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STATUTORY INSTRUMENTS

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**2011 No. 1848**

**PUBLIC PROCUREMENT**

**The Defence and Security Public Contracts Regulations 2011**

*Made* - - - - 28th July 2011  
*Laid before Parliament* 29th July 2011  
*Coming into force* - - 21st August 2011

The Secretary of State is designated<sup>(1)</sup> for the purposes of section 2(2) of the European Communities Act 1972<sup>(2)</sup> in relation to public procurement.

The Secretary of State makes these Regulations in exercise of the powers conferred by section 2(2) of, as read with paragraph 1A<sup>(3)</sup> of Schedule 2 to, that Act.

These Regulations make provision for a purpose mentioned in section 2(2) of that Act, and it appears to the Secretary of State that it is expedient for certain references to provisions of EU instruments to be construed as references to those provisions as amended from time to time.

**PART 1**

**GENERAL**

**Citation and commencement**

1. These Regulations may be cited as the Defence and Security Public Contracts Regulations 2011 and come into force on 21st August 2011.

**Review**

2.—(1) The Secretary of State must carry out a review of the provisions of these Regulations before the end of each review period and set out the conclusions of the review in a report.

(2) In carrying out the review the Secretary of State will, so far as is reasonable, compare the implementation of European obligations in the Defence and Security Procurement Directive with the implementations of those obligations in other member States.

(3) The report must in particular—

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(1) [S.I. 2009/2743](#).

(2) [1972 c. 68](#). There are amendments to this Act which are not relevant to these Regulations.

(3) Paragraph 1A was inserted by the Legislative and Regulatory Reform Act [2006 \(c. 51\)](#), section 28.

- (a) set out the objectives intended to be achieved by the regulatory system established by those provisions;
  - (b) assess the extent to which those objectives have been achieved;
  - (c) include the assessment of the comparison between implementations; and
  - (d) assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.
- (4) The Secretary of State must lay the report before Parliament before the end of the review period.
- (5) The first review period is the period of five years beginning with the day on which these Regulations came into force.
- (6) Each subsequent review period is a period of five years beginning with the date on which the report of the review carried out during the preceding review period was laid before Parliament.

### Interpretation

#### 3.—(1) In these Regulations—

“aircraft” means any machine capable of flight (whether or not propelled by mechanical means);

“applied research” means original work undertaken with a view to acquiring new knowledge and directed primarily towards a particular end or objective;

“to award” means to accept an offer made in relation to a proposed contract;

“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 useful general information, such as a contact point, a telephone number, a facsimile number, a postal address or an e-mail address;

“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 within the meaning of regulation 3 of the Public Contracts Regulations 2006<sup>(4)</sup> or regulation 3 of the Public Contracts (Scotland) Regulations 2006<sup>(5)</sup> or a European public body, if that authority or body—

- (a) acquires goods or services intended for one or more contracting authorities;
- (b) awards 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;

“classified information” means any information or material, regardless of its form, nature or mode of transmission, to which a security classification or protection has been attributed and which in the interests of national security and in accordance with the law or administrative provisions of any part of the United Kingdom requires protection against appropriation, destruction, removal, disclosure, loss or access by any unauthorised individual, or any other type of compromise;

“the Commission” means the European Commission;

<sup>(4)</sup> S.I. 2006/5; amended by S.I. 2007/2157, 2007/3542, 2008/2256, 2008/2683, 2008/2848, 2009/1307 and 2009/2992.

<sup>(5)</sup> S.S.I. 2006/1; amended by S.I. 2007/2157 and S.S.I. 2007/565, 2008/94, 2008/291, 2008/376, 2009/428 and 2010/222. S.S.I. 2009/428 was amended by S.S.I. 2009/439.

“[Commission Regulation \(EC\) No 1564/2005](#)” means [Commission Regulation \(EC\) No 1564/2005](#) of 7 September 2005(6);

“Common Procurement Vocabulary” means the reference nomenclature applicable to 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(7);

“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;

“contract” means, except in regulation 67 and unless specified otherwise, a services contract, a supply contract or a works contract;

“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 67, a notice sent to the Official Journal in accordance with these Regulations—

- (a) subject to sub-paragraph (b), containing the information specified in Annex IV to the Defence and Security Procurement Directive; or
- (b) if [Commission Regulation \(EC\) No 1564/2005](#) sets out a form to be used for this purpose, in that form and containing the information therein specified;

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

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

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

“CPV” means Common Procurement Vocabulary;

“crisis” means any situation—

- (a) in which a harmful event has occurred which clearly exceeds the dimensions of harmful events in everyday life and which substantially endangers or restricts the life and health of people, or has a substantial impact on property values, or requires measures in order to supply the population with necessities, or
- (b) in which such a harmful event is deemed by the Secretary of State to be impending, and includes armed conflicts and wars;

“Defence and Security Procurement Directive” means Directive [2009/81/EC](#) of the European Parliament and of the Council of 13th July 2009(8);

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(6) OJ No L 257, 1.10.2005, p.1, as amended by [Commission Regulation \(EC\) No 1792/2006](#), OJ No L 362, 20.12.2006, p.1 and [Commission Regulation \(EC\) No 1150/2009](#), OJ No L 313, 28.11.2009, p.3.

(7) OJ No L 340, 16.12.2002, p.1; relevant amending instruments are Regulation (EC) No 213/2008 of the Commission of the European Communities, OJ No L 74, 15.3.2008, p.1 and Regulation (EC) No 596/2009 of the European Parliament and the Council, OJ No L 188, 18.7.2009, p.14.

(8) OJ No L 216, 20.8.2009, p.76, as amended by [Commission Regulation \(EC\) No 1177/2009](#), OJ No L 314, 1.12.2009, p.64.

“disabled person” means any person recognised as disabled within the meaning of the Equality Act 2010<sup>(9)</sup> and “disabled persons” is to be interpreted accordingly;

“disability” has the same meaning as in that Act;

“economic operator” has the meaning given to it by regulation 5;

“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 12(1);

“experimental development” means work based on existing knowledge obtained from research or practical experience with a view to initiating the manufacture of new materials, products or devices, establishing new processes, systems and services or considerably improving those that already exist and includes the realisation of technological demonstrators;

“financial year” means, unless the context otherwise requires, 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, except in regulations 42 and 67, 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;

“fundamental research” means experimental or theoretical work undertaken mainly with a view to acquiring new knowledge regarding the underlying foundation of phenomena and observable facts without any particular application or use in view;

“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 supply contract, and any ship, aircraft or vehicle;

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

“international standard” has the meaning given to it in regulation 12(1);

“life cycle” means all the possible successive stages of a product, including research and development, industrial development, production, repair, modernisation, modification, maintenance, logistics, training, testing, withdrawal and disposal;

“military equipment” means equipment specifically designed or adapted for military purposes and intended for use as arms, munitions or war material including equipment—

(a) listed in the Common Military List of the European Union<sup>(10)</sup> as amended from time to time; or

(b) within the product types included in the list of arms, munitions and war material adopted by the Council in its decision 255/58 of 15th April 1958;

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<sup>(9)</sup> 2010 c. 15.

<sup>(10)</sup> OJ No C 86, 18.3.2011, p.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 member State” means, in the case of a person who is not an individual, a person formed in accordance with the laws of a member State and which has its registered office, central administration or principal place of business in a member 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;

“prior information notice” means a notice sent to the Official Journal in accordance with regulation 14—

- (a) subject to sub-paragraph (b), containing the information specified in Annex IV to the Defence and Security Procurement Directive; or
- (b) if [Commission Regulation \(EC\) No 1564/2005](#) sets out a form to be used for this purpose, in that form and containing the information therein specified;

“research and development” means all activities comprising fundamental research, applied research and experimental development but does not include the making and qualification of pre-production prototypes, tools and industrial engineering, industrial design or manufacture;

“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;

“sensitive equipment”, “sensitive work or works” and “sensitive services” means equipment, work or works and services for security purposes, involving, requiring or containing classified information;

“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 works contract, or
- (b) a supply contract,

but a contract for both goods and services shall be considered to be a services contract if the value of the consideration attributable to those services exceeds that of the goods covered by the contract and a contract for services which includes activities specified in Schedule 1 that are only incidental to the principal object of the contract shall be considered to be a services contract;

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

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

“ship” includes any boat, hovercraft 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 sought, who seeks, or who would have wished, to be the person to whom a supply contract is awarded; and
- (b) who is a national of and established in a member State;

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

- (c) 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
- (d) 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 shall only be a 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;

“technological demonstrator” means a device demonstrating the performance of a new concept or a new technology in a relevant or representative environment;

“the TEU” means the Treaty on European Union<sup>(11)</sup>;

“the TFEU” means the Treaty on the Functioning of the European Union<sup>(12)</sup>;

“work”, unless the context otherwise requires, 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, Christmas Day, Good Friday or Bank Holiday within the meaning of the Banking and Financial Dealings Act 1971<sup>(13)</sup>;

“works” means any of the activities specified in Schedule 1;

“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;

“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) Subject to paragraph (3), in these Regulations—

- (a) “a Part A services contract” is a contract under which services specified in Part A of Schedule 2 are to be provided;
- (b) “a Part B services contract” is a contract under which services specified in Part B of Schedule 2 are to be provided.

(3) Where services specified in both Parts A and B of Schedule 2 are to be provided under a single contract, then the contract shall be 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.

(4) Except in Part 9, where a thing is required to be done under these Regulations—

<sup>(11)</sup> OJ No C 115, 9.5.2008, p.13.

<sup>(12)</sup> OJ No C 115, 9.5.2008, p.47.

<sup>(13)</sup> 1971 c. 80. There are amendments to this Act which are not relevant to these Regulations.

- (a) within a certain period after an action is taken, the day on which that action is taken shall not be counted in the calculation of that period;
- (b) within a certain period, that period must include at least two working days; and
- (c) within a certain period and the last day of that period is not a working day, the period shall be extended to include the next working day.

### **Contracting authorities**

4. For the purposes of these Regulations “contracting authority”, except the first occurrence in the definition of “central purchasing body”, means—

- (a) a “contracting authority” within the meaning of regulation 3 of the Public Contracts Regulations 2006<sup>(14)</sup>;
- (b) a “contracting authority” within the meaning of regulation 3 of the Public Contracts (Scotland) Regulations 2006<sup>(15)</sup>;
- (c) a “utility” within the meaning of regulation 3 of the Utilities Contracts Regulations 2006<sup>(16)</sup>; and
- (d) a “utility” within the meaning of regulation 3 of the Utilities Contracts (Scotland) Regulations 2006<sup>(17)</sup>.

### **Economic operators**

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

- (2) A contracting authority shall—
  - (a) treat economic operators equally and in a non-discriminatory way; and
  - (b) act in a transparent way.

### **Application**

6.—(1) Subject to Article 4(2) of the TEU and Articles 36, 51, 52, 62 and 346 of the TFEU, these Regulations apply whenever a contracting authority seeks offers in relation to a proposed supply contract, works contract, Part A services contract or, subject to paragraph (2), a framework agreement, other than a contract or framework agreement excluded from the application of these Regulations by regulation 7 or 9, for—

- (a) the supply of military equipment, including any parts, components or subassemblies of military equipment;
- (b) the supply of sensitive equipment, including any parts, components or subassemblies of sensitive equipment;
- (c) work, works, goods or services directly related to equipment referred to in subparagraph (a) or (b) for any and all elements of its life cycle;
- (d) work, works or services for specifically military purposes; or
- (e) sensitive work or works or sensitive services.

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<sup>(14)</sup> S.I. 2006/5; amended by S.I. 2007/2157, 2007/3542, 2008/2256, 2008/2683, 2008/2848, 2009/1307 and 2009/2992.

<sup>(15)</sup> S.S.I. 2006/1; amended by S.I. 2007/2157 and S.S.I. 2007/565, 2008/94, 2008/291, 2008/376, 2009/428 and 2010/222. S.S.I. 2009/428 was amended by S.S.I. 2009/439.

<sup>(16)</sup> S.I. 2006/6; amended by S.I. 2007/2157, 2007/3542, 2008/2256, 2008/2848 and 2009/3100.

<sup>(17)</sup> S.S.I. 2006/2; amended by S.I. 2007/2157 and S.S.I. 2007/565, 2008/94, 2008/291, 2008/376 and 2009/428. S.S.I. 2009/428 was amended by S.S.I. 2009/439.

(2) Paragraph (1) does not apply whenever a contracting authority seeks offers in relation to a proposed framework agreement in respect of which only Part B services contracts can be based or awarded.

(3) Subject to Article 4(2) of the TEU and Articles 36, 51, 52, 62 and 346 of the TFEU, whenever a contracting authority seeks offers in relation to a proposed Part B services contract or a framework agreement in respect of which only Part B services contracts can be based or awarded, other than one excluded by virtue of regulation 7 or 9, for any services referred to in sub-paragraphs (c), (d) or (e) of paragraph (1)—

- (a) Parts 1, 9 and 10 apply; and
- (b) the following provisions in Parts 2 to 8 apply—
  - (i) regulation 12 (technical specifications in the contract documents);
  - (ii) regulation 32 (contract award notice);
  - (iii) regulation 46(2) (statistical and other reports);
  - (iv) regulation 47 (provision of reports); and
  - (v) regulation 48 (publication of notices).

(4) Where a contract or framework agreement has as its object work, works, goods or services falling partly within the application of these Regulations and partly within the application of the Public Contracts Regulations 2006, the Utilities Contracts Regulations 2006, the Public Contracts (Scotland) Regulations 2006 or the Utilities Contracts (Scotland) Regulations 2006 and the award of a single contract or the conclusion of a single framework agreement is justified for objective reasons, the contracting authority must award the contract or conclude the framework agreement in accordance with these Regulations.

(5) Where a contract or framework agreement has as its object work, works, goods or services falling partly within the application of these Regulations but with the other part not being within the application of either these Regulations, the Public Contracts Regulations 2006, the Utilities Contracts Regulations 2006 the Public Contracts (Scotland) Regulations 2006 or the Utilities Contracts (Scotland) Regulations 2006 and the award of a single contract or the conclusion of a single framework agreement is justified for objective reasons, the award of the contract or the conclusion of the framework agreement is not subject to these Regulations.

(6) A contracting authority must not award a single contract or conclude a single framework agreement for the purpose of avoiding the application of these Regulations, the Public Contracts Regulations 2006, the Utilities Contracts Regulations 2006, the Public Contracts (Scotland) Regulations 2006 or the Utilities Contracts (Scotland) Regulations 2006 where applicable.

### **General exclusions**

7.—(1) These Regulations do not apply to the seeking of offers in relation to a proposed contract or framework agreement—

- (a) where the application of these Regulations would oblige the United Kingdom to supply information the disclosure of which it considers contrary to the essential interests of its security;
- (b) for the purposes of intelligence activities;
- (c) where the contract is to be awarded or the framework agreement is to be concluded in the framework of a cooperative programme based on research and development, conducted jointly by at least two member States for the development of a new product and, where applicable, the later phases of all or part of the life cycle of the product;
- (d) where the contract is to be awarded or the framework agreement is to be concluded in a State which is not a member State, including a contract or framework agreement for a



civil purchase, carried out when forces are deployed outside the territory of the EU where operational needs require them to be concluded with economic operators located in the area of operations;

- (e) which is governed by specific procedural rules—
  - (i) pursuant to an international agreement or arrangement concluded between the United Kingdom and a State which is not a member State;
  - (ii) pursuant to a concluded international agreement or arrangement relating to the stationing of troops and concerning the undertakings of a member State or a State which is not a member State; or
  - (iii) of an organisation, of which only States are members (an “international organisation”) or of which only States or international organisations are members, purchasing for its purposes;
- (f) which must be awarded by a member State in accordance with specific procedural rules of an organisation referred to in sub-paragraph (e)(iii);
- (g) 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;
- (h) where a government is to award a contract to, or conclude a framework agreement with, another government relating to—
  - (i) the supply of military equipment or sensitive equipment;
  - (ii) work, works or services directly linked to such equipment; or
  - (iii) work, works or services specifically for military purposes, or sensitive work or works or sensitive services;
- (i) for arbitration or conciliation services;
- (j) for financial services, with the exception of insurance services;
- (k) for employment and other contracts of service; or
- (l) 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.

(2) For the purposes of paragraph (1)(h) “government” means the State, regional or local government of a member State or a State which is not a member State.

### **Reserved contracts**

**8.—(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 and “supported businesses” shall be interpreted accordingly;

“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 employment programmes” shall be interpreted accordingly; 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 and “supported factories” shall be interpreted accordingly.

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

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

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

### **Thresholds**

**9.**—(1) These Regulations do not apply to the seeking of offers in relation to a proposed contract or framework agreement where the estimated value of the contract or framework agreement (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 sum mentioned in—

- (a) Article 8(a) of the Defence and Security Procurement Directive in the case of a supply contract or a services contract; and
- (b) Article 8(b) of the Defence and Security Procurement Directive in the case of a works contract.

(3) The reference in paragraph (2) to the Defence and Security Procurement Directive is a reference to that Directive as amended from time to time.

(4) The value in pounds sterling of any amount expressed in these Regulations in euro shall be calculated by reference to the rate for the time being applying for the purposes of the Defence and Security Procurement Directive as published from time to time in the Official Journal.

