incorporate the references referred to in paragraph (16) into the technical specifications in the contract documents provided that the references are accompanied by the words “or equivalent”, where—

- (a) the subject of the contract makes the use of such references indispensable; or
- (b) the subject of the contract cannot otherwise be described by reference to technical specifications which are sufficiently precise and intelligible to all economic operators.

Variants

10.—(1) Where a contracting authority intends to award a public contract on the basis of the offer which is the most economically advantageous in accordance with regulation 30(1)(a), it must indicate in the contract notice whether or not it authorises economic operators to submit offers which contain variants on the requirements specified in the contract documents and a contracting authority must not accept an offer which contains a variant without that indication.

(2) Where a contracting authority authorises a variant in accordance with paragraph (1) it must state in the contract documents the minimum requirements to be met by the variant and any specific requirements for the presentation of an offer which contains variants.

(3) A contracting authority must only consider variants which meet its minimum requirements as stated in the contract documents in accordance with paragraph (2).

(4) A contracting authority must not reject an offer which contains variants on the requirements specified in the contract documents on the ground that—

- (a) where it intends to award a public services contract, the offer would lead to the award of a public supply contract; or
- (b) where it intends to award a public supply contract, the offer would lead to the award of a public services contract.

PART 3

PROCEDURES LEADING TO THE AWARD OF A PUBLIC CONTRACT

Prior information notices

11.—(1) Subject to paragraphs (4), (5) and (6), a contracting authority must send a notice in the form of the prior information notice in Annex I to [Commission Regulation \(EC\) No 1564/2005](#) and containing the information therein specified to the Commission or publish it on that contracting authority’s buyer profile as soon as possible after—

- (a) the beginning of the financial year in the case of public supply contracts or public services contracts or framework agreements for the purchase or hire of goods or for the provision of services; or

- (b) the decision authorising the programme of public works contracts or framework agreements for the carrying out of work or works, in the case of public works contracts or framework agreements for the carrying out of work or works.
- (2) The notice referred to in paragraph (1) must contain information in respect of—
- (a) the public supply contracts, the public services contracts or the framework agreements referred to in paragraph (1)(a) which the contracting authority expects to award or conclude during the period of 12 months beginning with the date of the notice; and
 - (b) the public works contracts or the framework agreements referred to in paragraph (1)(b) which the contracting authority expects to award or conclude, and that notice must be subdivided to give that information separately for each product area of goods by reference to the CPV nomenclature of each category of works or services as specified in Schedules 2 and 3.
- (3) Where a contracting authority publishes a notice on its buyer profile in accordance with paragraph (1), it must also send a notice in the form of a notice on a buyer profile in Annex VIII to [Commission Regulation \(EC\) No 1564/2005](#)⁽²⁸⁾ informing the Commission by electronic means in accordance with the format and procedure for sending notices specified in paragraph (3) of Annex VIII to the Public Sector Directive of that publication.
- (4) The obligation to publish a prior information notice in accordance with paragraph (1) applies only to proposed public contracts or framework agreements which are not excluded from the application of these Regulations by regulation 6 or 8 and where, at the date of dispatch of the notice—
- (a) the total consideration which the contracting authority expects to be payable under—
 - (i) public supply contracts or framework agreements for the purchase or hire of goods falling within the same product area; or
 - (ii) Part A services contracts or framework agreements for the provision of services falling within the same category specified in Part A of Schedule 3,is equal to or exceeds 750 000 euro; or
 - (b) the total consideration which the contracting authority expects to be payable under public works contracts or framework agreements for the carrying out of work or works is equal to or exceeds the amount set out in Article 7(c).
- (5) The obligation to publish a prior information notice applies only where the contracting authority takes the option of shortening the time limits for the receipt of tenders in accordance with regulation 15(7) or 16(18).
- (6) This regulation does not apply to a proposed public contract where the procedure for the award of the contract is the negotiated procedure without the prior publication of a contract notice in accordance with regulation 14.

Selection of contract award procedures

12.—(1) Subject to paragraph (3), for the purpose of seeking offers in relation to a proposed public contract, a contracting authority must use—

- (a) the open procedure in accordance with regulation 15; or
- (b) the restricted procedure in accordance with regulation 16,

in all circumstances, except where paragraph 2 applies.

(2) Subject to paragraph (3), for the purpose of seeking offers in relation to a proposed public contract, a contracting authority may use—

⁽²⁸⁾ The annex to Commission Regulation (EC) No 1564/2005 was amended by Commission Regulation [\(EC\) 1150/2009](#), OJ L 313, 29.11.2009, p.3.

- (a) the negotiated procedure in accordance with regulation 17 in the circumstances referred to in regulations 13 and 14; or
 - (b) the competitive dialogue procedure in accordance with regulation 18.
- (3) Paragraphs (1) and (2) do not apply in the case of a subsidised housing scheme works contract which is subject to regulation 35.

Use of the negotiated procedure with prior publication of a contract notice

13. A contracting authority may use the negotiated procedure with the prior publication of a contract notice in accordance with regulation 17(3) in the following circumstances—

- (a) subject to regulation 14(1)(a)(i), in the event that the procedure leading to the award of a contract by the contracting authority using the open procedure, the restricted procedure or the competitive dialogue procedure was discontinued because of—
 - (i) irregular tenders; or
 - (ii) unacceptable tenders following an evaluation made in accordance with regulation 15(11), 16(7) or 18(10),
 but only if the original terms of the proposed contract offered in the discontinued procedure have not been substantially altered in the negotiated procedure;
- (b) exceptionally, when the nature of the work or works to be carried out, the goods to be purchased or hired or the services to be provided under the contract or the risks attaching to them are such as not to permit prior overall pricing;
- (c) in the case of a public services contract, when the nature of the services to be provided, in particular in the case of services specified in category 6 of Part A of Schedule 3 and intellectual services, such as services involving the design of work or works, is such that specifications cannot be established with sufficient precision to permit the award of the contract using the open procedure or restricted procedure; or
- (d) in the case of a public works contract, when the work or works are to be carried out under the contract solely for the purpose of research, testing or development but not with the aim of ensuring profitability or to recover research and development costs.

Use of the negotiated procedure without prior publication of a contract notice

14.—(1) A contracting authority may use the negotiated procedure without the prior publication of a contract notice in accordance with regulation 17(3) in the following circumstances—

- (a) in the case of a public contract—
 - (i) when a contracting authority is using the negotiated procedure in accordance with regulation 13(a) and invites to negotiate the contract all of, and only, those economic operators which submitted a tender following an invitation made during the course of the discontinued open procedure, restricted procedure or competitive dialogue procedure (not being a tender or economic operator which was excluded in accordance with regulation 15(11), 16(7) or 18(10));
 - (ii) subject to paragraph (2), in the absence of tenders, suitable tenders or applications in response to an invitation to tender by the contracting authority using the open procedure or the restricted procedure but only if the original terms of the proposed contract offered in the discontinued procedure have not been substantially altered in the negotiated procedure;
 - (iii) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the public contract may be awarded only to a particular economic operator;

- (iv) when (but only if it is strictly necessary) for reasons of extreme urgency brought about by events unforeseeable by, and not attributable to, the contracting authority, the time limits specified in—
 - (aa) regulation 15 for the open procedure;
 - (bb) regulation 16 for the restricted procedure; or
 - (cc) regulation 17 for the negotiated procedure,cannot be met;
- (b) in the case of a public supply contract—
 - (i) when the goods to be purchased or hired under the contract are to be manufactured solely for the purpose of research, experiment, study or development but not when the goods are to be purchased or hired with the aim of ensuring profitability or to recover research and development costs;
 - (ii) subject to paragraph (3), when the goods to be purchased or hired under the contract are required by the contracting authority as a partial replacement for, or in addition to, existing goods or an installation and when to obtain the goods from a supplier other than the supplier which supplied the existing goods or the installation would oblige the contracting authority to acquire goods having different technical characteristics which would result in—
 - (aa) incompatibility between the existing goods or the installation and the goods to be purchased or hired under the contract; or
 - (bb) disproportionate technical difficulties in the operation and maintenance of the existing goods or the installation;
 - (iii) for the purchase or hire of goods quoted and purchased on a commodity market;
 - (iv) to take advantage of particularly advantageous terms for the purchase of goods in a closing down sale or in a sale brought about because a supplier is subject to a procedure referred to in regulation 23(4)(a), (b) or (c);
- (c) in the case of a public services contract, when the rules of a design contest require the contract to be awarded to the successful contestant or to one of the successful contestants, provided that all successful contestants are invited to negotiate the contract;
- (d) in the case of a public works contract or a public services contract—
 - (i) subject to paragraph (4), when a contracting authority wants an economic operator which has entered into a public works contract or a public services contract with the contracting authority to carry out additional work or works or provide additional services which were not included in the project initially considered or in the original public works contract or public services contract but which through unforeseen circumstances have become necessary, and such work, works or services—
 - (aa) cannot for technical or economic reasons be carried out or provided separately from those under the original contract without major inconvenience to the contracting authority; or
 - (bb) can be carried out or provided separately from those under the original contract but are strictly necessary to the later stages of the performance of that contract; and
 - (ii) subject to paragraph (5), when a contracting authority wants an economic operator which has entered into a public works contract or a public services contract with that contracting authority to carry out new work or works or provide new services which are a repetition of the work or works carried out or the services provided under the

original contract and which are in accordance with the project for the purpose of which the first contract was entered into.

(2) A contracting authority using the negotiated procedure in accordance with paragraph (1)(a)(ii) must, if the Commission requests it, submit a report recording the fact that it has used that procedure to the Scottish Ministers for onward transmission to the Commission.

(3) A contracting authority must not use the negotiated procedure in accordance with paragraph (1)(b)(ii) if the term of the proposed contract, or the term of that contract and of any other contract entered into for the same purpose, is more than three years, unless there are reasons why it is unavoidable that this period should be exceeded.

(4) A contracting authority must not use the negotiated procedure in accordance with paragraph (1)(d)(i), where the aggregate value of the consideration to be given under contracts for the additional work, works or services exceeds 50 per cent of the value of the consideration payable under the original contract.

(5) A contracting authority must not use the negotiated procedure in accordance with paragraph (1)(d)(ii) unless—

- (a) the contract notice relating to the original contract stated that a public works contract or a public services contract for new work, works or services which would be a repetition of the work or works carried out or the services provided under the original contract may be awarded using the negotiated procedure in accordance with paragraph (1)(d)(ii);
- (b) in determining the estimated value of the original contract for the purposes of regulation 8, the contracting authority took into account the value of the consideration which it expected to be payable for the new work, works or services; and
- (c) the procedure for the award of the new contract is commenced within 3 years of the original contract being entered into.

The open procedure

15.—(1) A contracting authority using the open procedure must comply with this regulation.

(2) The contracting authority must publicise its intention to seek offers in relation to the public contract by sending to the Official Journal as soon as possible after forming the intention a notice, in the form of the contract notice in Annex II to [Commission Regulation \(EC\) No 1564/2005](#)⁽²⁹⁾, inviting tenders and containing the information therein specified.

(3) Subject to paragraphs (5), (6) and (7), the date which the contracting authority fixes as the last date for the receipt by it of tenders made in response to the contract notice must be specified in the contract notice and must be not less than 52 days from the date of dispatch of the notice.

(4) Subject to any minimum time limit specified by this regulation, the contracting authority must take account of all the circumstances, in particular, the complexity of the contract and the time required for drawing up tenders when fixing time limits for the receipt by it of tenders.

(5) Where the contracting authority has transmitted a contract notice by electronic means in accordance with the format and procedures referred to in paragraph (3) of Annex VIII to the Public Sector Directive, the time limits referred to in paragraphs (3) and (7) may be reduced by 7 days.

(6) The contracting authority may reduce the time limits for the receipt by it of tenders by 5 days provided that—

- (a) the contracting authority offers unrestricted and full direct access by electronic means to the contract documents from the date of publication of the contract notice; and

⁽²⁹⁾ The annex to [Commission Regulation \(EC\) No 1564/2005](#) was amended by [Commission Regulation \(EC\) 1150/2009](#), OJ L 313, 29.11.2009, p.3.

- (b) the contract notice specifies the internet address at which the documents referred to in subparagraph (a) are available.

(7) Where—

- (a) the contracting authority has published a prior information notice in accordance with regulation 11;
- (b) the prior information notice contained as much of the information referred to in the form of the contract notice in Annex II to Commission Regulation (EC) No 1564/2005 as was available at the time of publication; and
- (c) the prior information notice was sent to the Official Journal at least 52 days and not more than 12 months before the date on which the contract notice provided for in paragraph (2) is dispatched;

the contracting authority may substitute for the period of not less than 52 days specified in paragraph (3), a shorter period of generally not less than 36 days and in any event not less than 22 days.

(8) Where the contracting authority does not offer unrestricted and full direct access by electronic means to the contract documents in accordance with paragraph (6), the contracting authority must send the contract documents to an economic operator within 6 days of the receipt of a request from that economic operator, provided that the documents are requested in good time before the date specified in the contract notice as the final date for the receipt by it of tenders.

(9) The contracting authority must supply to an economic operator such further information relating to the contract documents as may be reasonably requested by that economic operator, provided that the request is received in sufficient time to enable the contracting authority to supply the information not later than 6 days before the date specified in the contract notice as the final date for the receipt by it of tenders.

(10) The contracting authority must extend the time limit for receipt by it of tenders in order that all the information necessary for the preparation of a tender is available to all economic operators where—

- (a) an economic operator requests the contract documents in sufficient time to allow the contracting authority to respond in accordance with paragraphs (8) and (9) and, for whatever reason, the contract documents or further information are not supplied in accordance with those paragraphs; or
- (b) it is necessary that the economic operators be given the opportunity to inspect the site or premises or documents relating to the contract documents.

(11) The contracting authority must make its evaluation in accordance with regulations 23 to 26 and may exclude a tender from the evaluation of offers made in accordance with regulation 30 only if the economic operator—

- (a) may be treated as ineligible to tender on a ground specified in regulation 23; or
- (b) fails to satisfy the minimum standards required of economic operators by the contracting authority of—
 - (i) economic and financial standing; or
 - (ii) technical or professional ability.

(12) The contracting authority may require an economic operator to satisfy minimum levels of—

- (a) economic and financial standing; and/or
- (b) technical or professional ability,

provided that those minimum levels are specified in the contract notice and are related to and proportionate to the subject matter of the contract.

(13) The contracting authority may combine the reductions in the periods of time referred to in paragraphs (5) and (6).

The restricted procedure

16.—(1) A contracting authority using the restricted procedure must comply with this regulation.

(2) The contracting authority must publicise its intention to seek offers in relation to the public contract by sending to the Official Journal as soon as possible after forming the intention a notice, in the form of the contract notice in Annex II to [Commission Regulation \(EC\) No 1564/2005](#)⁽³⁰⁾, inviting requests to be selected to tender and containing the information therein specified.

(3) Subject to paragraph (5), the date which the contracting authority fixes as the last date for the receipt by it of requests to be selected to tender must be specified in the contract notice and must be not less than 37 days from the date of the dispatch of the notice.

(4) Subject to any minimum time limit specified by this regulation, the contracting authority must take account of all the circumstances, in particular, the complexity of the contract and the time required for drawing up tenders when fixing time limits for the receipt of requests to be selected to tender and for receipt by it of tenders.

(5) Where the contracting authority has transmitted a contract notice by electronic means in accordance with the format and procedures referred to in paragraph (3) of Annex VIII to the Public Sector Directive, the time limit referred to in paragraph (3) may be reduced by 7 days.

(6) Where compliance with the minimum time limit of 37 days referred to in paragraph (3) is rendered impractical for reasons of urgency, the contracting authority may substitute for that time limit—

- (a) a time limit of not less than 15 days from the date of dispatch of the contract notice; or
- (b) where the contracting authority has transmitted the contract notice by electronic means in accordance with paragraph (5), a time limit of not less than 10 days from the date of dispatch of the contract notice.

