

SCOTTISH STATUTORY INSTRUMENTS

2015 No. 446

The Public Contracts (Scotland) Regulations 2015

PART 1

GENERAL

Citation, commencement and extent

- 1.—(1) These Regulations may be cited as the Public Contracts (Scotland) Regulations 2015.
- (2) Subject to paragraphs (3) to (6), these Regulations come into force on 18th April 2016.
- [^{F1}(3) Regulation 23(1) to (7) (rules applicable to communication) comes into force—
 - (a) for the purposes of regulations 35 (dynamic purchasing systems), 36 (electronic auctions), 37 (electronic catalogues), 52(1) (form and manner of sending notices for publication at EU level) and 54 (electronic availability of procurement documents) on 18th April 2016;
 - (b) for the purpose of regulation 38(6) (centralised purchasing activities and central purchasing bodies) on 18th April 2017; and
 - (c) for all other purposes on 18th October 2018.]
- (4) Regulation 60(7) (European Single Procurement Document: electronic format) comes into force on 18th April 2018.
- (5) Regulation 60(11)(b) (European Single Procurement Document: providing supporting documents) comes into force on 18th October 2018.
- (6) Regulation 62 (recourse to e-Certis) comes into force on 18th October 2018.
- (7) These Regulations extend to Scotland only.

Textual Amendments

- F1** Reg. 1(3) substituted (18.4.2016) by [The Public Contracts \(Scotland\) Amendment Regulations 2016](#) (S.S.I. 2016/47), regs. 1, **2(2)**

Interpretation

- 2.—(1) In these Regulations—

“accelerated procedure” means any of the following—

 - (a) an open procedure in which the contracting authority has exercised the power conferred by regulation 28(5) (open procedure) to fix a time limit for the receipt of tenders that is shorter than the minimum specified in regulation 28(3) (open procedure);
 - (b) a restricted procedure in which the contracting authority has exercised the power conferred by regulation 29(11) (restricted procedure) to fix a time limit—

Status: Point in time view as at 18/04/2020.

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- (i) for the receipt of requests to participate that is shorter than the minimum specified in regulation 29(3) (restricted procedure), or
- (ii) for the receipt of tenders that is shorter than the minimum specified in regulation 29(6) (restricted procedure);
- (c) a competitive procedure with negotiation in which the contracting authority has exercised the power conferred by regulation 30(11) (competitive procedure with negotiation) to fix a time limit—
 - (i) for the receipt of requests to participate that is shorter than the minimum specified in regulation 30(5) (competitive procedure with negotiation); or
 - (ii) for the receipt of initial tenders that is shorter than the minimum specified in regulation 30(6) (competitive procedure with negotiation);

“ancillary purchasing activity” means activity consisting of the provision of support to a purchasing activity, in particular in any of the following forms—

- (a) technical infrastructure enabling a contracting authority to award a public contract or to conclude a framework agreement for works, supplies or services;
- (b) advice on the conduct or design of a public procurement procedure;
- (c) preparation and management of a procurement procedure for or on behalf of the contracting authority concerned;

“body governed by public law” means a body that has legal personality, is established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character and which—

- (a) is financed for the most part by the State, regional or local authorities, or by any other body governed by public law;
- (b) is subject to management supervision by any such authority or body; or
- (c) has an administrative, managerial or supervisory board more than half the members of which were appointed by any body referred to in sub-paragraph (a);

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

“candidate” means an economic operator that has sought an invitation to or has been invited to take part in any of the following—

- (i) a restricted procedure;
- (ii) a competitive procedure with negotiation;
- (iii) a negotiated procedure without prior publication;
- (iv) a competitive dialogue procedure;
- (v) an innovation partnership;

“central government authority” means the [F2contracting authorities] listed in Schedule 1 and, where any such authority is succeeded by another authority which is itself a contracting authority, their successors;

“central purchasing body” means a contracting authority providing centralised purchasing activity whether or not including ancillary purchasing activities;

“centralised purchasing activity” means activity conducted on a permanent basis in one of the following forms—

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- (a) the acquisition of supplies or services for contracting authorities;
- (b) the award of public contracts, or the conclusion of framework agreements for works, supplies or services intended for contracting authorities;

“commenced”, in relation to procurement, means—

- (a) where a contract notice has been sent to the Official Journal in order to invite offers or requests to be selected to tender for or to negotiate, or be selected to participate in a dialogue in relation to a contract, in respect of a proposed public contract, framework agreement or dynamic purchasing system;
- (b) in any case where there is no requirement to send a contract notice to the Official Journal, where the contracting authority has dispatched any form of advertisement seeking offers or expressions of interest in the proposed contract, framework agreement or dynamic purchasing system;
- (c) in any case where there is no such advertising, where the contracting authority has contacted any economic operator in order to—
 - (i) seek expressions of interest or offers in respect of a proposed contract, framework agreement or dynamic purchasing system; or
 - (ii) in response to an unsolicited expression of interest or offer in respect of a proposed contract, framework agreement or dynamic purchasing system; or
- (d) where the contracting authority has sent a notice to the Official Journal in order to hold a design contest;

“Commission” means the European Commission;

“common technical specification” means a technical specification in the field of information and communication technology laid down in accordance with Articles 13 and 14 of Regulation (EU) No 1025/2012 of the European Parliament and of the Council on European standardisation, amending Council Directives [89/686/EEC](#) and [93/15/EEC](#) and Directives [94/9/EC](#), [94/25/EC](#), [95/16/EC](#), [97/23/EC](#), [98/34/EC](#), [2004/22/EC](#), [2007/23/EC](#), [2009/23/EC](#) and [2009/105/EC](#) of the European Parliament and of the Council and repealing Council Decision [87/95/EEC](#) and Decision No [1673/2006/EC](#) of the European Parliament and of the Council ^{M1} as amended from time to time;

“contract award notice” means the notice referred to in regulation 51 (contract award notices) or, where relevant, regulation 75(3) (publication of notices);

“contract notice”, subject to regulation 98(6), means the notice referred to in regulation 50 (contract notices) or, where relevant, regulation 75(1)(a) (publication of notices);

“contracting authority” means the state, a regional or local authority, body governed by public law or association formed by one or more such authorities or bodies;

“contracting entity” has the meaning given by Article 4 of the Utilities Directive;

“CPV” means the Common Procurement Vocabulary as adopted by Regulation (EC) No [2195/2002](#) of the European Parliament and of the Council on the Common Procurement Vocabulary ^{M2} as amended from time to time and “CPV Code” shall be construed accordingly;

“Defence and Security Regulations” means the Defence and Security Public Contracts Regulations 2011 ^{M3};

“design contest”, subject to regulations 98(6) and 99(5), means those procedures which enable the contracting authority to acquire, mainly in the fields of town and country planning, architecture, engineering or data processing, a plan or design selected by a jury after being out to competition with or without the award of prizes;

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“Directive” means Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC^{M4};

“disabled”, in relation to a person, means a disabled person within the meaning of the Equality Act 2010^{M5} and, in relation to a worker, means a disabled person who is a worker;

“dynamic purchasing system”, subject to regulations 98(6) and 99(5), means the system referred to in regulation 35 (dynamic purchasing systems);

“economic operator”, subject to regulation 99(5), means any person or public entity or group of such persons and/or entities including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market;

“electronic means” means electronic equipment for processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, radio, optical or other electromagnetic means;

“ESPD” means the European Single Procurement Document referred to in regulation 60(1) (European single procurement document: Use, content and form of the ESPD);

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

“European Technical Assessment” means the documented assessment of the performance of a construction product, in relation to its essential characteristics, in accordance with the relevant European Assessment Document as defined in point 12 of Article 2 of Regulation (EU) No 305/2011 of the European Parliament and of the Council laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC^{M6} as amended from time to time;

“framework agreement”, subject to regulations 98(6) and 99(5), means an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular terms with regard to price and, where appropriate, the quantity envisaged;

“GPA” means the Agreement on Government Procurement between certain parties to the World Trade Organisation signed in Marrakesh on 15th April 1994 as amended^{M7};

“innovation” means the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method or a new organisational method in business practice, workplace organisation or external relations including with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy^{M8} for smart, sustainable and inclusive growth;

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

“joint entity” includes European groupings of territorial cooperation under Regulation (EC) No 1082/2006 of the European Parliament and of the Council on a European grouping of territorial cooperation^{M9} and other entities established under EU law;

“label” means any document, certificate or attestation confirming that the works, products, services, processes or procedures in question meet certain requirements;

“label requirements” means the requirements to be met by the works, products, services, processes or procedures in question in order to obtain the label concerned;

“life cycle” means all consecutive or interlinked stages, including research and development to be carried out, production, trading and its conditions, transport, use and maintenance, throughout the existence of the product or the works or the provision of the service, from raw

material acquisition or generation of resources to disposal, clearance and end of service or utilisation;

“main contractor” means an economic operator to which a contracting authority has awarded a public contract or framework agreement;

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

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

“procurement” means the process leading to the award of a public contract or framework agreement or establishment of a dynamic purchasing system for the acquisition of works, supplies or services from an economic operator;

“procurement document” means any document produced or referred to by the contracting authority to describe or determine elements of the procurement, including the contract notice, the prior information notice where it is used as a means of calling for competition, the technical specifications, the descriptive document, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents;

“public contract”, subject to regulation 98(6), means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as its object the execution of works, the supply of products or the provision of services;

“public service contract” means a public contract having as its object the provision of services not including those comprising a public works contract (except a subsidised public service contract);

“public supply contract” means a public contract having as its object the purchase, lease, rental or hire purchase, with or without an option to buy, of products which contract may include, as an incidental matter, siting and installation operations;

“public works contract” means a public contract having as its object one of the following—

- (a) the execution or the design and execution of works related to one of the activities within the meaning of Schedule 2;
- (b) the execution or the design and execution of a work;
- (c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work; (except a subsidised public works contract);

“selection criteria” means, except in regulation 79 (rules on the organisation of design contests and the selection of participants), selection criteria set out by a contracting authority in accordance with regulation 59;

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

“sub-central contracting authority” means a contracting authority which is not a central government authority;

“technical reference” means any deliverable produced by European standardisation bodies, other than European standards, according to procedures adapted to the development of market needs;

“technical specifications” means the matters referred to in regulation 43(1)(b) to (6);

“tenderer” means an economic operator that has submitted a tender;

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“TFEU” means the Treaty on the Functioning of the European Union ^{M10};

“Utilities Directive” means Directive 2014/25/EU of the European Parliament and of the Council on procurement entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC^{M11};

“a work” means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function; but “works” is to be interpreted in accordance with paragraph (2);

“working day” means a day other than a Saturday, Sunday or a bank holiday in Scotland within the meaning of the Banking and Financial Dealings Act 1971 ^{M12}; and

“written” or “in writing” means any expression which can be read by a person, reproduced and subsequently communicated, including information transmitted and stored by electronic means.

(2) Unless the context otherwise requires, any expression used in both these Regulations and the Directive has the meaning that it bears in the Directive.

(3) The value in pounds sterling of any amount expressed in Euros in these Regulations, except in regulation 82, or in any of the provisions of the Directive mentioned in these Regulations shall be taken to be the value determined by the Commission in accordance with Article 6 of the Directive and published from time to time in the Official Journal.

(4) Except in regulation 88(4) (enforcement of duties through the courts), where these Regulations refer to a period of time—

- (a) where the period follows an action taken, the day on which the action is taken is not counted in the calculation of the period;
- (b) the period must include at least 2 working days; and
- (c) where the last day of the period is not a working day, the period is extended to include the next working day.

(5) In the interpretation of these Regulations, except where the context otherwise requires, reference to a “contracting authority” shall be deemed to include reference to a person undertaking a procurement subject to the application of these Regulations by virtue of regulation 14(1).

Textual Amendments

- F2** Words in [reg. 2\(1\)](#) substituted (18.4.2016) by [The Public Contracts \(Scotland\) Amendment Regulations 2016 \(S.S.I. 2016/47\)](#), regs. 1, 2(3)

Marginal Citations

- M1** OJ L 316, 14.11.2012, p.1.
- M2** OJ L 340, 16.12.2002, p.1, last amended by Commission Regulation (EC) No. 213/2008 (OJ L 74, 15.3.2008, p.1).
- M3** [S.I. 2011/1848](#), amended by [S.S.I. 2012/88](#), [S.S.I. 2012/89](#) and [S.I. 2015/102](#).
- M4** OJ L 94, 28.3.2014, p.65.
- M5** [2010 c.15](#).
- M6** OJ L 88, 4.4.2011, p.5, last amended by Commission Delegated Regulation (EU) No 574/2014 (OJ L 159, 28.5.2014, p.41).
- M7** All the substantive provisions of the Agreement were substituted by the Protocol which was approved, on behalf of the EU, by Council Decision 2014/115/EU (OJ No L 68, 7.3.2014, p.1), to which the text of the Protocol is attached (at OJ No L 68, 7.3.2014, p.2). In accordance with Article 3 of the Protocol, the Protocol has entered into force for the EU.
- M8** European Commission COM(2010) 2020 3.3.2010.