(5) For the purposes of paragraph (1) the estimated value of a contract shall be 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.

(6) In determining the value of the total consideration which the contracting authority expects to be payable under a contract it shall, 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; and
- (e) fees, commission or other forms of remuneration payable for design services.

(7) For the purposes of paragraph (1) the estimated value of a 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 fixed for 12 months or less;
- (b) 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 more than 12 months; or
- (c) 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.

(8) For the purposes of paragraph (1) the estimated value of a 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.

(9) Subject to paragraphs (10) and (13), 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.

(10) Paragraph (9) 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 services contract or a supply contract, or
- (b) 1,000,000 euro for a 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.

(11) Subject to paragraph (13), 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 shall be the amount calculated under paragraph (12).

(12) The contracting authority shall calculate the amount referred to in paragraph (11) 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 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 services contracts, from the first date on which the services will be performed; or
  - (ii) the financial year if that is longer than 12 months.

(13) Notwithstanding paragraphs (9) and (11), in relation to a supply contract or a services contract, when the goods or services are required for the sole purposes 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 (9) and (12) shall be adapted by aggregating only the value of the consideration which was payable or the contracting authority expects to be payable, as the case may be, under a supply contract or a services contract which was or is required for the sole purpose of that unit.

(14) Where a contracting authority intends to provide any goods to the economic operator awarded a works contract for the purpose of carrying out that contract, the value of the consideration of the works contract for the purposes of paragraphs (5) and (9) shall be taken to include the estimated value at the relevant time of those goods.

(15) The relevant threshold for the purposes of paragraph (1) for a framework agreement is the threshold for—

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

(16) The estimated value of a framework agreement 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.

(17) A contracting authority shall 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.

(18) The relevant time for the purposes of paragraphs (1), (12) and (14) 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.

### **Confidential information**

**10.**—(1) Subject to the provisions of these Regulations and in accordance with the law of any part of the United Kingdom to which the contracting authority is subject and subject to contractually acquired rights, a contracting authority shall 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.

### **Classified information**

**11.**—(1) A contracting authority may impose on an economic operator requirements aimed at protecting classified information which the contracting authority communicates to the economic operator throughout the tendering and contracting procedure.

(2) A contracting authority may require that an economic operator provides for the compliance by its sub-contractors with requirements imposed upon the economic operator under paragraph (1).

## **PART 2**

### **TECHNICAL SPECIFICATIONS**

#### **Technical specifications in the contract documents**

**12.**—(1) In this regulation—

“common technical specification” means a civil 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;

“defence materiel specifications” means a specification adopted by the Ministry of Defence in relation to a specific item of defence materiel, setting out all the technical requirements for that item together with the procedures necessary to determine whether those requirements have been met and which is not a defence standard;

“defence standard” means a technical specification the observance of which is not compulsory and which is approved by a standardisation body specialising in the production of technical specifications for repeated or continuous application in the field of defence;

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

“British standard” means a civil 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” shall be interpreted accordingly;

“standard” means a technical specification approved by a recognised standardisation body for repeated and 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 services contract or a 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 the product, its 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 methods and procedures and conformity assessment procedures; and
- (b) in the case of a 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 shall 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 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 services contract and the materials and goods used in or for it,
- (b) the goods to be purchased or hired under a supply contract, or
- (c) the work or works to be carried out under a works contract and the materials and goods used in or for it,

it shall specify those technical specifications in the contract documents.

(3) A contracting authority shall 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.

(4) Subject to—

- (a) technical requirements (including those related to product safety) which are compulsory in the United Kingdom, or
- (b) technical requirements to be met by the United Kingdom under international standardisation agreements in order to guarantee the interoperability required by those agreements,

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 (5), (6), (7) or (8).

(5) A contracting authority may define the technical specifications referred to in paragraph (4) by reference to technical specifications in the following order of preference—

- (a) British standards transposing European standards,
- (b) European technical approvals,
- (c) common technical specifications,
- (d) British standards transposing international standards,
- (e) other international standards,
- (f) other technical reference systems established by the European standardisation bodies, or, in the absence of such systems, by reference to the following technical specifications—
  - (i) other 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 products,
- (g) civil technical specifications stemming from industry and widely recognised by it, or
- (h) British defence standards and defence materiel specifications similar to those standards,

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

(6) A contracting authority may define the technical specifications referred to in paragraph (4) 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 the contracting authority to award the contract.

(7) A contracting authority may define the technical specifications referred to in paragraph (4) by defining performance and functional requirements as referred to in paragraph (6) with reference to the technical specifications referred to in paragraph (5) as a means of presuming conformity with such performance or functional requirements.

(8) A contracting authority may define the technical specifications referred to in paragraph (4) by reference to technical specifications referred to in paragraph (5) for certain characteristics and by reference to performance or functional requirements referred to in paragraph (6) for other characteristics.

(9) Where a contracting authority defines technical specifications as referred to in paragraph (5), it shall 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 economic operator proposes in its tender satisfy the requirements of those technical specifications in an equivalent manner.

(10) Where a contracting authority defines technical specifications in terms of performance or functional requirements as referred to in paragraph (6), it shall 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.

(11) Where a contracting authority lays down environmental characteristics in terms of performance or functional requirements as referred to in paragraph (6), it may use the detailed technical specifications, or if necessary, parts of the technical specifications, 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.

(12) 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 shall accept any other appropriate means of proof that the materials, goods or services comply with those technical specifications.

(13) The term “appropriate means” referred to in paragraphs (9), (10) and (12) includes a technical dossier of a manufacturer or a test report from a recognised body.

(14) A contracting authority shall 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).

(15) Subject to paragraph (16), a contracting authority shall 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.

(16) Exceptionally, a contracting authority may incorporate the references referred to in paragraph (15) 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 justifiable; 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**

**13.**—(1) Where a contracting authority intends to award a contract on the basis of the offer which is the most economically advantageous in accordance with regulation 31(1)(a), it shall 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 shall 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 shall state in the contract documents the minimum requirements to be met by the variants and any specific requirements for the presentation of an offer which contains variants.

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

(4) A contracting authority shall 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 services contract, the offer would lead to the award of a supply contract; or
- (b) where it intends to award a supply contract, the offer would lead to the award of a services contract.

## **PART 3**

### **PROCEDURES LEADING TO THE AWARD OF A CONTRACT**

#### **Prior information notices**

**14.**—(1) Subject to paragraphs (5) and (6), a contracting authority shall send a notice in the form of a prior information notice to the Commission or publish it on that contracting authority’s buyer profile at the earliest opportunity after the decision approving the project for which the contracting authority intends to award contracts or framework agreements.

(2) The notice referred to in paragraph (1) shall contain information in respect of—

- (a) the supply contracts, the services contracts or the framework agreements for the purchase or hire of goods or for the provision of services 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 works contracts or the framework agreements for the carrying out of work or works which the contracting authority expects to award or conclude;

and that notice shall be sub-divided to give that information separately for each product area of goods by reference to the main vocabulary group CPV nomenclature of each product area of goods and for each class of works or category of services as specified in Schedules 1 and 2.

(3) Where a contracting authority publishes a notice on its buyer profile in accordance with paragraph (1), it shall also send a notice in the form of a notice on a buyer profile informing the Commission by electronic means in accordance with the format and procedure for sending notices specified in paragraph (3) of Annex VI to the Defence and Security Procurement Directive of that publication.

(4) A notice on a buyer profile sent to the Commission must—

- (a) subject to sub-paragraph (b), contain the information specified in Annex IV to the Defence and Security Procurement Directive; or
- (b) if [Commission Regulation \(EC\) No 1564/2005](#) sets out a form to be used for this purpose, be in that form and contain the information therein specified.

(5) The obligation to publish a prior information notice applies only where the contracting authority takes the option of shortening the time limit for the receipt of tenders in accordance with regulation 17(20).

(6) This regulation does not apply to a proposed 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 regulations 16 and 18(1), (2), (9) and (10).

### **Selection of contract award procedures**

**15.—**(1) For the purpose of seeking offers in relation to a proposed contract, a contracting authority shall, except in the circumstances specified to in paragraph (2), use—

- (a) the restricted procedure in accordance with regulation 17; or
- (b) the negotiated procedure with the prior publication of a contract notice in accordance with regulation 18.

(2) The circumstances referred to in paragraph (1) are where the contracting authority may use—

- (a) the negotiated procedure without the prior publication of a contract notice in accordance with regulations 16 and 18(1), (2), (9) and (10); or
- (b) the competitive dialogue procedure in accordance with regulation 19.

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

**16.—**(1) A contracting authority may use the negotiated procedure without the prior publication of a contract notice in accordance with this regulation and regulation 18(1), (2), (9) and (10) in the following circumstances and must give reasons for the use of this procedure in the contract award notice—

- (a) in the case of a contract—
  - (i) subject to paragraph (2), in the absence of tenders, suitable tenders or applications in response to a restricted procedure, a negotiated procedure with the prior publication of a contract notice or a competitive dialogue 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;

- (ii) when, for technical reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator;
  - (iii) when the periods laid down for the restricted procedure and negotiated procedure with the prior publication of a contract notice, including the shortened periods referred to in regulations 17(6), 17(19) and 18(8), are incompatible with the urgency resulting from a crisis;
  - (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 17 for the restricted procedure, or
    - (bb) regulation 18 for the negotiated procedure,cannot be met;
- (b) in the case of a supply contract—
- (i) 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;
  - (ii) for the purchase or hire of goods quoted and purchased on a commodity market;
  - (iii) 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 services contract or a supply contract—
- (i) for research and development services to which these Regulations apply;
  - (ii) when the goods to be purchased or hired under the contract are to be manufactured solely for the purpose of research or development but not when the goods are to be purchased or hired for quantity production to establish commercial viability or to recover research and development costs;
- (d) in the case of a works contract or a services contract—
- (i) subject to paragraph (5), when a contracting authority wants an economic operator which has entered into a works contract or a 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 works contract or 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;

- (ii) subject to paragraph (6), when a contracting authority wants an economic operator which has entered into a works contract or a 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;
  - (e) in the case of a contract related to the provision of air and maritime transport services for the armed forces or security forces of a member State deployed or to be deployed abroad, when the contracting authority has to procure such services from economic operators that guarantee the validity of their tenders only for such short periods that the time limit for the restricted procedure or the negotiated procedure with the prior publication of a contract notice, including the shortened time limits as referred to in regulations 17(6), 17(19) and 18(8), cannot be complied with;
  - (f) in the event that the procedure leading to the award of a contract by the contracting authority using the restricted procedure, the negotiated procedure with the prior publication of a contract notice or the competitive dialogue procedure was discontinued because of—
    - (i) irregular tenders, or
    - (ii) unacceptable tenders following an evaluation made in accordance with regulations 23, 24, 25 and 26,but only if the original terms of the proposed contract offered in the discontinued procedure have not been substantially altered in the negotiated procedure and the contracting authority invites all of, and only, those economic operators which submitted a tender following an invitation made during the course of the discontinued procedure (not being a tender which was excluded in accordance with regulation 17(7), 18(9) or 19(10)) to negotiate the contract.
- (2) A contracting authority using the negotiated procedure in accordance with paragraph (1)(a)(i) shall, if the Commission requests it, submit a report recording the fact that it has used that procedure to the Cabinet Office for onward transmission to the Commission, except—
- (a) where the contracting authority is the Secretary of State for Defence, in which case the Ministry of Defence must transmit the report to the Commission; or
  - (b) where the contracting authority is a contracting authority within the meaning of regulation 3(1)(w) of the Public Contracts Regulations 2006<sup>(18)</sup> or regulation 3(1)(aa) of the Public Contracts (Scotland) Regulations 2006<sup>(19)</sup> and the Secretary of State for Defence is “another contracting authority” within the meaning of those provisions, in which case the contracting authority must submit the report to the Ministry of Defence for onward transmission to the Commission.
- (3) A contracting authority shall not use the negotiated procedure in accordance with paragraph (1)(b)(i) if the term of the proposed contract, or the term of that contract and of any other contract entered into for the same purposes, is more than five years, unless there are exceptional circumstances which require that this period should be exceeded.
- (4) For the purposes of paragraphs (3) and (6)(c), exceptional circumstances are to be determined by taking into account the expected service life of any delivered items, installations or systems, and the technical difficulties which a change of economic operator may cause.

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<sup>(18)</sup> S.I. 2006/5; amended by S.I. 2007/2157, 2007/3542, 2008/2256, 2008/2683, 2008/2848, 2009/1307 and 2009/2992.

<sup>(19)</sup> S.S.I. 2006/1; amended by S.I. 2007/2157 and S.S.I. 2007/565, 2008/94, 2008/291, 2008/376, 2009/428 and 2010/222. S.S.I. 2009/428 was amended by S.S.I. 2009/439.

(5) A contracting authority shall 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% of the value of the consideration payable under the original contract.

(6) A contracting authority shall 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 works contract or a 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 9, 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 five years of the original contract being entered into, unless there are exceptional circumstances which require that the procedure for the award of the new contract be commenced outside this period.

### **The restricted procedure**

**17.**—(1) A contracting authority using the restricted procedure shall comply with this regulation.

(2) The contracting authority shall publicise its intention to seek offers in relation to the contract by sending to the Official Journal as soon as possible after forming the intention, a notice, in the form of the contract notice, inviting requests to be selected to tender.

(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 shall be specified in the contract notice and shall not be less than 37 days from the date of the despatch of the notice.

(4) Subject to any minimum time limit specified by this regulation, the contracting authority shall 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 by electronic means in accordance with the format and procedures referred to in paragraph (3) of Annex VI to the Defence and Security Procurement Directive, the time limit referred to in paragraph (3) may be reduced by seven 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 despatch 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 despatch of the contract notice.

(7) The contracting authority shall make its evaluation in accordance with regulations 23, 24, 25 and 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 shall make the selection of the economic operators to be invited to tender in accordance with regulations 23, 24, 25 and 26 and shall award the contract in accordance with regulation 31.

(9) Where there is 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
- (b) the minimum number of economic operators, which shall be not less than three, which the contracting authority intends to invite to tender and, where appropriate, the maximum number.

(10) The contracting authority shall 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, 24, 25 and 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,

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.

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

- (a) economic and financial standing, 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) Without prejudice to the ability of the contracting authority to cancel the ongoing procurement procedure and launch a new procedure, if the contracting authority considers that the number of economic operators suitable to be selected to be invited to tender is too low to ensure genuine competition, it may suspend the procedure and republish the initial contract notice in accordance with paragraph (2) and regulation 48.

(14) Where the contracting authority suspends the procedure and republishes the initial contract notice in accordance with paragraph (13), it must fix a new date as the last date for the receipt by it of requests to be selected to tender and the economic operators selected upon the first publication and those selected upon the second must be invited in accordance with paragraph (15).

(15) The contracting authority shall send invitations in writing simultaneously to each economic operator selected to tender for the contract and the invitation shall—

- (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 shall ensure that the contract documents are sent to economic operators by the most rapid means of communication possible.

(17) The contracting authority shall 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 one or more 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, 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 (2).

(18) Subject to paragraphs (20) and (21), the date which the contracting authority fixes as the last date for the receipt by it of tenders and which shall be specified in the invitation to tender in accordance with paragraph (17)(a), shall be not less than 40 days from the date of the despatch of the invitation.

(19) Where compliance with the minimum time limit of 40 days referred to in paragraph (18) 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 despatch of the invitation.

(20) Where—

- (a) the contracting authority has published a prior information notice in accordance with regulation 14,
- (b) the prior information notice contained as much of the information specified for a contract notice in Annex IV to the Defence and Security Procurement Directive or, if [Commission Regulation \(EC\) No 1564/2005](#) sets out a form to be used for that purpose, as much of the information therein specified, 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 despatched,

the contracting authority may substitute for the period of not less than 40 days in paragraph (18), a period of generally not less than 36 days and in any event not less than 22 days.

(21) The contracting authority may reduce the time limits for the receipt by it of tenders referred to in paragraphs (18) and (20) by five 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.

(22) The contracting authority or entity referred to in paragraph (15)(c) shall 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 four days before the date specified in the invitation to tender as the final date for the receipt by it of tenders.

(23) The contracting authority shall 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 (22) 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.

(24) The contracting authority may combine the reductions in the periods of time referred to in paragraphs (5) and (21).

### **The negotiated procedure**

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

(2) A contracting authority using the negotiated procedure in accordance with regulation 16 need only comply with paragraphs (9) and (10) of this regulation.

(3) The contracting authority shall publicise its intention to seek offers in relation to the contract by sending to the Official Journal as soon as possible after forming the intention, a notice, in the form of the contract notice inviting requests to be selected to negotiate.

(4) The contracting authority shall indicate whether the negotiated procedure will take place in successive stages in accordance with paragraph (24)—

- (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 shall be specified in the contract notice and shall not be less than 37 days from the date of despatch of the notice.

(6) Subject to any minimum time limit specified by this regulation, the contracting authority shall 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 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 VI to the Defence and Security Procurement Directive, the time limit referred to in paragraph (5) may be reduced by seven 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 the despatch 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 despatch of the contract notice.

(9) The contracting authority shall make its evaluation in accordance with regulations 23, 24, 25 and 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; 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.

(10) The contracting authority shall make the selection of the economic operators to be invited to negotiate in accordance with regulations 23, 24, 25 and 26 and shall award the contract in accordance with regulation 31.