(7) The contracting authority must make its evaluation in accordance with regulations 23 to 26 and may exclude an economic operator from those economic operators from which it will make the selection of economic operators to be invited to tender only if the economic operator—

- (a) may be treated as ineligible to tender on a ground specified in regulation 23; or
- (b) fails to satisfy the minimum standards required of economic operators by the contracting authority of—
 - (i) economic and financial standing; or
 - (ii) technical or professional ability.

(8) The contracting authority must make the selection of the economic operators to be invited to tender in accordance with regulations 23 to 26 and must award the contract in accordance with regulation 30.

(9) Where there are a sufficient number of economic operators suitable to be selected to be invited to tender, the contracting authority may limit the number of economic operators which it intends to invite to tender provided that the contract notice specifies—

- (a) the objective and non-discriminatory criteria to be applied in order to limit the number of economic operators in accordance with this paragraph; and

⁽³⁰⁾ The annex to [Commission Regulation \(EC\) No 1564/2005](#) was amended by [Commission Regulation \(EC\) 1150/2009](#), OJ L 313, 29.11.2009, p.3.

- (b) the minimum number of economic operators, which must be not less than 5, which the contracting authority intends to invite to tender and, where appropriate, the maximum number.
- (10) The contracting authority must ensure that the number of economic operators invited to tender is—
 - (a) sufficient to ensure genuine competition; and
 - (b) at least equal to the minimum number specified by the contracting authority in accordance with paragraph (9)(b).
- (11) Subject to paragraph (10)(a), where—
 - (a) the contracting authority carries out a selection in accordance with regulations 23 to 26; and
 - (b) the number of economic operators selected to be invited to tender is less than the minimum number specified by the contracting authority in the contract notice,

the contracting authority may continue the award procedure with the economic operators which have been selected, provided that any economic operator not selected or which did not request to participate is not included.

- (12) The contracting authority may require an economic operator to satisfy minimum levels of—
 - (a) economic and financial standing; and/or
 - (b) technical or professional ability,

provided that those minimum levels are specified in the contract notice and are related to and proportionate to the subject matter of the contract.

- (13) The contracting authority must send invitations in writing simultaneously to each economic operator selected to tender for the contract and the invitation must—
 - (a) be accompanied by the contract documents;
 - (b) specify the internet address which offers unrestricted and full direct access by electronic means to the contract documents; or
 - (c) where the contract documents are held by an entity other than the contracting authority, specify the address to which requests for contract documents should be sent including any final date for making such requests and the amount and any method of payment of any fee which may be charged for supplying that information.

(14) Where the contract documents are held by an entity other than the contracting authority, the contracting authority must ensure that the contract documents are sent to economic operators by the most rapid means of communication possible.

- (15) The contracting authority must include the following information in the invitation—
 - (a) the final date for the receipt by it of tenders, the address to which they must be sent and the language or languages in which they must be drawn up;
 - (b) a reference to the contract notice published in accordance with paragraph (2);
 - (c) an indication of the information to be included with the tender which the contracting authority may require to be provided in accordance with regulations 24 to 26; and
 - (d) the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance for such criteria, if this information was not specified in the contract notice published in accordance with paragraph (2).

(16) Subject to paragraphs (18) and (19), the date which the contracting authority fixes as the last date for the receipt by it of tenders and which must be specified in the invitation to tender in

accordance with paragraph (15)(a), must be not less than 40 days from the date of the dispatch of the invitation.

(17) Where compliance with the minimum time limit of 40 days referred to in paragraph (16) is rendered impractical for reasons of urgency, the contracting authority may substitute for that time limit, a time limit of not less than 10 days from the date of dispatch of the invitation.

(18) Where—

- (a) the contracting authority has published a prior information notice in accordance with regulation 11;
- (b) the prior information notice contained as much of the information referred to in the form of a contract notice in Annex II to [Commission Regulation \(EC\) No 1564/2005](#) as was available at the time of publication; and
- (c) the prior information notice was sent to the Official Journal at least 52 days and no more than 12 months before the date on which the contract notice provided for in paragraph (2) is dispatched,

the contracting authority may substitute for the period of not less than 40 days in paragraph (16), a period of generally not less than 36 days and in any event not less than 22 days.

(19) The contracting authority may reduce the time limits for the receipt by it of tenders referred to in paragraphs (16) and (18) by 5 days provided that—

- (a) the contracting authority offers unrestricted and full direct access by electronic means to the contract documents from the date of publication of the contract notice; and
- (b) the contract notice specifies the internet address at which the documents referred to in subparagraph (a) are available.

(20) The contracting authority or entity referred to in paragraph (13)(c) must supply such further information relating to the contract documents as may be reasonably requested by an economic operator provided that the request for such information is received in sufficient time to enable the contracting authority to supply it not less than 4 days before the date specified in the invitation to tender as the final date for the receipt by it of tenders.

(21) The contracting authority must extend the time limit for receipt by it of tenders in order that all the information necessary for the preparation of a tender is available to all economic operators where—

- (a) an economic operator requests the contract documents in sufficient time to allow the contracting authority to respond in accordance with paragraph (20) and, for whatever reason, the contract documents or further information are not supplied in accordance with that paragraph; or
- (b) it is necessary that the economic operators be given the opportunity to inspect the site or premises or documents relating to the contract documents.

(22) The contracting authority may combine the reductions in the periods of time referred to in paragraphs (5) and (19).

(23) The contracting authority must by notice in writing as soon as reasonably practicably after sending the invitations referred to in paragraph (13), inform any candidates that have not been selected to be invited to tender that they have been unsuccessful.

The negotiated procedure

17.—(1) Subject to paragraph (2), a contracting authority using the negotiated procedure must comply with this regulation.

(2) A contracting authority using the negotiated procedure in accordance with regulation 14 need only comply with paragraphs (9) and (10) of this regulation.

(3) The contracting authority must publicise its intention to seek offers in relation to the public contract by sending to the Official Journal as soon as possible after forming the intention a notice, in the form of the contract notice in Annex II to [Commission Regulation \(EC\) No 1564/2005](#)⁽³¹⁾, inviting requests to be selected to negotiate and containing the information therein specified.

(4) The contracting authority must indicate whether the negotiated procedure will take place in successive stages in accordance with paragraph (23)—

- (a) in the contract notice; or
- (b) in that notice and the contract documents.

(5) Subject to paragraphs (7) and (8), the date which the contracting authority fixes as the last date for the receipt by it of requests to be selected to negotiate must be specified in the contract notice and must be not less than 37 days from the date of dispatch of the notice.

(6) Subject to any minimum time limit specified by this regulation, the contracting authority must take account of all the circumstances, in particular, the complexity of the contract when fixing time limits for the receipt of requests to be selected to negotiate the contract.

(7) Where the contracting authority has transmitted a contract notice by electronic means in accordance with the format and procedures referred to in paragraph (3) of Annex VIII to the Public Sector Directive, the time limit referred to in paragraph (5) may be reduced by 7 days.

(8) Where compliance with the minimum time limit of 37 days referred to in paragraph (5) is rendered impractical for reasons of urgency, the contracting authority may substitute for that time limit—

- (a) a time limit of not less than 15 days from the date of dispatch of the contract notice; or
- (b) where the contracting authority has transmitted the contract notice by electronic means in accordance with paragraph (7), a time limit of not less than 10 days from the date of dispatch of the contract notice.

(9) The contracting authority must make its evaluation in accordance with regulations 23 to 26 and may exclude an economic operator from those economic operators from which it will make the selection of economic operators to be invited to negotiate the contract only if the economic operator—

- (a) may be treated as ineligible on a ground specified in regulation 23;
- (b) fails to satisfy the minimum standards required of economic operators by the contracting authority of—
 - (i) economic and financial standing; or
 - (ii) technical or professional ability.

(10) The contracting authority must make the selection of the economic operators to be invited to negotiate in accordance with regulations 23 to 26 and must award the contract in accordance with regulation 30.

(11) Where there is a sufficient number of economic operators suitable to be selected to negotiate, the contracting authority may limit the number of economic operators which it intends to invite to negotiate the contract provided that the contract notice specifies—

- (a) the objective and non-discriminatory criteria to be applied in order to limit the number of economic operators in accordance with this paragraph; and
- (b) the minimum number of economic operators, which must be not less than 3, which the contracting authority intends to invite to negotiate and, where appropriate, the maximum number.

(31) The annex to [Commission Regulation \(EC\) No 1564/2005](#) was amended by [Commission Regulation \(EC\) 1150/2009](#), OJ L 313, 29.11.2009, p.3.

(12) The contracting authority must ensure that the number of economic operators invited to negotiate is—

- (a) sufficient to ensure genuine competition; and
- (b) at least equal to the minimum number set by the contracting authority in accordance with paragraph (11)(b).

(13) Subject to paragraph (12)(a), where—

- (a) the contracting authority carries out a selection in accordance with regulations 23 to 26; and
- (b) the number of economic operators selected to be invited to negotiate is less than the minimum number specified by the contracting authority in the contract notice,

the contracting authority may continue the award procedure with the economic operators which have been selected, provided that any economic operator not selected or which did not request to participate is not included.

(14) The contracting authority may require an economic operator to satisfy minimum levels of—

- (a) economic and financial standing; and/or
- (b) technical or professional ability,

provided that those minimum levels are specified in the contract notice and are related to and proportionate to the subject matter of the contract.

(15) The contracting authority must send invitations in writing simultaneously to each economic operator selected to negotiate and the invitation must—

- (a) be accompanied by the contract documents;
- (b) specify the internet address which offers unrestricted and full direct access by electronic means to the contract documents; or
- (c) where the contract documents are held by an entity other than the contracting authority, specify the address to which requests for contract documents should be sent including any final date for making such requests and the amount and any method of payment of any fee which may be charged for supplying that information.

(16) Where the contract documents are held by an entity other than the contracting authority, the contracting authority must ensure that the contract documents are sent to economic operators by the most rapid means of communication possible.

(17) The contracting authority must include in the invitation—

- (a) the final date for the receipt by it of replies, the address to which they must be sent and the one or more languages in which they must be drawn up;
- (b) a reference to the contract notice published in accordance with paragraph (3);
- (c) an indication of the information to be included with the reply which the contracting authority may require to be provided in accordance with regulations 24 to 26; and
- (d) the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance for such criteria, if this information was not specified in the contract notice published in accordance with paragraph (3).

(18) The contracting authority or entity referred to in paragraph (15)(c) must supply to an economic operator such further information relating to the contract documents as may be reasonably requested by that economic operator provided that the request for such information is received in sufficient time to enable the contracting authority to supply it—

- (a) not less than 6 days before the date specified in the invitation to tender as the final date for the receipt by it of tenders; or

(b) in the case of urgency where paragraph (8) applies, not less than 4 days before the date specified in the invitation to tender as the final date for the receipt by it of tenders.

(19) The contracting authority must extend the time limit for receipt by it of tenders in order that all the information necessary for the preparation of a tender is available to all economic operators where—

(a) an economic operator requests the contract documents in sufficient time to allow a contracting authority to respond in accordance with paragraph (18) and, for whatever reason, the contract documents are not supplied in accordance with that paragraph; or

(b) it is necessary that the economic operators be given the opportunity to inspect the site or premises or documents relating to the contract documents.

(20) The contracting authority must by notice in writing as soon as reasonably practicable after sending the invitations referred to in paragraph (15), inform any candidates that have not been selected to be invited to negotiate that they have been unsuccessful.

(21) Where the contracting authority needs to identify the best tender in order to award the public contract in accordance with regulation 30(1), that contracting authority must negotiate with economic operators which have submitted tenders with the aim of adapting the tenders to the requirements specified in the contract documents.

(22) During any negotiations which take place in accordance with this regulation, a contracting authority must ensure equal treatment among all economic operators and in particular, must not provide information in a discriminatory manner which may give some economic operators an advantage over other economic operators.

(23) The contracting authority may provide for the negotiated procedure to take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria in the contract documents.

(24) Where the contracting authority provides for the negotiated procedure to take place in successive stages in accordance with paragraph (23), it must—

(a) ensure that the number of economic operators to be invited to negotiate the contract at the final stage is sufficient to ensure genuine competition to the extent that there is a sufficient number of operators to do so; and

(b) by notice in writing as soon as reasonably practicable after reducing the number of tenders to be negotiated, inform the affected economic operators that they have been excluded from the competition.

The competitive dialogue procedure

18.—(1) In this regulation—

“particularly complex contract” means a contract where a contracting authority is not objectively able to—

(a) define the technical means in accordance with regulation 9(7), (8) and (9) capable of satisfying its needs or objectives; or

(b) specify either the legal or financial make-up of a project or both; and

“participant” means an economic operator selected by a contracting authority using the procedure referred to in paragraph (2) to participate in the competitive dialogue procedure.

(2) Where a contracting authority wishes to award a particularly complex contract and considers that the use of the open or restricted procedure will not allow the award of that contract, the contracting authority may use the competitive dialogue procedure.

(3) A contracting authority using the competitive dialogue procedure must comply with the following paragraphs of this regulation.

(4) The contracting authority must publicise its intention to seek offers in relation to the public contract by sending to the Official Journal, as soon as possible after forming the intention a notice, in the form of a contract notice in Annex II to [Commission Regulation \(EC\) No 1564/2005](#)(32), inviting requests to participate and containing the information therein specified.

(5) The contracting authority must specify its needs and requirements in the contract notice and must define those needs and requirements—

- (a) in the contract notice;
- (b) in the descriptive document; or
- (c) in both those documents.

(6) The contracting authority must indicate that it may provide for the competitive dialogue procedure to take place in successive stages in accordance with paragraph (23)—

- (a) in the contract notice; or
- (b) in that notice and the descriptive document.

(7) Subject to paragraph (9), the date which the contracting authority must fix as the last date for the receipt by it of requests to be selected to participate must be specified in the contract notice and must be not less than 37 days from the date of the dispatch of the notice.

(8) Subject to any minimum time limit specified by this regulation, the contracting authority must take account of all the circumstances, in particular, the complexity of the contract when fixing time limits for the receipt by it of requests to be selected to participate in the dialogue.

(9) Where the contracting authority has transmitted a contract notice by electronic means in accordance with the format and procedures referred to in paragraph (3) of Annex VIII to the Public Sector Directive, the time limit referred to in paragraph (7) may be reduced by 7 days.

(10) The contracting authority must make its evaluation in accordance with regulations 23 to 26 and may exclude an economic operator from those economic operators from which it will make the selection of economic operators to be invited to participate in the dialogue only if the economic operator—

- (a) may be treated as ineligible on a ground specified in regulation 23; or
- (b) fails to satisfy the minimum standards required of economic operators by the contracting authority of—
 - (i) economic and financial standing; or
 - (ii) technical or professional ability.

(11) The contracting authority must make the selection of the economic operators to be invited to participate in the dialogue in accordance with regulations 23 to 26.

(12) Where there is a sufficient number of economic operators suitable to be selected to participate in the dialogue, the contracting authority may limit the number of economic operators which it intends to invite to participate in the dialogue provided that the contract notice specifies—

- (a) the objective and non-discriminatory criteria to be applied in order to limit the number of economic operators in accordance with this paragraph; and
- (b) the minimum number of economic operators, which must be not less than 3, which the contracting authority intends to invite to participate in the dialogue and, where appropriate, the maximum number.

(13) The contracting authority must ensure that the number of economic operators invited to participate in the dialogue is—

(32) The annex to [Commission Regulation \(EC\) No 1564/2005](#) was amended by [Commission Regulation \(EC\) 1150/2009](#), OJ L 313, 29.11.2009, p.3.