M9 OJ L 210, 31.7.2006, p.19.

M10 OJ C 326, 26.10.2012 p.47.

M11 OJ L 94, 28.3.2014, p.243.

M12 1971 c.80.

PART 2

RULES IMPLEMENTING THE PUBLIC CONTRACTS DIRECTIVE

CHAPTER 1

SCOPE AND GENERAL PRINCIPLES

SECTION 1

Scope

Subject Matter and application of these Regulations

3.—(1) This Part establishes the rules on procedures for the procurement by contracting authorities with respect to public contracts, framework agreements, dynamic purchasing systems and design contests which—

- (a) have a value estimated to be not less than the relevant threshold mentioned in regulation 5 (thresholds); and
 - (b) are not excluded from the scope of this Part by any other provision of these Regulations.
- (2) This Part is subject to Article 346 of the TFEU.

Mixed Procurement

4.—(1) Where a procurement has as its subject a mixed contract any part of which is covered by Article 346 of the TFEU ^{M13} or the Defence and Security Regulations ^{M14} regulation 17 (mixed procurement involving defence or security aspects) shall apply.

(2) Where a procurement has as its subject a mixed contract including works, supplies or services for the pursuit of an activity within the scope of the Utilities Directive the applicable rules shall be determined by Art 5 and 6 of the Utilities Directive.

(3) The application of these Regulations to a procurement which has as its subject a mixed contract, other than one to which paragraphs (1) or (2) apply, shall be determined by that part of the mixed contract that characterises the main subject of the contract in question. In the case of a mixed contract—

- (a) consisting partly of services of a kind referred to in regulation 74 (award of contracts for social and other specific services) and partly of other services; or
- (b) consisting partly of services and partly of supplies,

the main subject shall be determined by reference to which of the respective services or supplies has the highest estimated value.

(4) Where a contract includes different parts which are objectively separable and the procurement of which, if separate, includes matters that would be subject to the application of these Regulations and matters that would not, a contracting authority may choose to award—

- (a) separate contracts for the separate parts; or
- (b) a single contract.

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(5) Where a contracting authority decides to award separate contracts under [^{F3}paragraph (4)(a)] the application or otherwise of these Regulations to the procurement of each separate part shall be determined by reference to the characteristics of such part.

(6) Where a contracting authority decides to award a single contract under [^{F4}paragraph (4)(b)] these Regulations shall apply to the procurement of the single contract irrespective of the value of any parts that would, if separated, have not been subject to the application of these Regulations.

(7) Where a single contract referred to in [^{F5}paragraph (4)(b)] combines a public contract together with a concession contract the procurement shall be subject to the application of these Regulations where the estimated value of that part of the contract that would be a public contract is equal to or greater than the applicable threshold determined in accordance with regulation 5 (thresholds).

(8) Where a contract includes different parts which are objectively not separable the application or otherwise of these Regulations to the procurement of that contract shall be determined by reference to the main subject-matter of that contract.

Textual Amendments

- F3** Words in [reg. 4\(5\)](#) substituted (18.4.2016) by [The Public Contracts \(Scotland\) Amendment Regulations 2016 \(S.S.I. 2016/47\)](#), regs. 1, [2\(4\)\(a\)](#)
- F4** Words in [reg. 4\(6\)](#) substituted (18.4.2016) by [The Public Contracts \(Scotland\) Amendment Regulations 2016 \(S.S.I. 2016/47\)](#), regs. 1, [2\(4\)\(b\)](#)
- F5** Words in [reg. 4\(7\)](#) substituted (18.4.2016) by [The Public Contracts \(Scotland\) Amendment Regulations 2016 \(S.S.I. 2016/47\)](#), regs. 1, [2\(4\)\(b\)](#)

Marginal Citations

- M13** OJ C 326, 26.10.2012 p.47.
- M14** [S.I. 2011/1848](#), amended by [S.S.I. 2012/88](#), [S.S.I. 2012/89](#) and [S.I. 2015/102](#).

Thresholds

5.—(1) These Regulations apply to a procurement where the estimated value of the contract to be awarded (not including value added tax) is equal to or greater than—

- (a) in the case of a public works contract (except a subsidised public works contract), the amount specified in Article 4(a) of the Directive;
- (b) in the case of a public supply contract, except one to which paragraph (2)(b) applies, or a public service contract (except a subsidised public service contract) to be awarded by a central government authority or a design contest organised by such an authority, the amount specified in Article 4(b) of the Directive;
- (c) in the case of a public supply contract, except one to which paragraph (2)(a) applies, or a public service contract (except a subsidised public service contract) to be awarded by a sub-central contracting authority or a design contest organised by such an authority, the amount specified in Article 4(c) of the Directive;
- (d) in the case of a public service contract for a service listed in Schedule 3 (social and other specified services), the amount specified in Article 4(d) of the Directive.

(2) Where the procurement is for the award of a public supply contract by a contracting authority operating in the field of defence—

- (a) the amount specified in regulation 5(1)(b) applies to contracts concerning products referred to in Schedule 4 even where the contracting authority is a sub-central contracting authority; and

- (b) the amount specified in regulation 5(1)(c) applies to contracts concerning products not referred to in Schedule 4 even where the contracting authority is a central government authority.
- (3) Where a proposed work, acquisition of supplies or provision of services may be procured in the form of separate lots these Regulations do not apply to the award of a contract for a lot where—
 - (a) the estimated value of that lot is less than—
 - (i) 80 000 euros, in the case of supplies or services; or
 - (ii) 1 million euros, in the case of works; and
 - (b) the estimated total aggregate value of all such lots to be awarded without application of these Regulations does not exceed 20% of the estimated aggregate value of all the lots calculated in accordance with regulation 6 (methods for calculating the estimated value).
- (4) In this Regulation reference to a “contract” includes reference to a framework agreement, dynamic purchasing system or design contest.
- (5) References in paragraph (1) to the Directive are references to the Directive as amended from time to time.

Methods for calculating the estimated value

- 6.—(1) A contracting authority must calculate the estimated value of a contract by reference to the total amount payable under it (regardless of the form of such payment), not including value added tax.
 - (2) The total amount payable includes the amount payable as a result of the exercise of any form of option and any renewal of the contract as explicitly set out in the procurement documents.
 - (3) Where a contracting authority provides for prizes or payments to candidates or tenderers it must take them into account when calculating the estimated value.
 - (4) Where a contracting authority is comprised of separate operational units the authority —
 - (a) may calculate the estimated value by reference to each such unit where that unit is independently responsible for its procurement; and
 - (b) must calculate the estimated value by reference to the total for all the operational units which are not so responsible.
 - (5) A contracting authority must not choose a method to be used to calculate the estimated value of a contract with the intention of excluding the contract from the application of these Regulations.
 - (6) A contracting authority must not sub-divide a contract with the effect of excluding the contract from the application of these Regulations unless such sub-division is justified by objective reasons.
 - (7) The estimated value must be the value estimated at the moment at which the procurement is commenced.
 - (8) In the case of a framework agreement or dynamic purchasing system the estimated value shall be the total estimated value of all of the contracts envisaged pursuant to and for the total term of the agreement or system.
 - (9) In the case of an innovation partnership the estimated value shall be the total estimated value of the research and development activities to take place during all stages of the partnership together with the estimated value of works, supplies or services to be developed and delivered by the partner.
 - (10) In the case of a public works contract the estimated value shall include the total estimated value of any supplies and services that are necessary for executing the works and are to be provided by the contracting authority to the contractor.
 - (11) In the case of a public works contract or public service contract to be awarded in the form of separate lots, the estimated value shall be the total estimated value of all such lots.

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(12) In the case of a contract for supplies which may be awarded in the form of separate lots the estimated value shall be the total estimated value of all such lots and these Regulations apply to each lot accordingly where the aggregate value of the lots is equal to or greater than the relevant threshold referred to in regulation 5 (thresholds).

(13) In the case of public supply contracts or public service contracts which are regular in nature or which are intended to be renewed in a given period, the estimated value shall be calculated by reference to—

- (a) the total actual value of contracts of the same type awarded during the period of 12 months or the financial year preceding the proposed award of a further contract but with adjustment of such value, where possible, to take account of the changes in quantity or value which the authority considers likely to occur during the period of 12 months following the award of the contract; or
- (b) the total estimated value of the successive contracts awarded during the 12 months following the first delivery, or during the financial year where that is longer than 12 months.

(14) In the case of a public supply contract relating to the leasing, rental, hire or hire purchase of products the estimated value shall be—

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

(15) In the case of a public service contract for a service of a kind mentioned in this paragraph, the estimated value shall be calculated by reference to—

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

(16) In the case of a public service contract which does not indicate a total price, the estimated value must be calculated by reference to—

- (a) in the case of a contract for a fixed term of less than or equal to 48 months, the total value of the contract for its full term; and
- (b) in the case of a contract for a fixed term of more than 48 months or a contract without a fixed term, the monthly value multiplied by 48.

Exclusions: Utilities

7. These Regulations do not apply to procurement for the award of a contract or to the organisation of a design contest by a contracting entity where—

- (a) the contract or design contest is for the purpose of carrying out any of the activities referred to in Articles 8 to 14 of the Utilities Directive (gas and heat; electricity; water; transport services; ports and airports; postal services; extraction of oil and gas and exploration for or extraction of coal or other solid fuels);
- (b) the contract or design contest is excluded from the application of the Utilities Directive—
 - (i) under Articles 18 (resale), 23 (water, energy or fuels) and 34 (activities directly exposed to competition); or

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- (ii) by reason of the value being less than the threshold provided for in Article 15, of that Directive;
- (c) the contracting entity is a contracting authority providing postal services within the meaning of paragraph (b) of Article 13(2) of the Utilities Directive as amended from time to time and the contract is for the purpose of—
 - (i) added value services linked to and provided entirely by electronic means (including the secure transmission of coded documents by electronic means, address management services and transmission of registered electronic mail);
 - (ii) financial services specified under CPV Codes 66100000-1 to 66720000-3, within the meaning of paragraph (d) of Article 21 of the Utilities Directive and including in particular postal money orders and postal giro transfers;
 - (iii) philatelic services; or
 - (iv) logistics services (services combining physical delivery, warehousing or both with other non-postal functions).

Exclusions: Concessions

8.—(1) These Regulations do not apply to procurement for the award of works or services concessions which—

- (a) are subject to the application of the Concessions Directive; or
- (b) would be subject to the application of that Directive but for any provision contained therein.

(2) In this regulation—

“concession” has the meaning given by Article 5 of the Concessions Directive; and

“Concessions Directive” means Directive 2014/23/EU of the European Parliament and of the Council on the award of concession contracts as amended from time to time ^{M15}.

Marginal Citations

M15 OJ L 94, 28.3.2014, p.1.

Exclusions: Electronic Communications

9.—(1) These Regulations do not apply to procurement for the award of a public contract or to the organisation of a design contest for the principal purpose of permitting the contracting authority to provide or exploit public communications networks or to provide an electronic communications service to the public.

(2) In this regulation, “public communications networks” and “electronic communication service” have the same meanings as in Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services ^{M16} as amended from time to time.

Marginal Citations

M16 OJ No L 108, 24.4.2003, p.33, last amended by Directive 2009/140/EC of the European Parliament and of the Council (OJ No L 337, 18.12.2009, p.37).

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Exclusions: Public contracts awarded, and design contests organised, pursuant to international rules

10.—(1) These Regulations do not apply to procurement for the award of a public contract or the organisation of a design contest which the contracting authority is obliged to award or organise in accordance with procurement procedures which are established by—

- (a) an international agreement or any other legal instrument creating international law obligations, concluded in conformity with the Treaties, between the United Kingdom and one or more third country or any part thereof and covering works, supplies or services intended for the joint implementation or exploitation of a project by the signatories; or
- (b) an international organisation.

(2) These Regulations do not apply to procurement for the award of a public contract or the organisation of a design contest which the contracting authority undertakes or organises in accordance with procurement rules provided by an international organisation or international financing institution, where the contract or design contest is fully financed by that organisation or institution or is co-financed for the main part by that organisation or institution.

(3) This Regulation does not apply to procurement for the award of a contract or the organisation of a design contest involving defence or security aspects awarded or organised pursuant to international rules.