(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 shall be not less than three, which the contracting authority intends to invite to negotiate and, where appropriate, the maximum number.

(12) The contracting authority shall 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 specified 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, 24, 25 and 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,

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.

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

- (a) economic and financial standing, 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) Without prejudice to the ability of the contracting authority to cancel the ongoing procurement procedure and launch a new procedure, if the contracting authority considers that the number of economic operators suitable to be selected to negotiate is too low to ensure genuine competition, it may suspend the procedure and republish the initial contract notice in accordance with paragraph (3) and regulation 48.

(16) Where the contracting authority suspends the procedure and republishes the initial contract notice in accordance with paragraph (15), it must fix a new date as the last date for the receipt by it of requests to be selected to negotiate and the economic operators selected upon the first publication and those selected upon the second must be invited in accordance with paragraph (17).

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

- (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.

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

(19) The contracting authority shall include in the invitation—

- (a) the final date for the receipt by it of tenders, 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 tender 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 (3).

(20) The contracting authority or entity referred to in paragraph (17)(c) shall 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 six 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 four 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 shall 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 (20) 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.

(22) Where the contracting authority needs to identify the best tender in order to award the contract in accordance with regulation 31(1), that contracting authority shall negotiate with economic operators which have submitted tenders with the aim of adapting the tenders to the requirements specified in the contract documents.

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

(24) 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.

(25) Where the contracting authority provides for the negotiated procedure to take place in successive stages in accordance with paragraph (24), it shall 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 economic operators to do so.

### **The competitive dialogue procedure**

**19.**—(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 12(6), (7) and (8) 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 negotiated procedure with the prior publication of a contract notice 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 shall comply with the following paragraphs of this regulation.

(4) The contracting authority shall publicise its intention to seek offers in relation to the contract by sending to the Official Journal, as soon as possible after forming the intention, a notice, in the form of a contract notice inviting requests to participate.

(5) The contracting authority shall specify its needs and requirements in the contract notice and shall 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 shall indicate that it may provide for the competitive dialogue procedure to take place in successive stages in accordance with paragraph (24)—

- (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 fixes as the last date for the receipt by it of requests to be selected to participate shall be specified in the contract notice and shall be not less than 37 days from the date of the despatch of the notice.

(8) Subject to any minimum time limit specified by this regulation, the contracting authority shall 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 VI to the Defence and Security Procurement Directive, the time limit referred to in paragraph (7) may be reduced by seven days.

(10) The contracting authority shall make its evaluation in accordance with regulations 23, 24, 25 and 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 shall make the selection of the economic operators to be invited to participate in the dialogue in accordance with regulations 23, 24, 25 and 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 shall be not less than three, which the contracting authority intends to invite to participate in the dialogue and, where appropriate, the maximum number.

(13) The contracting authority shall ensure that the number of economic operators invited to participate in the dialogue 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 (12)(b).

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

- (a) the contracting authority carries out a selection in accordance with regulations 23, 24, 25 and 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, 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) Without prejudice to the ability of the contracting authority to cancel the ongoing procurement procedure and launch a new procedure, if the contracting authority considers that the number of economic operators suitable to be selected to participate in the dialogue is too low to ensure genuine competition, it may suspend the procedure and republish the initial contract notice in accordance with paragraph (4) and regulation 48.

(17) Where the contracting authority suspends the procedure and republishes the initial contract notice in accordance with paragraph (16), it must fix a new date as the last date for the receipt by it of requests to participate and the economic operators selected upon the first publication and those selected upon the second must be invited in accordance with paragraph (18).

(18) The contracting authority shall send invitations in writing simultaneously to each economic operator selected to participate in the dialogue and the invitation shall—

- (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.

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

(20) The contracting authority shall 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).

(21) The contracting authority or entity referred to in paragraph (18)(c) shall 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 six days before the date specified in the invitation to tender as the final date of the receipt by it of tenders.

(22) The contracting authority shall open with the participants selected in accordance with regulations 23, 24, 25 and 26, a dialogue the aim of which shall be to identify and define the means best suited to satisfying its needs.

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

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

(24) 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.

(25) Where the contracting authority provides for the competitive dialogue procedure to take place in successive stages in accordance with paragraph (24), it shall 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.

(26) The contracting authority may continue the competitive dialogue procedure until it can identify one or more solutions, if necessary after comparing them, likely to meet its needs.

(27) Where the contracting authority declares that the dialogue is concluded, it shall—

- (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.

(28) The contracting authority may request a participant to clarify, specify or fine-tune a tender referred to in paragraph (27)(b), but such clarification, specification, fine-tuning or additional information shall 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.

(29) The contracting authority shall assess the tenders received on the basis of the award criteria specified in the contract notice or descriptive document and shall award the contract to the participant which submits the most economically advantageous tender in accordance with regulation 31(1)(a).

(30) 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.

(31) 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**

**20.**—(1) A contracting authority which intends to conclude a framework agreement shall comply with this regulation.

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

- (a) follow one of the procedures set out in regulation 17, 18 or 19 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 31.

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

- (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 shall 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 shall 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 shall be three, 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 shall 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 shall—

- (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; and
- (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.

(10) The contracting authority shall not conclude a framework agreement for a period which exceeds seven years except in exceptional circumstances determined by taking into account the expected service life of any delivered items, installations or systems, and the technical difficulties which a change of supplier may cause, and where it does conclude a framework agreement for a period which exceeds seven years it shall include the reasons for doing so in the notice referred to in regulation 32(1).

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

(12) The contracting authority shall not use a framework agreement 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 shall comply with this regulation.

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

- (a) the restricted procedure;
- (b) the negotiated procedure with the prior publication of a contract notice; or
- (c) the procedure set out in regulation 20(7)(b) on the re-opening of competition among the parties to a framework agreement.

(3) The contracting authority shall not hold an electronic auction to precede the award of a services contract or a 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 shall 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 documents, where the contract is to be awarded on the basis of the offer which is the most economically advantageous in accordance with regulation 31(1)(a).

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

(7) Contract documents prepared by the contracting authority in relation to a contract the award of which is to be preceded by an electronic auction shall 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 documents) 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 shall—

- (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 31(1)(a), each invitation referred to in paragraph (8)(b) shall 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 31(3).

(10) The contracting authority shall 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 re-ranking 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 shall 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) shall 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 documents; 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 shall not disclose the identity of any economic operator participating in the auction.

(15) The contracting authority shall 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 phases in the electronic auction specified in the invitation referred to in paragraph (8)(b) have been completed.

(16) Where the contracting authority intends to close an electronic auction—

- (a) as described in paragraph (15)(b), it shall 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 shall 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 shall award the contract in accordance with regulation 31 on the basis of the results of the electronic auction.

(18) The contracting authority shall 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 contract documents.

(19) The references to values in paragraphs (5)(b), (8)(b), (10)(d), (13)(b) and (15)(b) shall 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 shall be deemed to have complied with these Regulations to the extent that—



- (a) the central purchasing body has complied with them; or
- (b) when the central purchasing body is not a contracting authority, the contract award rules applied by it are compliant with these Regulations and the contracts awarded can be subject to efficient remedies comparable to those provided for in Part 9.

## PART 4

### SELECTION OF ECONOMIC OPERATORS

#### Criteria for the rejection of economic operators

**23.**—(1) Subject to paragraph (2), a contracting authority shall treat as ineligible and shall 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) conspiracy within the meaning of section 1 or 1A of the Criminal Law Act 1977(**20**) or article 9 or 9A of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983(**21**), or in Scotland the offence of conspiracy, where that conspiracy relates to participation in a criminal organisation as defined in Article 2 of the Council Framework Decision 2008/841/JHA(**22**);
- (b) involvement in serious organised crime or directing serious organised crime within the meaning of section 28 or 30 of the Criminal Justice and Licensing (Scotland) Act 2010(**23**);
- (c) corruption within the meaning of section 1 of the Public Bodies Corrupt Practices Act 1889(**24**) or section 1 of the Prevention of Corruption Act 1906(**25**);
- (d) the offence of bribery;
- (e) bribery within the meaning of section 1, 2 or 6 of the Bribery Act 2010(**26**);
- (f) bribery or corruption within the meaning of section 68 and 69 of the Criminal Justice (Scotland) Act 2003(**27**);
- (g) fraud, where the offence relates to fraud affecting the European Communities' financial interests as defined by Article 1 of the Convention on the protection of the financial interests of the European Communities(**28**), within the meaning of—
  - (i) the offence of cheating the Revenue;
  - (ii) the offence of conspiracy to defraud;

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(20) 1977 c. 45. Section 1 was amended by section 5(1) of the Criminal Attempts Act 1981 (c. 47), Part 2 of Schedules 1 and 2 to the Criminal Justice (Terrorism and Conspiracy) Act 1998 (c. 40) and Schedule 1 to the Trade Union and Labour Relations (Consolidation) Act 1992 (c. 52). Section 1A was inserted by section 5(1) of the Criminal Justice (Terrorism and Conspiracy) Act 1988 and was amended by section 72(1)(a) of the Coroners and Justice Act 2009 (c. 25).

(21) S.I. 1983/1120 (N.I.13); amended by section 6(1) of, and Part 2 of Schedules 1 and 2 to, the Criminal Justice (Terrorism and Conspiracy) Act 1998 (c. 40). There are other amendments which are not relevant to these Regulations.

(22) OJ No L 300, 11.11.2008, p.42.

(23) 2010 asp 13.

(24) 1889 c. 69. This Act has been repealed by Schedule 2 to the Bribery Act 2010 (c. 23).

(25) 1906 c. 34. Section 1 was amended by section 108(2) of the Anti-terrorism, Crime and Security Act 2001 (c. 24) and repealed by Schedule 2 to the Bribery Act 2010 (c. 23).

(26) 2010 c. 23.

(27) 2003 asp 7.

(28) OJ No C 316, 27.11.1995, p.49; relevant amending instruments are Council Act of 26 July 1995, OJ No C 316, 27.11.1995, p.48 and Council Decision of 6 December 2007, OJ No L 9, 12.1.2008, p.23.

- (iii) fraud or theft within the meaning of the Theft Act 1968(29), the Theft Act (Northern Ireland) 1969(30), the Theft Act 1978(31) or the Theft (Northern Ireland) Order 1978(32);
  - (iv) fraud within the meaning of section 2, 3 or 4 of the Fraud Act 2006(33);
  - (v) in Scotland, the offence of fraud;
  - (vi) in Scotland, the offence of theft;
  - (vii) fraudulent trading within the meaning of section 458 of the Companies Act 1985(34), article 451 of the Companies (Northern Ireland) Order 1986(35) or section 993 of the Companies Act 2006(36);
  - (viii) fraudulent evasion within the meaning of section 170 of the Customs and Excise Management Act 1979(37) or section 72 of the Value Added Tax Act 1994(38);
  - (ix) an offence in connection with taxation in the European Union within the meaning of section 71 of the Criminal Justice Act 1993(39);
  - (x) destroying, defacing or concealing of documents or procuring the execution of a valuable security within the meaning of section 20 of the Theft Act 1968(40) or section 19 of the Theft Act (Northern Ireland) 1969(41) or making, adapting, supplying or offering to supply articles for use in frauds within the meaning of section 7 of the Fraud Act 2006;
  - (xi) in Scotland, the offence of uttering; or
  - (xii) in Scotland, the criminal offence of attempting to pervert the course of justice;
- (h) terrorist offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Framework Decision 2002/475/JHA(42);

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- (29) 1968 c. 60. Sections 15A and 15B were inserted by section 1(1) of the Theft (Amendment) Act 1996 (c. 62) and section 15B was amended article 278 of the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001 (S.I. 2001/3649). Section 16 was amended by section 5(5) of the Theft Act 1978 (c. 31). Section 14(3) was repealed by Schedule 2 to the Postal Services Act (Consequential Modifications) Order 2003 (S.I. 2003/2908). Sections 15, 15A, 15B and 16 were repealed, and section 20 was amended, by Schedules 1 and 3 to the Fraud Act 2006 (c. 35). There are other amendments which are not relevant to these Regulations.
- (30) 1969 c. 16 (N.I.). Section 14(3) was repealed by Schedule 2 to the Postal Services Act 2000 (Consequential Modifications) Order 2003 (S.I. 2003/2908). Sections 15A and 15B were inserted by article 3(1) of the Theft (Amendment) (Northern Ireland) Order 1997 (S.I. 1997/277 (N.I.3)). Section 15B was amended by section 279 of the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001 (S.I. 2001/3649). Sections 15, 15A, 15B and 16 were repealed, and sections 19 and 23 were amended, by Schedules 1 and 3 to the Fraud Act 2006 (c. 35). There are other amendments which are not relevant to these Regulations.
- (31) 1978 c. 31. Section 1 was amended by section 4(1) of the Theft (Amendment) Act 1996 (c. 62). Section 5 was amended by Schedule 2 to the Extradition Act 1989 (c. 33) and Schedules 1 and 3 to the Fraud Act 2006 (c. 35). Sections 1 and 2 were repealed by Schedules 1 and 3 to the Fraud Act 2006. There are other amendments which are not relevant to these Regulations.
- (32) S.I. 1978/1407 (N.I.23); article 3 was amended by article 6(1) of the Theft (Amendment) (Northern Ireland) Order 1997 (S.I. 1997/277 (N.I.3)). Articles 3 and 4 were repealed by Schedules 1 and 3 to the Fraud Act 2006 (c. 35). There are other amendments which are not relevant to these Regulations.
- (33) 2006 c. 35.
- (34) 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).
- (35) S.I. 1986/1032 (N.I.6); article 451 was modified by regulation 4 of, and Part 1 of Schedule 2 to, the Limited Liability Partnerships Regulations (Northern Ireland) 2004 (S.R. (NI) 2004 No 307) and repealed by Schedule 16 to the Companies Act 2006 (c. 46).
- (36) 2006 c. 46; applied (with modifications) by regulation 47 of the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009 (S.I. 2009/1804) and by regulation 3 of, and Schedule 1 to, the Unregistered Companies Regulations 2009 (S.I. 2009/2436).
- (37) 1979 c. 2.
- (38) 1994 c. 23. Section 72 was amended by section 17 of the Finance Act 2003 (c. 40).
- (39) 1993 c. 36.
- (40) 1968 c. 60. Section 20 was amended by Schedules 1 and 3 to, the Fraud Act 2006 (c. 35).
- (41) 1969 c. 16 (N.I.). Section 19 was amended by Schedules 1 and 3 to the Fraud Act 2006 (c. 35).
- (42) OJ No L 164, 22.6.2002, p.3, as amended by Council Framework Decision 2008/919/JHA, OJ No L 330, 9.12.2008, p.21.

- (i) money laundering within the meaning of the Money Laundering Regulations 2003<sup>(43)</sup> or money laundering or terrorist financing within the meaning of the Money Laundering Regulations 2007<sup>(44)</sup>;
- (j) an offence in connection with the proceeds of criminal conduct within the meaning of section 93A, 93B or 93C of the Criminal Justice Act 1988<sup>(45)</sup> or article 45, 46 or 47 of the Proceeds of Crime (Northern Ireland) Order 1996<sup>(46)</sup>;
- (k) an offence in connection with proceeds of drug trafficking within the meaning of section 49, 50 or 51 of the Drug Trafficking Act 1994<sup>(47)</sup>;
- (l) in Scotland, the offence of incitement to commit any of the crimes described in this paragraph; or
- (m) any other offence within the meaning of Article 39(1) of the Defence and Security Procurement Directive as defined by the national law of any member 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—

- (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 debt relief restrictions order made against him 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<sup>(48)</sup>, or article 242 of the Insolvency (Northern Ireland) Order 1989<sup>(49)</sup>, 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 his 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<sup>(50)</sup> has passed a resolution or is the subject of an order by the court for the

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<sup>(43)</sup> [S.I. 2003/3075](#). These Regulations were revoked in relation to England, Wales and Scotland by regulation 1(3) of [S.I. 2007/2157](#) and in relation to Northern Ireland by [S.I. 2008/1741](#).

<sup>(44)</sup> [S.I. 2007/2157](#). Regulation 2(1) is amended by regulation 1 of [S.I. 2009/1912](#). There are other amendments which are not relevant to these Regulations.

<sup>(45)</sup> [1988 c. 33](#); sections 93A, 93B and 93C were inserted by sections 29(1), 30 and 31 of the Criminal Justice Act 1993 ([c. 36](#)) and were repealed by Schedules 11 and 12 to the Proceeds of Crime Act 2002 ([c. 29](#)).

<sup>(46)</sup> [S.I. 1996/1299 \(N.I. 9\)](#); articles 45 to 47 were repealed by Schedules 11 and 12 to the Proceeds of Crime Act 2002 ([c. 29](#)). There are other amendments which are not relevant to these Regulations.

<sup>(47)</sup> [1994 c. 37](#). Sections 49, 50 and 51 were repealed by Schedules 11 and 12 to the Proceeds of Crime Act 2002 ([c. 29](#)).

<sup>(48)</sup> [1986 c. 45](#).

<sup>(49)</sup> [S.I. 1989/2405 \(N.I. 19\)](#). There are amendments to this Order which are not relevant to these Regulations.

<sup>(50)</sup> [2002 c. 40](#).