- (a) sufficient to ensure genuine competition; and
 - (b) at least equal to the minimum number set by the contracting authority in accordance with paragraph (12)(b).
- (14) Subject to paragraph (13)(a), where—
- (a) the contracting authority carries out a selection in accordance with regulations 23 to 26; and
 - (b) the number of economic operators selected to be invited to participate in the dialogue is less than the minimum number specified by the contracting authority in the contract notice, that contracting authority may continue the award procedure with the economic operators which have been selected, provided that any economic operator not selected or which did not request to participate is not included.
- (15) The contracting authority may require an economic operator to satisfy minimum levels of—
- (a) economic and financial standing; and/or
 - (b) technical or professional ability,
- provided that those minimum levels are specified in the contract notice and are related to and proportionate to the subject matter of the contract.
- (16) The contracting authority must send invitations in writing simultaneously to each economic operator selected to participate in the dialogue and the invitation must—
- (a) be accompanied by the contract documents;
 - (b) specify the internet address which offers unrestricted and full direct access by electronic means to the contract documents; or
 - (c) where the contract documents are held by an entity other than the contracting authority, specify the address to which requests for contract documents should be sent including any final date for making such requests and the amount and any method of payment of any fee which may be charged for supplying that information.
- (17) Where the contract documents are held by an entity other than the contracting authority, the contracting authority must ensure that the contract documents are sent to economic operators by the most rapid means of communication possible.
- (18) The contracting authority must include the following information in the invitation—
- (a) the date specified for the commencement of the competitive dialogue, the address to which replies must be sent and the one or more languages in which they must be drawn up;
 - (b) a reference to the contract notice published in accordance with paragraph (4);
 - (c) an indication of the information to be included with the reply which the contracting authority may require to be provided in accordance with regulations 24, 25 and 26; and
 - (d) the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance for such criteria, if this information was not specified in the contract notice published in accordance with paragraph (4).
- (19) The contracting authority or entity referred to in paragraph (16)(c) must supply such further information to the economic operator relating to the contract documents or the descriptive document as may reasonably be requested by that economic operator provided that the request for such information is received in sufficient time to enable the contracting authority to supply it not less than 6 days before the date specified in the invitation to tender as the final date of the receipt by it of tenders.
- (20) The contracting authority must by notice in writing as soon as reasonably practicable after sending the invitations referred to in paragraph (16), inform any candidates that have not been selected to be invited to participate in the dialogue that they have been unsuccessful.

(21) The contracting authority must open with the participants selected in accordance with regulations 23 to 26 a dialogue the aim of which is to identify and define the means best suited to satisfying its needs.

(22) During the competitive dialogue procedure, a contracting authority—

- (a) may discuss all aspects of the contract with the participants selected;
- (b) must ensure equality of treatment among all participants and, in particular, must not provide information in a discriminatory manner which may give some participants an advantage over others; and
- (c) must not reveal to the other participants solutions proposed or any confidential information communicated by a participant without that participant's agreement.

(23) The contracting authority may provide for the competitive dialogue procedure to take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria in the contract notice or in the descriptive document.

(24) Where the contracting authority provides for the competitive dialogue procedure to take place in successive stages in accordance with paragraph (23), it must—

- (a) ensure that the number of economic operators to be invited to participate at the final stage is sufficient to ensure genuine competition to the extent that there is a sufficient number of economic operators to do so; and
- (b) by notice in writing as soon as reasonably practicable after reducing the number of solutions to be discussed, inform the affected economic operators that they have been excluded from the competition.

(25) The contracting authority may continue the competitive dialogue procedure until it can identify one or more solutions, if necessary after comparing them, capable of meeting its needs.

(26) Where the contracting authority declares that the dialogue is concluded, it must—

- (a) inform each participant that the dialogue is concluded;
- (b) request each participant to submit a final tender containing all the elements required and necessary for the performance of the project on the basis of any solution presented and specified during the dialogue; and
- (c) specify in the invitation to submit a tender the final date for the receipt by it of tenders, the address to which they must be sent and the language or languages in which they must be drawn up.

(27) The contracting authority may request a participant to clarify, specify or fine-tune a tender referred to in paragraph (26)(b), but such clarification, specification, fine-tuning or additional information must not involve changes to the basic features of the tender or the call for tender when those variations are likely to distort competition or have a discriminatory effect.

(28) The contracting authority must assess the tenders received on the basis of the award criteria specified in the contract notice or descriptive document and must award the contract to the participant which submits the most economically advantageous tender in accordance with regulation 30(1)(a).

(29) The contracting authority may request the participant identified as having submitted the most economically advantageous tender to clarify aspects of that tender or confirm commitments contained in the tender provided that this does not have the effect of modifying substantial aspects of the tender or of the call for tender and does not risk distorting competition or causing discrimination.

(30) The contracting authority may specify that payments may be made to a participant in respect of the participant's expenses incurred in participating in the competitive dialogue procedure.

Framework agreements

19.—(1) A contracting authority which intends to conclude a framework agreement must comply with this regulation.

(2) Where the contracting authority intends to conclude a framework agreement, it must—

- (a) follow one of the procedures set out in regulation 15, 16, 17 or 18 up to (but not including) the beginning of the procedure for the award of any specific contract set out in this regulation; and
- (b) select an economic operator to be party to a framework agreement by applying award criteria set in accordance with regulation 30.

(3) Where the contracting authority awards a specific contract based on a framework agreement, it must—

- (a) comply with the procedures set out in this regulation; and
- (b) apply those procedures only to the economic operators which are party to the framework agreement.

(4) When awarding a specific contract on the basis of a framework agreement neither the contracting authority nor the economic operator must include in that contract terms that are substantially amended from the terms laid down in that framework agreement.

(5) Where the contracting authority concludes a framework agreement with one economic operator—

- (a) it must award any specific contract within the limits of the terms laid down in the framework agreement; and
- (b) in order to award a specific contract, the contracting authority may consult in writing the economic operator which is party to the framework agreement requesting that economic operator to supplement its tender if necessary.

(6) Where the contracting authority concludes a framework agreement with more than one economic operator, the minimum number of economic operators must be 3, insofar as there is a sufficient number of—

- (a) economic operators to satisfy the selection criteria; or
- (b) admissible tenders which meet the award criteria.

(7) Where the contracting authority concludes a framework agreement with more than one economic operator, a specific contract may be awarded—

- (a) by application of the terms laid down in the framework agreement without re-opening competition; or
- (b) where not all the terms of the proposed contract are laid down in the framework agreement, by re-opening competition between the economic operators which are parties to that framework agreement and which are capable of performing the proposed contract in accordance with paragraphs (8) and (9).

(8) Where the contracting authority is following the procedure set out in paragraph (7)(b), it must re-open the competition on the basis of the same or, if necessary, more precisely formulated terms, and where appropriate other terms referred to in the contract documents based on the framework agreement.

(9) Where the contracting authority is following the procedure set out in paragraph (7)(b), for each specific contract to be awarded it must—

- (a) consult in writing the economic operators capable of performing the contract and invite them within a specified time limit to submit a tender in writing for each specific contract to be awarded;

- (b) set a time limit for the receipt by it of the tenders which takes into account factors such as the complexity of the subject matter of the contract and the time needed to send in tenders;
- (c) keep each tender confidential until the expiry of the time limit for the receipt by it of tenders;
- (d) award each contract to the economic operator which has submitted the best tender on the basis of the award criteria specified in the contract documents based on the framework agreement; and
- (e) by notice in writing as soon as reasonably practicable after the decision has been made, inform the economic operators that submitted tenders of its decision in relation to the award of the contract.

(10) The contracting authority must not conclude a framework agreement for a period which exceeds 4 years except in exceptional circumstances, in particular, circumstances relating to the subject of the framework agreement.

(11) In this regulation, a “specific contract” means a contract based on the terms of a framework agreement.

(12) The contracting authority must not use a framework agreement improperly or in such a way as to prevent, restrict or distort competition.

Dynamic purchasing systems

20.—(1) A contracting authority using a dynamic purchasing system must comply with this regulation.

(2) The contracting authority which seeks to establish a dynamic purchasing system must comply with the requirements of regulation 44(2) to (7) and must use only electronic means to—

- (a) establish that system; and
- (b) award contracts under it.

(3) The contracting authority must use the open procedure in accordance with regulation 15 to establish a dynamic purchasing system up to the beginning of the procedure for the award of contracts under the system set out in this regulation.

(4) When establishing a dynamic purchasing system, the contracting authority must—

- (a) send to the Official Journal as soon as possible after forming the intention a notice, in the form of the contract notice in Annex II to Commission Regulation (EC) No 1564/2005⁽³³⁾ stating that a dynamic purchasing system is to be established; and
- (b) produce a specification which indicates—
 - (i) the nature of the goods, work, works or services intended to be purchased under that system; and
 - (ii) information concerning the purchasing system, the electronic equipment to be used in its operation, the arrangements for technical connection to the system, the rules governing its operation and any other necessary information relating to the system.

(5) When establishing a dynamic purchasing system a contracting authority may also produce additional documents relating to the operation of the system.

(6) Where the contracting authority establishes a dynamic purchasing system it must—

⁽³³⁾ The annex to [Commission Regulation \(EC\) No 1564/2005](#) was amended by Commission Regulation (EC) 1150/2009, OJ L 313, 29.11.2009, p.3.

- (a) offer unrestricted, direct and full access to the specification and to any additional documents by electronic means from the date of publication of the contract notice to the date when the system ceases to be operated; and
 - (b) indicate in the contract notice the internet address at which those documents may be examined.
- (7) Throughout the duration of the dynamic purchasing system, the contracting authority must—
- (a) give any economic operator the opportunity to—
 - (i) submit an indicative tender; and
 - (ii) be admitted to that system under the conditions referred to in paragraph (8); and
 - (b) complete the evaluation of an indicative tender within 15 days from the date of its submission or such longer period as the contracting authority may determine if no invitation to tender is issued under the system as provided in paragraph (13) within the 15 day period.
- (8) The contracting authority must admit to the dynamic purchasing system each economic operator which satisfies the selection criteria and has submitted an indicative tender which complies with the specification and any additional documents produced by the contracting authority in accordance with paragraph (5) when establishing the system.
- (9) The contracting authority must as soon as possible notify an economic operator of its admission to a dynamic purchasing system or of the rejection of its indicative tender and must do so in writing if requested by the economic operator.
- (10) An economic operator which is admitted to a dynamic purchasing system may improve its indicative tender at any time provided that the improved tender complies with the specification described in paragraph (4)(b).
- (11) Where the contracting authority proposes to award a contract under a dynamic purchasing system, it must send to the Official Journal as soon as possible after forming the intention a notice, in the form of a simplified contract notice on a dynamic purchasing system in Annex IX to [Commission Regulation \(EC\) No 1564/2005](#), inviting economic operators to submit an indicative tender in accordance with paragraph (7)(a)(i) not less than 15 days from the date of the dispatch of the simplified contract notice.
- (12) The indicative tenders received within the period specified in paragraph (11) must be evaluated by a contracting authority for admittance to the dynamic purchasing system before it proceeds with the issue of invitations to submit tenders in relation to any contract to be awarded under the dynamic purchasing system to an economic operator admitted to the system.
- (13) The contracting authority must invite all economic operators admitted to the dynamic purchasing system to submit a tender for each contract within a time limit specified by the contracting authority.
- (14) For each contract to be awarded under the dynamic purchasing system, the contracting authority—
- (a) must award the contract to the economic operator which submits the tender which best meets the award criteria specified in the contract notice for the establishment of the dynamic purchasing system; and
 - (b) may, if appropriate, formulate those award criteria more precisely in the invitation to submit tenders.
- (15) The contracting authority must by notice in writing as soon as reasonably practicable after a decision has been made in accordance with paragraph (14)(a), inform the economic operators that submitted tenders of its decision in relation to the award of the contract.

(16) The contracting authority may not charge any economic operator seeking admission to a dynamic purchasing system or which has been admitted to such a system in relation to any aspect of that system.

(17) A dynamic purchasing system established by a contracting authority may not be operated for more than 4 years, unless there are exceptional circumstances.

(18) The contracting authority must not use a dynamic purchasing system improperly or in such a way as to prevent, restrict or distort competition.

Electronic auctions

21.—(1) A contracting authority which holds an electronic auction must comply with this regulation.

(2) Subject to paragraph (3), the contracting authority may hold an electronic auction when using—

- (a) the open procedure;
- (b) the restricted procedure;
- (c) the negotiated procedure in the circumstances referred to in regulation 13(a) and 14(1)(a)(i);
- (d) the procedure set out in regulation 19(7)(b) on the re-opening of competition among the parties to a framework agreement; or
- (e) the procedure set out in regulation 20 on the opening of competition for contracts to be awarded under a dynamic purchasing system.

(3) The contracting authority must not hold an electronic auction to precede the award of a public services contract or a public works contract having as its subject matter intellectual performance, such as the design of works.

(4) The contracting authority may only hold an electronic auction to precede the award of a contract when the contract specification can be established with precision.

(5) The contracting authority must base an electronic auction on—

- (a) price alone where the contract is to be awarded on the basis of the lowest price; or
- (b) price or the values of quantifiable elements of tenders indicated in the contract specification, where the contract is to be awarded on the basis of the offer which is the most economically advantageous in accordance with regulation 30(1)(a).

(6) When the contracting authority intends to hold an electronic auction it must state this in the contract notice.

(7) A contract specification prepared by the contracting authority in relation to a contract the award of which is to be preceded by an electronic auction must include—

- (a) the quantifiable elements of tenders capable of expression in figures or percentages which will be the subject of the electronic auction;
- (b) any limitations on the values for the quantifiable elements of tenders (resulting from the contract specification) which may be submitted in the electronic auction;
- (c) the information to be made available to economic operators during the electronic auction and, where appropriate, an indication of when it will be made available to them;
- (d) a description of the electronic auction process;
- (e) the conditions under which the economic operators will be able to bid and, in particular, the minimum differences which may be required when bidding; and
- (f) all relevant information concerning—

- (i) the electronic system to be used in the electronic auction; and
 - (ii) the arrangements for and technical specifications relevant to connection to the electronic system to be used.
- (8) Before proceeding with an electronic auction, the contracting authority must—
 - (a) make an initial evaluation of the tenders in accordance with the award criteria specified and with any weighting fixed for them; and
 - (b) by electronic means simultaneously invite all the economic operators which have submitted admissible tenders to submit new prices or new values in the electronic auction.
- (9) Where the contracting authority is to award a contract on the basis of the offer which is the most economically advantageous to it in accordance with regulation 30(1)(a), each invitation referred to in paragraph (8)(b) must include the outcome of the evaluation of the tender submitted by the economic operator to which the invitation is sent, carried out in accordance with the weighting described in regulation 30(3).
- (10) The contracting authority must include in the invitation referred to in paragraph (8)(b)—
 - (a) all relevant information concerning individual connection to the electronic system to be used in the electronic auction;
 - (b) the date and time of the start of the electronic auction;
 - (c) the number of phases in the electronic auction;
 - (d) the mathematical formula to be used in the electronic auction to determine automatic reranking of tenders on the basis of the new prices or new values submitted by economic operators and incorporating the weighting of all the criteria set to determine the most economically advantageous tender;
 - (e) where variant bids are authorised by the contracting authority, a separate mathematical formula for each variation; and
 - (f) the basis on which the electronic auction is to be closed and the appropriate additional information specified in paragraph (16).
- (11) In relation to the formula referred to in paragraph (10)(d), any ranges used in the weighting of criteria must be set at a specified value before the invitation is sent to economic operators.
- (12) At least two working days must elapse between the date on which the invitation referred to in paragraph (8)(b) is sent and the date of the electronic auction.
- (13) During each phase of an electronic auction, the contracting authority—
 - (a) must instantaneously communicate to all economic operators participating in the auction at least sufficient information to enable them to ascertain their relative rankings in the auction at any time;
 - (b) may communicate to each economic operator other information concerning prices or values submitted by other economic operators provided that this has been stated in the contract specification; and
 - (c) may disclose the number of economic operators participating in that phase of the auction.
- (14) During any phase of an electronic auction, the contracting authority must not disclose the identity of any economic operator participating in the auction.
- (15) The contracting authority must close an electronic auction—
 - (a) at the date and time fixed for closure in the invitation referred to in paragraph (8)(b);
 - (b) when it receives no further new prices or new values which meet the requirements concerning minimum differences; or

- (c) when the number of phases in the electronic auction specified in the invitation referred to in paragraph (8)(b) has been completed.
- (16) Where a contracting authority intends to close an electronic auction—
- (a) as described in paragraph (15)(b), it must state in the invitation referred to in paragraph (8)
 - (b) the period which it intends to allow to elapse before it closes the auction after receiving a submission from an economic operator participating in the auction; or
 - (b) as described in paragraph (15)(c), it must state in the invitation referred to in paragraph (8)
 - (b) the timetable for each phase in the auction.
- (17) After closing an electronic auction the contracting authority must award the contract in accordance with regulation 30 on the basis of the results of the electronic auction.
- (18) The contracting authority must not use an electronic auction improperly or in such a way as to prevent, restrict or distort competition or to change the subject matter of the contract as referred to in the contract notice and defined in the specification.
- (19) The references to values in paragraph (5)(b), (8)(b), (10)(d), (13)(b) and (15)(b) must be interpreted as including price.