Exclusions: Specific service contracts

11.—(1) These Regulations do not apply to procurement for the award of a public service contract, framework agreement or dynamic purchasing system—

- (a) for the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or of any estate, right, servitude or other interest in or over such land, buildings or property;
- (b) by an audio-visual or radio media service provider, for the acquisition, development production or co-production of programme material intended for audio-visual media services or radio media services;
- (c) to an audio-visual or radio media service provider, for broadcasting time or programme provision;
- (d) for arbitration or conciliation services;
- (e) for any of the following legal services—
 - (i) legal representation of a client by a lawyer within the meaning of Article 1 of the Lawyers' Services Directive in—
 - (aa) an arbitration or conciliation held in a member State, a third country or before an international arbitration or conciliation instance; or
 - (bb) judicial proceedings before the courts, tribunals or public authorities of a member State or a third country or before international courts, tribunals or institutions;
 - (ii) legal advice given by a lawyer within the meaning of Article 1 of the Lawyers' Services Directive—
 - (aa) in preparation of any proceedings referred to in paragraph (i); or
 - (bb) where there is a tangible indication and high probability that the matter to which the advice relates will become the subject of such proceedings;
 - (iii) document certification or authentication services which must be provided by a notary public;

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- (iv) legal services provided by trustees or appointed guardians or other legal services the providers of which are designated by a court or tribunal in the member State concerned or are designated by law to carry out specific tasks under the supervision of such tribunals or courts;
 - (v) other legal services which, in the member State concerned, are connected, even occasionally, with the exercise of official authority;
 - (f) for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC^{M17} as amended from time to time;
 - (g) for central bank services;
 - (h) for operations conducted with the European Financial Stability Facility or the European Stability Mechanism;
 - (i) for loans, whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments;
 - (j) which is an employment contract;
 - (k) for civil defence, civil protection or danger prevention services that are provided by non-profit organisations or associations, and which are specified under CPV Codes 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8, 98113100-9 and 85143000-3 except patient transport ambulance services;
 - (l) for public passenger transport services by rail or metro; or
 - (m) for political campaign services which are specified under CPV Codes 79341400-0, 92111230-3 and 92111240-6, when awarded by a political party in the context of an election campaign.
- (2) In this Regulation—
- (a) “audio-visual media services” has the meaning given by Article 1(1)(a) of the Audio-visual Media Services Directive;
 - (b) “Audio-visual Media Services Directive” means Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services as amended from time to time^{M18};
 - (c) “Lawyers' Services Directive” means Council Directive 77/249/EEC to facilitate the effective exercise by lawyers of freedom to provide services^{M19};
 - (d) “media service provider” has the meaning given by Article 1(1)(d) of the Audio-visual Media Services Directive; and
 - (e) “programme” and “programme material” have the meaning given by Article 1(1)(b) of the Audio-visual Media Services Directive but also include radio programmes and radio programme material.

Marginal Citations

M17 OJ L 145, 30.4.2004, p.1.

M18 OJ L 95, 15.4.2010, p.1.

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M19 OJ No L 78, 26.3.1977, p.17, last amended by Council Directive 2013/25/EU (OJ No L 158, 10.6.2013, p.368).

Exclusions: Service contracts awarded on the basis of an exclusive right

12. These Regulations do not apply to procurement for a public service contract to be awarded by a contracting authority to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which such authority or association of authorities enjoys pursuant to law, regulation or published administrative provision which is compatible with the TFEU.

Exclusions: Public contracts between entities within the public sector

- 13.—**(1) These Regulations do not apply to procurement for the award of a public contract—
- (a) by a contracting authority to a controlled person;
 - (b) by a controlled person to a contracting authority which controls that person; or
 - (c) by a controlled person to another controlled person where both such persons are controlled by the same contracting authority.
- (2) For the purpose of this regulation, a person is a “controlled person” where—
- (a) the contracting authority exercises over that person control similar to that which it exercises over its own departments;
 - (b) the person carries out more than 80% of its activities in the performance of tasks entrusted to it by the authority or by other persons controlled by that authority; and
 - (c) no other person has direct private capital participation in the person with the exception of non-controlling and non-blocking forms of private capital participation required by any enactment, in conformity with the Treaties, which do not exert a decisive influence on the person being awarded the contract.
- (3) For the purpose of paragraph (2)(a) an authority shall be deemed to exercise control over a person similar to the control that it exercises over its own departments where—
- (a) it exercises a decisive influence over the strategic objectives and significant decisions of the person; or
 - (b) such control is exercised by another person which is itself controlled in the same way by the contracting authority.
- (4) These Regulations do not apply to procurement for the award of a public contract by a contracting authority to a person which is jointly controlled.
- (5) For the purpose of paragraph (4) a person is jointly controlled where—
- (a) the contracting authority, jointly with other contracting authorities, exercises over that person control similar to that which the authorities exercise over their own departments;
 - (b) the person carries out more than 80% of its activities in the performance of tasks entrusted to it by the contracting authorities or by other persons controlled by those authorities; and
 - (c) no other person has direct capital participation in the person with the exception of non-controlling and non-blocking forms of private capital participation required by any enactment, in conformity with the Treaties, which do not exert a decisive influence on the person.
- (6) For the purpose of paragraph (5)(a) contracting authorities shall be deemed to exercise control over a person similar to the control that they exercise over their own departments where—
- (a) the decision making bodies of the person are composed of representatives of all participating contracting authorities;

- (b) those contracting authorities jointly exercise a decisive influence over the strategic objectives and significant decisions of the person; and
 - (c) the person does not pursue any interests which are contrary to those of the contracting authorities.
- (7) For the purpose of paragraph (6)(a) individual representatives may represent several or all of the contracting authorities.
- (8) These Regulations do not apply to procurement for the award of a public contract exclusively between two or more contracting authorities where—
- (a) the contract is for the purpose of establishing or implementing co-operation between the contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;
 - (b) the implementation of that co-operation is governed solely by considerations relating to the public interest; and
 - (c) the contracting authorities perform on the open market less than 20% of the activities concerned by the co-operation.
- (9) The percentage of activities referred to in paragraphs (2)(b), (5)(b) and (8)(c), shall be determined by reference to—
- (a) the average turnover of the person or, as the case may be, contracting authority for the period of 3 years preceding the date of proposed contract award; or
 - (b) an appropriate alternative activity-based measure such as costs incurred by the relevant person or contracting authority with respect to works, supplies and services for such 3 year period.
- (10) Where paragraph (11) applies, an alternative credible measurement of activity shall be used, and for this purpose use of business projections shall be treated as a credible measure.
- (11) This paragraph applies where the turnover or activity based measure are not available for the preceding 3 years or are no longer relevant because of—
- (a) the date on which the person or contracting authority was created or commenced activities; or
 - (b) a reorganisation of its activities.

Specific situations: Contracts subsidised by a contracting authority

- 14.—(1) These Regulations apply to procurement for the award of—
- (a) a works contract which is subsidised directly by a contracting authority by more than 50% and the estimated value of which, net of value added tax, is equal to or greater than the sum specified in Article 13(a) of the Directive as amended from time to time, where those contracts involve one of the following activities—
 - (i) civil engineering activities listed in Schedule 2; or
 - (ii) building works for hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes; or
 - (b) a service contract which is subsidised directly by a contracting authority by more than 50% and the estimated value of which, net of value added tax, is equal to or greater than the sum specified in Article 13(b) of the Directive as amended from time to time and which is connected to a works contract as referred to in paragraph (a).
- (2) The contracting authority providing a subsidy referred to in paragraph (1) must ensure compliance with these Regulations where the authority does not itself award the subsidised contract or where the authority awards that contract for and on behalf of another person.

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(3) The contracting authority providing the subsidy referred to in paragraph (1) must notify the recipient of the subsidy that these Regulations apply in the circumstances referred to in this regulation.

Specific situations: Research and development services

15. These Regulations only apply to procurement for the award of public service contracts for research and development service which are covered by CPV Codes 73000000-2 to 73120000-9, 73300000-5, [F673420000-2] and 73430000-5 provided that—

- (a) the benefits accrue exclusively to the contracting authority for use in the conduct of its own affairs; and
- (b) the service provided is wholly remunerated by the contracting authority.

Textual Amendments

F6 Word in [reg. 15](#) substituted (18.4.2016) by [The Public Contracts \(Scotland\) Amendment Regulations 2016 \(S.S.I. 2016/47\)](#), [regs. 1, 2\(5\)](#)

Specific situations: Defence and security

16.—(1) These Regulations apply to procurement for the award of public contracts and to design contests organised in the fields of defence and security, with the exception of procurement or design contests—

- (a) to which the Defence and Security Regulations apply; or
- (b) to which those Regulations do not apply pursuant to regulations 7 or 9 of those Regulations.

(2) These Regulations do not apply to procurement for the award of public contracts or design contests, not otherwise exempt by virtue of paragraph (1), to the extent that—

- (a) the protection of the essential security interests of the United Kingdom or another member State cannot be guaranteed by less intrusive measures; or
- (b) the application of these Regulations would oblige the United Kingdom to supply information the disclosure of which it considers contrary to the essential interests of its security.

(3) These Regulations do not apply where—

- (a) the procurement and performance of the public contract or design contest are classified as secret or must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in any part of the United Kingdom; and
- (b) the United Kingdom has determined that the protection of the essential interests concerned cannot be guaranteed by less intrusive measures.

(4) In this regulation reference to “less intrusive measures” includes, but is not limited to, imposing requirements aimed at protecting the confidential nature of information which the contracting authority makes available in a contract award procedure as provided for in these Regulations.

Mixed procurement involving defence or security aspects

17.—(1) This regulation applies where a procurement has as its subject a mixed contract, the procurement of any part of which, if separated, would be covered by Article 346 of the TFEU or the Defence and Security Regulations.

(2) Where different parts of a given contract are objectively separable, a contracting authority may decide to undertake procurement for the award of—

- (a) separate contracts for the separate parts; or
- (b) a single contract.

(3) Any decision to undertake a procurement for the award of a single contract must not be made for the purpose of excluding the procurement from the application of these Regulations or the Defence and Security Regulations.

(4) Where a contracting authority decides to undertake procurement for the award of separate contracts for separate parts the applicable law for the procurement of each separate contract is to be determined by the characteristics of such contract.

(5) Where a contracting authority decides, in accordance with paragraph (6), to undertake a procurement for the award of a single contract, and—

- (a) part of the contract is covered by Article 346 of the TFEU, the contract may be awarded without applying these Regulations; or
- (b) part of the contract is covered by the Defence and Security Regulations, the procurement may be undertaken in accordance with those Regulations, in which event these Regulations do not apply to such procurement.

(6) A contracting authority may only decide to undertake a procurement for the award of a single contract of a kind referred to in paragraph (5) where—

- (a) different parts of such a contract are not objectively separable; or
- (b) such decision is justified by objective reasons.

(7) Paragraph (5)(b) is without prejudice to the thresholds and exclusions provided for by the Defence and Security Regulations.

(8) Paragraph (5)(a) applies to a mixed contract to which both paragraph (5)(a) and (5)(b) could otherwise apply.

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

18.—(1) These Regulations do not apply to procurement for the award of a public contract or to a design contest involving defence or security aspects which the contracting authority is obliged to award or organise in accordance with procurement procedures which are established by—

- (a) an international agreement or arrangement, concluded in conformity with the Treaties, between the United Kingdom and one or more third country or part thereof and covering works, supplies or services intended for the joint implementation or exploitation of a project by their signatories;
- (b) an international agreement or arrangement relating to the stationing of troops and concerning the undertakings of the United Kingdom or a third country; or
- (c) an international organisation.

(2) These Regulations do not apply to procurement for the award of a public contract or to the organisation of a design contest involving defence or security aspects which the contracting authority carries out in accordance with procurement rules provided by an international organisation or international financing institution where the public contract or design contest concerned is fully financed by that organisation or institution or is co-financed for the most part by such organisation or institution.

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SECTION 2

General Rules

Principles of procurement

19.—(1) A contracting authority must, in carrying out any procurement or design contest which is subject to the application of these Regulations—

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

(2) A contracting authority must not design a procurement or design contest with the intention of excluding it from the application of these Regulations or of artificially narrowing competition.

(3) Without prejudice to the generality thereof, competition shall be deemed to be artificially narrowed for the purpose of paragraph (2) where the design of the procurement or design contest is made with the intention of unduly favouring or disadvantaging any particular economic operator.

(4) A contracting authority must include in each public contract or framework agreement such conditions relating to the performance of the contract or framework as meet the requirements mentioned in paragraph (5) and are reasonably necessary to ensure that the economic operator complies with environmental, social and employment law, including any relevant collective agreements or international law measures referred to in Annex X of the Directive as amended from time to time.

(5) The requirements referred to in paragraph (4) are that the conditions are—

- (a) linked to the subject matter of the contract or framework within the meaning of regulation 70 (conditions for performance of contracts); and
- (b) indicated in the call for competition or in the procurement documents.

Economic Operators

20.—(1) A contracting authority must not reject an economic operator solely on the ground that under the law of any part of the United Kingdom it would require to be a natural or legal person if such economic operator is entitled to provide the relevant service under the law of the member State in which that operator is established.