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 of the company's business 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 the economic operator's business or profession;
- (e) has committed an act of grave misconduct in the course of the economic operator's business or profession, including a breach of obligations regarding security of information or security of supply required by a contracting authority in accordance with regulation 38 or 39 during a previous contract;
- (f) has been found, on the basis of any evidence, including protected data sources, not to possess the reliability necessary to exclude risks to the security of the United Kingdom;
- (g) 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 member State in which the economic operator is established;
- (h) has not fulfilled obligations relating to the payment of taxes under the law of any part of the United Kingdom or of the member State in which the economic operator is established;
- (i) is guilty of serious misrepresentation in providing any information referred to within this regulation or regulation 24, 25, 26 or 27 or has not provided such information in response to a request by the contracting authority;
- (j) in relation to procedures for the award of a services contract, is not licensed in the member State in which the economic operator is established or is not a member of an organisation in that member State when the law of that member 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
- (k) subject to paragraphs (7), (8), (9), (10), (11), (12) and (13), is required to be registered on the professional or trade register of the member State specified in Schedule 3 from which the economic operator originates or in which it is established, in order to pursue its professional activity and is not so registered.

(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 shall accept as conclusive evidence that an economic operator does not fall within the ground specified in paragraphs (1) or (4)(a), (b), (c), (d), (g) or (h) if that economic operator provides to the contracting authority—

- (a) in relation to a ground specified in paragraphs (1) and (4)(a), (b), (c) or (d)—
  - (i) an extract from the judicial record; or
  - (ii) in a member State which does not maintain such a judicial record, a document issued by the relevant judicial or administrative authority;
- (b) in relation to the ground specified in paragraph (4)(g) or (h), a certificate issued by the relevant competent authority; and
- (c) in a member 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), (g) or (h), 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 member State in which the economic operator is established.

(7) Sub-paragraphs (j) and (k) of paragraph (4) are without prejudice to EU law on the freedom of establishment and the freedom to provide services.

(8) An economic operator established in the United Kingdom or Ireland shall be treated as registered on the professional or trade register for the purposes of paragraph (4)(k) 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.

(9) An economic operator established in Cyprus shall be treated as registered on the professional or trade register for the purposes of paragraph (4)(k) if—

- (a) in relation to procedures for the award of a services contract or a 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 the economic operator 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 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.

(10) An economic operator established in Malta shall be treated as registered on the professional or trade register for the purposes of paragraph (4)(k) if—

- (a) the economic operator produces its “numru ta’ registrazzjoni tat-Taxxa tal-Valur Miżjud (VAT) u n-numru tal-licenzja ta’ kummerc”; and
- (b) where the economic operator is a member of a partnership or is a company, it produces the relevant registration number by the Malta Financial Services Authority.

(11) In relation to procedures for the award of a services contract, an economic operator established in Greece shall be treated as registered on the professional or trade register for the purposes of paragraph (4)(k)—

- (a) when the services to be provided under the contract are specified in category 14 of Schedule 2 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 (14).

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

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

(14) An economic operator established in a member State, other than the United Kingdom or Ireland, which either has an equivalent professional or trade register which is not listed in Schedule 3 or which does not have an equivalent professional or trade register shall be treated as registered on a professional or trade register for the purposes of paragraph (4)(k) on production of either a certificate that he is registered on the equivalent professional or trade register or where no such register exists, a declaration on oath, or in a member 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 he 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 regulation 17(7), 18(9), or 19(10), and
- (b) in selecting the economic operators to be invited to tender for or to negotiate the contract in accordance with regulation 17(8), 18(10) or 19(11),

a contracting authority may take into account any of the information specified in paragraph (6).

(2) Where the information specified in paragraph (6) 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 paragraph (1) or (2) shall specify in the contract notice 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 shall 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 shall accept such other information provided by the economic operator as the contracting authority considers appropriate.

(6) The information referred to in paragraph (1) is—

- (a) appropriate statements from the economic operator's bankers or where appropriate, evidence of relevant professional risk indemnity insurance;
- (b) 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 member State in which the economic operator is established; and

- (c) where appropriate, a statement, covering the three previous financial years of the economic operator, of—
  - (i) the overall turnover of the business of the economic operator; and
  - (ii) 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 contract.

**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 17(7), 18(9) or 19(10), and
- (b) in selecting the economic operators to be invited to tender for or to negotiate the contract in accordance with regulation 17(8), 18(10) or 19(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 supply contract requiring the siting or installation of goods, a services contract or a works contract, 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 five 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 five years, or during a shorter period if necessary, 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 service 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) a statement of the economic operator's—
    - (i) technical facilities;
    - (ii) measures for ensuring quality;
    - (iii) study and research facilities; and
    - (iv) internal rules regarding intellectual property;
  - (f) a check carried out by the contracting authority or on its behalf by a competent official body of the member State in which the economic operator is established—
    - (i) on the technical capacity of the economic operator; and
    - (ii) if relevant, on the economic operator's study and research facilities and quality control measures;
  - (g) in the case of works contracts, services contracts or supply contracts also covering siting and installation operations or services, the economic operator's educational and professional qualifications where the economic operator is an individual and—
    - (i) if any, those of the economic operator's managerial staff; and
    - (ii) those of 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 economic operator 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 three years;
  - (j) a description of the tools, material, technical equipment, staff numbers, know-how and sources of supply (with an indication of their geographical location when it is outside the territory of the EU) available to the economic operator to perform the contract, cope with any additional needs required by the contracting authority as a result of a crisis or carry out the maintenance, modernisation or adaptation of the goods covered by the contract;
  - (k) any samples, descriptions and photographs of the goods to be purchased or hired under the contract and certification of the authenticity of such samples, descriptions or photographs;
  - (l) certification by official quality control institutes or agencies of recognised competence, attesting that the goods to be purchased or hired under the contract conform to standards and technical specifications (within the meaning of regulation 12(1)) identified by the contracting authority;
  - (m) in the case of contracts involving, entailing or containing classified information, evidence of the ability to process, store and transmit such information at the level of protection required by the contracting authority;
  - (n) a certificate—
    - (i) attesting conformity to quality management systems standards based on the relevant European standard; and
    - (ii) from an independent accredited body established in any member State conforming to the European standards concerning accreditation and certification; or
  - (o) any other evidence of conformity to quality management systems standards 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 shall 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 EU Eco-Management and Audit Scheme; or
      - (bb) the relevant European or international standards; and
    - (ii) from an independent body established in any member 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) The evidence referred to in paragraph (2)(m) may include evidence of holding an appropriate security clearance recognised by the United Kingdom and the contracting authority may grant economic operators which do not yet hold the necessary security clearance additional time to obtain such clearance and, where this is the case, shall indicate this possibility and the time limit in the contract notice.

(6) A contracting authority which requires information to be provided in accordance with paragraph (2) shall specify in the contract notice the information which the economic operator must provide.

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

### **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 regulations 23, 24 or 25 or to clarify that information, provided that the information so required relates to the matters specified in regulations 23, 24 or 25.

### **Official lists of approved economic operators**

27.—(1) This regulation applies where an economic operator is registered in accordance with paragraph (2) or certified in accordance with paragraph (3).

(2) An economic operator is registered in accordance with this paragraph where it is registered on the official list of approved contractors, services providers or suppliers in a member State which maintains such lists and in which the economic operator is established.

(3) An economic operator is certified in accordance with this paragraph where it is certified by a certification body complying with European certification standards in a member State which maintains such certification and in which the economic operator is established.

(4) Where an economic operator which is registered or certified submits to the contracting authority—

- (a) a certificate of registration issued by the authority administering the official list referred to in paragraph (2), or

(b) a certificate issued by the body administering the certification referred to in paragraph (3), 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, the contracting authority shall accept the certificate as evidence of the matters referred to in paragraph (5).

(5) Subject to paragraph (6), where the certificate referred to in paragraph (4) deals with the grounds referred to in regulations 23(1), (4)(a) to (e), (i), and (k), 24(6)(b) and (c) and—

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

the contracting authority shall—

- (i) accept the certificate that the economic operator does not fall within the grounds specified in regulation 23(1), (4)(a) to (e), (i) and (k) and shall not be entitled to require the economic operator to submit such information relating to those grounds as is specified in regulation 23;
- (ii) not be entitled to require the economic operator to provide information specified in regulation 24(6)(b) and (c) and—
  - (aa) in the case of a contractor, regulation 25(2)(b), (d), (e), (f), (g), (h) and (i);
  - (bb) in the case of a services provider, regulation 25(2)(c), (d), (e), (f), (g) and (i); and
  - (cc) in the case of a supplier, regulation 25(2)(c), (d), (e), (f), (g), (k) and (l); and
- (iii) not be entitled to seek any supplementary information in accordance with regulation 26 in relation to the matters specified in sub-paragraph (c)(i) and (ii).

(6) A contracting authority is not required to comply with paragraph (5) 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 contract.

(2) Subject to paragraph (3), a contracting authority shall 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 contract on the grounds that the consortium has not formed a legal entity for the purposes of tendering for or negotiating the contract.

(3) Where a contracting authority awards a 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 shall 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 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 member State in which the services provider is established, that services provider is authorised to provide such services.

(2) In the case of—

- (a) a services contract,
- (b) a works contract, or
- (c) a 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 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.

### **Notification**

**30.**—(1) Where a contracting authority decides, prior to the stage at which it makes a decision to which regulation 33(1) (award decision) applies, to exclude an applicant, the contracting authority shall notify the applicant of that exclusion.

(2) In this regulation, “applicant” means an economic operator which submitted an offer, applied to be included amongst the economic operators to be selected to tender for or to negotiate the contract, or applied to be a party to the framework agreement.

(3) For the purposes of this regulation, an applicant is excluded if, and only if—

- (a) the applicant, or the applicant’s tender, is excluded as mentioned in regulation 17(7), 18(9) or 19(10); or
- (b) the applicant is not among those selected to be—
  - (i) invited to tender as mentioned in regulation 17(8);
  - (ii) invited to negotiate, as mentioned in regulation 18(10) or (25), or for the purposes of regulation 18(24); or
  - (iii) invited to participate, as mentioned in regulation 19(11) or (25), or for the purposes of regulation 19(24).

## **PART 5**

### **THE AWARD OF A CONTRACT**

#### **Criteria for the award of a contract**

**31.**—(1) Subject to regulation 19(29) and to paragraphs (6) and (9) of this regulation, a contracting authority shall award a 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) A contracting authority shall use criteria linked to the subject matter of the contract to determine that an offer is the most economically advantageous including quality, price, technical merit, functional characteristics, environmental characteristics, running costs, life cycle costs, cost effectiveness, after sales service, technical assistance, delivery date and delivery period, period of completion, security of supply, interoperability and operational characteristics.

(3) Where a contracting authority intends to award a contract on the basis of the offer which is the most economically advantageous it shall state the weighting which it gives to each of the criteria chosen in the contract notice or contract documents.

(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 shall indicate the criteria in descending order of importance in the contract notice or contract documents.

(6) If an offer for a 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 for 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 shall send a report justifying the rejection to the Cabinet Office for onward transmission to the Commission, except—

- (a) where the contracting authority is the Secretary of State for Defence, in which case the Ministry of Defence must transmit the report to the Commission; or
- (b) where the contracting authority is a contracting authority within the meaning of regulation 3(1)(w) of the Public Contracts Regulations 2006<sup>(51)</sup> or regulation 3(1)(aa) of the Public Contracts (Scotland) Regulations 2006<sup>(52)</sup> and the Secretary of State for Defence is “another contracting authority” within the meaning of those provisions, in which case the contracting authority must send the report to the Ministry of Defence 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 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.

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<sup>(51)</sup> S.I. 2006/5; amended by S.I. 2007/2157, 2007/3542, 2008/2256, 2008/2683, 2008/2848, 2009/1307 and 2009/2992.

<sup>(52)</sup> S.S.I. 2006/1; amended by S.I. 2007/2157 and S.S.I. 2007/565, 2008/94, 2008/291, 2008/376, 2009/428 and 2010/222. S.S.I. 2009/428 was amended by S.S.I. 2009/439.

### **Contract award notice**

**32.**—(1) Subject to paragraphs (2) and (3), a contracting authority which has awarded a contract or concluded a framework agreement shall, not later than 48 days after the award or conclusion, send to the Official Journal a notice, in the form of a contract award notice—

- (a) subject to sub-paragraph (b), containing the information specified in Annex IV to the Defence and Security Procurement Directive; or
- (b) if [Commission Regulation \(EC\) No 1564/2005](#) sets out a form to be used for this purpose, in that form and containing the information therein specified.

(2) Any of the information specified in the form of the contract award notice in Annex IV to the Defence and Security Procurement Directive or, if [Commission Regulation \(EC\) No 1564/2005](#) sets out a form to be used for that purpose, specified in that form, 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, in particular defence or security interests;
- (c) would prejudice the legitimate commercial interest of any person; or
- (d) might prejudice fair competition between economic operators.

(3) A contracting authority shall not be required to send a contract award notice in accordance with paragraph (1) where it awards a contract under a framework agreement.

### **Information about contract award procedures**

#### *Award decision notice*

**33.**—(1) Subject to paragraph (11), a contracting authority shall, at the earliest opportunity after the decision has been made, inform the tenderers and candidates of its decision to—

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

and shall do so by notice in writing by the most rapid means of communication practicable.

(2) Where it is to be sent to a tenderer, the notice referred to in paragraph (1) shall include—

- (a) the criteria for the award of the contract;
- (b) the reasons for the decision, including the characteristics and relative advantages of the successful tender, the score (if any) 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,

and anything required by paragraph (8);

- (c) the name of the economic operator—
  - (i) to be awarded the contract; or
  - (ii) to become a party to the framework agreement; and
- (d) a precise statement of either—

- (i) when, in accordance with regulation 34, the standstill period is expected to end and, if relevant, how the timing of its ending might be affected by any and, if so what, contingencies; or
  - (ii) the date before which the contracting authority will not, in conformity with regulation 34, enter into the contract or conclude the framework agreement.
- (3) Where it is to be sent to a candidate, the notice referred to in paragraph (1) shall include—
- (a) the reasons why the candidate was unsuccessful; and
  - (b) the information mentioned in paragraph (2), but as if the words “and relative advantages” were omitted from sub-paragraph (b).
- (4) Where the contract or framework agreement is permitted by these Regulations to be awarded or concluded without the prior publication of a contract notice, the contracting authority need not comply with paragraph (1).
- (5) Where the only tenderer is the one who is to be awarded the contract or who is to become a party to the framework agreement, and there are no candidates, the contracting authority need not comply with paragraph (1).
- (6) Where a contracting authority awards a contract under a framework agreement, that contracting authority need not comply with paragraph (1).

*Reasons to be given on request to unsuccessful economic operators*

- (7) Except to the extent that the contracting authority has already informed the economic operator (whether by notice under paragraph (1) or otherwise), and subject to paragraph (11), a contracting authority shall at the earliest opportunity and at the latest within 15 days of the date on which it receives a request in writing from any economic operator which was unsuccessful (whether in accordance with regulation 17(7), 17(8), 18(9), 18(10), 18(24), 18(25), 19(10), 19(11), 19(24), 19(25), 20(9) or 31)—
- (a) inform that economic operator of the reasons why it was unsuccessful; and
  - (b) if the economic operator submitted an admissible tender, the contracting authority shall inform that economic operator of the characteristics and relative advantages of the successful tender and—
    - (i) the name of the economic operator to be awarded the contract; or
    - (ii) the names of the parties to the framework agreement.
- (8) The reasons referred to in paragraphs (2)(b) and (7)(a) shall include—
- (a) any reason for the contracting authority’s decision that the economic operator did not meet the technical specifications—
    - (i) as specified in regulation 12(5) by an equivalent means; or
    - (ii) in terms of the performance or functional requirements in regulation 12(6) by an equivalent means; and
  - (b) any reason for the contracting authority’s decision that the economic operator did not meet its requirements of security of information and security of supply as set out in accordance with regulations 38 and 39.

*Abandonment or recommencement of procedure*

- (9) Subject to paragraph (11), a contracting authority shall as soon as possible after the decision has been made, inform any 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; or
  - (b) the conclusion of a framework agreement.

(10) A contracting authority which informs an economic operator of its decision in accordance with paragraph (9) shall—

- (a) include the reasons for the decision; and
- (b) provide the decision and reasons in writing if requested by the economic operator.