Central purchasing bodies

- 22.**—(1) A contracting authority may purchase work, works, goods or services from or through a central purchasing body.
- (2) Where a contracting authority makes purchases in accordance with paragraph (1), it is deemed to have complied with these Regulations to the extent that the central purchasing body has complied with them.

PART 4

SELECTION OF ECONOMIC OPERATORS

Criteria for the rejection of economic operators

- 23.**—(1) Subject to paragraph (2), a contracting authority must treat as ineligible and must not select an economic operator in accordance with these Regulations if the contracting authority has actual knowledge that the economic operator or its directors or any other person who has powers of representation, decision or control of the economic operator has been convicted of any of the following offences—
- (a) the common law offence of conspiracy where that conspiracy relates to participation in a criminal organisation as defined in Article 2 of Council Framework Decision 2008/841/JHA(34) or an offence under sections 28 or 30 of the Criminal Justice and Licensing (Scotland) Act 2010(35);
 - (b) corruption within the meaning of section 1(2) of the Public Bodies Corrupt Practices Act 1889(36) or section 1 of the Prevention of Corruption Act 1906(37), where the offence relates to active corruption as defined in Article 3 of the Council Act of 26th May 1997(38) and Article 3(1) of Council Joint Action 98/742/JHA(39);

(34) OJ L 300, 11.11.2008, p.42.

(35) 2010 asp 13.

(36) 1889 c.69. This Act was repealed by Schedule 2 to the Bribery Act 2010 (c.23).

(37) 1906 c.34. Section 1 was amended by section 47(2) and (3) of the Criminal Justice Act 1988 (c.33), section 108(2) of the Anti-terrorism, Crime and Security Act 2001(c.24) and section 68(2) of the Criminal Justice (Scotland) Act 2003 (asp 7) and repealed by Schedule 2 to the Bribery Act 2010 (c.23).

(38) OJ C 195, 25.6.1997, p.2.

- (c) bribery or corruption within the meaning of sections 68 and 69 of the Criminal Justice (Scotland) Act 2003(40) where the offence relates to active corruption, or bribery within the meaning of sections 1 or 6 of the Bribery Act 2010(41);
- (d) the common law offence of incitement to commit a crime;
- (e) fraud, where the offence relates to fraud affecting the financial interests of the European Communities as defined by Article 1 of the Convention relating to the protection of the financial interests of the European Communities(42), within the meaning of—
 - (i) the offence of cheating the Revenue;
 - (ii) the common law offence of fraud;
 - (iii) the common law offence of theft or fraud;
 - (iv) fraudulent trading within the meaning of section 458 of the Companies Act 1985(43) or section 993 of the Companies Act 2006(44);
 - (v) fraudulent evasion within the meaning of section 170 of the Customs and Excise Management Act 1979(45) or section 72 of the Value Added Tax Act 1994(46);
 - (vi) an offence in connection with taxation in the European Union within the meaning of section 71 of the Criminal Justice Act 1993(47);
 - (vii) the common law offence of uttering; or
 - (viii) the common law offence of attempting to pervert the course of justice;
- (f) money laundering within the meaning of section 340(11) of the Proceeds of Crime Act 2002(48) or the Money Laundering Regulations 2007(49), or an offence in connection with proceeds of drug trafficking within the meaning of sections 49, 50 or 51 of the Drug Trafficking Act 1994(50); or
- (g) any other offence within the meaning of Article 45(1) of the Public Sector Directive as defined by the national law of any relevant state.

(2) In any case where an economic operator or its directors or any other person who has powers of representation, decision or control has been convicted of an offence described in paragraph (1), a contracting authority may disregard the prohibition described there if it is satisfied that there are overriding requirements in the general interest which justify doing so in relation to that economic operator.

(3) A contracting authority may apply to the relevant competent authority to obtain further information regarding the economic operator and in particular details of convictions of the offences listed in paragraph (1) if it considers it needs such information to decide on any exclusion referred to in that paragraph.

(4) A contracting authority may treat an economic operator as ineligible or decide not to select an economic operator in accordance with these Regulations on one or more of the following grounds, namely that the economic operator—

(39) OJ L 358, 31.12.1998, p.2; repealed by Council Framework Decision 2003/568/JHA (OJ L 192, 31.7.2003, p.54).

(40) 2003 asp 7. Sections 68 and 69 were repealed by Schedule 2 to the Bribery Act 2010 (c.23).

(41) 2010 c.23.

(42) OJ C 316, 27.11.1995, p.49.

(43) 1985 c.6. Section 458 was modified by regulation 4 of, and Part 1 of schedule 2 to, the Limited Liability Partnerships Regulations 2001 (S.I. 2001/1090) and repealed by Schedule 16 to the Companies Act 2006 (c.46).

(44) 2006 c.46.

(45) 1979 c.2. There are amendments to this Act which are not relevant to these Regulations.

(46) 1994 c.23. Section 72 was amended by section 17 of the Finance Act 2003 (c.40). There are other amendments to this Act which are not relevant to these Regulations.

(47) 1993 c.36. There are amendments to this Act which are not relevant to these Regulations.

(48) 2002 c.29.

(49) S.I. 2007/2157. These Regulations were amended by S.I. 2007/3299, S.I. 2011/1781 and S.I. 2011/2833.;

(50) 1994, c.37. Sections 49, 50 and 51 were repealed by Schedules 11 and 12 to the Proceeds of Crime Act 2002 (c.29).

- (a) being an individual is a person in respect of whom a debt relief order has been made or is bankrupt or has had a receiving order or administration order or bankruptcy restrictions order or a debt relief restriction order made against that individual or has made any composition or arrangement with or for the benefit of creditors or has made any conveyance or assignment for the benefit of creditors or appears unable to pay, or to have no reasonable prospect of being able to pay, a debt within the meaning of section 268 of the Insolvency Act 1986⁽⁵¹⁾, or article 242 of the Insolvency (Northern Ireland) Order 1989⁽⁵²⁾, or in Scotland has granted a trust deed for creditors or become otherwise apparently insolvent, or is the subject of a petition presented for sequestration of that individual's estate, or is the subject of any similar procedure under the law of any other state;
- (b) being a partnership constituted under Scots law has granted a trust deed or become otherwise apparently insolvent, or is the subject of a petition presented for sequestration of its estate;
- (c) being a company or any other entity within the meaning of section 255 of the Enterprise Act 2002⁽⁵³⁾ has passed a resolution or is the subject of an order by the court for the company's winding up otherwise than for the purpose of bona fide reconstruction or amalgamation, or has had a receiver, manager or administrator on behalf of a creditor appointed in respect of the company's business or any part thereof or is the subject of the above procedures or is the subject of similar procedures under the law of any other state;
- (d) has been convicted of a criminal offence relating to the conduct of that economic operator's business or profession;
- (e) has committed an act of grave misconduct in the course of that economic operator's business or profession;
- (f) has not fulfilled obligations relating to the payment of social security contributions under the law of any part of the United Kingdom or of the relevant State in which the economic operator is established;
- (g) has not fulfilled obligations relating to the payment of taxes under the law of any part of the United Kingdom or of the relevant State in which the economic operator is established;
- (h) is guilty of serious misrepresentation in providing any information referred to in this regulation or regulation 24 to 27 or has not provided such information in response to a request by the contracting authority;
- (i) in relation to procedures for the award of a public services contract, is not licensed in the relevant State in which the economic operator is established or is not a member of an organisation in that relevant State when the law of that relevant State prohibits the provision of the services to be provided under the contract by a person who is not so licensed or who is not such a member; or
- (j) subject to paragraphs (7), (8), (9), (10), (11), (12) and (13) is not registered on the professional or trade register of the relevant State specified in Schedule 6 in which that economic operator is established under conditions laid down by that State.

(5) The contracting authority may require an economic operator to provide such information as it considers it needs to make the evaluation in accordance with paragraphs (1) and (4) except that it must accept as conclusive evidence that an economic operator does not fall within the grounds specified in paragraphs (1) and (4)(a), (b), (c), (d), (f) or (g) if that economic operator provides to the contracting authority—

- (a) in relation to the grounds specified in paragraphs (1) and (4)(a), (b), (c) or (d)—

⁽⁵¹⁾ 1986 c.45. There are amendments to this Act which are not relevant to these Regulations.

⁽⁵²⁾ S.I. 1989/2405 (N.I. 19). There are amendments to this Order which are not relevant to these Regulations.

⁽⁵³⁾ 2002 c.40. There are amendments to this Act which are not relevant to these Regulations.

- (i) an extract from the judicial record; or
 - (ii) in a relevant State which does not maintain such a judicial record, a document issued by the relevant judicial or administrative authority;
 - (b) in relation to the grounds specified in paragraphs (4)(f) or (g), a certificate issued by the relevant competent authority; and
 - (c) in a relevant State where the documentary evidence specified in paragraphs (5)(a) and (b) is not issued in relation to one of the grounds specified in paragraphs (1), (4)(a), (b), (c), (d), (f) or (g), a declaration on oath made by the economic operator before the relevant judicial, administrative or competent authority or a relevant notary public or Commissioner for oaths.
- (6) In this regulation, “relevant” in relation to a judicial, administrative or competent authority, notary public or commissioner for oaths means an authority designated by, or a notary public or commissioner for oaths in the relevant State in which the economic operator is established.
- (7) An economic operator established in the United Kingdom or Ireland must be treated as registered on the professional or trade register for the purposes of paragraph (4)(j) if the economic operator—
- (a) is established in Ireland and is certified as registered with the Registrar of Friendly Societies; or
 - (b) is established in either State and is either—
 - (i) certified as incorporated by their respective Registrar of Companies, or
 - (ii) is certified as having declared on oath that it is carrying on business in the trade in question in the State in which it is established at a specific place of business and under a specific trading name.
- (8) An economic operator established in Cyprus is treated as registered on the professional or trade register for the purposes of paragraph (4)(j) if—
- (a) in relation to procedures for the award of a public services contract or a public supply contract the economic operator is either—
 - (i) certified as incorporated by the Registrar of Companies and Official Receiver (Έφορος Εταιρειών και Επίσημος Παραλήπτης); or
 - (ii) certified as having declared on oath that it is carrying on business in the trade in question in Cyprus at a specific place of business and under a specific trading name; or
 - (b) in relation to procedures for the award of a public works contract the economic operator is certified by the Council for the Registration and Audit of Civil Engineering and Building Contractors (Συμβούλιο Εγγραφής και Ελέγχου Εργοληπτών Οικοδομικών και Τεχνικών Έργων) according to the Registration and Audit of Civil Engineering and Building Contractors Law of Cyprus.
- (9) An economic operator established in Malta is treated as registered on the professional or trade register for the purposes of paragraph (4)(j) if—
- (a) the economic operator produces its “numru ta’ registrazzjoni tat- Taxxa tal- Valur Miżjud (VAT) u n- numru tal-liċenzja ta’ kummerċ”; and
 - (b) where the economic operator is a member of a partnership or is a company, it produces the relevant registration number as issued by the Malta Financial Services Authority.
- (10) In relation to procedures for the award of a public services contract, an economic operator established in Greece must be treated as registered on the professional or trade register for the purposes of paragraph (4)(j)—

- (a) when the services to be provided under the contract are specified in category 8 of Schedule 3 and when Greek legislation requires persons who provide those services to be registered on the professional register (Μητρώο Μελετητών and Μητρώο Γραφείων Μελετών), if it is registered on that register; and
- (b) in any other case, in accordance with paragraph (13).

(11) In relation to procedures for the award of a public services contract, an economic operator established in Hungary is treated as registered on the professional or trade register for the purposes of paragraph (4)(j) if it is certified as being entitled to be engaged in the trade in question in Hungary.

(12) In relation to procedures for the award of a public supply contract, an economic operator established in Spain is treated as registered on the professional or trade register for the purposes of paragraph (4)(j) if it is certified as having declared on oath that it is entitled to be engaged in the trade in question in Spain.

(13) An economic operator established in a relevant State, other than the United Kingdom or Ireland, which either has an equivalent professional or trade register which is not listed in Schedule 6 or which does not have an equivalent professional or trade register must be treated as registered on a professional or trade register for the purposes of paragraph (4)(j) on production of either a certificate that the economic operator is registered on the equivalent professional or trade register or where no such register exists, a declaration on oath, or in a relevant State which does not provide for a declaration on oath a solemn declaration, made by the economic operator before the relevant judicial, administrative or competent authority or a relevant notary public or Commissioner for oaths, that the economic operator exercises the particular profession or trade.

Information as to economic and financial standing

24.—(1) Subject to regulation 27 and paragraph (2), in assessing whether an economic operator meets any minimum standards of economic and financial standing required of economic operators by the contracting authority—

- (a) for the purposes of regulations 15(11), 16(7) and 17(9) or 18(10); and
- (b) in selecting the economic operators to be invited to tender for or to negotiate the contract, in accordance with regulations 16(8), 17(10) or 18(11),

a contracting authority may take into account any of the following information—

- (i) appropriate statements from the economic operator's bankers or where appropriate, evidence of relevant professional risk indemnity insurance;
- (ii) statements of accounts or extracts from those accounts relating to the business of the economic operator where publication of the statement is required under the law of the relevant State in which the economic operator is established; or
- (iii) where appropriate, a statement, covering the 3 previous financial years of the economic operator, of—
 - (aa) the overall turnover of the business of the economic operator; and
 - (bb) where appropriate, the turnover in respect of the work, works, goods or services which are of a similar type to the subject matter of the public contract.

(2) Where the information specified in paragraph (1) is not appropriate in a particular case, a contracting authority may require an economic operator to provide other information to demonstrate the economic operator's economic and financial standing.

(3) A contracting authority which requires information to be provided in accordance with paragraphs (1) and (2) must specify in the contract notice or in the invitation to tender the information which the economic operator must provide.

(4) Where appropriate—

- (a) an economic operator or a group of economic operators as referred to in regulation 28 may rely on the capacities of other entities or members in the group, regardless of the legal nature of the link between the economic operator or group of economic operators and the other entities; and
- (b) the economic operator or the group of economic operators must prove to the contracting authority that the resources necessary to perform the contract will be available and the contracting authority may, in particular, require the economic operator to provide an undertaking from the other entities to that effect.