(2) Where paragraph (3) applies, a contracting authority may require an economic operator to state, in its tender or request to participate, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract.

(3) This paragraph applies where an economic operator which is a legal person is seeking the award of—

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

(4) A contracting authority must not require a group of economic operators, including temporary associations, to have a specific legal form in order to be able to submit a tender or a request to participate.

(5) A contracting authority may specify in the procurement documents the method by which a group of economic operators is to meet the requirements as to economic and financial standing or technical and professional ability referred to in regulation 59 (selection criteria).

(6) Any method specified as referred to in paragraph (5) must be justified by objective reasons and must be proportionate.

(7) Any conditions for the performance of a contract by a group of economic operators, which are different from those imposed upon individual participants, must be justified by objective reasons and must be proportionate.

(8) A contracting authority may, if it is necessary for the satisfactory performance of the contract, require a group of economic operators to assume a specific legal form for the purpose of the award of the contract.

(9) In this Regulation reference to a “contract” includes reference to a framework agreement, dynamic purchasing system or design contest.

Reserved contracts

21.—(1) A contracting authority may—

- (a) reserve the right to participate in procurement for the award of a public contract or framework agreement to a supported business; or
- (b) provide for such a contract or framework agreement to be performed in the context of a supported employment programme.

(2) In this regulation—

“supported business” means an economic operator whose main aim is the social and professional integration of disabled or disadvantaged persons and where at least 30% of the employees of the economic operator are disabled or disadvantaged persons; and

“supported employment programme” means an employment programme operated by an economic operator the main aim of which is the social and professional integration of disabled or disadvantaged persons and where at least 30% of those engaged in the programme are disabled or disadvantaged persons.

(3) Where a contracting authority is following the approach set out in paragraph (1), it must specify that fact in the contract notice and refer to Article 20 of the Directive.

Confidentiality

22.—(1) A contracting authority must not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.

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

- (a) any other provision of these Regulations, including the obligation relating to advertising of awarded contracts and to provision of information to candidates and tenderers set out in regulations 51 (contract award notices) and 56 (informing candidates and tenderers);
- (b) the Freedom of Information (Scotland) Act 2002 ^{M20};
- (c) the Environmental Information (Scotland) Regulations 2004 ^{M21}; and
- (d) any other enactment to which the contracting authority is subject relating to the disclosure of information.

(3) A contracting authority may impose upon an economic operator requirements aimed at protecting the confidential nature of information which the contracting authority makes available throughout the procurement procedure.

Marginal Citations

M20 2002 asp 13, amended by the Freedom of Information (Amendment) (Scotland) Act 2013 (2013 asp 2).

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M21 S.S.I. 2004/520, amended by the Environmental Information (Scotland) Amendment Regulations 2013, S.S.I. 2013/127.

Rules applicable to communication

23.—(1) Subject to paragraphs (3), (5) and (8), a contracting authority must ensure that all communication and information exchange, including submission, pursuant to these Regulations is performed using electronic means of communications in accordance with this Regulation.

(2) Subject to paragraph (13), the tools and devices to be used for electronic means of communication, and their technical characteristics, must—

- (a) be non-discriminatory;
- (b) be generally available;
- (c) be interoperable with the information and communication technology products in general use; and
- (d) not restrict economic operators' access to the procurement procedure.

(3) A contracting authority is not obliged to require electronic means of communication in the submission process where—

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

(4) Where, in accordance with paragraph (3), electronic means of communication is not required, communication must be carried out—

- (a) by post or by other suitable carrier; or
- (b) by a combination of post or other suitable carrier and, to the extent that electronic means of communication is possible, by such means.

(5) A contracting authority is not obliged to require electronic means of communication in the submission process to the extent that the use of means of communication other than electronic means is necessary—

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

(6) Where, in accordance with this regulation, a contracting authority requires means of communication in the submission process other than electronic means, the authority must state the reason for this in the individual report referred to in regulation 83 (reporting and documentation requirements).

(7) Where electronic means of communication is not required for a reason referred to in paragraph (5), the contracting authority must state in the individual report the reasons why use of means of communication other than electronic means has been considered necessary under that paragraph.

(8) Notwithstanding paragraph (1), oral communication may be used in respect of communications other than those concerning the essential elements of a procurement procedure, provided that the content of the oral communication is documented by the contracting authority.

(9) In paragraph (8), reference to “the essential elements of a procurement procedure” includes the procurement documents, requests for participation, confirmations of interest and tenders.

(10) A contracting authority must, to a sufficient extent and by appropriate means, document oral communications with tenderers which could have a substantial impact on the content and assessment of the tenders, in particular, by preparing written or audio records or summaries of the main elements of the communication.

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

(12) A contracting authority must examine the content of tenders and requests to participate only after the time limit set for submitting them has expired.

(13) A contracting authority may, where necessary, require the use of tools and devices which are not generally available, provided that the contracting authority offers suitable alternative means of access.

(14) A contracting authority shall be deemed to offer suitable alternative means of access where the authority—

- (a) offers unrestricted and full direct access free of charge by electronic means to those tools and devices from the date of publication of the call for competition or from the date when the invitation to confirm interest is sent;
- (b) ensures that tenderers having no access to the tools and devices concerned, or no possibility of obtaining them within the relevant time limits (provided that the lack of access is not attributable to the tenderer) may access the procurement procedure through the use of provisional tokens made available free of charge online; or
- (c) supports an alternative channel for electronic submission of tenders.

(15) For the purpose of paragraph (14)(a) “date of publication of the call for competition” means the date of publication in the Official Journal after being sent in accordance with regulation 52 (form and manner of sending notices for publication at EU level).

(16) A contracting authority must specify in the call for competition or the invitation to confirm interest, referred to in paragraph (14)(a), the internet address at which those tools and devices are accessible.

(17) Tools and devices for the electronic receipt of tenders, requests to participate and, in design contests, plans and projects, must—

- (a) enable the precise determination of the exact time and date of the receipt of tenders, requests to participate and the submission of plans and projects;
- (b) to the extent reasonably possible, ensure that, before the time limit referred to in paragraph (12) has expired, no-one can have access to data transmitted to the authority using the tools and devices;
- (c) ensure that only authorised persons may set or change the dates for opening data received;
- (d) ensure that, during the different stages of the procurement procedure, only authorised persons may have access to data submitted or to part of such data;

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- (e) ensure that only authorised persons may give access to data transmitted and only after the time limit referred to in paragraph (12) has expired;
 - (f) ensure that data received and opened in accordance with the requirements in sub paragraphs (a) to (e) remains accessible only to persons authorised to acquaint themselves with the data; and
 - (g) to the extent reasonably possible, ensure that any infringement, or attempted infringement, of the conditions referred to in sub-paragraphs (b) to (f) is clearly detectable.
- (18) In addition to the requirements set out in paragraph (17), a contracting authority must comply with all of the following requirements in relation to tools and devices for the electronic transmission and receipt of tenders and for the electronic receipt of requests to participate—
- (a) information on specifications for the electronic submission of tenders and requests to participate, including encryption and time-stamping, must be available to interested parties;
 - (b) a contracting authority must specify the level of security required for the electronic means of communication in the various stages of the specific procurement procedure;
 - (c) the level of security specified in accordance with sub-paragraph (b) must be proportionate to the risks attached;
 - (d) where paragraph (19) applies, the contracting authority must accept advanced electronic signatures supported by a qualified certificate, created with or without a secure signature creation device, subject to compliance with all of the following conditions—
 - (i) the contracting authority must establish the required advanced electronic signature format on the basis of formats established in Commission Decision 2011/130/EU establishing minimum requirements for the cross-border processing of documents signed electronically by competent authorities under Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market (notified under document C(2011) 1081) ^{M22} and must put in place necessary measures to be able to process these formats technically;
 - (ii) where a different format of electronic signature is used, the electronic signature or the electronic document carrier must include information on existing validation possibilities;
 - (iii) the validation possibilities must allow the contracting authority to validate the received electronic signature as an advanced electronic signature supported by a qualified certificate, such validation to be online, free of charge and in a way that is understandable for non-English speakers;
 - (iv) where a tender is signed with an advanced electronic signature with the support of a qualified certificate from a provider that is included on a trusted list provided for in Commission Decision 2009/767/EC setting out measures facilitating the use of procedures by electronic means through the points of single contact under Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market (notified under document C(2009) 7806) ^{M23}, as amended from time to time (in this regulation “the Commission Decision”), the contracting authority must not apply additional requirements that may hinder the use of the signature by the tenderer.
- (19) This paragraph applies where a contracting authority concludes that the level of risk assessed in accordance with paragraphs (21) and (22) is such that advanced electronic signatures as defined by [F7 Regulation (EU) No 910/2014 of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market] as amended from time to time, are required.

(20) A contracting authority shall assess the certificate referred to in paragraph (18)(d) by taking into account whether the certificate is provided by a certificate services provider, which is on a trusted list provided for in the Commission Decision.

(21) In deciding the level of security required at each stage of a procurement procedure, and in concluding whether the level of risk is such that advanced electronic signatures are required, a contracting authority must assess the risks having regard to—

- (a) the likelihood of particular risks materialising;
- (b) the potential adverse consequences if those risks materialise;
- (c) the need for consistency as between similar procurements performed by the same contracting authority; and
- (d) the need for proportionality between the expected benefits of any particular security requirements (in terms of eliminating or reducing any of the risks referred to in paragraph (22)), and the costs, burdens and obligations which those requirements may impose upon an economic operator.

(22) A contracting authority must assess all relevant risks, including, in particular, where applicable—

- (a) the risk to the proper functioning and integrity of the specific procurement process, including risks of breach of these Regulations;
- (b) risks to national security;
- (c) the risk of inadvertent or unauthorised disclosure of, or access to, any economic operator's confidential information;
- (d) the risk of inadvertent or unauthorised disclosure of, or access to, information held by the contracting authority including information relating to the specific procurement;
- (e) the risk that use of electronic communications could provide opportunity for malicious attacks on the electronic systems of, or data held by, the authority, any economic operator or any other person, including introduction of malware or denial of service attacks; and
- (f) any other material risk relating to the procurement procedure in question.

(23) Paragraph (24) applies where—

- (a) a competent authority of the United Kingdom located in Scotland; or
- (b) another issuing entity located in Scotland,

signs and issues a document for use in a procurement with the scope of the Directive, whether the procedure is under these Regulations or under the law of any member State.

(24) The competent authority or issuing entity may establish the required advanced signature format in accordance with the requirements set out in Article 1(2) of Commission Decision 2011/130/EU establishing minimum requirements for the cross-border processing of documents signed electronically by competent authorities under Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market (notified under document C(2011) 1081)^{M24}, as amended from time to time, and, where it does so—

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

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Textual Amendments

- F7** Words in reg. 23(19) substituted (22.7.2016) by [The Electronic Identification and Trust Services for Electronic Transactions Regulations 2016 \(S.I. 2016/696\)](#), reg. 1, **Sch. 3 para. 18**

Marginal Citations

- M22** OJ L 53, 26.2.2011, p.66, amended by Commission Implementing Decision 2014/148/EU (OJ L 80, 19.3.2014, p.7).
M23 OJ L 274, 20.10.2009, p.36, last amended by Commission Decision 2013/662/EU (OJ L 306, 16.11.2013, p.21).
M24 OJ L 53, 26.2.2011 p.66.

Nomenclatures

24. A contracting authority must, when making any reference to nomenclatures of the subject matter of a public contract in the conduct of a procurement, do so by using the CPV.

Conflicts of Interest

25.—(1) A contracting authority must take appropriate measures to prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.

(2) Without prejudice to the generality thereof, reference to “conflicts of interest” in paragraph (1) includes any situation where relevant staff members have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

(3) In paragraph (2)—

“relevant staff members” means staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority, who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure; and

“procurement service provider” means a public or private body which offers ancillary purchasing activities on the market.

CHAPTER 2

RULES ON PUBLIC CONTRACTS

SECTION 3

Procedures

Conditions relation to the GPA and other international agreements

26. In so far as they are covered by Annexes 1, 2 and 4 to 7 to the EU's Appendix I to the GPA and by the other international agreements by which the EU is bound, a contracting authority must accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the EU.

Choice of procedures

27.—(1) When undertaking a procurement a contracting authority must apply a procedure which complies with these Regulations and includes publication of a call for competition except where regulation 33 (use of the negotiated procedure without prior notification) permits a contracting authority to award a contract using negotiated procedure without prior publication.

(2) A call for competition must be made—

(a) where permitted by paragraph (8), by means of a prior information notice in accordance with regulation 49(6) to (8) (prior information notices); or

(b) by means of a contract notice in accordance with regulation 50 (contract notices).

(3) A contracting authority may, in accordance with these Regulations, apply—

(a) an open or a restricted procedure; or

(b) an innovation partnership.