*Grounds for withholding information*

(11) A contracting authority may withhold any information to be provided in accordance with paragraph (1), (7) or (9) where the disclosure of such information—

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

*Records and reports*

(12) A contracting authority shall prepare a record in relation to each contract awarded by it or framework agreement concluded by it, specifying—

- (a) the name and address of the contracting authority;
- (b) the award procedure chosen;
- (c) the value of the consideration to be given under the contract or framework agreement and—
  - (i) the type of goods purchased or hired;
  - (ii) the work or works to be carried out; or
  - (iii) the services to be provided;
- (d) where offers were evaluated in accordance with regulation 31, 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, or
  - (ii) with which the framework agreement was concluded,and the reasons for having awarded the contract to, or concluded the framework agreement with that economic operator;
- (f) the names of the economic operators which were unsuccessful in the circumstances referred to in regulation 17(7), 17(8), 18(9), 18(10), 19(10), 19(11) or 31 and the reasons why they were unsuccessful;
- (g) if known to the contracting authority, the parts and proportion 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;
- (h) in the case of a contracting authority which used the negotiated procedure without the prior publication of a contract notice, which of the circumstances specified in regulation 16 constituted grounds for using that procedure;
- (i) in the case of a contracting authority which used the negotiated procedure without the prior publication of a contract notice, if relevant, reasons for exceeding the time limits laid down in regulation 16(3);

- (j) if relevant, the reasons for the framework agreement lasting more than seven years;
  - (k) 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 19(2); and
  - (l) where a contracting authority has abandoned a contract award procedure or the conclusion of a framework agreement, the reasons why the contracting authority has decided not to award the contract or conclude the framework agreement as the case may be.
- (13) A contracting authority shall keep appropriate information to document the progress of contract award procedures conducted by electronic means.
- (14) If the Commission requests a report containing the information specified in paragraph (12), the contracting authority shall send a written report containing that information, or the main features of it, to the Cabinet Office for onward transmission to the Commission, except—
- (a) where the contracting authority is the Secretary of State for Defence, in which case the Ministry of Defence must transmit the report to the Commission; or
  - (b) where the contracting authority is a contracting authority within the meaning of regulation 3(1)(w) of the Public Contracts Regulations 2006 or regulation 3(1)(aa) of the Public Contracts (Scotland) Regulations 2006 and the Secretary of State for Defence is “another contracting authority” within the meaning of those provisions, in which case the contracting authority must send the report to the Ministry of Defence for onward transmission to the Commission.

#### *Definitions*

- (15) For the purposes of this regulation—
- (a) “candidate” means an economic operator (other than a tenderer) which applied—
    - (i) to be included amongst the economic operators to be selected to tender or to negotiate the contract, or
    - (ii) to be a party to the framework agreement,
 but does not include an economic operator which has been informed of the rejection of its application, and the reasons for it; and
  - (b) “tenderer” means an economic operator which submitted an offer.

#### **Standstill period**

- 34.—**(1) Where regulation 33(1) applies, the contracting authority must not enter into the contract or conclude the framework agreement before the end of the standstill period.
- (2) Subject to paragraph (6), where the contracting authority sends a regulation 33(1) notice to all the relevant economic operators by facsimile or electronic means, the standstill period ends at midnight at the end of the 10th day after the relevant sending date.
- (3) Subject to paragraph (6), where the contracting authority sends a regulation 33(1) notice to all the relevant economic operators only by other means, the standstill period ends at whichever of the following occurs first—
- (a) midnight at the end of the 15th day after the relevant sending date;
  - (b) midnight at the end of the 10th day after the date on which the last of the economic operators to receive such a notice receives it.
- (4) In paragraphs (2) and (3), “the relevant sending date” means the date on which the regulation 33(1) notices are sent to the relevant economic operators, and if the notices are sent to different relevant economic operators on different dates, the relevant sending date is the date on which the last of the notices is sent.



(5) Subject to paragraph (6), where the contracting authority sends a regulation 33(1) notice to one or more of the relevant economic operators by facsimile or electronic means and to the others by other means, the standstill period ends at whichever of the following two times occurs latest—

- (a) midnight at the end of the 10th day after the date on which the last notice is sent by facsimile or electronic means;
- (b) the time when whichever of the following occurs first—
  - (i) midnight at the end of the 15th day after the date on which the last notice is sent by other means;
  - (ii) midnight at the end of the 10th day after the date on which the last of the economic operators to receive a notice sent by any such other means receives it.

(6) Where the last day of the standstill period reckoned in accordance with paragraphs (2) to (5) is not a working day, the standstill period is extended to midnight at the end of the next working day.

(7) In this regulation—

- “regulation 33(1) notice” means a notice given in accordance with regulation 33(1); and
- “relevant economic operators” means economic operators to which regulation 33(1) requires information to be given.

## PART 6

### MATTERS RELATING TO A CONTRACT

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

**35.**—(1) A contracting authority may include in the contract documents relating to a works contract or to a 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 works contract; or
- (b) the services to be provided under a services contract.

(2) A contracting authority which provides the information referred to in paragraph (1) shall 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**

**36.**—(1) A contracting authority may impose special conditions relating to the performance of a contract, provided that the special conditions are compatible with EU law and are indicated in the contract documents.

(2) The special conditions referred to in paragraph (1) may, in particular, concern sub-contracting or include the requirements of the contracting authority relating to the security of classified information and the security of supply in accordance with regulations 37, 38 and 39, or take environmental or social considerations into account.

## **Sub-contracting**

**37.**—(1) Subject to paragraph (3), the successful economic operator is free to select its sub-contractors for all sub-contracts and, in particular, must not be required to discriminate against potential sub-contractors on grounds of nationality.

(2) The contracting authority may require the economic operator—

(a) to indicate in its tender—

- (i) any part of the contract it intends to sub-contract;
- (ii) the details of any proposed sub-contractor; and
- (iii) the subject matter of the proposed sub-contracts; and

(b) to indicate any change occurring with respect to proposed sub-contracting before or during the execution of the contract.

(3) The contracting authority may oblige the successful economic operator to apply the provisions set out in Part 7 to all or certain sub-contracts which the successful economic operator intends to award to third parties.

(4) The contracting authority may reject the sub-contractors selected by—

- (a) the economic operator at the stage of the award procedure of the main contract, or
- (b) the successful economic operator during the performance of the main contract,

but such a rejection may only be based on criteria applied for the selection of the economic operators for the main contract.

(5) Where a contracting authority rejects a sub-contractor in accordance with paragraph (4), it must produce a written justification to the economic operator or the successful economic operator setting out why it considers that the sub-contractor does not meet the criteria but may withhold any information where any of the grounds referred to in regulation 33(11)(a) to (d) would apply to the disclosure of such information.

(6) Where the contracting authority requires an economic operator to fulfil requirements in accordance with paragraph (2) or (3) or may reject a sub-contractor in accordance with paragraph (4), it must set out the requirements or indicate the possibility of rejection in the contract notice.

(7) For the purposes of paragraph (3), the following are not to be considered to be third parties—

- (a) related undertakings;
- (b) groups of undertakings which have formed to obtain the contract, and undertakings related to them.

(8) For the purposes of paragraph (7), “related undertaking” means any undertaking over which the successful economic operator can exert a dominant influence, whether directly or indirectly, or any undertaking which can exert a dominant influence on the successful economic operator or which, as the successful economic operator, is subject to the dominant influence of another undertaking as a result of ownership, financial participation or the rules which govern it; and a dominant influence is to be presumed when, directly or indirectly in relation to another undertaking, the dominant undertaking—

- (a) holds a majority of the other undertaking’s subscribed capital;
- (b) controls a majority of the votes attached to the shares issued by the other undertaking; or
- (c) is entitled to appoint more than half of the other undertaking’s administrative, management or supervisory bodies.

(9) The economic operator must include a list of undertakings to which paragraph (7) applies in the tender and must update the list following any change of relationship between the undertakings.

### **Security of information**

**38.**—(1) Where a contract involves, requires or contains classified information, the contracting authority must specify, in the contract documents, the measures and requirements necessary to ensure the security of that information at the requisite level.

(2) Where paragraph (1) applies, the contracting authority may require that the tender contain particulars including the following—

- (a) a commitment from the economic operator and the sub-contractors already identified to safeguard appropriately the confidentiality of all classified information in their possession or coming to their notice throughout the duration of the contract and after the termination or conclusion of the contract;
- (b) a commitment from the economic operator to obtain the commitment referred to in subparagraph (a) from other sub-contractors to which it will sub-contract during the execution of the contract;
- (c) sufficient information on sub-contractors already identified to enable the contracting authority to determine that each of them possess the capabilities required to safeguard appropriately the confidentiality of the classified information to which they have access or which they are required to produce when carrying out their sub-contracting activities;
- (d) a commitment from the economic operator to provide the information referred to in subparagraph (c) on any new sub-contractor before awarding a sub-contract.

(3) The measures and requirements referred to in paragraphs (1) and (2) must comply with the security clearance provisions of the United Kingdom.

### **Security of supply**

**39.**—(1) The contracting authority must specify, in the contract documents, its security of supply requirements.

(2) Where a contracting authority specifies its requirements in accordance with paragraph (1), the contracting authority may require that the tender contain particulars including the following—

- (a) certification or documentation demonstrating to the satisfaction of the contracting authority that the economic operator will be able to honour its obligations regarding the export, transfer and transit of goods associated with the contract, including any supporting documentation received from the member State concerned;
- (b) an indication of any restriction on the contracting authority regarding disclosure, transfer or use of the products and services or any result of those products and services, which would result from export control or security arrangements;
- (c) certification or documentation demonstrating that the organisation and location of the economic operator's supply chain will allow it to comply with the requirements of the contracting authority concerning security of supply set out in the contract documents, and a commitment to ensure that possible changes in its supply chain during the execution of the contract will not adversely affect compliance with these requirements;
- (d) a commitment from the economic operator to establish or maintain the capacity required to meet additional needs required by the contracting authority as a result of a crisis, according to terms and conditions to be agreed;
- (e) any supporting documentation received from the economic operator's national authorities regarding the fulfilment of additional needs required by the contracting authority as a result of a crisis;
- (f) a commitment from the economic operator to carry out the maintenance, modernisation or adaptation of the goods covered by the contract;

- (g) a commitment from the economic operator to inform the contracting authority in due time of any change in its organisation, supply chain or industrial strategy that may affect its obligations to the contracting authority;
- (h) a commitment from the economic operator to provide the contracting authority, according to terms and conditions to be agreed, with all specific means necessary for the production of spare parts, components, assemblies and special testing equipment, including technical drawings, licences and instructions for use, in the event that it is no longer able to provide these goods.

(3) An economic operator may not be required to obtain a commitment from a member State that would prejudice that member State's freedom to apply, in accordance with international or EU law, its national export, transfer or transit licensing criteria in the circumstances prevailing at the time of such a licensing decision.

## PART 7

### RULES APPLICABLE TO SUB-CONTRACTING

#### CHAPTER 1

Sub-contracts awarded by economic operators which are not contracting authorities

#### Scope

**40.** When in accordance with regulation 37(3) this Part applies, an economic operator which is not a contracting authority must apply the rules set out in regulations 41 to 44 when it awards sub-contracts to third parties.

#### Principles

**41.** When applying the rules set out in this Part, the economic operator must act transparently and treat all potential sub-contractors in an equal and non-discriminatory way.

#### Thresholds and rules on advertising

**42.—(1)** When a successful economic operator which is not a contracting authority intends to award a sub-contract which has a value, net of value added tax, estimated not to be lower than the thresholds laid down in regulation 9, it must make known its intention by way of a sub-contract notice.

(2) Sub-contract notices must—

- (a) subject to sub-paragraph (b), contain the information referred to in Annex V to the Defence and Security Procurement Directive, or
- (b) if [Commission Regulation \(EC\) No 1564/2005](#) sets out a form to be used for this purpose, be in that form and contain the information therein specified,

and any other information deemed useful by the successful economic operator, if necessary with the approval of the contracting authority.

(3) Sub-contract notices must be published in accordance with regulation 48(1)(b) and (3) and the successful economic operator must not place a notice in any publication—

- (a) before the date on which the notice is despatched in accordance with regulation 48(1)(b); or
- (b) which contains any additional information to that contained in the notice despatched in accordance with regulation 48(1)(b).

(4) A sub-contract notice is not required when a sub-contract meets the conditions of regulation 43.

(5) The successful economic operator may fulfil the sub-contracting requirements in regulation 37(3) by awarding sub-contracts on the basis of a framework agreement concluded in accordance with the rules set out in regulations 41 and 44 and in paragraphs (1) to (4).

(6) Sub-contracts based on a framework agreement concluded in accordance with paragraph (5)

(a) must be awarded within the limits of the terms laid down in the framework agreement and, when awarding sub-contracts, the parties to the framework agreement must not include terms in the sub-contract that are inconsistent with the terms laid down in that framework agreement; and

(b) may only be awarded to sub-contractors that were originally party to the framework agreement.

(7) The term of a framework agreement concluded in accordance with paragraph (5) may not exceed seven years, except in exceptional circumstances determined by taking into account the expected service life of any delivered items, installations or systems, and the technical difficulties which a change of supplier may cause.

(8) A framework agreement concluded in accordance with paragraph (5) may not be used improperly or in such a way as to prevent, restrict or distort competition.

(9) For the award of sub-contracts which have a value, net of value added tax, estimated to be less than the thresholds laid down in regulation 9, successful economic operators must apply the principles of the TFEU regarding transparency and competition.

(10) Regulation 9 applies to the calculation of the estimated value of sub-contracts.

(11) In this regulation “framework agreement” means an agreement between the successful economic operator and one or more sub-contractors which establishes the terms (in particular the terms as to price and, where appropriate, quantity) under which the sub-contractor will enter into one or more contracts with the successful economic operator in the period during which the framework agreement applies.

### **Award of a sub-contract without publication of a sub-contract notice**

**43.—**(1) A successful economic operator may award a sub-contract without publication of a sub-contract notice in the following circumstances—

(a) in the case of any such sub-contract—

(i) in the absence of tenders, suitable tenders or applications in response to the sub-contract notice issued by the successful economic operator using the procedure set out in regulation 42(1) to (3), but only if the original terms of the proposed sub-contract are not substantially altered in the new sub-contract award procedure;

(ii) when, for technical reasons, or for reasons connected with the protection of exclusive rights, the sub-contract may be awarded only to a particular sub-contractor;

(iii) where the publication of a sub-contract notice would be incompatible with the urgency resulting from a crisis;

(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 successful economic operator, the requirement to publish a sub-contract notice cannot be met;

(b) in the case of a supply sub-contract—

(i) subject to paragraph (2), when the goods to be purchased or hired under the sub-contract are required by the successful economic operator as a partial replacement

- for, or in addition to, existing goods or an installation and when to obtain the goods from a sub-contractor other than the sub-contractor which supplied the existing goods or installation would oblige the successful economic operator 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 sub-contract; or
  - (bb) disproportionate technical difficulties in the operation and maintenance of the existing goods or the installation;
- (ii) for the purchase or hire of goods quoted and purchased on a commodity market;
  - (iii) 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 sub-contractor is subject to a procedure referred to in regulation 23(4)(a), (b) or (c);
- (c) in the case of a services sub-contract or a supply sub-contract—
- (i) for research and development services;
  - (ii) when the goods to be purchased or hired under the sub-contract are to be manufactured solely for the purpose of research or development but not when the goods are to be purchased or hired for quantity production to establish commercial viability or to recover research and development costs;
- (d) in the case of a works sub-contract or a services sub-contract—
- (i) subject to paragraph (4), when the successful economic operator wants the sub-contractor to carry out additional work or works or provide additional services which were not included in the project initially considered or in the original works sub-contract or services sub-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 sub-contract without major inconvenience to the successful economic operator; or
    - (bb) can be carried out or provided separately from those under the original sub-contract but are strictly necessary to the later stages of the performance of that sub-contract;
  - (ii) subject to paragraph (5), when a successful economic operator wants a sub-contractor which has entered into a works sub-contract or a services sub-contract with that successful economic operator to carry out a 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 sub-contract and which are in accordance with the project for the purpose of which the first sub-contract was entered into;
- (e) in the case of a sub-contract related to the provision of air and maritime transport services for the armed forces of a member State deployed or to be deployed abroad, when the successful economic operator has to procure such services from sub-contractors that guarantee the validity of their tenders only for such short periods that the requirement to publish the sub-contract notice cannot be met;
- (f) in the event of irregular tenders or the submission of tenders which are unacceptable under the conditions relating to the performance of a sub-contract or the criteria for qualitative selection prescribed by the contracting authority under regulation 44, but only if—
- (i) the original terms of the proposed sub-contract are not substantially altered; and
  - (ii) the successful economic operator includes in the new sub-contract award procedure all of, and only, those tenderers which satisfy all the criteria for the qualitative

selection of sub-contracts and which, during the prior sub-contract award procedure, submitted a tender.

(2) A successful economic operator must not award a sub-contract without publication of a sub-contract notice in accordance with paragraph (1)(b)(i) if the term of the proposed sub-contract, or the term of that sub-contract and of any other sub-contract entered into for the same purposes, is more than five years, unless there are exceptional circumstances which require that this period should be exceeded.

(3) For the purposes of paragraphs (2) and (5)(c), exceptional circumstances are to be determined by taking into account the expected service life of any delivered items, installations or systems, and the technical difficulties which a change of sub-contractor may cause.

(4) A successful economic operator must not award a sub-contract without publication of a sub-contract notice in accordance with paragraph (1)(d)(i), where the aggregate value of consideration to be given under the sub-contract for the additional work, works or services exceeds 50% of the value of the consideration payable under the original sub-contract.

(5) A successful economic operator must not award a sub-contract without publication of a sub-contract notice in accordance with paragraph 1(d)(ii) unless—

- (a) the sub-contract notice relating to the original sub-contract stated that a works sub-contract or a services sub-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 sub-contract might be awarded in accordance with paragraph (1)(d)(ii);
- (b) in determining the estimated value of the original sub-contract for the purposes of regulations 9 and 42(1), the successful economic operator 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 sub-contract is commenced within five years of the original sub-contract being entered into, unless there are exceptional circumstances which require that the procedure for the award of the new sub-contract be commenced outside this period.