(5) Where an economic operator is unable for a valid reason to provide the information which the contracting authority has required, the contracting authority must accept such other information provided by the economic operator as the contracting authority considers appropriate.

Information as to technical or professional ability

25.—(1) Subject to regulation 27, in assessing whether an economic operator meets any minimum standards of technical or professional ability required of economic operators by the contracting authority—

- (a) for the purposes of regulation 15(11), 16(7), 17(9) or 18(10); and
- (b) in selecting the economic operators to be invited to tender for or to negotiate the contract in accordance with regulation 16(8), 17(10) or 18(11),

a contracting authority may have regard to any means listed in paragraph (2) according to the purpose, nature, quantity or importance of the contract.

(2) The means referred to in paragraph (1) are—

- (a) in the case of a public services contract, a public works contract or a public supply contract requiring the siting or installation of work, the economic operator's technical ability, taking into account in particular that economic operator's skills, efficiency, experience and reliability;
- (b) a list of works carried out over the past 5 years together with (unless the contracting authority specifies that the following certificate should be submitted direct to the contracting authority by the person certifying) certificates of satisfactory completion for the most important of those works indicating in each case—
 - (i) the value of the consideration received;
 - (ii) when and where the work or works were carried out; and
 - (iii) specifying whether they were carried out according to the rules of the trade or profession and properly completed;
- (c) a statement of the principal goods sold or services provided by the supplier or the services provider in the past 3 years and—
 - (i) the dates on which the goods were sold or the services provided;
 - (ii) the consideration received;
 - (iii) the identity of the person to whom the goods were sold or the services were provided;
 - (iv) any certificate issued or countersigned by that person confirming the details of the contract for those goods sold or services provided; and
 - (v) where—
 - (aa) that person was not a contracting authority; and
 - (bb) the certificate referred to in sub-paragraph (c)(iv) is not available,

- any declaration by the economic operator attesting the details of the goods sold or services provided;
- (d) a statement of the technicians or technical services available to the economic operator to—
 - (i) carry out the work under the contract; or
 - (ii) be involved in the production of goods or the provision of services under the contract, particularly those responsible for quality control, whether or not they are independent of the economic operator;
 - (e) in relation to the goods to be purchased or hired or the services to be provided under the contract, a statement of the supplier's or services provider's—
 - (i) technical facilities;
 - (ii) measures for ensuring quality; and
 - (iii) study and research facilities;
 - (f) where the goods to be sold or hired or the services to be provided under the contract are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authority or on its behalf by a competent official body of the relevant State in which the supplier or services provider is established—
 - (i) on the technical capacity of the supplier or services provider in relation to the goods to be purchased or hired or the services to be provided under the contract; and
 - (ii) if relevant, on the supplier's or services provider's study and research facilities and quality control measures;
 - (g) the services provider's or contractor's educational and professional qualifications where the services provider or contractor is an individual and—
 - (i) if any, those of the services provider's or contractor's managerial staff; and
 - (ii) those of the one or more persons who would be responsible for providing the services, or carrying out the work or works under the contract;
 - (h) the environmental management measures, evidenced in accordance with paragraph (4), that the services provider or contractor is able to apply when performing the contract, but only where it is necessary for the performance of that contract;
 - (i) a statement of the services provider's or contractor's average annual number of staff and managerial staff over the previous 3 years;
 - (j) a statement of the tools, plant and technical equipment available to the services provider or contractor for performing the contract;
 - (k) a statement of any proportion of the contract which the services provider intends to sub-contract to another person;
 - (l) any samples, descriptions and photographs of the goods to be purchased or hired under the public supply contract and certification of the authenticity of such samples, descriptions or photographs;
 - (m) certification by official quality control institutes or agencies of recognised competence, attesting that the goods to be purchased or hired under the public supply contract conform to standards and technical specifications (within the meaning of regulation 9(1)) identified by the contracting authority;
 - (n) a certificate—
 - (i) attesting conformity to quality assurance standards based on the relevant European standard; and

- (ii) from an independent body established in any relevant State conforming to the European standard concerning certification; or
 - (o) any other evidence of conformity to quality assurance measures which are equivalent to the standards referred to in sub-paragraph (n)(i).
- (3) Where appropriate—
 - (a) an economic operator or a group of economic operators as referred to in regulation 28 may rely on the capacities of other entities or members in the group, regardless of the legal nature of the link between the economic operator or group of economic operators and the other entities; and
 - (b) the economic operator or the group of economic operators must prove to the contracting authority that the resources necessary to perform the contract will be available and the contracting authority may, in particular, require the economic operator to provide an undertaking from the other entities to that effect.
- (4) The evidence referred to in paragraph (2)(h) is—
 - (a) a certificate—
 - (i) attesting conformity to environmental management standards based on—
 - (aa) the Community Eco-Management and Audit Scheme⁽⁵⁴⁾; or
 - (bb) the relevant European or international standards; and
 - (ii) from an independent body established in any relevant State conforming to EU law or the relevant European or international standards concerning certification; or
 - (b) any other evidence of environmental management measures which are equivalent to the standards referred to in sub-paragraph (a)(i).
- (5) A contracting authority which requires information to be provided in accordance with paragraph (2) must specify in the contract notice or in the invitation to tender the information which the economic operator must provide.

Supplementary information

26. Subject to regulation 27, the contracting authority may require an economic operator to provide information supplementing the information provided in accordance with regulation 23, 24 or 25 or to clarify that information, provided that the information so required relates to the matters specified in regulation 23, 24 or 25.

Official lists of approved economic operators

27.—(1) Subject to paragraph (5), where an economic operator which is registered or certified, submits to the contracting authority a certificate referred to in paragraph (2) and which deals with the matters referred to in paragraph (3), the contracting authority must accept the certificate as evidence of the matters referred to in that paragraph, and is not entitled to seek any information, or supplementary information according to regulation 26, in relation to such matters.

- (2) The certificates referred to in this paragraph are—
 - (a) a certificate of registration issued by the authority administering the official list; or
 - (b) a certificate issued by the body administering the certification,

⁽⁵⁴⁾ The Community Eco-Management and Audit Scheme (EMAS) is a management tool for companies and other organisations to evaluate, report and improve their environmental performance; for more information see www.europa.eu.int/comm/environment/emas/index-en.htm.

which specifies the information submitted to that authority or body which enabled the economic operator to be registered or certified and which states the classification given.

(3) The matters referred to in this paragraph are the grounds referred to in regulations 23(1), 4(a) to (e), (h) and (j), 24(1)(b)(ii) and (iii) and—

- (a) in the case of a contractor, regulation 25(2)(b), (d), (g), (i) and (j);
- (b) in the case of a service provider, regulation 25(2)(c), (e), (f), (g), (h), (i), (j) and (k); or
- (c) in the case of a supplier, regulation 25(2)(c), (d), (e), (f), (l) and (m).

(4) In this regulation—

“registered” means an economic operator who is registered on the official list of approved contractors, service providers or suppliers in a relevant State which maintains such lists and in which the economic operator is established; and

“certified” means an economic operator who is certified by a certification body complying with European standards in a relevant State which maintains such certification and in which the economic operator is established.

(5) A contracting authority is not required to comply with paragraph (1) where it considers that it has justification for not doing so.

Consortia

28.—(1) In this regulation a “consortium” means two or more persons, at least one of whom is an economic operator, acting jointly for the purpose of being awarded a public contract.

(2) Subject to paragraph (3), a contracting authority must not treat the tender of a consortium as ineligible nor decide not to include a consortium amongst those economic operators from which it will make the selection of economic operators to be invited to tender for or to negotiate a public contract or to be admitted to a dynamic purchasing system on the grounds that the consortium has not formed a legal entity for the purposes of tendering for or negotiating the contract or being admitted to a dynamic purchasing system.

(3) Where a contracting authority awards a public contract to a consortium it may, if it is justified for the satisfactory performance of the contract, require the consortium to form a legal entity before entering into, or as a term of, the contract.

(4) In these Regulations references to an economic operator where the economic operator is a consortium includes a reference to each person who is a member of that consortium.

Corporations

29.—(1) A contracting authority must not treat the tender of a services provider as ineligible nor decide not to include a services provider amongst those services providers from which it will make the selection of services providers to be invited to tender for or to negotiate a contract or to be admitted to a dynamic purchasing system on the ground that under the law of any part of the United Kingdom the services provider is required to be an individual, a corporation or other type of body, if under the law of the relevant State in which the services provider is established, that services provider is authorised to provide such services.

(2) In the case of—

- (a) a public services contract;
- (b) a public works contract; or
- (c) a public supply contract which includes services or siting and installation operations,

a contracting authority may require an economic operator which is not an individual to indicate in the tender, the indicative tender or in the request to be selected to tender for or to negotiate the

contract, the names and relevant professional qualifications of the staff who will be responsible for the performance of the contract.

PART 5

THE AWARD OF A PUBLIC CONTRACT

Criteria for the award of a public contract

30.—(1) Subject to regulation 18(28) and to paragraphs (6) and (9) of this regulation, a contracting authority must award a public contract on the basis of the offer which—

- (a) is the most economically advantageous from the point of view of the contracting authority;
or
- (b) offers the lowest price.

(2) In order to determine that an offer is the most economically advantageous, a contracting authority must use criteria linked to the subject matter of the contract which may include quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after sales service, technical assistance, delivery date and delivery period or period of completion.

(3) Where a contracting authority intends to award a public contract on the basis of the offer which is the most economically advantageous it must state the weighting which it gives to each of the criteria chosen in the contract notice or in the contract documents or, in the case of a competitive dialogue procedure, in the descriptive document.

(4) When stating the weightings referred to in paragraph (3), a contracting authority may give the weightings a range and specify a minimum and maximum weighting where it considers it appropriate in view of the subject matter of the contract.

(5) Where, in the opinion of the contracting authority, it is not possible to provide weightings for the criteria referred to in paragraph (3) on objective grounds, the contracting authority must indicate the criteria in descending order of importance in the contract notice or contract documents or, in the case of a competitive dialogue procedure, in the descriptive document.

(6) If an offer for a public contract is abnormally low the contracting authority may reject that offer but only if it has—

- (a) requested in writing an explanation of the offer or of those parts which it considers contribute to the offer being abnormally low;
- (b) taken account of the evidence provided in response to a request in writing; and
- (c) subsequently verified the offer or parts of the offer being abnormally low with the economic operator.

(7) Where a contracting authority requests an explanation in accordance with paragraph (6), the information requested may, in particular, include—

- (a) the economics of the method of construction, the manufacturing process or the services provided;
- (b) the technical solutions suggested by the economic operator or the exceptionally favourable conditions available to the economic operator for the execution of the work or works, for the supply of goods or the provision of the services;
- (c) the originality of the work, works, goods or services proposed by the economic operator;
- (d) compliance with the provisions relating to employment protection and working conditions in force at the place where the contract is to be performed; or

(e) the possibility of the economic operator obtaining State aid.

(8) Where a contracting authority establishes that a tender is abnormally low because the economic operator has obtained State aid, the offer may be rejected on that ground alone only after—

(a) consultation with the economic operator; and

(b) the economic operator is unable to prove, within a reasonable time limit fixed by the contracting authority, that the aid was granted in a way which is compatible with the TFEU.

(9) Where a contracting authority rejects an abnormally low offer in accordance with paragraph (8), it must send a report justifying the rejection to the Scottish Ministers for onward transmission to the Commission.

(10) In this regulation “offer” includes a bid by one part of a contracting authority to provide services, to carry out a work or works or to make goods available to another part of the contracting authority when the former part is invited by the latter part to compete with the offers sought from other persons.

Contract award notice

31.—(1) Subject to paragraphs (2) and (3), a contracting authority which has awarded a public contract or concluded a framework agreement must, not later than 48 days after the award or conclusion, send to the Official Journal a notice, in the form of the contract award notice in Annex III to [Commission Regulation \(EC\) No 1564/2005](#)⁽⁵⁵⁾ including the information therein specified.

(2) Any of the information specified in the form of the contract award notice in Annex III to [Commission Regulation \(EC\) No 1564/2005](#) to be included in the contract award notice may be omitted in a particular case where to publish such information—

(a) would impede law enforcement;

(b) would otherwise be contrary to the public interest;

(c) would prejudice the legitimate commercial interest of any person; or

(d) might prejudice fair competition between economic operators.

(3) A contracting authority is not required to send a contract award notice in accordance with paragraph (1) where it awards a contract under a framework agreement which has been concluded in accordance with regulation 19.

(4) A contracting authority which has awarded a contract under a dynamic purchasing system in accordance with regulation 20 may—

(a) send the contract award notice in accordance with paragraph (1); or

(b) retain any notice it is proposing to send to the Official Journal in accordance with paragraph (1) for a period of 3 months from the date that the first notice was retained.

(5) Where a contracting authority retains contract award notices in accordance with paragraph (4) (b), it must send those contract award notices to the Official Journal not later than 48 days after the end of each period of 3 months.

(6) A contracting authority which has awarded a Part B services contract must state in the contract award notice whether or not it agrees to its publication.

⁽⁵⁵⁾ The annex to [Commission Regulation \(EC\) No 1564/2005](#) was amended by [Commission Regulation \(EC\) 1150/2009](#), OJ L 313, 29.11.2009, p.3.

Information about contract award procedures and standstill period

32.—(1) Subject to paragraphs (4) and (10), a contracting authority must by notice in writing as soon as possible after the decision has been made, inform all tenderers and all candidates concerned (if any) of its decision to—

- (a) award the contract; or
- (b) conclude the framework agreement.

(2) The notice referred to in paragraph (1) must include—

- (a) the criteria for the award of the contract;
- (b) where practicable, the score obtained by—
 - (i) the economic operator which is to receive the notice; and
 - (ii) the economic operator—
 - (aa) to be awarded the contract; or
 - (bb) to become a party to the framework agreement;

(c) the name of the economic operator—

- (i) to be awarded the contract; or
- (ii) to become a party to the framework agreement;

(d) in the case of an unsuccessful economic operator, a summary of the reasons why the economic operator was unsuccessful;

(e) in the case of an unsuccessful tenderer, the characteristics and relative advantages of the successful tender; and

(f) a precise statement of the effect of paragraph (3) on the economic operator which is to receive the notice.

(3) A contracting authority must allow a period of at least the relevant standstill period to elapse between the date of dispatch of the notice referred to in paragraph (1) and the date on which that contracting authority enters into the contract or concludes the framework agreement.

(4) Paragraphs (1) to (3) do not apply where—

- (a) the only tenderer is the economic operator to be awarded the contract or to become a party to the framework agreement, and there are no candidates concerned; or
- (b) the contract is a contract based on a framework agreement or a contract awarded under a dynamic purchasing system.

(5) Without prejudice to paragraph (4), paragraph (3) does not apply where—

- (a) the contract or framework agreement is exempt from the requirement for prior publication of a contract notice; or
- (b) there are no tenderers concerned or candidates concerned.

(6) Subject to paragraph (10), a contracting authority must within 15 days of the date on which it receives a request in writing from any economic operator which was unsuccessful—

- (a) inform that economic operator of the reasons why it was unsuccessful; and
- (b) in the case of an unsuccessful tenderer, other than a tenderer which has been informed by notice under paragraph (1), inform that economic operator of the characteristics and relative advantages of the successful tender and the name of—
 - (i) the economic operator to be awarded the contract;
 - (ii) the parties to the framework agreement; or
 - (iii) the economic operators admitted to the dynamic purchasing system.

(7) The reasons referred to in paragraphs (2)(d) and (6)(a) include any reason for the contracting authority's decision that the economic operator did not meet the technical specifications or their equivalent—

- (a) as specified in regulation 9(6); or
- (b) in terms of the performance or functional requirements referred to in regulation 9(7).