(4) A contracting authority may apply a competitive procedure with negotiation or a competitive dialogue where—

(a) the needs of the contracting authority cannot be met without adaptation of readily available solutions;

(b) the works, supplies or services required include design or innovative solutions;

(c) the contract cannot be awarded without prior negotiations because of specified circumstances related to the nature or complexity of the works, supplies or services or the legal and financial make-up or because of the risks attaching to any of them;

(d) the technical specifications of the works, supplies or services cannot be established with sufficient precision by the contracting authority with reference to a standard, European Technical Assessment, common technical specification or technical reference; or

(e) in response to an open or restricted procedure only irregular or unacceptable tenders are submitted.

(5) Where paragraph (4)(e) applies, a contracting authority is not required to publish a contract notice where the authority includes in the procedure all of, and only, the tenderers which satisfy the criteria set out in regulations 57 to 64 and which, during the prior open or restricted procedure submitted tenders in accordance with the formal requirements of the procurement procedure.

(6) A tender must be considered irregular, for the purpose of paragraph (4)(e), where—

(a) it does not comply with the procurement documents;

(b) it was received late;

(c) there is evidence of collusion or corruption; or

(d) it has been found by the contracting authority to be abnormally low.

(7) A tender must be considered unacceptable, for the purpose of paragraph (4)(e), where—

(a) it was submitted by a tenderer which does not have the required qualifications; or

(b) the price tendered exceeds the contracting authority's budget as determined and documented prior to the commencement of the procurement procedure.

(8) Where the contract is to be awarded following a restricted procedure or competitive procedure with negotiation, a sub-central contracting authority may make the call for competition by means of a prior information notice.

(9) Nothing in these Regulations prevents an authority which has commenced a procurement from terminating that procurement at any time.

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Open Procedure

28.—(1) In an open procedure, a contracting authority must permit any interested economic operator to submit a tender in response to a call for competition within the time period set by the authority in accordance with this regulation.

(2) The tender must be accompanied by the information for qualitative selection that is required by the contracting authority.

(3) Subject to paragraphs (4) to (6), the minimum time period for the receipt of tenders shall be 35 days from the date on which the contract notice is sent for publication.

(4) Where a contracting authority has published a prior information notice which was not itself used as a means of calling for competition under regulation 27(8) (choice of procedures), the minimum time limit for the receipt of tenders may be reduced to 15 days, provided that—

- (a) the prior information notice included all the information required for the contract notice in section I of Part B of Annex V to the Directive insofar as that information was available at the time the prior information notice was published; and
- (b) the prior information notice was sent for publication between 35 days and 12 months before the date on which the contract notice was sent for publication.

(5) Where a state of urgency duly substantiated by a contracting authority renders it impracticable to apply the minimum time limit set out in paragraph (3), the authority may fix a time limit which must not be less than 15 days from the date on which the contract notice was sent for publication.

(6) A contracting authority may reduce the minimum time period referred to in paragraph (3) by a period of up to 5 days where it accepts that tenders may be submitted by electronic means in accordance with regulation 23 (rules applicable to communication).

Restricted Procedure

29.—(1) In a restricted procedure, a contracting authority must permit any economic operator to submit a request to participate in response to a call for competition within the time period set in accordance with this regulation.

(2) A request by an economic operator referred to in paragraph (1) must be accompanied by the information for qualitative selection that is requested by the contracting authority.

(3) Subject to paragraph (11), the minimum time period for receipt of requests to participate shall be 30 days from the date on which—

- (a) the contract notice was sent for publication; or
- (b) where a prior information notice is used as a means of calling for competition, the invitation to confirm interest was sent.

(4) Only those economic operators invited to do so by the contracting authority following its assessment of the information provided may submit a tender.

(5) A contracting authority may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 66 (reduction of the number of otherwise qualified candidates to be invited to participate).

(6) Subject to paragraphs (7) to (11), the minimum time limit for the receipt of tenders shall be 30 days from the date on which the invitation to tender is sent.

(7) Where a contracting authority has published a prior information notice which was not itself used as a means of calling for competition, the minimum time period for the receipt of tenders referred to in paragraph (6), may be reduced to a minimum of 10 days provided that the prior information notice—

- (a) included all the information required in section I of Part B of Annex V to the Directive, insofar as that information was available at the time the prior information notice was published; and
 - (b) was sent for publication between 35 days and 12 months before the date on which the contract notice was sent.
- (8) A sub-central contracting authority may set the time limit for the receipt of tenders by mutual agreement between the contracting authority and the selected candidates, provided that all the selected candidates have the same time to prepare and submit their tenders.
- (9) In the absence of such an agreement, the time limit must be at least 10 days from the date on which the invitation to tender was sent.
- (10) The time limit for the receipt of tenders provided for by paragraph (6) may be reduced by 5 days where the contracting authority accepts that tenders may be submitted by electronic means in accordance with regulation 23 (rules applicable to communication).
- (11) Where a state of urgency duly substantiated by the contracting authority renders impracticable the time limit laid down in this regulation, it may fix a time limit—
- (a) for the receipt of requests to participate which shall not be less than 15 days from the date on which the contract notice was sent; and
 - (b) for the receipt of tenders which shall not be less than 10 days from the date on which the invitation to tender was sent.

Competitive procedure with negotiation

- 30.—**(1) In a competitive procedure with negotiation, a contracting authority must permit any economic operator to submit a request to participate in response to a call for competition within the time period set in accordance with this regulation.
- (2) A request by an economic operator referred to in paragraph (1) must be accompanied by the information for qualitative selection that is requested by the contracting authority.
- (3) In the procurement documents, the contracting authority must—
- (a) identify the subject-matter of the procurement by providing a description of the authority's needs and the characteristics required of the works, supplies or services to be procured;
 - (b) indicate which elements of the description define the minimum requirements to be met by all tenders; and
 - (c) specify the contract award criteria.
- (4) The information provided by the contracting authority in accordance with paragraph (3) must be sufficiently precise to enable economic operators to identify the nature and scope of the procurement and decide whether to request to participate in the procedure.
- (5) The minimum time period for the receipt of requests to participate shall, subject to paragraph (11), be 30 days from the date on which—
- (a) the contract notice was sent for publication; or
 - (b) where a prior information notice is used as a means of calling for competition, the invitation to confirm interest was sent.
- (6) The minimum time period for the receipt of initial tenders shall, subject to paragraphs (7) to (11), be 30 days from the date on which the invitation to tender was sent.
- (7) Where a contracting authority has published a prior information notice which was not itself used as a means of calling for competition, the minimum time period for the receipt of initial tenders referred to in paragraph (6), may be reduced to a minimum of 10 days provided that the prior information notice—

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- (a) included all the information required in section I of Part B of Annex V, insofar as that information was available at the time the prior information notice was published; and
 - (b) was sent for publication between 35 days and 12 months before the date on which the contract notice was sent.
- (8) A sub-central contracting authority may set the time limit for the receipt of initial tenders by mutual agreement between the contracting authority and the selected candidates, provided that all the selected candidates have the same time to prepare and submit their initial tenders.
- (9) In the absence of such an agreement, the time limit must be at least 10 days from the date on which the invitation to tender was sent.
- (10) The time limit for the receipt of initial tenders provided for by paragraph (6) may be reduced by 5 days where the contracting authority accepts that tenders may be submitted by electronic means in accordance with regulation 23 (rules applicable to communication).
- (11) Where a state of urgency duly substantiated by the contracting authority renders impracticable the time limit laid down in this regulation, it may fix a time limit—
- (a) for the receipt of requests to participate which shall not be less than 15 days from the date on which the contract notice was sent;
 - (b) for the receipt of initial tenders which shall not be less than 10 days from the date on which the invitation to tender was sent.
- (12) A contracting authority may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 66 (reduction of the number of otherwise qualified candidates to be invited to participate).
- (13) Only those economic operators invited to do so by the contracting authority following its assessment of the information provided may submit an initial tender which shall be the basis for the subsequent negotiations.
- (14) Subject to paragraph (16), a contracting authority must negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve its content.
- (15) A contracting authority must not negotiate the minimum requirements or the award criteria referred to in paragraph (3).
- (16) A contracting authority may award a contract on the basis of the initial tender without negotiation where the authority has indicated, in the contract notice or in the invitation to confirm interest, that the authority reserves the possibility of doing so.
- (17) During the negotiations, a contracting authority must—
- (a) ensure equal treatment of all tenderers;
 - (b) not provide information in a discriminatory manner which may give some tenderers an advantage over others;
 - (c) inform in writing all tenderers whose tenders have not been eliminated of any changes to the technical specification or other procurement documents; and
 - (d) following any such changes, provide sufficient time for all tenderers referred to in paragraph (c) to modify and re-submit amended tenders, as appropriate.
- (18) In accordance with regulation 22 (confidentiality), a contracting authority must not reveal to the other participants confidential information communicated by a candidate or tenderer participating in the negotiations without its agreement.
- (19) Such agreement must not take the form of a general waiver but must be given with reference to the intended communication of specific information.

(20) A contracting authority may conduct a competitive procedure with negotiation in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria specified in—

- (a) the contract notice;
- (b) the invitation to confirm interest; or
- (c) another procurement document.

(21) The contracting authority must indicate, in the contract notice, the invitation to confirm interest or in another procurement document, whether it will use the option described in paragraph (20).

(22) Where the contracting authority uses the option described in paragraph (20) it must ensure that in the final stage, the number of tenders remaining shall make for genuine competition in so far as there are enough tenders or qualified candidates.

(23) Where the contracting authority intends to conclude the negotiations, it must—

- (a) inform the remaining tenderers and set a common deadline to submit any new or revised tenders;
- (b) verify that the final tenders are in conformity with the minimum requirements and comply with regulation 57(1) (general principles);
- (c) assess the final tenders on the basis of the award criteria; and
- (d) award the contract in accordance with regulations 67 to 69.

Competitive Dialogue

31.—(1) In a competitive dialogue, a contracting authority must permit any economic operator to submit a request to participate in response to a contract notice within the time period set in accordance with this regulation.

(2) Any negotiation and finalisation of the terms of the contract referred to in paragraph (20) must not involve changes to the essential aspects of the tender or the procurement, including the needs and requirements set out in the contract notice or in the descriptive document, where such changes are likely to distort competition or cause discrimination.

(3) A contracting authority may specify prizes or payments to the participants in the dialogue.

(4) A contracting authority may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 66 (reduction of the number of otherwise qualified candidates to be invited to participate).

(5) Only those economic operators invited to do so by the contracting authority following its assessment of the information provided may participate in the dialogue.

(6) The contract must be awarded on the sole basis of the best price-quality ratio in accordance with regulation 67 (contract award criteria).

(7) A contracting authority must—

- (a) in the contract notice, set out its needs and requirements; and
- (b) in the contract notice, in a descriptive document or in both—
 - (i) define those needs and requirements;
 - (ii) set out and define the chosen award criteria; and
 - (iii) set out an indicative timeframe.

(8) A contracting authority—

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- (a) must open, with the participants selected in accordance with the relevant provisions of regulations 57 to 66, a dialogue with the aim of identifying and defining the means best suited to satisfying its needs; and
 - (b) may discuss all aspects of the procurement with the chosen participants during this dialogue.
- (9) During the dialogue, a contracting authority—
- (a) must ensure equal treatment of all participants; and
 - (b) must not provide information in a discriminatory manner which may give any participant an advantage over others.
- (10) In accordance with regulation 22 (confidentiality), a contracting authority must not reveal to the other participants solutions proposed or other confidential information communicated by a candidate or tenderer participating in the dialogue without its agreement.
- (11) Any agreement referred to in paragraph (10) shall not take the form of a general waiver but must be given with reference to the intended communication of specific information.
- (12) A contracting authority may conduct a competitive dialogue in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage only by applying the award criteria specified in—
- (a) the contract notice; or
 - (b) the descriptive document.
- (13) The contracting authority must indicate, in the contract notice or the descriptive document, whether it will use the option described in paragraph (12).
- (14) The contracting authority shall continue the dialogue until it can identify the solution or solutions which are capable of meeting its needs.
- (15) Where the contracting authority uses the option described in paragraph (12) it must ensure that in the final stage, the number of solutions remaining shall make for genuine competition in so far as there are enough solutions or qualified candidates.
- (16) When the contracting authority has declared that the dialogue is concluded and informed the remaining participants, the authority must invite each remaining participant to submit their final tender on the basis of the solution or solutions presented and specified during the dialogue.
- (17) The final tenders—
- (a) shall contain all the elements required and necessary for the performance of the project; and
 - (b) may, subject to paragraph (18), be clarified, specified and optimised at the request of the contracting authority.
- (18) Any clarification, specification, optimisation or additional information provided pursuant to a request referred to in paragraph (17)(b) must not involve changes to the essential aspects of the tender or the procurement, including the needs and requirements set out in the contract notice or in the descriptive document, where such changes are likely to distort competition or cause discrimination.
- (19) A contracting authority must assess the tenders received on the basis of the award criteria laid down in the contract notice or in the descriptive document.
- (20) At the request of the contracting authority, and subject to paragraph (21), negotiations with the tenderer identified as having submitted the tender presenting the best price-quality ratio in accordance with regulation 67 (contract award criteria) may be carried out to confirm financial commitments or other terms contained in the tender in order to finalise the terms of the contract.
- (21) Any negotiation and finalisation of the terms of the contract referred to in paragraph (20) must not involve changes to the essential aspects of the tender or the procurement, including the

needs and requirements set out in the contract notice or in the descriptive document, where such changes are likely to distort competition or cause discrimination.