#### **Criteria for qualitative selection of sub-contractors**

**44.—**(1) In the sub-contract notice, the successful economic operator must indicate the criteria for qualitative selection prescribed by the contracting authority, as well as any other criteria it will apply for the qualitative selection of sub-contractors.

(2) All the criteria for qualitative selection prescribed must be objective, non-discriminatory and consistent with the criteria applied by the contracting authority for the selection of the economic operators for the main contract and the capabilities required must be directly related to the subject of the sub-contract, and the levels of ability required must be commensurate with it.

(3) The successful economic operator is not to be required to sub-contract if it proves to the satisfaction of the contracting authority that—

- (a) none of the sub-contractors participating in the competition or their proposed bids meets the criteria indicated in the sub-contract notice; and
- (b) the failure to meet the criteria would prevent the successful economic operator from fulfilling the requirements set out in the main contract.

## CHAPTER 2

Sub-contracts awarded by economic operators which are contracting authorities

### Rules to be applied

45. Where an economic operator is a contracting authority, it must comply with the provisions on main contracts laid down in Parts 1 to 8 when it awards sub-contracts.

## PART 8

### MISCELLANEOUS

#### Statistical and other reports

46.—(1) Subject to regulation 47, a contracting authority which is not the Secretary of State for Defence shall, not later than 31st July in each year, send to the Cabinet Office or, where paragraph (3) applies, to the Ministry of Defence a report specifying in relation to each contract awarded by it or framework agreement concluded by it during the reporting period—

- (a) whether the contract was a services contract, a supply contract or a 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 restricted procedure, the negotiated procedure or the competitive dialogue procedure was used;
- (e) if the negotiated procedure was used without the prior publication of a contract notice, under which provision of regulation 16 that procedure was used;
- (f) in the case of—
  - (i) a 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 2;
  - (ii) a 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 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 1; and
- (g) the nationality of any economic operator to which the contract was awarded or the framework agreement was concluded and the State in which that economic operator is established.

(2) Subject to regulation 47, a contracting authority which is not the Secretary of State for Defence shall send to the Cabinet Office or, where paragraph (3) applies, to the Ministry of Defence a report containing such other information as the Cabinet Office or the Ministry of Defence, as appropriate, may from time to time require in respect of a particular contract or framework agreement (including a contract or framework agreement which is excluded from the application of these Regulations by regulation 7 or 9) for the purposes of providing the Commission with information.



(3) This paragraph applies where the contracting authority is a contracting authority within the meaning of regulation 3(1)(w) of the Public Contracts Regulations 2006<sup>(53)</sup> or regulation 3(1)(aa) of the Public Contracts (Scotland) Regulations 2006<sup>(54)</sup> and the Secretary of State for Defence is “another contracting authority” within the meaning of those provisions.

(4) 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**

**47.**—(1) Subject to paragraph (2), where a contracting authority—

- (a) is not a Minister of the Crown or a government department, and
- (b) is required in accordance with these Regulations to send a report to the Cabinet Office or the Ministry of Defence,

it shall instead send the report to the Minister responsible for that contracting authority and that Minister shall be responsible for sending the report to the Cabinet Office.

(2) Where a contracting authority is a Scottish public authority it must send the report to the Scottish Ministers, and the Scottish Ministers are responsible for sending the report to the Cabinet Office.

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

(4) Any questions 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 (3) shall be determined by the Cabinet Office whose determination is final.

(5) The requirement on a contracting authority to send any report in accordance with paragraph (1) or (2) to the Minister of the Crown responsible for that contracting authority shall be enforceable, on the application of the Minister responsible to the High Court or the Court of Session by specific implement, by mandatory order.

(6) In the application of this regulation to Northern Ireland references to the Minister shall include references to the head of a Northern Ireland department.

(7) In this regulation, “Scottish public authority” has the same meaning as in section 126(1) of the Scotland Act 1998<sup>(55)</sup>.

### **Publication of notices**

**48.**—(1) Any notice required by these Regulations to be sent to the Official Journal shall be—

- (a) in the correct format and contain the necessary information—
  - (i) subject to sub-sub-paragraph (ii), specified in Annex IV to the Defence and Security Procurement Directive, or
  - (ii) if [Commission Regulation \(EC\) No 1564/2005](#) sets out a form to be used for that purpose, specified in that form,

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

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<sup>(53)</sup> S.I. 2006/5, amended by S.I. 2007/2157, 2007/3542, 2008/2256, 2008/2683, 2008/2848, 2009/1307 and 2009/2992.

<sup>(54)</sup> S.S.I. 2006/1, amended by S.I. 2007/2157 and S.S.I. 2007/565, 2008/94, 2008/291, 2008/376, 2009/428 and 2010/222. S.S.I. 2009/428 was amended by S.S.I. 2009/439.

<sup>(55)</sup> 1998 c. 46.

paragraph (3) of Annex VI to the Defence and Security Procurement 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 17(6), 17(19) or 18(8) the notice shall be sent by facsimile or by electronic means in the format and in accordance with the procedures referred to in paragraph (3) of Annex VI to the Defence and Security Procurement Directive.

(3) Where a notice is not sent by electronic means in accordance with paragraph (1)(b) or (2), it shall not contain more than 650 words.

(4) The contracting authority shall not place a notice in any publication—

- (a) before the date on which the notice is despatched in accordance with paragraph (1)(b) or (2); or
- (b) which contains any additional information to that contained in the notice despatched in accordance with paragraph (1)(b) or (2) or published on the contracting authority's buyer profile in accordance with regulation 14(1).

(5) The contracting authority shall refer in the notice to the date of despatch 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 shall not publish a prior information notice on its buyer profile before the date on which notice of its publication in that form is despatched to the Commission in accordance with regulation 14(3) and the contracting authority shall refer to the date of that despatch on its buyer profile.

(7) The contracting authority shall retain evidence of the date of despatch 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 contract or framework agreement it may nevertheless publish such a notice in accordance with the provisions of this regulation.

### **Means of communication**

**49.**—(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);
- (d) by telephone in the circumstances referred to in paragraph (8); or
- (e) by any combination of those means of communication.

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

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

- (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 shall 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 shall 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 comply with national provisions adopted in accordance with Directive [1999/93/EC](#) of the European Parliament and the Council of 13th December 1999 on a Community framework for electronic signatures<sup>(56)</sup>;
  - (b) the exact time and date of the receipt of tenders and requests to participate are 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 shall set or change the dates for opening data received from economic operators;
  - (e) access to any data shall 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, 24, 25, 26 and 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.
- (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 shall 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) shall specify any requirement for such confirmation and the time limit for sending it in the contract notice.

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<sup>(56)</sup> OJ No L 13, 19.1.2000, p.12, as amended by Regulation [\(EC\) No 1137/2008](#) of the European Parliament and of the Council, OJ No L 311, 21.11.2008, p.1.

## PART 9

### Applications to the Court

#### Interpretation of Part 9

**50.**—(1) In this Part, except where the context otherwise requires—

“claim form” includes in Northern Ireland, the originating process by which proceedings are commenced;

“contract”, except in regulation 64, means a contract or a framework agreement;

“declaration of ineffectiveness” means a declaration made under regulation 59(2)(a) or 64(3);

“grounds for ineffectiveness” has the meaning given to it by regulation 60;

“proceedings” means court proceedings taken for the purposes of regulation 52; and

“standstill period”, and references to its end, have the same meaning as in regulation 34.

(2) In this Part, except in regulation 53(2), any reference to a period of time, however expressed, is to be interpreted subject to the requirement that, if the period would otherwise have ended on a day which is not a working day, the period is to end at the end of the next working day.

#### Duty owed to economic operators

**51.**—(1) This regulation applies to the obligation on a contracting authority to comply with—

(a) the provisions of these Regulations, other than regulations 16(2), 31(9), 33(12), 46 and 47(1) and (2); and

(b) any enforceable EU obligation in respect of a contract (other than one excluded from the application of these Regulations by regulation 7 or 9).

(2) That obligation is a duty owed to an economic operator.

#### Enforcement of duties through the Court

**52.**—(1) A breach of the duty owed in accordance with regulation 51 is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage.

(2) Proceedings for that purpose must be started in England and Wales and in Northern Ireland in the High Court or in Scotland in either the Sheriff Court or the Court of Session, and regulations 53 to 65 apply to such proceedings.

(3) Proceedings for that purpose must not be brought unless the economic operator bringing the proceedings has informed the contracting authority of the breach or the apprehended breach of the duty owed to it and of its intention to bring proceedings in respect of it.

(4) In these Regulations “the Court” means whichever Court in which proceedings are being conducted

#### General time limits for starting proceedings

**53.**—(1) This regulation limits the time within which proceedings may be started where the proceedings do not seek a declaration of ineffectiveness.

(2) Subject to paragraphs (3) and (4), such proceedings must be started within 3 months beginning with the date when the economic operator first knew or ought to have known that grounds for starting proceedings had arisen.

(3) Paragraph (2) does not require proceedings to be started before the end of any of the following periods—

- (a) where the proceedings relate to a decision which is sent to the economic operator by facsimile or electronic means, 10 days beginning with—
  - (i) the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;
  - (ii) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;
- (b) where the proceedings relate to a decision which is sent to the economic operator by other means, whichever of the following periods ends first—
  - (i) 15 days beginning with the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision;
  - (ii) 10 days beginning with—
    - (aa) the day after the date on which the decision is received, if the decision is accompanied by a summary of the reasons for the decision; or
    - (bb) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;
- (c) where sub-paragraphs (a) and (b) do not apply but the decision is published, 10 days beginning with the day on which the decision is published.

(4) The Court may extend the time limits imposed by this regulation (but not the limits imposed by regulation 54) where the Court considers that there is a good reason for doing so.

(5) For the purposes of this regulation, proceedings are to be regarded as started only when the claim form is served, or in Scotland proceedings are served, in compliance with regulation 55(1).

### **Special time limits for seeking a declaration of ineffectiveness**

**54.**—(1) This regulation limits the time within which proceedings may be started where the proceedings seek a declaration of ineffectiveness.

(2) Such proceedings must be started—

- (a) where paragraph (3) or (5) applies, within 30 days beginning with the relevant date mentioned in that paragraph;
- (b) in any event, within six months beginning with the day after the date on which the contract was entered into.

(3) This paragraph applies where a relevant contract award notice has been published in the Official Journal, in which case the relevant date is the day after the date on which the notice was published.

(4) For the purposes of paragraph (3), a contract award notice is relevant if, and only if—

- (a) the contract was awarded without the prior publication of a contract notice; and
- (b) the contract award notice includes justification of the decision of the contracting authority to award the contract without the prior publication of a contract notice.

(5) This paragraph applies where the contracting authority has informed the economic operator of—

- (a) the conclusion of the contract, and
- (b) a summary of the relevant reasons,

in which case the relevant date is the day after the date on which the economic operator was informed of the conclusion or, if later, was informed of a summary or the relevant reasons.

(6) In paragraph (5), “the relevant reasons” means the reasons which the economic operator would have been entitled to receive in response to a request under regulation 33(7).

(7) In this regulation, “contract award notice” means a notice in accordance with regulation 32(1).

(8) For the purposes of this regulation, proceedings are to be regarded as started only when the claim form is served, or in Scotland proceedings are served, in compliance with regulation 55(1).

### **Starting proceedings**

**55.**—(1) Where proceedings are to be started, the economic operator must—

- (a) after filing the claim form, serve it on the contracting authority; or
- (b) in Scotland, serve the proceedings on the contracting authority.

(2) Paragraph (3) applies where proceedings are started—

- (a) seeking a declaration of ineffectiveness; or
- (b) alleging a breach of regulation 34, 56 or 57(1)(b) where the contract has not been fully performed.

(3) In those circumstances, the economic operator must, as soon as practicable, send a copy of the claim form, or in Scotland the proceedings, to each person, other than the contracting authority, who is a party to the contract in question.

(4) The contracting authority must, as soon as practicable, comply with any request from the economic operator for any information that the economic operator may reasonably require for the purpose of complying with paragraph (3).

(5) In this regulation “serve” means serve in accordance with rules of court, and for the purposes of this regulation a claim form is, or in Scotland proceedings are, deemed to be served on the day on which it is, or they are, deemed by rules of court to be served.

### **Contract-making suspended by challenge to award decision**

**56.**—(1) Where—

- (a) proceedings are started in respect of a contracting authority’s decision to award the contract, and
- (b) the contract has not been entered into,

the starting of the proceedings requires the contracting authority to refrain from entering into the contract.

(2) The requirement continues until any of the following occurs—

- (a) the Court brings the requirement to an end by interim order under regulation 57(1)(a);
- (b) the proceedings at first instance are determined, discontinued or otherwise disposed of and no order has been made continuing the requirement (for example in connection with an appeal or the possibility of an appeal).

(3) For the purposes of paragraph (1), proceedings are to be regarded as started only when the claim form is, or in Scotland proceedings are, served in compliance with regulation 55(1).

(4) This regulation does not affect the obligations imposed by regulation 34.

### **Interim orders**

**57.**—(1) In proceedings, the Court may, where relevant, make an interim order—

- (a) bringing to an end the requirement imposed by regulation 56(1);

- (b) restoring or modifying that requirement;
  - (c) suspending the procedure leading to the award of the contract in relation to which the breach of the duty owed in accordance with regulation 51 is alleged;
  - (d) suspending the implementation of any decision or action taken by the contracting authority in the course of following such a procedure.
- (2) When deciding whether to make an order under paragraph (1), the Court must take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and in particular defence or security interests.
- (3) When deciding whether to make an order under paragraph (1)(a)—
- (a) the Court must also consider whether, if regulation 56(1) were not applicable, it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract; and
  - (b) only if the Court considers that it would not be appropriate to make such an interim order may it make an order under paragraph (1)(a).
- (4) If the Court considers that it would not be appropriate to make an interim order of the kind mentioned in paragraph (3)(a) in the absence of undertakings or conditions, it may require or impose such undertakings or conditions in relation to the requirement in regulation 56(1).
- (5) The Court may not make an order under paragraph (1)(a) or (b) or (4) before the end of the standstill period.
- (6) This regulation does not prejudice any other powers of the Court.

#### **Remedies where the contract has not been entered into**

- 58.**—(1) Paragraph (2) applies where—
- (a) the Court is satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with regulation 51; and
  - (b) the contract has not yet been entered into.
- (2) In those circumstances, the Court may do one or more of the following—
- (a) order the setting aside of the decision or action concerned;
  - (b) order the contracting authority to amend any document;
  - (c) award damages to an economic operator which has suffered loss or damage as a consequence of the breach.
- (3) This regulation does not prejudice any other powers of the Court.

#### **Remedies where the contract has been entered into**

- 59.**—(1) Paragraph (2) applies if—
- (a) the Court is satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with regulation 51; and
  - (b) the contract has already been entered into.
- (2) In those circumstances, the Court—
- (a) must, if it is satisfied that any of the grounds for ineffectiveness applies, make a declaration of ineffectiveness in respect of the contract unless regulation 61 requires the Court not to do so;
  - (b) must, where required by regulation 63, impose penalties in accordance with that regulation;

- (c) may award damages to an economic operator which has suffered loss or damage as a consequence of the breach, regardless of whether the Court also acts as described in subparagraphs (a) and (b);
- (d) must not order any other remedies.

(3) Paragraph (2)(d) is subject to regulation 64(3) and 64(9) (additional relief in respect of specific contracts where a framework agreement is ineffective) and does not prejudice any power of the Court under regulation 62(3) or 63(14) (orders which supplement a declaration of ineffectiveness or a contract-shortening order).

### **Grounds for ineffectiveness**

**60.**—(1) There are three grounds for ineffectiveness.

#### *The first ground*

(2) Subject to paragraph (3), the first ground applies where the contract has been awarded without the prior publication of a contract notice in any case in which these Regulations required the prior publication of a contract notice.

(3) The first ground does not apply if all the following apply—

- (a) the contracting authority considered the award of the contract without the prior publication of a contract notice to be permitted by these Regulations;
- (b) the contracting authority has had published in the Official Journal a voluntary transparency notice expressing its intention to enter into the contract; and
- (c) the contract has not been entered into before the end of a period of at least 10 days beginning with the day after the date on which the voluntary transparency notice was published in the Official Journal.

(4) In paragraph (3), “voluntary transparency notice” means a notice—

- (a) which contains the following information—
  - (i) the name and contact details of the contracting authority;
  - (ii) a description of the object of the contract;
  - (iii) a justification of the decision of the contracting authority to award the contract without the prior publication of a contract notice;
  - (iv) the name and contact details of the economic operator to be awarded the contract; and
  - (v) where appropriate, any other information which the contracting authority considers it useful to include; and
- (b) which, if [Commission Regulation \(EC\) No 1564/2005](#) sets out a form to be used for the purposes of paragraph (3), is in that form.

#### *The second ground*

(5) The second ground applies where all the following apply—

- (a) the contract has been entered into in breach of any requirement imposed by—
  - (i) regulation 34 (the standstill period);
  - (ii) regulation 56 (contract-making suspended by challenge to award); or
  - (iii) regulation 57(1)(b) (interim order restoring or modifying a suspension originally imposed by regulation 56);



- (b) there has also been a breach of the duty owed to the economic operator in accordance with regulation 51 in respect of obligations other than those imposed by regulation 34 (the standstill period) and this Part;
- (c) the breach mentioned in sub-paragraph (a) has deprived the economic operator of the possibility of starting proceedings in respect of the breach mentioned in sub-paragraph (b), or pursuing them to a proper conclusion, before the contract was entered into; and
- (d) the breach mentioned in sub-paragraph (b) has affected the chances of the economic operator obtaining the contract.