(8) Subject to paragraph (10), a contracting authority must as soon as possible after the decision has been made, inform all candidates and tenderers of its decision to abandon or to recommence a contract award procedure in respect of which a contract notice has been published, in relation to—

- (a) the award of a contract;
- (b) the conclusion of a framework agreement; or
- (c) the establishment of a dynamic purchasing system.

(9) A contracting authority which informs an economic operator of its decision in accordance with paragraph (8) must include the reasons for the decision and, if so requested by the economic operator, must provide the decision and reasons in writing.

(10) A contracting authority may withhold any information to be provided in accordance with paragraph (1), (6) or (8) where the disclosure of such information—

- (a) would impede law enforcement;
- (b) would otherwise be contrary to the public interest;
- (c) would prejudice the legitimate commercial interests of any economic operator; or
- (d) might prejudice fair competition between economic operators.

(11) A contracting authority must prepare a record in relation to each public contract awarded by it, framework agreement concluded by it or dynamic purchasing system established by it, specifying—

- (a) the name and address of the contracting authority;
- (b) the value of the consideration to be given under the contract, framework agreement or dynamic purchasing system;
- (c) the type of goods to be purchased or hired, the work or works to be carried out or, as the case may be, the services to be provided;
- (d) where offers were evaluated in accordance with regulation 30, the names of the economic operators which submitted those offers and where the contracting authority has used the restricted procedure or negotiated procedure, the reasons why those economic operators were selected;
- (e) the name of any economic operator—
 - (i) to which the contract was awarded;
 - (ii) with which the framework agreement was concluded; or
 - (iii) which was admitted to the dynamic purchasing system;
- (f) the reasons for having—
 - (i) awarded the contract to, or concluded the framework agreement with, the economic operator referred to in sub-paragraph (e); or
 - (ii) admitted that economic operator to the dynamic purchasing system;
- (g) the names of the economic operators which were unsuccessful and the reasons why they were unsuccessful;
- (h) if known to the contracting authority, the parts of the contract or framework agreement that the economic operator to which the contract has been awarded or with which the

framework agreement has been concluded, intends to sub contract to another economic operator;

- (i) in the case of a contracting authority which used the negotiated procedure, which of the circumstances specified in regulation 13 or 14 constituted grounds for using that procedure;
- (j) in the case of a contracting authority which used the competitive dialogue procedure, details of the circumstances which constituted grounds for using that procedure in accordance with regulation 18(2); and
- (k) where a contracting authority has abandoned a contract award procedure, the conclusion of a framework agreement or the establishment of a dynamic purchasing system, the reasons why the contracting authority has decided not to award the contract, to conclude the framework agreement or to establish the dynamic purchasing system as the case may be.

(12) A contracting authority must keep appropriate information to document the progress of contract award procedures conducted by electronic means.

(13) If the Commission requests a report containing the information specified in paragraph (11), the contracting authority must send a written report containing that information, or the main features of it, to the Scottish Ministers for onward transmission to the Commission.

PART 6

SPECIALISED CONTRACTS

Design contests

33.—(1) A contracting authority which organises a design contest—

- (a) must establish the rules for that design contest in accordance with the provisions of this regulation; and
- (b) must not limit the admission of any economic operator to the design contest by reference to the territory or part of the territory of a relevant State.

(2) This regulation applies to a design contest if it is organised as part of a procedure leading to the award of a public services contract whose estimated value (net of value added tax and including the value of any prizes or payments) is not less than the relevant threshold described in paragraphs (4) and (5).

(3) This regulation applies to a design contest whether or not it is organised as part of a procedure leading to the award of a public services contract if the aggregate value of the prizes or payments for the contest, including the estimated value (net of value added tax) of the contract which might subsequently be awarded in accordance with regulation 14(1)(c) (provided that the contracting authority does not exclude such an award), is not less than the relevant threshold described in paragraphs (4) and (5).

(4) Subject to paragraph (5), the relevant threshold for the purposes of paragraphs (2) and (3) is—

- (a) the amount set out in Article 67(1)(a) where offers are sought by a Schedule 1 entity; or
- (b) the amount set out in Article 67(1)(b) where offers are sought by any other contracting authority.

(5) For the purposes of paragraphs (2) and (3), the relevant threshold is the amount set out in Article 67(1)(c) in the case of a public services contract which is—

- (a) for telecommunications services specified under CPV references 64221000-1, 64227000-3, 64228000-0, 64228100-1 and 64228200-2 within category 5 of Part A of Schedule 3;
 - (b) for research and development services specified in category 8 of Part A of Schedule 3; or
 - (c) a Part B services contract.
- (6) This regulation does not apply to a design contest—
- (a) where the contracting authority is a utility within the meaning of regulation 3 of the Utilities Contracts (Scotland) Regulations 2012 and that contract is for the purposes of carrying out an activity specified in any Part of Schedule 1 to those Regulations in which the utility is specified;
 - (b) where the principal purpose is to permit the contracting authority to provide or exploit public telecommunications networks or to provide to the public one or more telecommunications services;
 - (c) which is classified as secret or where it must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions of any part of the United Kingdom or when the protection of the essential interests of the security of the United Kingdom requires it;
 - (d) where different rules govern the procedures of the design contest and it is to be entered into in accordance with—
 - (i) an international agreement to which the United Kingdom and a State which is not a relevant State are parties and it relates to a design contest intended for the joint implementation or exploitation of a project related to that agreement;
 - (ii) an international agreement relating to the stationing of troops; or
 - (iii) the design contest procedures of an organisation of which only States are members (an “international organisation”) or of which only States or international organisations are members; or
 - (e) which is otherwise excluded from the scope of these Regulations.
- (7) The contracting authority must publicise its intention to hold a design contest by sending to the Official Journal a notice in the form of the design contest notice in Annex XII to [Commission Regulation \(EC\) No 1564/2005](#)⁽⁵⁶⁾ and containing the information therein specified.
- (8) The contracting authority must make the rules of the design contest available to economic operators which wish to participate in the contest.
- (9) Regulations 28(2) and 29 apply to design contests as they apply to the seeking of offers in relation to a proposed public contract.
- (10) Regulation 42(1)(b) to (8) applies to notices relating to design contests as they apply to notices in relation to a proposed public contract.
- (11) Regulation 44(1), (2) and (4) applies to all communications relating to design contests as they apply to a proposed public contract.
- (12) The contracting authority must ensure that the specified means of communication and of information storage enable—
- (a) the integrity and confidentiality of information provided by those economic operators participating in the design contest to be maintained; and
 - (b) the jury to ascertain the contents of proposals only after the time limit for their submission has expired.

(56) The annex to [Commission Regulation \(EC\) No 1564/2005](#) was amended by [Commission Regulation \(EC\) 1150/2009](#), OJ L 313, 29.11.2009, p.3.

(13) Where the contracting authority requires that proposals are to be received by electronic means, it must ensure that—

- (a) details of the equipment which is necessary for the electronic receipt of proposals, including encryption, are available to all economic operators which wish to participate in the design contest; and
- (b) the equipment for the electronic receipt of proposals complies with the requirements of regulation 44(6).

(14) Where the contracting authority restricts the number of economic operators in the design contest, it must—

- (a) establish clear and non-discriminatory criteria to select those economic operators;
- (b) ensure that the number of economic operators selected is sufficient to ensure adequate competition; and
- (c) by notice in writing as soon as reasonably practicable after restricting the number of economic operators, inform the affected economic operators that they have been excluded from the design contest.

(15) A contracting authority must ensure that—

- (a) the members of the jury are all individuals who are independent of those economic operators participating in the design contest;
- (b) where the economic operators are required to possess a particular professional qualification, that at least one third of the members of the jury also possess that qualification or an equivalent qualification;
- (c) the proposals of the economic operators are submitted to the jury without any indication as to the authorship of each proposal;
- (d) the jury makes its decisions or opinions independently and solely on the basis of the criteria specified in the notice referred to in paragraph (7);
- (e) the jury is not informed of the authorship of any proposal until after it has reached its decision or opinion;
- (f) the jury prepares minutes signed by its members in which it records—
 - (i) its ranking of the proposals based upon its assessment of each proposal's merits; and
 - (ii) its observations or details of any issues upon which clarification is required in relation to each proposal; and
- (g) the jury may invite the economic operators to answer any questions to clarify issues noted in the minutes referred to in sub-paragraph (f) and must record complete minutes of any such communications with economic operators.

(16) The contracting authority must, not later than 48 days after the date the jury makes its selection, publicise the results of the design contest by sending to the Official Journal a notice in the form of the notice of the results of a design contest in Annex XIII to [Commission Regulation \(EC\) No 1564/2005](#) and including the information therein specified.

(17) The contracting authority must retain evidence of the date of dispatch to the Official Journal of each notice.

(18) Any of the information specified in the form of the notice referred to in paragraph (16) to be included in that notice may be omitted in a particular case where to publish such information—

- (a) would impede law enforcement;
- (b) would otherwise be contrary to the public interest;
- (c) would prejudice the legitimate commercial interests of any person; or

- (d) might prejudice fair competition between economic operators.

Subsidised public works contracts and public services contracts

34.—(1) Where—

- (a) a contracting authority undertakes to contribute more than half of the consideration to be or expected to be paid under a contract to which this paragraph applies by virtue of paragraph (2); and
- (b) the contract has been or is to be entered into by a person other than another contracting authority (in this regulation referred to as “the subsidised body”), that contracting authority must—
 - (i) make it a condition of the making of such a contribution that the subsidised body complies with the provisions of these Regulations in relation to that contract as if it were a contracting authority; and
 - (ii) ensure that the subsidised body does so comply or recover the contribution.

(2) Paragraph (1) applies to a contract which, if the subsidised body were a contracting authority, would be—

- (a) a public works contract to which these Regulations apply by virtue of regulation 8 and which is for the carrying out of—
 - (i) any of the civil engineering activities specified in Schedule 2; or
 - (ii) building work for hospitals, facilities intended for sports, recreation and leisure, school and university buildings or buildings for administrative purposes; or
- (b) a public services contract to which these Regulations apply by virtue of regulation 8 for providing services in connection with a contract referred to in sub-paragraph (a) of this paragraph.

Subsidised housing scheme works contracts

35.—(1) For the purpose of seeking offers in relation to a subsidised housing scheme works contract to which the circumstances of paragraph (2) apply, a contracting authority may, except as indicated in the following paragraphs, depart from the provisions of these Regulations insofar as it is necessary to do so to select the contractor which is most suitable for integration into the team referred to in paragraph (2).

(2) The circumstances referred to in paragraph (1) are where the size and complexity of the scheme and the estimated duration of the works involved require that the planning of the scheme be based from the outset on a close collaboration of a team comprising representatives of the contracting authority, experts and the contractor.

(3) The contracting authority must comply with the provisions of—

- (a) regulations 4(3), 11, 31, 32, 42 and 44; and
- (b) the time limits referred to in regulations 15, 16, 17 and 18.

(4) The contracting authority must include in the contract notice a job description which is as accurate as possible so as to enable contractors to form a valid idea of the scheme and of the minimum standards relating to the business or professional status, the economic and financial standing, the technical ability and any quality assurance standards which the contractor awarded the contract will be expected to fulfil in accordance with regulations 23 to 26.

Public works concession contracts

36.—(1) A contracting authority seeking offers in relation to a public works concession contract must comply with this regulation.

(2) These Regulations do not apply to the seeking of offers in relation to a proposed public works concession contract where the estimated value of the contract (net of value added tax) at the relevant time is less than the amount set out in Article 56.

(3) In this regulation “relevant time” has the same meaning it has in regulation 8(20).

(4) The estimated value of a public works concession contract for the purposes of paragraph (2) must be the value of the consideration which the contracting authority would expect to give for the carrying out of the work or works if it did not propose to grant a concession.

(5) The value of the consideration under a public works concession contract must be calculated in accordance with regulation 8(6).

(6) These Regulations do not apply to the seeking of offers in relation to a proposed public works concession contract—

(a) where—

(i) the contracting authority is a utility within the meaning of regulation 3 of the Utilities Contracts (Scotland) Regulations 2012; and

(ii) the work or works to be carried out under it are for the purposes of carrying out an activity specified in any Part of Schedule 1 to those Regulations in which the utility is specified;

(b) where the principal purpose of the contract is to permit the contracting authority to provide or exploit public telecommunications networks or to provide to the public one or more telecommunications services;

(c) which is classified as secret or where the performance of the contract must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions of any part of the United Kingdom or when the protection of the essential interests of the security of the United Kingdom require it;

(d) where Article 346 of the TFEU applies to that public works concession contract;

(e) where different procedures govern the procedures leading to the award of the contract and it is to be entered into in accordance with—

(i) an international agreement concluded in conformity with the TFEU to which the United Kingdom and a State which is not a relevant State are parties and it relates to the carrying out of works intended for the joint implementation or exploitation of a project related to that agreement;

(ii) an international agreement relating to the stationing of troops and concerning the undertakings of a relevant State; or

(iii) the contract award procedures of an organisation of which only States are members (an “international organisation”) or of which only States or international organisations are members; or

(f) subject to paragraph (7), when a contracting authority wants an economic operator which has entered into a public works concession contract with the contracting authority to carry out additional work or works which were not included in the project initially considered or in the original public works concession contract but which through unforeseen circumstances have become necessary, and such work or works—

(i) cannot for technical or economic reasons be carried out separately from those under the original contract without major inconvenience to the contracting authority; or

(ii) can be carried out separately from those under the original contract but are strictly necessary to the later stages of the performance of that contract.

(7) Paragraph (6)(f) does not apply where the aggregate value of the consideration to be given under contracts for the additional work or works exceeds 50% of the value of the consideration payable under the original contract.

(8) The contracting authority must—

- (a) publicise its intention to seek offers in relation to the public works concession contract by sending to the Official Journal as soon as possible after forming the intention a notice in the form of the public works concession contract notice in Annex X to [Commission Regulation \(EC\) No 1564/2005](#)⁽⁵⁷⁾ and containing the information therein specified and any other information which the contracting authority considers useful; and
- (b) comply with regulation 42 in relation to a public works concession contract notice as it would comply in relation to a proposed public contract.

(9) Subject to paragraphs (10) and (13), the date which the contracting authority fixes as the last date for the receipt by it of tenders or of requests to be selected to tender for or to negotiate the contract, must be specified in the contract notice and must be not less than 52 days from the date of dispatch of the notice.

(10) Where the contracting authority has transmitted a contract notice by electronic means in accordance with the format and procedures referred to in paragraph (3) of Annex VIII to the Public Sector Directive, the time limit referred to in paragraph (9) may be reduced by 7 days.

(11) The contracting authority must send the contract documents to an economic operator within 6 days of the receipt of a request from that economic operator provided that the documents are requested in good time and any fee specified in the contract notice has accompanied the request.

(12) The contracting authority must supply to an economic operator such further information relating to the contract documents as may be reasonably requested by that economic operator provided that the request is received in sufficient time to enable the contracting authority to supply the information not later than 6 days before the date specified in the contract notice as the final date for the receipt by it of tenders.

(13) The contracting authority must extend the time limit for the receipt by it of tenders in order that all the information necessary for the preparation of a tender is available to all economic operators where—

- (a) an economic operator requests the contract documents in sufficient time to allow the contracting authority to respond in accordance with paragraphs (11) and (12) and, for whatever reason, the contract documents are not supplied in accordance with those paragraphs; or
- (b) it is necessary that the economic operators be given the opportunity to inspect the site or premises or documents relating to the contract documents.