(22) A contracting authority may specify prizes or payments to the participants in the dialogue.

Innovation Partnership

32.—(1) A contracting authority may establish an innovation partnership with one partner or with several partners conducting separate research and development activities.

(2) The innovation partnership must aim at the development of innovative works, products or services and the subsequent purchase of the resulting works, supplies or services provided that they correspond to the performance levels and maximum costs agreed between the contracting authority and the partners.

(3) The estimated value of works, supplies or services must not be disproportionate in relation to the investment required for their development.

(4) The innovation partnership must be structured in successive phases following the sequence of steps in the research and innovation process, which may include the manufacturing of the products, the provision of the services or the completion of the works.

(5) The innovation partnership must set intermediate targets to be attained by the partners and provide for payment of the remuneration in appropriate instalments.

(6) Based on those targets, the contracting authority may decide after each phase to—

(a) terminate the innovation partnership; or

(b) in the case of an innovation partnership with several partners, reduce the number of partners by terminating individual contracts,

provided that the contracting authority has indicated in the procurement documents those possibilities and the conditions for their use.

(7) In the procurement of an innovation partnership, a contracting authority must permit any economic operator to submit a request to participate in response to a contract notice within the time period set in accordance with this regulation.

(8) A request by an economic operator referred to in paragraph (7) must be accompanied by the information for qualitative selection that is requested by the contracting authority

(9) In the procurement documents, the contracting authority must—

(a) identify the subject matter of the procurement by providing the description of the authority's need for innovative works, products or services that cannot be met by purchasing works, products or services already available on the market;

(b) indicate which elements of this description define the minimum requirements to be met by all tenders;

(c) specify the award criteria; and

(d) define the arrangements applicable to intellectual property rights.

(10) The information provided by the contracting authority in accordance with paragraph (9) must be sufficiently precise to enable economic operators to identify the nature and scope of the required solution and decide whether to request to participate in the procedure.

(11) The minimum time period for the receipt of requests to participate shall be 30 days from the date on which the contract notice is sent for publication.

(12) A contracting authority may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 66 (reduction of the number of otherwise qualified candidates to be invited to participate).

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(13) In selecting candidates, a contracting authority must, in particular, apply criteria concerning the candidates' capacity in the field of research and development and of developing and implementing innovative solutions.

(14) Only those economic operators invited to do so by the contracting authority following its assessment of the requested information may participate in the procedure and submit research and innovation projects aimed at meeting the needs identified by the contracting authority that cannot be met by existing solutions.

(15) A contracting authority must negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve its content.

(16) A contracting authority must not negotiate the minimum requirements or the award criteria referred to in paragraph (9).

(17) During the negotiations, a contracting authority—

- (a) must ensure equal treatment of all tenderers;
- (b) must not provide information in a discriminatory manner which may give some tenderers an advantage over others;
- (c) must, in writing, inform all tenderers whose tenders have not been eliminated of any changes to the technical specifications or other procurement documents; and
- (d) must provide sufficient time following any such changes for all tenderers referred to in paragraph (c) to modify and re-submit amended tenders, as appropriate.

(18) In accordance with regulation 22 (confidentiality), a contracting authority must not reveal to the other participants confidential information communicated by a candidate or tenderer participating in the negotiations without its agreement.

(19) Any agreement referred to in paragraph (18) must not take the form of a general waiver but must be given with reference to the intended communication of specific information.

(20) A contracting authority may conduct negotiations during innovation partnership procedures in successive stages in order to reduce the number of tenders to be negotiated only by applying the award criteria specified in the contract notice or another procurement document.

(21) The contracting authority must indicate in the contract notice or in another procurement document, whether it will use the option described in paragraph (20).

(22) The contracts must be awarded on the sole basis of the best price-quality ratio in accordance with regulation 67 (contract award criteria).

(23) The contracting authority must ensure that the structure of the partnership and, in particular, the duration and value of the different phases reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities required for the development of an innovative solution not yet available on the market.

(24) In the case of an innovation partnership with several partners, the contracting authority must not, in accordance with regulation 22 (confidentiality), reveal to the other partners solutions proposed or other confidential information communicated by a partner in the framework of the partnership without that partner's agreement.

(25) Any agreement referred to in paragraph (24) must not take the form of a general waiver but must be given with reference to the intended communication of specific information.

Use of the negotiated procedure without prior publication

33.—(1) A contracting authority may award a public contract following negotiated procedure without prior publication of a contract notice or prior information notice in any of the following cases—

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- (a) where no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Commission where it so requests;
 - (b) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons—
 - (i) the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance;
 - (ii) competition is absent for technical reasons;
 - (iii) the protection of exclusive rights, including intellectual property rights, but only, in the case of paragraphs (ii) and (iii), where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement; or
 - (c) where (but only if it is strictly necessary) for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for open procedure, restricted procedure or competitive procedure with negotiation cannot be complied with.
- (2) For the purposes of paragraph (1)(a)—
- (a) a tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority's needs and requirements as specified in the procurement documents; and
 - (b) a request to participate shall be considered not to be suitable where the economic operator concerned—
 - (i) has been or would be excluded under regulation 58 (exclusion grounds); or
 - (ii) does not meet the selection criteria.
- (3) For the purposes of paragraph (1)(c), the circumstances invoked to justify extreme urgency must not, in any event, be attributable to the contracting authority.
- (4) A contracting authority may award a public supply contract following negotiated procedure without prior publication in any of the following cases—
- (a) where the products involved are manufactured purely for the purpose of research, experimentation, study or development, but a contract awarded in reliance upon this subparagraph shall not include quantity production to establish commercial viability or to recover research and development costs;
 - (b) for additional deliveries by the original supplier which are intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire supplies having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance;
 - (c) for supplies quoted and purchased on a commodity market;
 - (d) for the purchase of supplies on particularly advantageous terms, from either a supplier which is definitively winding up its business activities, or the liquidator in an insolvency procedure, an arrangement with creditors, or a similar procedure under national laws or regulations.
- (5) For the purposes of paragraph (4)(b), the duration of such a contract, as well as that of recurrent contracts must not, save in exceptional circumstances, exceed 3 years.
- (6) A contracting authority may award a public service contract following negotiated procedure without prior publication where the contract concerned—

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- (a) follows a design contest organised in accordance with these Regulations; and
 - (b) is to be awarded, under the rules provided for in the design contest, to the winner or one of the winners of the design contest.
- (7) Where there is more than one winner of the design contest referred to in paragraph (6), all of them must be invited to participate in the negotiation.
- (8) A contracting authority may award a public contract following negotiated procedure without prior publication where—
- (a) it is for new works, services or both, consisting of the repetition of similar works or services entrusted to the economic operator to which the contracting authority awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded following a procedure in accordance with regulation 27(1) and (2) (choice of procedures);
 - (b) the basic project indicated the extent of possible additional works or services and the conditions under which they would be awarded;
 - (c) the possible use of this procedure was disclosed in the procurement documents and the total estimated cost of subsequent works or services was taken into consideration by the contracting authority when applying regulation 5 (thresholds) in relation to the original contract; and
 - (d) not more than 3 years has elapsed following the conclusion of the original contract.

SECTION 4

Techniques and Instruments for Electronic and Aggregated Procurement

Framework Agreements

34.—(1) A contracting authority may conclude a framework agreement, provided that the authority applies the procedures provided for in these Regulations.

(2) The term of a framework agreement must not exceed 4 years, save in exceptional cases duly justified, in particular by the subject of the framework agreement.

(3) A contract based on a framework agreement must be awarded in accordance with the procedures laid down in this regulation.

(4) The procedures referred to in paragraph (3) may be applied only between those contracting authorities clearly identified for that purpose in the call for competition or the invitation to confirm interest and those economic operators that are party to the framework agreement as concluded.

(5) A contract based on a framework agreement must under no circumstances entail substantial modifications to the terms laid down in that framework agreement, in particular in the case referred to in paragraph (6).

(6) Where a framework agreement is concluded with a single economic operator—

- (a) a contract based on that agreement must be awarded within the limits laid down in the framework agreement; and
- (b) for the award of such a contract, a contracting authority may consult in writing the economic operator which is party to the framework agreement, requesting it to supplement its tender as necessary.

(7) Where a framework agreement is concluded with more than one economic operator, that framework agreement must be performed in one of the following ways—

- (a) following the terms and conditions of the framework agreement, without reopening competition, where it sets out—

- (i) all the terms governing the provision of the works, supplies or services concerned; and
 - (ii) the objective conditions for determining which of the economic operators that are party to the framework agreement must perform those works, supplies or services (which conditions must be indicated in the procurement documents for the framework agreement);
- (b) where the framework agreement sets out all the terms governing the provision of the works, supplies or services concerned—
- (i) partly without reopening competition in accordance with sub-paragraph (a); and
 - (ii) partly through reopening competition amongst the economic operators which are party to the framework agreement,
- where this possibility has been stipulated by the contracting authority in the procurement documents for the framework agreement; or
- (c) where not all the terms governing the provision of the works, supplies or services are laid down in the framework agreement, through reopening competition amongst the economic operators which are parties to the framework agreement.
- (8) For the purposes of paragraph (7)(b)—
- (a) the choice of whether specific works, supplies or services shall be acquired following reopening of competition or directly on the terms set out in the framework agreement must be made pursuant to objective criteria, which must be set out in the procurement documents for the framework agreement; and
 - (b) those procurement documents must also specify which terms may be subject to reopening of competition.
- (9) The possibilities provided for in paragraph (7)(b) must also apply to any lot of a framework agreement for which all the terms governing the provision of the works, supplies or services concerned are set out in the framework agreement, regardless of whether all the terms governing the provision of the works, supplies or services concerned under other lots have been set out.
- (10) The competition referred to in paragraph (7)(b) and (c) must be based on the same terms as applied for the award of the framework agreement and, where necessary, more precisely formulated terms and, where appropriate, other terms referred to in the procurement documents for the framework agreement, in accordance with the following procedure—
- (a) for every contract to be awarded, a contracting authority must consult in writing the economic operators capable of performing the contract;
 - (b) a contracting authority must fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject-matter of the contract and the time needed to send in tenders;
 - (c) a contracting authority must require tenders to be submitted in writing and must not open the tenders until the stipulated time limit for reply has expired; and
 - (d) a contracting authority must award each contract to the tenderer that has submitted the most economically advantageous tender on the basis of the award criteria set out in the procurement documents for the framework agreement.

Dynamic Purchasing Systems

35.—(1) A contracting authority may use a dynamic purchasing system for commonly used purchases the characteristics of which, as generally available on the market, meet their requirements.

- (2) The dynamic purchasing system must—

Status: Point in time view as at 18/04/2020.

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- (a) be operated as a completely electronic process; and
 - (b) throughout the period of validity of the system, be open to any economic operator that satisfies the selection criteria.
- (3) The dynamic purchasing system may be divided into categories of works, supplies or services that are objectively defined on the basis of characteristics of the procurement to be undertaken under the category concerned.
- (4) The characteristics referred to in paragraph (3) may include reference to either or both of—
- (a) the maximum allowable size of the subsequent specific contracts; and
 - (b) a specific geographic area in which subsequent specific contracts will be performed.
- (5) In order to procure under a dynamic purchasing system, a contracting authority must follow the restricted procedure, and accordingly the provisions of regulation 29 (restricted procedure) apply, subject to the following provisions of this regulation.
- (6) A contracting authority must admit to a dynamic purchasing system all of the candidates satisfying the selection criteria and must not limit the number of candidates to be admitted whether under regulations 29(4) (restricted procedure) or 66 (reduction of the number of otherwise qualified candidates to be invited to participate) or otherwise.
- (7) Where a contracting authority has divided the system into categories of works, supplies or services in accordance with paragraph (3), the authority must specify the applicable selection criteria for each category.
- (8) The minimum time limit for receipt of requests to participate shall be 30 days from the date on which—
- (a) the contract notice is sent; or
 - (b) where a prior information notice is used as a means of calling for competition, the invitation to confirm interest is sent.
- (9) No further time limits for receipt of requests to participate shall apply once the invitation to tender for the first specific procurement under the dynamic purchasing system has been sent.
- (10) The minimum time limit for receipt of tenders shall be 10 days from the date on which the invitation to tender is sent.
- (11) All communications in the context of a dynamic purchasing system must be made only by electronic means in accordance with regulation 23(1) to (7) and (11) to (20) (Rules applicable to communication).
- (12) For the purposes of awarding contracts under a dynamic purchasing system, a contracting authority must—
- (a) publish a call for competition making it clear that a dynamic purchasing system is involved;
 - (b) indicate in the procurement documents at least the nature and estimated quantity of the purchases envisaged, as well as all the necessary information concerning the dynamic purchasing system, including how the system operates, the electronic equipment used and the technical connection arrangements and specifications;
 - (c) indicate in the procurement documents any division into categories of works, supplies or services and the characteristics defining them; and
 - (d) throughout the period of validity of the system, offer unrestricted and full direct access to the procurement documents in accordance with regulation 54 (electronic availability of procurement documents).