*The third ground*

- (6) Subject to paragraph (7), the third ground applies where all the following apply—
  - (a) the contract is based on a framework agreement;
  - (b) the contract was awarded in breach of any requirement imposed by regulation 20(7)(b), (8), and (9) (award of particular contracts under framework agreements through re-opening of competition); and
  - (c) the estimated value of the contract is equal to or exceeds the relevant threshold for the purposes of regulation 9.
- (7) The third ground does not apply if all the following apply—
  - (a) the contracting authority considered the award of the contract to be in accordance with the provisions mentioned in paragraph (6)(b);
  - (b) the contracting authority has, despite regulation 33(6), voluntarily complied with the requirements set out in regulation 33(1) to (3); and
  - (c) the contract has not been entered into before the end of the standstill period.

**General interest grounds for not making a declaration of ineffectiveness**

**61.**—(1) Subject to paragraph (5), where the Court is satisfied that any of the grounds for ineffectiveness applies, the Court must not make a declaration of ineffectiveness if—

- (a) the contracting authority or another party to the proceedings raises an issue under this regulation; and
- (b) the Court is satisfied that overriding reasons relating to a general interest, first and foremost in connection with defence or security interests, require that the effects of the contract should be maintained.

(2) For that purpose, economic interests in the effectiveness of the contract may be considered as overriding reasons only if in exceptional circumstances ineffectiveness would lead to disproportionate consequences.

(3) However, economic interests directly linked to the contract cannot constitute overriding reasons relating to a general interest.

- (4) For that purpose, economic interests directly linked to the contract include—
  - (a) the costs resulting from the delay in the execution of the contract;
  - (b) the costs resulting from the commencement of a new procurement procedure;
  - (c) the costs resulting from change of the economic operator performing the contract; and
  - (d) the costs of legal obligations resulting from the ineffectiveness.

(5) The Court must not make a declaration of ineffectiveness if the consequences of that ineffectiveness would seriously endanger the existence of a wider defence or security programme which is essential for the United Kingdom's security interests.

(6) For the purposes of paragraph (1)(b), overriding reasons may be taken to require that the effects of the contract should be maintained even if they do not require the Court to refrain from shortening the duration of the contract by an order under regulation 63(3)(a).

### **The consequences of ineffectiveness**

**62.**—(1) Where a declaration of ineffectiveness is made, the contract is to be considered to be prospectively, but not retrospectively, ineffective as from the time when the declaration is made and, accordingly, those obligations under the contract which at that time have yet to be performed are not to be performed.

(2) Paragraph (1) does not prevent the exercise of any power under which the orders or decisions of the Court may be stayed, but at the end of any period during which a declaration of ineffectiveness is stayed, the contract is then to be considered to have been ineffective as from the time when the declaration had been made.

(3) When making a declaration of ineffectiveness, or at any time after doing so, the Court may make any order that it thinks appropriate for addressing—

- (a) the implications of paragraph (1) or (2) for the particular circumstances of the case;
- (b) any consequential matters arising from the ineffectiveness.

(4) Such an order may, for example, address issues of restitution and compensation as between those parties to the contract who are parties to the proceedings so as to achieve an outcome which the Court considers to be just in all the circumstances.

(5) Paragraph (6) applies where the parties to the contract have, at any time before the declaration of ineffectiveness is made, agreed by contract any provisions for the purpose of regulating their mutual rights and obligations in the event of such a declaration being made.

(6) In those circumstances, the Court must not exercise its power to make an order under paragraph (3) in any way which is inconsistent with those provisions, unless and to the extent that the Court considers that those provisions are incompatible with the requirement in paragraph (1) or (2).

### **Penalties in addition to, or instead of, ineffectiveness**

**63.**—(1) Where the Court makes a declaration of ineffectiveness, it must also order that the contracting authority pay a civil financial penalty of the amount specified in the order.

(2) Paragraph (3) applies where—

- (a) in proceedings for a declaration of ineffectiveness, the Court is satisfied that any of the grounds for ineffectiveness applies but does not make a declaration of ineffectiveness because regulation 61 requires it not to do so; or
- (b) in any proceedings, the Court is satisfied that the contract has been entered into in breach of any requirement imposed by regulation 34, 56, or 57(1)(b), and does not make a declaration of ineffectiveness (whether because none was sought or because the Court is not satisfied that any of the grounds for ineffectiveness applies).

(3) In those circumstances, the Court must order at least one, and may order both, of the following penalties—

- (a) that the duration of the contract be shortened to the extent specified in the order;
- (b) that the contracting authority pay a civil financial penalty of the amount specified in the order.

(4) When the Court is considering what order to make under paragraph (1) or (3), the overriding consideration is that the penalties must be effective, proportionate and dissuasive.

(5) In determining the appropriate order, the Court must take account of all the relevant factors, including—

- (a) the seriousness of the relevant breach of the duty owed in accordance with regulation 51;
- (b) the behaviour of the contracting authority;
- (c) where the order is to be made under paragraph (3), the extent to which the contract remains in force.

(6) Where more than one economic operator starts proceedings in relation to the same contract, paragraph (4) applies to the totality of penalties imposed in respect of the contract.

*Civil financial penalties*

(7) Subject to paragraphs (8) and (9), where a contracting authority is ordered by the High Court of England and Wales to pay a civil financial penalty under this regulation—

- (a) the Court's order must state that the penalty is payable to the Minister for the Cabinet Office;
- (b) the Court must send a copy of the order to the Minister;
- (c) the contracting authority must pay the penalty to the Minister; and
- (d) the Minister must, on receipt of the penalty, pay it into the Consolidated Fund.

(8) Where the Minister for the Cabinet Office, or the Cabinet Office, is ordered to pay a civil financial penalty under this Part—

- (a) paragraph (7) does not apply; and
- (b) the Minister for the Cabinet Office must pay the penalty into the Consolidated Fund.

(9) Where the Secretary of State for Defence, or the Ministry of Defence, is ordered to pay a civil financial penalty under this Part—

- (a) paragraph (7) does not apply; and
- (b) the Secretary of State for Defence must pay the penalty into the Consolidated Fund.

(10) Where a contracting authority is ordered by the Sheriff Court or the Court of Session to pay a civil financial penalty under this regulation—

- (a) the Court's order must state that the penalty is payable to the Scottish Ministers;
- (b) the Court must send an extract of the decree (without charge) to the Scottish Ministers;
- (c) the contracting authority must pay the penalty to the Scottish Ministers; and
- (d) the Scottish Ministers must, when they receive the penalty, pay it into the Scottish Consolidated Fund.

(11) Paragraph (10) does not apply to any civil financial penalty ordered to be paid by the Scottish Ministers or an office in the Scottish Administration which is not a ministerial office.

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

(13) 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<sup>(57)</sup>.

(14) Subject to paragraph (15), where a contracting authority is ordered by the High Court of Northern Ireland to pay a civil financial penalty under this regulation—

- (a) the Court's order must state that the penalty is payable to the Department of Finance and Personnel;

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(57) 1998 c. 46.

- (b) the Court must send a copy of the order to the Department;
  - (c) the contracting authority must pay the penalty to the Department; and
  - (d) the Department must, when it receives the penalty, pay it into the Consolidated Fund of Northern Ireland.
- (15) Where the Department of Finance and Personnel is ordered to pay a civil financial penalty under this Part—
- (a) paragraph (14) does not apply; and
  - (b) the Department must pay the penalty into the Consolidated Fund of Northern Ireland.
- (16) Where a contracting authority is a non-Crown body—
- (a) any payment due under paragraph (7) may be enforced by the Minister for the Cabinet Office as a judgment debt due to the Minister; and
  - (b) any payment due under paragraph (14) may be enforced by the Department of Finance and Personnel as a judgment debt due to it.

#### *Contract shortening*

(17) When making an order under paragraph (3)(a), or at any time after doing so, the Court may make any order that it thinks appropriate for addressing the consequences of the shortening of the duration of the contract.

(18) Such an order may, for example, address issues of restitution and compensation as between those parties to the contract who are parties to the proceedings so as to achieve an outcome which the Court considers to be just in all the circumstances.

(19) Paragraph (20) applies where the parties to the contract have, at any time before the order under paragraph (3)(a) is made, agreed by contract any provisions for the purposes of regulating their mutual rights and obligations in the event of such an order being made.

(20) In those circumstances, the Court must not exercise its power to make an order under paragraph (17) in any way which is inconsistent with those provisions, unless and to the extent that the Court considers that those provisions are incompatible with the primary order that is being made, or has been made, under paragraph (3)(a).

(21) In paragraph (3)(a), “duration of the contract” refers only to its prospective duration as from the time when the Court makes the order.

#### **Ineffectiveness etc in relation to specific contracts based on a framework agreement**

**64.—**(1) In this regulation, “specific contract” means a contract which—

- (a) is based on the terms of a framework agreement; and
- (b) was entered into before a declaration of ineffectiveness (if any) was made in respect of the framework agreement.

(2) A specific contract is not to be considered to be ineffective merely because a declaration of ineffectiveness has been made in respect of the framework agreement.

(3) Where a declaration of ineffectiveness has been made in respect of the framework agreement, the Court must, subject to paragraph (5), make a separate declaration of ineffectiveness in respect of each relevant specific contract.

(4) For that purpose, a specific contract is relevant only if a claim for a declaration of ineffectiveness in respect of that specific contract has been made—

- (a) within the time limits mentioned in regulation 54 as applicable to the circumstances of the specific contract;

- (b) regardless of whether the claim was made at the same time as any claim for a declaration of ineffectiveness in respect of the framework agreement.
- (5) Regulation 61 (general interest grounds for not making a declaration of ineffectiveness) applies for the purposes of paragraph (3), insofar as the overriding reasons relate specifically to the circumstances of the specific contract.
- (6) This regulation does not prejudice the making of a declaration of ineffectiveness in relation to a specific contract in accordance with other provisions of these Regulations on the basis of—
- (a) the third ground of ineffectiveness set out in regulation 60(6) and (7); or
  - (b) the second ground of ineffectiveness set out in regulation 60(5), where—
    - (i) the relevant breach of the kind mentioned in regulation 60(5)(a) is entering into the specific contract in breach of regulation 56 or 57(1)(b); and
    - (ii) the relevant breach of the kind mentioned in regulation 60(5)(b) relates specifically to the award of the specific contract and the procedure relating to that award, rather than to the award of the framework agreement and the procedure relating to it.
- (7) A declaration of ineffectiveness must not be made in respect of a specific contract otherwise than in accordance with paragraph (3) or on a basis mentioned in paragraph (6).
- (8) Where a declaration of ineffectiveness is made in respect of a specific contract in accordance with paragraph (3)—
- (a) regulation 62 (the consequences of ineffectiveness) applies;
  - (b) regulation 63(1) (requirement to impose a civil financial penalty) does not apply.
- (9) Where the Court refrains, by virtue of paragraph (5), from making a declaration of ineffectiveness which would otherwise have been required by paragraph (3), the Court must, subject to paragraph (10), order that the duration of the contract be shortened to the extent specified in the order.
- (10) The extent by which the duration of the contract is to be shortened under paragraph (9) is the maximum extent, if any, which the Court considers to be possible having regard to what is required by the overriding reasons mentioned in paragraph (5).
- (11) In paragraphs (9) and (10), “duration of the contract” refers only to its prospective duration as from the time when the Court makes the order.

### **Injunctions against the Crown**

**65.** In proceedings against the Crown, the Court has power to grant an injunction or interdict despite sections 21 and 42 of the Crown Proceedings Act 1947(**58**).

## **PART 10**

### **Consequential Amendments and Transitional Provisions**

#### **Consequential amendments, repeals and revocations**

**66.** Subject to regulation 67, the instruments specified in Schedule 4 are amended in accordance with the provisions of that Schedule.

**Transitional provisions**

67.—(1) Nothing in these Regulations affects any contract award procedure commenced before 21st August 2011.

(2) Nothing in these Regulations affects the award of a specific contract based on a framework agreement where the framework agreement was concluded—

- (a) before 21st August 2011; or
- (b) on or after 21st August 2011 following a contract award procedure commenced before that date.

(3) Nothing in these Regulations affects the award of a specific contract under a dynamic purchasing system where the system was established —

- (a) before 21st August 2011; or
- (b) on or after 21st August 2011 following a contract award procedure commenced before that date.

(4) For the purposes of paragraphs (1), (2) and (3), a contract award procedure has been commenced before 21st August 2011 if, before that date—

- (a) a contract notice has been sent to the Official Journal in accordance with the Public Contracts Regulations 2006(59), the Utilities Contracts Regulations 2006(60), the Public Contracts (Scotland) Regulations 2006(61) or the Utilities Contracts (Scotland) Regulations 2006(62) where applicable in order to invite offers or requests to be selected to tender for or to negotiate in respect of a proposed public contract, contract, framework agreement or dynamic purchasing system;
- (b) the contracting authority has had published any form of advertisement seeking offers or expressions of interest in respect of a proposed public contract, contract, framework agreement or dynamic purchasing system; or
- (c) the contracting authority has contacted any economic operator in order to—
  - (i) seek expressions of interest or offers in respect of a proposed public contract, contract, framework agreement or dynamic purchasing system; or
  - (ii) respond to an unsolicited expression of interest or offer received from that economic operator in relation to a proposed public contract, contract, framework agreement or dynamic purchasing system.

(5) In this regulation—

- (a) “contract notice”, “dynamic purchasing system” and “framework agreement” have the same meaning as in the Public Contracts Regulations 2006, the Utilities Contracts Regulations 2006, the Public Contracts (Scotland) Regulations 2006 or the Utilities Contracts (Scotland) Regulations 2006;
- (b) “public contract” has the same meaning as in the Public Contracts Regulations 2006 and the Public Contracts (Scotland) Regulations 2006; and
- (c) “contract” has the same meaning as in the Utilities Contracts Regulations 2006 and the Utilities Contracts (Scotland) Regulations 2006.

(59) S.I. 2006/5; amended by S.I. 2007/2157, 2007/3542, 2008/2256, 2008/2683, 2008/2848, 2009/1307 and 2009/2992.

(60) S.I. 2006/6; amended by S.I. 2007/2157, 2007/3542, 2008/2256, 2008/2848 and 2009/3100.

(61) S.S.I. 2006/1; amended by S.I. 2007/2157 and S.S.I. 2007/565, 2008/94, 2008/291, 2008/376, 2009/428 and 2010/222. S.S.I. 2009/428 was amended by S.S.I. 2009/439.

(62) S.S.I. 2006/2; amended by S.I. 2007/2157 and S.S.I. 2007/565, 2008/94, 2008/291, 2008/376 and 2009/428. S.S.I. 2009/428 was amended by S.S.I. 2009/439.