Sub-contracting the work or works to be carried out under a public works concession contract

37.—(1) A contracting authority seeking offers in relation to a public works concession contract must either—

- (a) include in the invitation to tender for, to apply to be selected to tender for or to negotiate, the concession contract, a request that the economic operator specify whether it would

⁽⁵⁷⁾ The annex to [Commission Regulation \(EC\) No 1564/2005](#) was amended by [Commission Regulation \(EC\) 1150/2009](#), OJ L 313, 29.11.2009, p.3.

intend, if awarded the concession contract, to sub-contract to economic operators which are not related to it—

- (i) any of the work or works to be carried out under the contract; and
 - (ii) where sub-paragraph (a)(i) applies, how much as a proportion of the value of such work or works would be so sub-contracted; or
- (b) require as a term of the public works concession contract—
- (i) that the concessionaire sub-contract to economic operators which are not related to the concessionaire some or all of the work or works to be carried out under the concession contract; and
 - (ii) that the amount of the work or works so sub-contracted be not less than 30%, or such higher percentage as may be specified in the contract at the option of the concessionaire, of the value of the consideration which the contracting authority would expect to give for the carrying out of the work or works if it did not grant a concession.

(2) Where the concessionaire is a contracting authority, that contracting authority must comply with the provisions of these Regulations in respect of any public works contract in relation to which it seeks offers for the purpose of sub-contracting the work or works to be carried out under the public works concession contract.

(3) Where the concessionaire is not a contracting authority, the concessionaire must—

- (a) publicise its intention to seek offers in relation to any contract to which this paragraph applies by virtue of paragraph (4) by sending to the Official Journal as soon as possible after forming the intention a notice in the form of the contract notice for contracts to be awarded by a concessionaire in Annex XI to Commission Regulation (EC) No 1564/2005 and containing the information therein specified and any other information which the concessionaire considers useful;
- (b) comply with regulation 42 in relation to that contract notice as if the concessionaire were a contracting authority; and
- (c) subject to paragraphs (5), (6) and (9)—
 - (i) if that contract notice invites tenders, fix as the last date for the receipt by the concessionaire of tenders a date of not less than 40 days from the date of the dispatch of the notice and specify that date in that notice; or
 - (ii) if that contract notice invites applications to be selected to tender for or negotiate the contract—
 - (aa) fix as the last date for the receipt of such applications a date not less than 37 days from the date of dispatch of the notice and specify that date in that notice; and
 - (bb) fix as the last date for the receipt of tenders following selection of the economic operators to be invited to tender a date of not less than 40 days from the date of dispatch of the invitation and specify that date in the invitation.

(4) Paragraph (3) applies to a contract—

- (a) in relation to which the concessionaire is seeking offers for the purpose of sub-contracting any of the work or works to be carried out under the public works concession contract;
- (b) which the concessionaire does not intend to enter into with an economic operator—
 - (i) which is a member of the group of economic operators which acted jointly for the purpose of obtaining the public works concession contract; or

- (ii) related to it or any member of the group mentioned in paragraph (i); and
- (c) which would, if the concessionaire were a contracting authority, be a public works contract, other than a public works contract—
 - (i) in respect of which a contracting authority would be entitled to use the negotiated procedure in accordance with regulation 14; or
 - (ii) which is excluded from the application of these Regulations by regulation 6 or 8.
- (5) Where the concessionaire has transmitted a contract notice by electronic means in accordance with the format and procedures referred to in paragraph (3) of Annex VIII to the Public Sector Directive, the time limits referred to in paragraph (3)(c) may be reduced by 7 days.
- (6) The concessionaire may reduce the time limits for the receipt of tenders by 5 days provided that—
 - (a) the concessionaire offers unrestricted and full direct access by electronic means to the contract documents from the date of publication of the contract notice; and
 - (b) the contract notice specifies the internet address at which the documents referred to in subparagraph (a) are available.
- (7) The concessionaire must send the contract documents to an economic operator within 6 days of the receipt of a request from that economic operator provided that the documents are requested in good time and any fee specified in the contract notice has accompanied the request.
- (8) The concessionaire must supply to an economic operator such further information relating to the contract documents as may be reasonably requested by that economic operator provided that the request is received in sufficient time to enable the concessionaire to supply the information not later than 6 days before the date specified in the contract notice as the final date for the receipt by it of tenders.
- (9) The concessionaire must extend the time limit for the receipt by it of tenders in order that all the information necessary for the preparation of a tender is available to all economic operators where—
 - (a) an economic operator requests the contract documents in sufficient time to allow the concessionaire to respond in accordance with paragraphs (7) and (8) and, for whatever reason, the contract documents are not supplied by that date; or
 - (b) it is necessary that the economic operators be given the opportunity to inspect the site or premises or documents relating to the contract documents.
- (10) The concessionaire may combine the reduction in the periods of time referred to in paragraphs (5) and (6).
- (11) In this regulation an economic operator is to be treated as related to another economic operator—
 - (a) if one economic operator exercises, directly or indirectly, a dominant influence over the other; or
 - (b) if both those economic operators are subject to the dominant influence of another economic operator.
- (12) An economic operator is taken to exercise a dominant influence over another economic operator within the meaning of paragraph (11)—
 - (a) if it possesses the greater part of the issued share capital of that economic operator or controls the voting power attached to such greater part; or
 - (b) if it may appoint more than half of the individuals which are ultimately responsible for managing that economic operator's affairs.

(13) A contracting authority must require applicants for a public works concession contract to submit with the application a list of—

- (a) all economic operators which are related to the applicant; and
- (b) all economic operators which are related to the economic operators referred to in sub-paragraph (a),

and to update the list from time to time to take account of any changes in the economic operators referred to in sub-paragraphs (a) and (b).

PART 7

MATTERS RELATING TO A PUBLIC CONTRACT

Obligations relating to taxes, environmental protection, employment protection and working conditions

38.—(1) A contracting authority may include in the contract documents relating to a public works contract or to a public services contract information as to where a contractor or services provider may obtain information about the obligations relating to taxes, environmental protection, employment protection and working conditions which will apply to—

- (a) the work or works to be carried out under a public works contract; or
- (b) the services to be provided under a public services contract.

(2) A contracting authority which provides the information referred to in paragraph (1) must request contractors or services providers to indicate that they have taken account of the obligations relating to those employment protection provisions and those working conditions in preparing their tender or in negotiating the contract.

Conditions for performance of contracts

39.—(1) A contracting authority may stipulate conditions relating to the performance of a public contract, provided that those conditions are compatible with EU law and are indicated in—

- (a) the contract notice and the contract documents; or
- (b) the contract documents.

(2) The conditions referred to in paragraph (1) may, in particular, include social and environmental considerations.

PART 8

MISCELLANEOUS

Statistical and other reports

40.—(1) Subject to regulation 41, a contracting authority must, not later than 31st July in each year, send to the Scottish Ministers a report specifying in relation to each public contract awarded by it or framework agreement concluded by it during the reporting period—

- (a) whether the contract was a public services contract, a public supply contract or a public works contract;

- (b) whether the framework agreement was for the provision of services, for the purchase or hire of goods or for the carrying out of work or works;
- (c) the value (estimated if necessary) of the consideration payable under the contract or framework agreement;
- (d) whether the open procedure, the restricted procedure, the negotiated procedure or the competitive dialogue procedure was used;
- (e) if the negotiated procedure was used, under which provision of regulation 13 or 14 that procedure was used;
- (f) in the case of—
 - (i) a public services contract or a framework agreement for the provision of services, the principal category of service provided or to be provided under the contract or framework agreement according to the nomenclature used in Schedule 3;
 - (ii) a public supply contract or a framework agreement for the purchase or hire of goods, the type of goods purchased or hired or to be purchased or hired under the contract or framework agreement; and
 - (iii) a public works contract or a framework agreement for the carrying out of works, the principal category of works carried out or to be carried out under the contract or framework agreement according to the nomenclature used in Schedule 2; and
- (g) the nationality of the economic operator to which the contract was awarded or the framework agreement was concluded and the relevant State in which that economic operator is established.

(2) Subject to regulation 41, a contracting authority must send to the Scottish Ministers a report containing such other information as the Scottish Ministers may from time to time require in respect of a particular public contract or framework agreement (including a public contract or framework agreement which is excluded from the application of these Regulations by regulation 6 or 8) for the purposes of providing the Commission with information.

(3) In this regulation “the reporting period” means the year preceding the year in which the reports referred to in paragraph (1) are to be made.

Provision of reports

41.—(1) Where a contracting authority is a Scottish public authority it must send the report to the Scottish Ministers otherwise it must send the report to the Minister responsible for that contracting authority and that Minister is responsible for sending the report to the Cabinet Office.

(2) The Minister responsible for a contracting authority is the Minister of the Crown whose areas of responsibility are most closely connected with the functions of the contracting authority.

(3) Any question as to which Minister of the Crown’s areas of responsibility are most closely connected with the functions of a contracting authority in accordance with paragraph (2) must be determined by the Cabinet Office whose determination is final.

(4) The requirement on a contracting authority to send any report in accordance with paragraph (1) to the Minister of the Crown responsible for that contracting authority is enforceable, on the application of the Minister responsible to the Court of Session by specific implement or the High Court in England and Wales or Northern Ireland, by mandatory order.

Publication of notices

42.—(1) Any notice required by these Regulations to be sent to the Official Journal must be—

- (a) in the correct format and contain the necessary information specified by [Commission Regulation \(EC\) No 1564/2005](#)(58) and contain any other information which the contracting authority considers useful; and
 - (b) subject to paragraph (2), sent to the Office for Official Publications of the European Union by electronic means in the format and in accordance with the procedures specified in paragraph (3) of Annex VIII to the Public Sector Directive or by other means.
- (2) Where the contracting authority is applying the restricted procedure or the negotiated procedure and, for reasons of urgency, is applying the provisions of regulation 16(6), 16(17) or 17(8) the notice must be sent by facsimile or by electronic means in the format and in accordance with the procedures referred to in paragraph (3) of Annex VIII to the Public Sector Directive.
- (3) Where a notice is not sent by electronic means in accordance with paragraph (1)(b) or (2), it must not contain more than 650 words.
- (4) The contracting authority must not place a notice in any publication—
- (a) before the date on which the notice is dispatched in accordance with paragraph (1)(b) or (2); or
 - (b) which contains any additional information to that contained in the notice dispatched in accordance with paragraph (1)(b) or (2) or published on the contracting authority’s buyer profile in accordance with regulation 11(1).
- (5) The contracting authority must refer in the notice to the date of dispatch of that notice to the Official Journal or the date of its publication on its buyer profile where it publishes a notice in the circumstances referred to in paragraph (4).
- (6) The contracting authority must not publish a prior information notice on its buyer profile before the date on which notice of its publication in that form is dispatched to the Commission in accordance with regulation 11(3) and the contracting authority must refer to the date of that dispatch on its buyer profile.
- (7) The contracting authority must retain evidence of the date of dispatch to the Official Journal of each notice.
- (8) Where the contracting authority is not required to send a contract notice to the Official Journal in respect of a particular public contract or framework agreement it may nevertheless publish such a notice in accordance with the provisions of this regulation.

Confidentiality of information

- 43.**—(1) Subject to the provisions of these Regulations, a contracting authority must not disclose information forwarded to it by an economic operator which the economic operator has reasonably designated as confidential.
- (2) In this regulation, confidential information includes technical or trade secrets and the confidential aspects of tenders.

Means of communication

- 44.**—(1) A contracting authority may specify that any communication referred to in these Regulations may be made—
- (a) by post;
 - (b) by facsimile;
 - (c) by electronic means in accordance with paragraphs (4) and (5);

(58) The annex to [Commission Regulation \(EC\) No 1564/2005](#) was amended by [Commission Regulation \(EC\) 1150/2009](#), OJ L 313, 29.11.2009, p.3.

- (d) by telephone in the circumstances referred to in paragraph (8); or
- (e) by a combination of the means of communication.

(2) The means of communication specified by a contracting authority must be generally available and must not restrict economic operators' access to the contract award procedures specified in these Regulations.

(3) A contracting authority must ensure that the specified means of communication and of information storage enable—

- (a) the integrity of data provided by economic operators and the confidentiality of tenders and requests to be selected to tender for or to negotiate the contract to be maintained; and
- (b) tenders and requests to be selected to tender for or to negotiate the contract to be opened only after the time limit for their submission has expired.

(4) The equipment used for communications made by electronic means must be—

- (a) non-discriminatory;
- (b) generally available; and
- (c) interoperable with information and communication technology products in general use.

(5) Where a contracting authority requires that tenders and requests to be selected to tender for or to negotiate the contract are to be transmitted by electronic means, it must ensure that—

- (a) details of the equipment including any software which is necessary for the electronic receipt of tenders and requests to be selected to tender for or to negotiate the contract, including encryption, are available to all interested economic operators; and
- (b) the equipment for the electronic receipt of tenders and requests to be selected to tender for or to negotiate the contract complies with the requirements of paragraph (6).

(6) The requirements referred to in paragraph (5)(b) are—

- (a) electronic signatures relating to tenders and requests to participate must comply with national provisions adopted in accordance with Directive 1999/93/EC of the European Parliament and of the Council of 13th December 1999 on a Community framework for electronic signatures⁽⁵⁹⁾;
- (b) the exact time and date of the receipt of tenders and requests to participate must be capable of being determined precisely;
- (c) it may reasonably be considered that—
 - (i) data is not capable of being accessed before the time limits specified by the contracting authority; and
 - (ii) any such unauthorised access is clearly detectable;
- (d) only authorised persons can set or change the dates for opening data received from economic operators;
- (e) access to any data must be possible only through simultaneous action by authorised persons and only after the prescribed date; and
- (f) data received and opened in accordance with these requirements must remain accessible only to authorised persons.

(7) A contracting authority may require any documents, certificates and declarations referred to in regulations 23 to 27 which do not exist in electronic format to be submitted before the time limit has expired for the receipt by it of tenders or requests to be selected to tender for or to negotiate the contract.

⁽⁵⁹⁾ OJ L 13, 19.1.00, p.12. The Directive was amended by Regulation (EC) No 1137/2008 of the European Parliament and of the Council, OJ L 311, 21.11.2008, p.1.

(8) Requests to be selected to tender for or to negotiate the contract may be made—

- (a) in writing; or
- (b) by telephone.

(9) Where a request to be selected to tender for or to negotiate the contract is made by telephone, an economic operator must confirm the request in writing before the deadline for receipt of such requests has expired.

(10) Where a request to be selected to tender for or to negotiate the contract is made by facsimile, a contracting authority—

- (a) may require that the request be confirmed by post or by electronic means where this is necessary for the purposes of legal proof; and
- (b) must specify any requirement for such confirmation and the time limit for sending it in the contract notice.

Sub-contracting

45. A contracting authority may require an economic operator to indicate in its tender—

- (a) any part of the contract that the economic operator intends to sub-contract to any other person; and
- (b) the identity of any person to whom that economic operator proposes to sub-contract any part of the contract.

Public service bodies

46.—(1) Where a contracting authority, other than one which is a contracting authority only by reason of being a Schedule 1 entity, grants to a person other than a contracting authority, special or exclusive rights to carry on a service for the benefit of the public, it must impose an express duty on that person in the terms referred to in paragraph (2).

(2) The duty referred to in paragraph (1) is a duty not to discriminate in seeking offers in relation to, or in awarding, a contract for the purchase or hire of goods on the grounds—

- (a) of nationality, against a person who is a national of a relevant State and established in a relevant State; or
- (b) that the goods to be supplied under the contract originate in another relevant State.

PART 9

APPLICATIONS TO THE COURT

Enforcement of obligations

47.—(1) The obligation on—

- (a) a contracting authority to comply with the provisions of these Regulations, other than regulations 14(2), 30(9), 32(11), 40 and 41(1), and with any enforceable EU obligation in respect of a contract, framework agreement, dynamic purchasing system or design contest (other than one excluded from the application of these Regulations by regulation 6, 8 or 33); and
- (b) a concessionaire to comply with the provisions of regulation 37(3),

is a duty owed to an economic operator.