(13) A contracting authority must, throughout the period of validity of the dynamic purchasing system, give any economic operator the possibility of requesting to participate in the system under the conditions referred to in paragraphs (5) to (12).

(14) A contracting authority must finalise evaluation of such requests in accordance with the selection criteria within 10 working days following their receipt.

(15) The deadline referred to in paragraph (14) may be extended to a maximum of 15 working days in individual cases where justified, in particular, because of the need to examine additional documentation or otherwise to verify whether the selection criteria are met.

(16) Despite paragraphs (14) and (15), as long as the invitation to tender for the first specific procurement under the dynamic purchasing system has not been sent, a contracting authority may extend the evaluation period provided that no invitation to tender is issued during the extended evaluation period.

(17) Where a contracting authority intends to extend the evaluation period in accordance with paragraph (16), the authority must indicate in the procurement documents the length of the extended period that the authority intends to apply.

(18) A contracting authority must inform the economic operator concerned at the earliest possible opportunity of whether or not it has been admitted to the dynamic purchasing system.

(19) A contracting authority must invite all admitted participants to submit a tender for each specific procurement under the dynamic purchasing system, in accordance with regulation 55 (invitations to candidates).

(20) Where the dynamic purchasing system has been divided into categories of works, supplies or services, a contracting authority must invite every relevant participant to submit a tender.

(21) In paragraph (20), “relevant participant” means an economic operator which has been admitted to the dynamic purchasing system in relation to the category corresponding to the specific procurement concerned.

(22) A contracting authority must award the contract to the tenderer that submitted the most economically advantageous tender on the basis of the award criteria set out in the contract notice for the dynamic purchasing system or, where a prior information notice is used as a means of calling for competition, in the invitation to confirm interest.

(23) Those criteria may, where appropriate, be formulated more precisely in the invitation to tender.

(24) A contracting authority may, at any time throughout the period of validity of the dynamic purchasing system, require admitted participants to submit a renewed ESPD within 5 working days from the date on which that request is transmitted.

(25) Regulation 60(8) to (11) (European Single Procurement Document: use, content and form of the ESPD) shall apply throughout the period of validity of the dynamic purchasing system.

(26) A contracting authority must indicate the period of validity of the dynamic purchasing system in the call for competition.

(27) A contracting authority must notify the Commission of any change to the period of validity using—

- (a) where the period of validity is changed without terminating the system, the form used initially for the call for competition for the dynamic purchasing system;
- (b) where the system is terminated, a contract award notice referred to in regulation 51 (contract award notice).

(28) No charges may be made to any economic operators which are interested in or are a party to the dynamic purchasing system.

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Electronic Auctions

36.—(1) A contracting authority may use electronic auctions, in which economic operators present one or both of the following:—

- (a) new prices, revised downwards; or
- (b) new values concerning certain elements of tenders.

(2) A contracting authority must structure the electronic auction as a repetitive electronic process, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.

(3) Electronic auctions must not be used for public works contracts or public service contracts, which have as their subject-matter intellectual activities (such as the design of works) which cannot be ranked using automatic evaluation methods.

(4) A contracting authority which decides to hold an electronic auction must state that fact in the contract notice or in the invitation to confirm interest.

(5) In open or restricted procedures or competitive procedures with negotiation when the content of the procurement documents, in particular the technical specifications, can be established with precision a contracting authority—

- (a) may decide that the award of a public contract shall be preceded by an electronic auction;
- (b) may hold an electronic auction—
 - (i) on the reopening of competition among the parties to a framework agreement as provided for in regulation 34(7)(b) or (c) (framework agreements); or
 - (ii) on the opening for competition of contracts to be awarded under a dynamic purchasing system.

(6) The electronic auction must be based on prices, on the new values of the features of the tenders indicated in the procurement documents or on both, where the contract is awarded on the basis of the best price-quality ratio.

(7) Where a contracting authority has decided to hold an electronic auction, the procurement documents must include at least the following—

- (a) the features, the values for which will be the subject of electronic auction, provided that such features are quantifiable and can be expressed in figures or percentages;
- (b) any limits on the values which may be submitted, as they result from the specifications relating to the subject of the contract;
- (c) the information which will be made available to tenderers in the course of the electronic auction and, where appropriate, when it will be made available to them;
- (d) information concerning the electronic auction process;
- (e) the conditions under which the tenderers will be able to bid and, in particular, the minimum differences which will, where appropriate, be required when bidding; and
- (f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.

(8) Before proceeding with an electronic auction, a contracting authority must make a full initial evaluation of the tenders in accordance with the award criteria and with the weighting fixed for them.

(9) A tender must be considered admissible where—

- (a) it has been submitted by a tenderer who has not been excluded pursuant to regulation 58 (exclusion grounds) and who meets the selection criteria; and
- (b) it is in conformity with the technical specifications without being irregular, unacceptable or unsuitable.

- (10) A tender must be considered to be irregular for the purposes of paragraph (9)(b) where—
- (a) it does not comply with the procurement documents;
 - (b) it was received late;
 - (c) there is evidence of collusion or corruption; or
 - (d) it has been found by the contracting authority to be abnormally low.
- (11) A tender must be considered to be unacceptable for the purposes of paragraph (9)(b) where—
- (a) it was submitted by a tenderer which does not have the required qualifications; or
 - (b) the price tendered exceeds the contracting authority's budget as determined and documented prior to the commencement of the procurement procedure.
- (12) A tender must be considered not to be suitable for the purpose of paragraph (9)(b) where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority's needs and requirements as specified in the procurement documents.
- (13) All tenderers that have submitted admissible tenders must be invited simultaneously to participate in the electronic auction using, as of the date and time specified in the invitation, the technical connection arrangements referred to in accordance with the instructions set out in the invitation.
- (14) The electronic auction may take place in a number of successive phases.
- (15) The electronic auction must not start sooner than 2 working days after the date on which invitations are sent out.
- (16) The invitation must be accompanied by the outcome of a full evaluation of the relevant tender, carried out in accordance with the weighting provided for in regulation 67(9) (contract award criteria).
- (17) The invitation must also state the mathematical formula to be used in the electronic auction to determine the automatic re-rankings on the basis of the new prices or new values submitted, or both.
- (18) The formula referred to in paragraph (17) must incorporate the weighting of all the criteria established to determine the most economically advantageous tender, as indicated in the notice used as a means of calling for competition or in other procurement documents.
- (19) For the purpose of paragraph (18), any ranges of weightings must be reduced beforehand to a specified value.
- (20) Where variants are authorised in accordance with regulation 46 (variants), a separate formula must be provided for each variant.
- (21) Throughout each phase of an electronic auction the contracting authority must instantaneously communicate to all tenderers at least sufficient information to enable the tenderers to ascertain their relative rankings at any moment.
- (22) A contracting authority may, where this has been previously indicated, communicate other information concerning other prices or values submitted.
- (23) A contracting authority may also at any time announce the number of participants in the current phase of the auction.
- (24) In no case, however, may a contracting authority disclose the identities of the tenderers during any phase of an electronic auction.
- (25) A contracting authority must close an electronic auction—
- (a) at the previously indicated date and time;
 - (b) when the authority receives no more new prices or new values which meet the requirements concerning minimum differences specified in accordance with paragraph (7)

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(e), provided that the authority has previously stated the time which they will allow to elapse after receiving the last submission before they close the electronic auction; or

(c) when all of the previously indicated number of phases in the auction have been completed.

(26) Where the contracting authority intends to close an electronic auction in accordance with paragraph (25)(c), whether or not in combination with any arrangements laid down in paragraph (25)(b), the authority must indicate in the invitation to participate in the auction the timetable for each phase of the auction.

(27) After closing an electronic auction, a contracting authority must award the contract in accordance with regulation 67 (contract award criteria) on the basis of the results of the electronic auction.

Electronic catalogues

37.—(1) Where the use of electronic means of communication is required, a contracting authority may require tenders to be presented in the format of an electronic catalogue or to include an electronic catalogue.

(2) Tenders presented in the form of an electronic catalogue may be accompanied by other documents, completing the tender.

(3) Electronic catalogues must be established by the candidates or tenderers with a view to participating in a given procurement procedure in accordance with the technical specifications and format established by the contracting authority.

(4) Electronic catalogues must also comply with the requirements for electronic communication tools set out in regulation 23 (rules applicable to communication) as well as with any additional requirements set by the contracting authority in accordance with that regulation.

(5) Where the presentation of tenders in the form of electronic catalogues is accepted or required, a contracting authority must—

(a) state that to be the case in the contract notice, or in the invitation to confirm interest where a prior information notice is used as a means of calling for competition; and

(b) indicate in the procurement documents all the necessary information pursuant to regulation 23(16) to (20) (rules applicable to communication) concerning the format, the electronic equipment used and the technical connection arrangements and specifications for the catalogue.

(6) Where a framework agreement has been concluded with more than one economic operator following the submission of tenders in the form of electronic catalogues, a contracting authority may provide that the reopening of competition for a specific contract is to take place on the basis of updated catalogues.

(7) Where a contracting authority requires updated catalogues in accordance with paragraph (6), the authority must—

(a) invite tenderers to resubmit their electronic catalogues, adapted to the requirements of the contract in question; or

(b) notify tenderers that the authority intends to collect from the electronic catalogues which have already been submitted the information needed to constitute tenders adapted to the requirements of the contract in question, provided that the use of that method has been indicated in the procurement documents for the framework agreement.

(8) Where a contracting authority reopens competition for a specific contract in accordance with paragraph (7)(b), the authority must—

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- (a) notify tenderers of the date and time at which the authority intends to collect the information needed to constitute tenders adapted to the requirements of the specific contract in question, and
 - (b) allow tenderers to refuse such collection of information.
- (9) A contracting authority must allow an adequate period of time between the notification referred to in paragraph (8)(a) and the collection of information.
- (10) Before awarding the contract, a contracting authority must present the collected information to the tenderer concerned and give the tenderer the opportunity to contest or confirm that the tender thus constituted does not contain any material errors.
- (11) A contracting authority may award a contract based on a dynamic purchasing system by requiring that offers for a specific contract are to be presented in the format of an electronic catalogue.
- (12) A contracting authority may also award a contract based on a dynamic purchasing system in accordance with paragraphs (7)(b) and (8) to (10) provided that the request for participation in the dynamic purchasing system is accompanied by an electronic catalogue in accordance with the technical specifications and format established by the contracting authority.
- (13) For the purpose of paragraph (12), the catalogue must be completed subsequently by the candidates, when they are informed of the contracting authority's intention to constitute tenders by means of the procedure set out in paragraph (7)(b).

Centralised purchasing activities and central purchasing bodies

- 38.**—(1) A contracting authority may acquire supplies, services or both from a central purchasing body offering [^{F8}a centralised purchasing activity].
- (2) A contracting authority may acquire works, supplies or services by using—
 - (a) a contract awarded by a central purchasing body;
 - (b) a dynamic purchasing system operated by a central purchasing body; or
 - (c) to the extent set out in regulation 34(4) (framework agreements), a framework agreement concluded by a central purchasing body offering the centralised purchasing activity.
 - (3) Where a dynamic purchasing system which is operated by a central purchasing body may be used by another contracting authority, this must be mentioned in the call for competition setting up that dynamic purchasing system.
 - (4) Subject to paragraph (5), where a contracting authority makes an acquisition in accordance with paragraphs (1) or (2), the contracting authority fulfils its obligations under these Regulations in relation to such acquisition.
 - (5) A contracting authority referred to in paragraph (4) is responsible for fulfilling the obligations imposed by these Regulations in respect of any part of the procedure that the authority conducts itself, such as—
 - (a) awarding a contract under a dynamic purchasing system which is operated by a central purchasing body;
 - (b) conducting a reopening of competition under a framework agreement that has been concluded by a central purchasing body; or
 - (c) determining, pursuant to regulation 34(7)(a) or (b) (framework agreements), which of the economic operators, that are party to a framework agreement that has been concluded by a central purchasing body, shall perform a given task under such framework agreement.
 - (6) All procurement procedures conducted by a central purchasing body must be performed using electronic means of communication, in accordance with the requirements set out in regulation 23 (rules applicable to communication).