28th July 2011

*Peter Luff*  
Parliamentary Under Secretary of State  
Ministry of Defence

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SCHEDULE 1

Regulation 3(1)

ACTIVITIES CONSTITUTING WORKS

<i>Division</i>	<i>Section F Group</i>	<i>Class</i>	<i>Subject</i>	<i>Construction Notes</i>	<i>CPV Code</i>
45			Construction	Construction of new buildings and works, restoring and common repairs	45000000
	45.1		Site preparation		45100000
		45.11	Demolition and wrecking of buildings; earth moving	Demolition of buildings and other structures Clearing of building sites Earth moving; excavation, landfill, levelling and grading of construction sites, trench digging, rock removal, blasting, etc. Site preparation for mining; overburden removal and other development and preparation of mineral properties and sites Building site drainage Drainage of agricultural or forestry land	45110000
		45.12	Test drilling and boring	Test drilling, test boring and core sampling for construction, geophysical, geological or similar purposes	45120000
	45.2		Building of complete constructions or parts of constructions; civil engineering		45200000
		45.21	General construction of buildings and civil engineering works	Construction of all types of buildings Construction of civil engineering constructions Bridges, including those for elevated highways, viaducts, tunnels and subways Long-distance pipelines, communication and power lines	45210000 Except: 45213316 45220000 45231000 45232000



<i>Division</i>	<i>Section F Group</i>	<i>Class</i>	<i>Subject</i>	<i>Construction Notes</i>	<i>CPV Code</i>
				Urban pipelines, urban communication and power lines	
				Ancillary urban works	
				Assembly and erection of prefabricated constructions on the site	
		45.22	Erection of roof covering and frames	Erection of roofs Roof covering Waterproofing	45261000
		45.23	Construction of highways, roads, airfields and sport facilities	Construction of highways, streets, roads, other vehicular and pedestrian ways Construction of railways Construction of airfield runways Construction works, other than buildings, for stadiums, swimming pools, gymnasiums, tennis courts, golf courses and other sports installations Painting of markings on road surfaces and car parks	45212212 and DA03 45230000 Except: 45231000 45232000 45234115
		45.24	Construction of water projects	Construction of: waterways, harbour and river works, pleasure ports (marinas), locks, etc. dams and dykes dredging subsurface work	45240000
		45.25	Other construction work involving special trades	Construction activities specialising in one aspect common to different kinds of structures, requiring specialised skill or equipment Construction of foundations, including pile driving Water well drilling and construction, shaft sinking Erection of non-self-manufactured steel elements	45250000 45262000

**Status:** This is the original version (as it was originally made).

<i>Division</i>	<i>Section F Group</i>	<i>Class</i>	<i>Subject</i>	<i>Construction Notes</i>	<i>CPV Code</i>
				Steel bending	
				Bricklaying and stone setting	
				Scaffolds and work platform erecting and dismantling, including renting of scaffolds and work platforms	
				Erection of chimneys and industrial ovens	
	45.3		Building installation		45300000
		45.31	Installation of electrical wiring and fittings	Installation in buildings or other construction projects of: electrical wiring and fittings telecommunications systems electrical heating systems residential antennas and aerials fire alarms burglar alarm systems lifts and escalators lightning conductors, etc.	45213316 45310000 Except: 45316000
		45.32	Insulation work activities	Installation in buildings or other construction projects of thermal, sound or vibration insulation	45320000
		45.33	Plumbing	Installation in buildings or other construction projects of: plumbing and sanitary equipment gas fittings heating, ventilation, refrigeration or air-conditioning equipment and ducts sprinkler systems	45330000
		45.34	Other building installation	Installation of illumination and signalling systems for roads, railways, airports and harbours  Installation in buildings or other construction projects of fittings and fixtures n.e.c.	45234115 45316000 45340000

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<i>Division</i>	<i>Section F Group</i>	<i>Class</i>	<i>Subject</i>	<i>Construction Notes</i>	<i>CPV Code</i>
	45.4		Building completion		45400000
		45.41	Plastering	Application in buildings or other construction projects of interior and exterior plaster or stucco, including related lathing materials	45410000
		45.42	Joinery installation	Installation of non-self-manufactured doors, windows, door and window frames, fitted kitchens, staircases, shop fittings and the like, of wood or other materials  Interior completion such as ceilings, wooden wall coverings, movable partitions, etc.	45420000
		45.43	Floor and wall covering	Laying, tiling, hanging or fitting in buildings or other construction projects of:  ceramic, concrete or cut stone wall or floor tiles  parquet and other wood floor coverings, carpets and linoleum floor coverings, including of rubber or plastic  terrazzo, marble, granite or slate floor or wall coverings  wallpaper	45430000
		45.44	Painting and glazing	Interior and exterior painting of buildings  Painting of civil engineering structures  Installation of glass, mirrors, etc.	45440000
		45.45	Other building completion	Installation of private swimming pools  Steam cleaning, sand blasting and similar activities for building exteriors  Other building completion and finishing work n.e.c.	45212212 and DA04 45450000

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<i>Division</i>	<i>Section F Group</i>	<i>Class</i>	<i>Subject</i>	<i>Construction Notes</i>	<i>CPV Code</i>
	45.5		Renting of construction or demolition equipment with operator		45500000
		45.50	Renting of construction or demolition equipment with operator		45500000

## SCHEDULE 2

Regulation 3(2)

## CATEGORIES OF SERVICES

<i>PART A</i>		
<i>Category</i>	<i>Services</i>	<i>CPV Code</i>
1	Maintenance and repair services	50000000-5, from 50100000-6 to 50884000-5 (except from 50310000-1 to 50324200-4 and 50116510-9, 50190000-3, 50229000-6, 50243000-0) and from 51000000-9 to 51900000-1
2	Foreign military-aid-related services	75211300-1
3	Defence services, military defence services and civil defence services	75220000-4, 75221000-1, 75222000-8
4	Investigation and security services	From 79700000-1 to 79720000-7
5	Land transport services	60000000-8, from 60100000-9 to 60183000-4 (except 60160000-7, 60161000-4), and from 64120000-3 to 64121200-2
6	Air transport services of passengers and freight, except transport of mail	60400000-2, from 60410000-5 to 60424120-3 (except 60411000-2, 60421000-5), from 60440000-4 to 60445000-9 and 60500000-3
7	Transport of mail by land and by air	60160000-7, 60161000-4, 60411000-2, 60421000-5
8	Rail transport services	From 60200000-0 to 60220000-6
9	Water transport services	From 60600000-4 to 60653000-0, and from 63727000-1 to 63727200-3
10	Supporting and auxiliary transport services	From 63100000-0 to 63111000-0, from 63120000-6 to 63121100-4,

<i>PART A</i>		
<i>Category</i>	<i>Services</i>	<i>CPV Code</i>
		63122000-0, 63512000-1 and from 63520000-0 to 6370000-6
11	Telecommunication services	From 64200000-8 to 64228200-2, 72318000-7, and from 72700000-7 to 72720000-3
12	Financial services: Insurance services	From 66500000-5 to 66720000-3
13	Computer and related services	From 50310000-1 to 50324200-4, from 72000000-5 to 72920000-5 (except 72318000-7 and from 72700000-7 to 72720000-3), 79342410-4, 9342410-4
14	Research and development services, where the benefits accrue exclusively to the contracting authority for its own use in the conduct of its own affairs and the services are to be wholly paid for by the contracting authority, and evaluation tests	From 73000000-2 to 73436000-7
15	Accounting, auditing and bookkeeping services	From 79210000-9 to 79212500-8
16	Management consulting services, but not arbitration and conciliation services, and related services	From 73200000-4 to 73220000-0, from 79400000-8 to 79421200-3 and 79342000-3, 79342100-4, 79342300-6, 79342320-2, 79342321-9, 79910000-6, 79991000-7 and 98362000-8
17	Architectural services: engineering services and integrated engineering services; urban planning and landscape engineering services; related scientific and technical consulting services; technical testing and analysis services	From 71000000-8 to 71900000-7 (except 71550000-8) and 79994000-8
18	Building-cleaning services and property management services	From 70300000-4 to 70340000-6 and from 90900000-6 to 90924000-0
19	Sewage and refuse disposal services; sanitation and similar services	From 90400000-1 to 90743200-9 (except 90712200-3), from 90910000-9 to 90920000-2 and 50190000-3, 50229000-6, 50243000-0
20	Training and simulation services in the fields of defence and security	80330000-6, 80600000-0, 80610000-3, 80620000-6, 80630000-9, 80640000-2, 80650000-5, 80660000-8

***PART B***

<i>Category</i>	<i>Services</i>	<i>CPV Code</i>
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<i>PART A</i>		
<i>Category</i>	<i>Services</i>	<i>CPV Code</i>
21	Hotel and restaurant services	From 55100000-1 to 55524000-9 and from 98340000-8 to 98341100-6
22	Supporting and auxiliary transport services	From 63000000-9 to 63734000-3 (except 63711200-8, 63712700-0, 63712710-3), from 63727000-1 to 63727200-3 and 98361000-1
23	Legal services	From 79100000-5 to 79140000-7
24	Personnel placement and supply services but not employment contracts	From 79600000-0 to 79635000-4 (except 79611000-0, 79632000-3, 79633000-0) and from 98500000-8 to 98514000-9
25	Health and social services	79611000-0 and from 85000000-9 to 85323000-9 (except 85321000-5, 85322000-2)
26	Other services	

### SCHEDULE 3

Regulation 23(4)(k)

#### PROFESSIONAL OR TRADE REGISTERS

##### *Services Contracts*

1. In relation to procedures for the award of a services contract, the following are the appropriate professional or trade registers for the purposes of regulation 23(4)(j)—

in Austria, the Firmenbuch, the Gewerberegister or the Mitgliederverzeichnisse der Landeskammern;

in Belgium, the Registre du Commerce/Handelsregister and the Ordres Professionels/Beroepsorden;

in Bulgaria, the Търговски регистър;

in the Czech Republic, the obchodní rejstřík;

in Denmark, the Erhvervs- og Selskabsstyrelsen;

in Estonia, the Registrate ja Infosüsteemide Keskus;

in Finland, the Kaupparekisteri and Handelsregistret;

in France, the Registre du commerce et des sociétés and the Répertoire des métiers;

in Germany, the Handelsregister, the Handwerksrolle, the Vereinsregister, Partnerschaftsregister and the Mitgliedsverzeichnisse der Berufskammern der Ländern;

in Hungary, the Cégnylvántartás, the egyéni vállalkozók jegyzői nyilvántartása, or a szakmai kamarák nyilvántartása;

in Italy, the Registro della Camera di commercio, industria, agricoltura e artigianato, the Registro delle commissioni provinciali per l'artigianato or the Consiglio nazionale degli ordini professionali;

in Latvia, the Uzņēmumu reģistrs (Enterprise Register);

in Lithuania, the Juridinių asmenų registras;

in Luxembourg, the Registre aux firmes and the Rôle de la Chambre des métiers;

in the Netherlands, the Handelsregister;

in Poland, Krajowy Rejestr Sądowy (National Court Registry);

in Portugal, the Registro Nacional das Pessoas Colectivas;

in Romania, the Registrul Comerțului;

in Slovakia, the Obchodný register;

in Slovenia, the Sodni register and the obrtni register;

in Spain, the Registro Oficial de Licitadores y Empresas Clasificadas del Estado; and

in Sweden, the aktiebolags-, handels- eller föreningsregistren.

#### *Works Contracts*

2. In relation to procedures for the award of a works contract the following are the appropriate professional or trade registers for the purposes of regulation 23(4)(j)—

in Austria, the Firmenbuch, the Gewerberegister or the Mitgliederverzeichnisse der Landeskammern;

in Belgium, the Registre du Commerce/Handelsregister;

in Bulgaria, the Търговски регистър;

in the Czech Republic, the obchodní rejstřík;

in Denmark, the Erhvervs- og Selskabsstyrelsen;

in Estonia, the Registrate ja Infosüsteemide Keskus;

in Finland, the Kaupparekisteri/Handelsregistret;

in France, the Registre du commerce et des sociétés and the Répertoire des métiers;

in Germany, the Handelsregister and the Handwerksrolle;

in Greece, the registrar of contractors' enterprises (Μητρώο Εργοληπτικών Επιχειρήσεων) of the Ministry for Environment, Town and Country Planning and Public Works (Υ.Π.Ε.Χ.Ω.Δ.Ε);

in Hungary, the Cégnylvántartás or the egyéni vállalkozók jegyzői nyilvántartása;

in Italy, the Registro della Camera di commercio, industria, agricoltura e artigianato;

in Latvia, the Uzņēmumu reģistrs (Enterprise Register);

in Lithuania, the Juridinių asmenų registras;

in Luxembourg, the Registre aux firmes and the Rôle de la Chambre des métiers;

in the Netherlands, the Handelsregister;

in Poland, Krajowy Rejestr Sądowy (National Court Registry);

in Portugal, the Instituto da Construção e do Imobiliário (INCI);

in Romania, the Registrul Comerțului;

in Slovakia, the Obchodný register;

in Slovenia, the Sodni register and the obrtni register;

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in Spain, the Registro Oficial de Licitadores y Empresas Clasificadas del Estado; and  
in Sweden, the aktiebolags-, handels- eller föreningsregistren.

### *Supply Contracts*

**3.** In relation to procedures for the award of a supply contract the following are the appropriate professional or trade registers for the purposes of regulation 23(4)(j)—

- in Austria, the Firmenbuch, the Gewerberegister or the Mitgliederverzeichnisse der Landeskammern;
- in Belgium, the Registre du Commerce/Handelsregister;
- in Bulgaria, the Търговски регистър;
- in the Czech Republic, the obchodní rejstřík;
- in Denmark, the Erhvervs- og Selskabsstyrelsen;
- in Estonia, the Registrate ja Infosüsteemide Keskus;
- in Finland, the Kaupparekisteri and Handelsregistret;
- in Germany, the Handelsregister and Handwerksrolle;
- in Greece, the Βιοτεχνικό ή Εμπορικό ή Βιομηχανικό Επιμελητήριο and the Μητρώο Κατασκευαστών Αμυντικού Υλικού;
- in Hungary, the Cégnylvántartás, the egyéni vállalkozók jegyzői nyilvántartása;
- in Italy, the Registro della Camera di commercio, industria, agricoltura e artigianato and the Registro delle Commissioni provinciali per l'artigianato;
- in Latvia, the Uzņēmumu reģistrs (Enterprise Register);
- in Lithuania, the Juridinių asmenų registras;
- in Luxembourg, the Registre aux firmes and the Rôle de la Chambre des métiers;
- in the Netherlands, the Handelsregister;
- in Poland, Krajowy Rejestr Sądowy (National Court Registry);
- in Portugal, the Registro Nacional das Pessoas Colectivas;
- in Romania, the Registrul Comerțului;
- in Slovakia, the Obchodný register;
- in Slovenia, the Sodni register and the obrtni register;
- in Spain, the Registro Mercantil; and
- in Sweden, the aktiebolags-, handels- eller föreningsregistren.

## SCHEDULE 4

Regulation 66

### CONSEQUENTIAL AMENDMENTS, REPEALS AND REVOCATIONS

#### **Public Contracts Regulations 2006**

- 1.—(1) Regulation 6 of the Public Contracts Regulations 2006(**63**) is amended as follows.
- (2) Delete the word “or” at the end of paragraph (2)(1).

(63) S.I. 2006/5; amended by S.I. 2007/2157, 2007/3542, 2008/2256, 2008/2683, 2008/2848, 2009/1307 and 2009/2992.



- (3) For “.” at the end of paragraph (2)(m) substitute “; or”.
- (4) After paragraph (2)(m) insert—
  - “(n) where—
    - (i) the Defence and Security Public Contracts Regulations 2011 apply; or
    - (ii) the application of those Regulations is excluded by regulation 9 (thresholds) or 7 (general exclusions) of those Regulations.”

### **Public Contracts (Scotland) Regulations 2006**

2.—(1) Regulation 6 of the Public Contracts (Scotland) Regulations 2006(64) is amended as follows.

- (2) Delete the word “or” at the end of paragraph (2)(l).
- (3) For “.” at the end of paragraph (2)(m) substitute “; or”.
- (4) After paragraph (2)(m) insert—
  - “(n) where—
    - (i) the Defence and Security Public Contract Regulations 2011 apply; or
    - (ii) the application of those Regulations is excluded by regulation 9 (thresholds) or 7 (general exclusions) of those Regulations.”

### **Utilities Contracts Regulations 2006**

3.—(1) Regulation 6 of the Utilities Contracts Regulations 2006(65) is amended as follows.

- (2) Delete the word “or” at the end of sub-paragraph (n)(ii).
- (3) For “.” at the end of sub-paragraph (o) substitute “; or”.
- (4) After sub-paragraph (o) insert—
  - “(p) where—
    - (i) the Defence and Security Public Contracts Regulations 2011 apply; or
    - (ii) the application of those Regulations is excluded by regulation 9 (thresholds) or 7 (general exclusions) of those Regulations.”

### **Utilities Contracts (Scotland) Regulations 2006**

4.—(1) Regulation 6 of the Utilities Contracts (Scotland) Regulations 2006(66) is amended as follows.

- (2) Delete the word “or” at the end of sub-paragraph (n)(ii).
- (3) For “.” at the end of sub-paragraph (o) substitute “; or”.
- (4) After sub-paragraph (o) insert—
  - “(p) where—
    - (i) the Defence and Security Public Contracts Regulations 2011 apply; or
    - (ii) the application of those Regulations is excluded by regulation 9 (thresholds) or 7 (general exclusions) of those Regulations.”

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(64) S.S.I. 2006/1; amended by S.I. 2007/2157 and S.S.I. 2007/565, 2008/94, 2008/291, 2008/376, 2009/428 and 2010/222. S.S.I. 2009/428 was amended by S.S.I. 2009/439.

(65) S.I. 2006/6; amended by S.I. 2007/2157, 2007/3542, 2008/2256, 2008/2848 and 2009/3100.

(66) S.S.I. 2006/2; amended by S.I. 2007/2157 and S.S.I. 2007/565, 2008/94, 2008/291, 2008/376 and 2009/428. S.S.I. 2009/428 was amended by S.S.I. 2009/439.

## **Quality Contracts Schemes (Tendering Requirements) (England) Regulations 2009**

5.—(1) Regulation 9 of the Quality Contracts Schemes (Tendering Requirements) (England) Regulations 2009<sup>(67)</sup> is amended as follows.

(2) After the words “the Public Contracts Regulations 2006” insert “,” and delete the word “or”.

(3) After the words “the Utilities Contracts Regulations 2006” insert “or the Defence and Security Public Contracts Regulations 2011”.

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### **EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

These Regulations implement Directive [2009/81/EC](#) of the European Parliament and Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts in the field of defence and security (OJ No L 216, 20.8.2009, p.76-136).

These Regulations specify the procedures to be followed in relation to the award of such contracts by public bodies called contracting authorities and by utilities.

These Regulations also provide remedies for breaches of these Regulations.

Regulation 2 requires the Secretary of State to review the operation and effect of these Regulations five years after they come into force and every five years thereafter and lay a report before Parliament. Following each review the Secretary of State will decide whether the Regulations should be revoked or be amended. A further instrument will be needed to revoke the Regulations or to amend them.

An impact assessment of the effect that this instrument will have has been prepared and placed in the library of each House of Parliament. Copies may be obtained from [www.legislation.gov.uk](http://www.legislation.gov.uk).

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<sup>(67)</sup> S.I. 2009/3244.