(2) Subject to paragraph (3), the duty owed to an economic operator in accordance with paragraph (1) is also owed to a GPA economic operator, except in relation to—

- (a) a Part B services contract;
- (b) a contract for research and development services specified in category 8 of Part A of Schedule 3;
- (c) regulation 34;
- (d) regulation 36;
- (e) regulation 37(1); or
- (f) regulation 37(2).

(3) The duty owed to a GPA economic operator referred to in paragraph (2) is only owed by the Secretary of State for Defence in relation to public supply contracts for the purchase or hire of goods specified in Schedule 5.

(4) Notwithstanding regulation 4, references to an “economic operator” in this Part—

- (a) where the duty owed under paragraph (1) is the obligation on a concessionaire to comply with regulation 37(3), include any person—
 - (i) who sought, who seeks or would have wished, to be the person to whom a contract to which regulation 37(3) applies is awarded; and
 - (ii) who is a national of and established in a relevant State; and
- (b) except in paragraph (1) of this regulation, include a reference to a GPA economic operator.

(5) A breach of the duty owed in accordance with paragraph (1) or (2) is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage and those proceedings must be brought in the Sheriff Court or the Court of Session.

(6) Proceedings under this regulation may not be brought unless—

- (a) the economic operator bringing the proceedings has informed the contracting authority or concessionaire, as the case may be, of—
 - (i) the breach or apprehended breach of the duty owed to it in accordance with paragraph (1) or (2); and
 - (ii) of its intention to bring proceedings under this Part in respect of that breach or apprehended breach; and
- (b) the proceedings are brought in accordance with paragraph (7).

(7) For the purpose of paragraph (6)(b), proceedings must be brought—

- (a) in the case of proceedings seeking an ineffectiveness order (as defined in regulation 49)—
 - (i) where paragraph (8) applies, within 30 days from the relevant date referred to in that paragraph; or
 - (ii) in any other case, within 6 months from the date of the contract being entered into or the date of conclusion of the framework agreement; and
- (b) in any other case, within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen unless the Court considers that there is a good reason for extending the period within which proceedings may be brought, in which case the Court may extend that period up to a maximum of 3 months from that date.

(8) For the purpose of paragraph (7)(a)(i), this paragraph applies where—

- (a) the contracting authority has sent a contract award notice to the Official Journal in accordance with regulation 31 (contract award notice), including reasons for its decision

to enter into the contract or conclude the framework agreement without prior publication of a contract notice, in which case the relevant date is the date of publication of the notice in the Official Journal; or

- (b) the contracting authority has by notice in writing informed all tenderers concerned and all candidates concerned (if any) of its decision in relation to the award of the contract or the conclusion of the framework agreement, and the notice includes the information referred to in regulation 32(2)(d), in which case the relevant date is the date of sending of the notice.

(9) Except in the case of a contract or framework agreement to which regulation 6 applies, and without prejudice to the application of any relevant standstill period, where proceedings under this Part are served on a contracting authority or concessionaire in relation to a contract that has not been entered into or a framework agreement that has not been concluded, the contracting authority must not enter into the contract or conclude the framework agreement unless—

- (a) the proceedings are determined, discontinued or disposed of; or
- (b) the Court, by interim order, brings to an end the prohibition.

(10) In this regulation—

“GPA economic operator” means a person from a GPA State who sought, who seeks, or would have wished, to be the person to whom the contract is awarded;

“GPA State” means any country other than a relevant State which, at the relevant time is a signatory to the GPA and has agreed with the European Union that the GPA applies to a contract of the type to be awarded⁽⁶⁰⁾; and

“relevant time” means the date on which the contracting authority would have sent a contract notice in respect of the contract to the Official Journal if it had been required by these Regulations to do so.

Powers and duties of the court

48.—(1) Subject to paragraphs (3) and (7), but otherwise without prejudice to any other powers of the Court, in proceedings brought under this Part the Court—

- (a) may by interim order suspend—
 - (i) the procedure leading to the award of a contract, the conclusion of a framework agreement, the establishment of a dynamic purchasing system or the determination of a design contest; and
 - (ii) the implementation of any decision or action taken by the contracting authority or concessionaire, as the case may be, in the course of following a procedure referred to in paragraph (i); and
- (b) if satisfied that a decision or action taken by a contracting authority or concessionaire was in breach of the duty owed under regulation 47(1) or (2), may—
 - (i) order the setting aside of that decision or action;
 - (ii) order the contracting authority to amend any document; and
 - (iii) award damages to an economic operator which has suffered loss or damage as a consequence of the breach.

(2) In any interim proceedings under this Part the Court may decide not to grant an interim order when the negative consequences of such an order are likely to outweigh the benefits, having regard to the following considerations—

⁽⁶⁰⁾ Information on the detailed application of the GPA under bilateral agreements between the EU and other signatories is maintained in the Annexes and general notes in Appendix 1 to the GPA. Access to this information is available through the World Trade Organisation website at www.wto.org.

- (a) that decisions taken by a contracting authority must be reviewed effectively and, in particular, as rapidly as possible;
 - (b) the probable consequences of an interim order for all interests likely to be harmed; and
 - (c) the public interest.
- (3) Where the Court is satisfied that regulation 49(7)(a) applies but the second ground for ineffectiveness is not otherwise met, the Court must, without prejudice to the other powers of the Court, order—
- (a) the payment by the contracting authority of a financial penalty; or
 - (b) where the contract in relation to which the breach occurred has been entered into, or the framework agreement in relation to which the breach occurred has been concluded, the shortening of the duration of the contract or framework agreement.
- (4) In determining what order to make under paragraph (3) the Court must—
- (a) ensure that the order is effective, proportionate and dissuasive; and
 - (b) have regard to all relevant factors including—
 - (i) the seriousness of the breach; and
 - (ii) the behaviour of the contracting authority.
- (5) Where the Court makes an order under paragraph (3)(b) the Court must, without prejudice to the other powers of the Court, make such other order as the Court considers appropriate to address the consequences of the shortening of the duration of the contract or framework agreement on the rights and obligations of the parties to the contract or framework agreement.
- (6) Before making an order under paragraph (5), the Court must have regard to any terms of the contract or framework agreement relating to the rights and obligations of the parties should the duration of the contract or framework agreement be shortened.
- (7) Subject to paragraph (3) and regulation 49, in proceedings under this Part the Court does not have power to order any remedy other than an award of damages in respect of a breach of the duty owed under regulation 47(1) or (2) if the contract in relation to which the breach occurred has been entered into, or the framework agreement in relation to which the breach occurred has been concluded.
- (8) Sections 21 and 42 of the Crown Proceedings Act 1947(61) do not apply in proceedings brought under this Part against the Crown.

Ineffectiveness orders

49.—(1) Without prejudice to all rights and obligations in respect of the period leading up to the date of the order, an ineffectiveness order made in relation to a contract renders unenforceable all rights and obligations directly arising from the contract in respect of the period commencing on the date of the order.

(2) Subject to any order made under paragraph (10)(b), obligations rendered unenforceable by an ineffectiveness order made in relation to a contract must not be performed by the parties to the contract.

(3) Without prejudice to any power of the Court to make an ineffectiveness order in relation to a contract based on a framework agreement in accordance with this Part, an ineffectiveness order made in relation to a framework agreement prohibits, with effect from the date of the order, the awarding of contracts based on the framework agreement.

(4) Subject to paragraphs (12) and (18), the Court must make an ineffectiveness order where one of the grounds for ineffectiveness set out in paragraphs (5), (7) and (8) applies.

(5) The first ground for ineffectiveness is that the contracting authority has entered into a contract or has concluded a framework agreement without sending a contract notice to the Official Journal in circumstances where the contract or framework agreement was not exempt from the requirement for prior publication of a contract notice.

(6) The first ground for ineffectiveness does not apply where—

(a) the contracting authority sent to the Official Journal a notice in the form of the voluntary ex ante transparency notice in Annex XIV to Commission Regulation (EC) No 1564/2005, expressing its intention to enter into the contract or to conclude the framework agreement and containing—

(i) the name and contact details of the contracting authority;

(ii) a description of the object of the contract or framework agreement;

(iii) a justification of the decision of the contracting authority to award the contract or conclude the framework agreement without prior publication of a contract notice;

(iv) the name and contact details of the economic operator to be awarded the contract or to become party to the framework agreement; and

(v) any other information which the contracting authority considered useful; and

(b) the contracting authority allowed a period of at least 10 days to elapse between the date of publication in the Official Journal of the notice referred to in sub-paragraph (a) and the date on which the contracting authority entered into the contract or concluded the framework agreement.

(7) The second ground for ineffectiveness is that—

(a) the contracting authority has breached regulation 32(1) (requirement to send decision notice to all tenderers and all candidates concerned) or (3) (requirement to delay entering into a contract or concluding a framework agreement for an applicable standstill period) or 47(9) (prohibition on entering into a contract or concluding a framework agreement when proceedings are brought);

(b) the contracting authority's breach prevented the economic operator from bringing proceedings or obtaining a remedy before the contract was entered into or the framework agreement was concluded;

(c) in awarding the contract or concluding the framework agreement there has been another breach of these Regulations, other than a breach of regulation 4(3) (in the case of a Part B services contract), 8(21), 32(1) or (3) or this Part; and

(d) the breach referred to in sub-paragraph (c) has affected the chances of the economic operator bringing proceedings under this Part to obtain the contract or become a party to the framework agreement.

(8) The third ground for ineffectiveness is that—

(a) the contract is a contract based on a framework agreement or a contract awarded under a dynamic purchasing system;

(b) the contract was awarded in breach of—

(i) regulation 19(7)(b) or (8), in the case of a contract based on a framework agreement (rules governing the award of contracts based on a framework agreement); or

(ii) regulation 20(11), (12), (13) or (14), in the case of a contract awarded under a dynamic purchasing system (rules governing the award of contracts under a dynamic purchasing system); and

- (c) the estimated value of the contract at the relevant time is not less than the relevant threshold.
- (9) The third ground for ineffectiveness does not apply where—
- (a) the contracting authority has by notice in writing informed the economic operators that submitted tenders of its decision in relation to the award of the contract in accordance with regulation 19(9)(e) or 20(15), and the notice includes the information referred to in regulation 32(2)(d); and
 - (b) the contracting authority allowed a period of at least the relevant standstill period to elapse between the date of sending of the notice referred to in sub-paragraph (a) and the date on which the contracting authority entered into the contract.
- (10) If an ineffectiveness order is made, the Court must, without prejudice to the other powers of the Court—
- (a) order the payment by the contracting authority of a financial penalty; and
 - (b) make such other order as the Court considers appropriate to address the consequences of the ineffectiveness order on the rights and obligations of the parties to the contract or framework agreement.
- (11) Before making an order under paragraph (10)(b), the Court must have regard to any terms of the contract or framework agreement relating to the rights and obligations of the parties should an ineffectiveness order be made in relation to the contract or framework agreement.
- (12) The Court may decline to make an ineffectiveness order where the Court is satisfied that overriding reasons relating to a general interest require that the enforceability of the rights and obligations arising from the contract or framework agreement should be maintained.
- (13) For the purposes of paragraph (12)—
- (a) economic interests directly linked to the contract or framework agreement do not constitute overriding reasons relating to a general interest; and
 - (b) economic interests in the effectiveness of the contract or framework agreement may only be considered as overriding reasons relating to a general interest in exceptional circumstances where ineffectiveness would lead to disproportionate consequences.
- (14) For the purposes of paragraph (13)(a), economic interests directly linked to the contract or framework agreement include the costs—
- (a) resulting from the delay in the performance of the contract or framework agreement;
 - (b) resulting from the commencement of a new procurement procedure;
 - (c) resulting from the change of the economic operator performing the contract or framework agreement; and
 - (d) of legal obligations resulting from an ineffectiveness order.
- (15) Where the Court declines to make an ineffectiveness order under paragraph (12), the Court must, without prejudice to the other powers of the Court, order—
- (a) the payment by the contracting authority of a financial penalty; or
 - (b) the shortening of the duration of the contract or framework agreement.
- (16) In determining what order to make under paragraph (10)(a) or (15), regulation 48(4) applies and, in the case of an order made under paragraph (10)(a), the Court must have regard to the extent to which the contract or framework agreement will remain in effect in respect of the period leading up to the date of the ineffectiveness order.
- (17) Regulation 48(5) and (6) applies to an order made under paragraph (15)(b) as it applies to an order made under regulation 48(3)(b).

(18) In proceedings under this Part to which regulation 47(7)(b) applies, the Court does not have power to make an ineffectiveness order if the proceedings would be incompetent if regulation 47(7)(a) applied to the proceedings.

(19) In paragraph (8)(c), “estimated value”, “relevant time” and “relevant threshold” have the same meanings they have in regulation 8.

Financial penalties

50.—(1) Subject to paragraph (2), where a financial penalty is ordered to be paid under this Part—

- (a) the order must state that the financial penalty must be paid to the Scottish Ministers; and
- (b) the clerk of the Court must send an extract of the decree (without charge) to the Scottish Ministers.

(2) Paragraph (1) does not apply to any financial penalty ordered to be paid by the Scottish Ministers or an office in the Scottish Administration which is not a ministerial office.

(3) The Scottish Ministers must pay into the Scottish Consolidated Fund any financial penalty—

- (a) ordered to be paid by them under this Part; or
- (b) recovered by them under paragraph (1).

(4) An office in the Scottish Administration which is not a ministerial office must pay any financial penalty ordered to be paid by them under this Part into the Scottish Consolidated Fund.

(5) In this regulation, “an office in the Scottish Administration which is not a ministerial office” is construed in accordance with section 126(8) of the Scotland Act 1998(62).

PART 10

REPEALS, REVOCATIONS, SAVINGS, TRANSITIONAL PROVISIONS

Revocations

51. Subject to regulation 52, the instruments specified in column 1 of Part A of Schedule 7 (which have the numbers specified in column 2) are revoked to the extent specified in column 3 of that Part.

Savings and transitional provisions

52.—(1) Where a contracting authority has commenced a contract award procedure or design contest before 1st May 2012, the regulations referred to in regulation 51 continue to have effect on and after 1st May 2012 in relation to that contract award procedure, as if those regulations had not been revoked in accordance with regulation 51.

(2) For the purposes of paragraph (1), a procedure or contest has been commenced before 1st May 2012 if, before that date—

- (a) a contract notice has been sent to the Official Journal in accordance with the Public Contracts (Scotland) Regulations 2006(63) in order to invite offers or requests to be selected to tender for or to negotiate, or to be selected to participate in a dialogue in relation to a contract, in respect of a proposed public contract, framework agreement or dynamic purchasing system;
- (b) in any case where there is no requirement to send a contract notice to the Official Journal in accordance with the Public Contracts (Scotland) Regulations 2006, the contracting

(62) 1998 c.46.

(63) S.S.I. 2006/1.

- authority has dispatched any form of advertisement seeking offers or expressions of interest in a proposed contract, framework agreement or dynamic purchasing system;
- (c) where there is no such advertising, the contracting authority has contacted any economic operator in order to—
- (i) seek expressions of interest or offers in respect of a proposed contract, framework agreement or dynamic purchasing system; or
 - (ii) respond to an unsolicited expression of interest or offer in respect of a proposed contract, framework agreement or dynamic purchasing system; or
- (d) the contracting authority has sent a notice to the Official Journal in accordance with the Public Contracts (Scotland) Regulations 2006 in order to hold a design contest.
- (3) Where a framework agreement has been concluded before 1st May 2012, these Regulations do not apply to the award of any specific contract under that framework agreement.

Consequential amendments

53. The instruments specified in column 1 of Part B of Schedule 7 (which have the numbers specified in column 2) are amended in accordance with the provisions in column 3 of that Part.

St Andrew's House,
Edinburgh
14th March 2012

ALEX NEIL
A member of the Scottish Executive