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(7) A contracting authority may, without applying the procedures provided for in these Regulations, award a public service contract for the provision of centralised purchasing activities to a central purchasing body.

(8) A public service contract referred to in paragraph (7) may also include the provision of ancillary purchasing activities.

Textual Amendments

F8 Words in [reg. 38\(1\)](#) substituted (18.4.2016) by [The Public Contracts \(Scotland\) Amendment Regulations 2016 \(S.S.I. 2016/47\)](#), [regs. 1, 2\(6\)](#)

Occasional joint procurement

39.—(1) Two or more contracting authorities may agree to perform certain specific procurements jointly.

(2) Contracting authorities shall be jointly responsible for fulfilling their obligations under these Regulations where—

- (a) the conduct of a procurement procedure in its entirety is carried out jointly in the name of and on behalf of all the contracting authorities concerned; or
- (b) one contracting authority manages the procedure, acting on its own behalf and on behalf of the other contracting authorities concerned.

(3) Where the conduct of a procurement procedure is not in its entirety carried out in the name of and on behalf of the contracting authorities concerned—

- (a) the contracting authorities shall be jointly responsible only for those parts carried out jointly; and
- (b) each contracting authority shall have sole responsibility for fulfilling its obligations under these Regulations in respect of the parts it conducts in its own name and on its own behalf.

Procurement involving contracting authorities from different member States

40.—(1) Without prejudice to regulation 13 (exclusions: public contracts between entities within the public sector), a contracting authority may act jointly with a contracting authority from another member State in the award of a public contract by using one of the means provided for in this regulation.

(2) A contracting authority must not use the means provided for in this regulation for the purpose of avoiding the application of mandatory public law provisions in the applicable law of the jurisdiction to which the authority is subject, where those provisions are in conformity with EU law.

(3) A contracting authority may use centralised purchasing activities offered by a central purchasing body located in another member State.

(4) A contracting authority may only use the provision of centralised purchasing activities by a central purchasing body located in another member State where they are conducted in accordance with the national provisions of the member State where the central purchasing body is located.

(5) The national provisions of the member State where the central purchasing body is located also apply to—

- (a) the award of a contract under a dynamic purchasing system;
- (b) the conduct of a reopening of competition under a framework agreement; and
- (c) the determination, for the purpose of points (a) and (b) of Article 33(4) of the Directive (to which effect is given in these Regulations by regulation 34(7)(a) and (b)) (framework

agreements), of which of the economic operators which are party to the framework agreement shall perform a given task.

(6) In the circumstances set out in paragraph (7), several contracting authorities from different member States may—

- (a) jointly award a public contract, conclude a framework agreement or operate a dynamic purchasing system; and
- (b) to the extent that they may do so in accordance with Article 33(2) of the Directive (to which effect is given in these Regulations by regulation 34(3) to (5) (framework agreements)), award contracts based on the framework agreement or award public contracts under the dynamic purchasing system.

(7) The circumstances referred to in paragraph (6) are that—

- (a) unless the necessary elements have been regulated by an international agreement concluded between the member States concerned, the participating contracting authorities have concluded an agreement that determines—
 - (i) the responsibilities of the parties and the relevant applicable national provisions; and
 - (ii) the internal organisation of the procurement procedure, including the management of the procedure, the distribution of the works, supplies or services to be procured, and the conclusion of contracts; and
- (b) the allocation of responsibilities and the applicable national law have been referred to in the procurement documents.

(8) When determining responsibilities and the applicable national law as referred to in paragraph (7)(a)(i), the participating contracting authorities may allocate specific responsibilities among them and determine the applicable provisions of the national laws of any of their respective member States.

(9) A participating contracting authority fulfils its obligations under these Regulations when it purchases works, supplies or services from a contracting authority which is responsible for the procurement procedure.

(10) Contracting authorities from different member States may set up a joint entity for the purpose of paragraph (1), subject to compliance with paragraph (11).

(11) The participating contracting authorities must, before undertaking any given procurement, by a decision of the competent body of the joint entity, agree on the applicable national procurement rules of—

- (a) the member State where the joint entity has its registered office; or
- (b) the member State where the joint entity is carrying out its activities.

(12) The agreement referred to in paragraph (11) may either apply for an undetermined period, when fixed in the constitutive act of the joint entity, or may be limited to a certain period of time, certain types of contract or one or more individual contract awards.

(13) The other provisions of these Regulations apply to procurement by the joint entity only where they are the national provisions applicable in accordance with paragraph (11).

(14) In this regulation—

“central purchasing body located in another member State” means any person which is a central purchasing body for the purposes of the Directive in the member State in which it is located; and

“contracting authority from another member State” means any person which is a contracting authority for the purposes of the Directive in a member State other than the United Kingdom,

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and references to “participating contracting authorities” shall, to the extent that they are from another member State, be interpreted accordingly.

SECTION 5

Conduct of the Procedure

Preliminary market consultation

41.—(1) Before commencing a procurement, a contracting authority may conduct market consultation with a view to preparing the procurement and informing economic operators of the authority's procurement plans and requirements.

(2) For this purpose, a contracting authority may act as it considers appropriate, including seeking or accepting advice from independent experts or authorities or from market participants.

(3) Such advice may be used in the planning and conduct of the procurement procedure, provided that it does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.

Prior involvement of candidates or tenderers

42.—(1) A contracting authority must take appropriate measures to ensure that competition is not distorted by the participation of a candidate or tenderer where that candidate or tenderer, or an undertaking related to that candidate or tenderer—

- (a) has advised the contracting authority, whether in the context of regulation 41 (preliminary market consultation) or not; or
- (b) has otherwise been involved in the preparation of the procurement.

(2) Such measures must include—

- (a) the communication to the other candidates and tenderers of relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure; and
- (b) the fixing of adequate time limits for the receipt of tenders.

(3) A candidate or tenderer in a situation referred to in paragraph (1) may only be excluded from the procedure for the purpose of paragraph (1) where there are no other means to ensure compliance with the duty referred to in regulation 19(1) (principles of procurement).

(4) Prior to any such exclusion, a candidate or tenderer must be given the opportunity to prove that their involvement in preparing the procurement procedure is not capable of distorting competition.

(5) The measures taken must be documented in the report referred to in regulation 83(1) (reporting and documentation requirements).

Technical specifications

43.—(1) The technical specifications must—

- (a) be set out in the procurement documents; and
- (b) lay down the characteristics required of any works, supply or service.

(2) In the case of a public works contract, technical specifications define any characteristics required of a material, product or supply so that it fulfils the use for which it is intended by the contracting authority.

(3) The characteristics referred to in paragraph (2) may include—

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- (a) levels of environmental and climate performance;
 - (b) design for all requirements (including accessibility for disabled persons) and conformity assessment;
 - (c) performance, safety or dimensions, including the procedures concerning quality assurance;
 - (d) terminology;
 - (e) symbols;
 - (f) testing and test methods;
 - (g) packaging, marking and labelling;
 - (h) user instructions;
 - (i) production processes and methods at any stage of the life cycle of the works;
 - (j) rules relating to design and costing, and the test, inspection and acceptance conditions for works; and
 - (k) methods or techniques of construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve.
- (4) In the case of a public supply or public service contract, the required characteristics may include—
- (a) quality levels;
 - (b) environmental and climate performance levels;
 - (c) design for all requirements (including accessibility for disabled persons) and conformity assessment;
 - (d) performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold;
 - (e) terminology;
 - (f) symbols;
 - (g) testing and test methods;
 - (h) packaging, marking and labelling;
 - (i) user instructions;
 - (j) production processes and methods at any stage of the life cycle of the supply or service; and
 - (k) conformity assessment procedures.
- (5) In the case of any public contract, the required characteristics may also refer to—
- (a) the specific process or method of production or provision of the requested works, supplies or services; or
 - (b) a specific process for another stage of its life cycle,
- even where such factors do not form part of their material substance provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.
- (6) The technical specifications may also specify whether the transfer of intellectual property rights will be required.
- (7) Where the subject of the procurement is intended for use by natural persons, whether the general public or staff of the contracting authority, the technical specifications must, except in duly justified cases, be drawn up so as to take into account accessibility criteria for persons with disabilities or design for all users.

Status: Point in time view as at 18/04/2020.

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(8) Where mandatory accessibility requirements are adopted by a legal act of the EU, technical specifications must, as far as accessibility criteria for persons with disabilities or design for all users are concerned, be defined by reference thereto.

(9) Technical specifications must afford equal access of economic operators to the procurement procedure and must not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

(10) Without prejudice to mandatory national technical rules, to the extent that they are compatible with EU law, the technical specifications must be formulated—

- (a) in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow the contracting authority to award the contract;
- (b) by reference to any of the following technical specifications in the following order of precedence—
 - (i) national standards transposing European standards;
 - (ii) European Technical Assessments;
 - (iii) common technical specifications;
 - (iv) international standards;
 - (v) other technical reference systems established by the European standardisation bodies; or
 - (vi) when none of the above exist, national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies,but each reference must be accompanied by the words ‘or equivalent’;
- (c) in terms of performance or functional requirements as referred to in sub-paragraph (a), with reference to the technical specifications referred to in sub-paragraph (b) as a means of presuming conformity with such performance or functional requirements; or
- (d) by reference to the technical specifications referred to in sub-paragraph (b) for certain characteristics, and by reference to the performance or functional requirements referred to in sub-paragraph (a) for other characteristics.

(11) Subject to paragraph (12), technical specifications must not, with the effect of favouring or eliminating certain undertakings or certain products, refer to—

- (a) a specific make or source;
- (b) a particular process which characterises the products or services provided by a specific economic operator; or
- (c) trade marks, patents, types, or a specific origin or production.

(12) Reference of a kind referred to in paragraph (11) is permitted in any of the following circumstances—

- (a) where justified by the subject-matter of the contract;
- (b) on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraph (10) is not possible, in which case the reference must be accompanied by the words “or equivalent”.

(13) Where a contracting authority formulates technical specifications in terms of performance or functional requirements in accordance with paragraph (10)(a), it must not reject a tender for works, supplies or services which complies with a technical specification of a kind mentioned

in paragraph (10)(b)(i) to (v), where those specifications address the performance or functional requirements which it has laid down.

(14) Where a contracting authority formulates technical specifications in accordance with paragraph (10)(b), it must not reject a tender on the grounds that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred, where the tenderer proves in its tender by any appropriate means, including the means of proof referred to in regulation 45 (test reports, certificates and other means of proof), that the solution proposed satisfies in an equivalent manner the requirements defined by the technical specifications.

(15) In its tender, the tenderer must prove by any appropriate means, including those referred to in regulation 45 (test reports, certificates and other means of proof), that the works, supply or service in compliance with the standard meets the performance or functional requirements of the contracting authority.

Labels

44.—(1) Where a contracting authority intends to purchase works, supplies or services with specific environmental, social or other characteristics the authority may, in the technical specifications, the award criteria or the contract performance conditions, require a specific label as means of proof that the works, services or supplies correspond to the required characteristics, provided that all of the following conditions are fulfilled—

- (a) the label requirements only concern criteria which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services;
- (b) the label requirements are based on objectively verifiable and non-discriminatory criteria;
- (c) the label is established in an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate;
- (d) the label is accessible to all interested parties; and
- (e) the label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.

(2) Where a contracting authority does not require the works, supplies or services to meet all of the label requirements, the authority must indicate which label requirements are required.

(3) A contracting authority requiring a specific label must accept all labels that confirm that the works, supplies or services meet equivalent label requirements.

(4) Where an economic operator had demonstrably no possibility of obtaining the specific label indicated by the contracting authority, or an equivalent label, within the relevant time limits for reasons that are not attributable to that economic operator, the contracting authority must accept other appropriate means of proof, which may include a technical dossier from the manufacturer, provided that the economic operator concerned proves that the works, supplies or services to be provided by it fulfil the requirements of the specific label or the specific requirements indicated by the contracting authority.

(5) Where a label fulfils the conditions mentioned in paragraph (1)(b), (c), (d) and (e) but also sets out requirements not linked to the subject-matter of the contract, a contracting authority must not require the label but may define the technical specification by reference to those of the detailed specifications of that label, or, where necessary, parts of it, that are linked to the subject-matter of the contract and are appropriate to define characteristics of that subject-matter.

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Test reports, certificates and other means of proof

45.—(1) A contracting authority may require an economic operator to provide a test report from a conformity assessment body or a certificate issued by such a body as means of proof of conformity with requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

(2) Where a contracting authority requires the submission of certificates drawn up by a specific conformity assessment body, certificates from other equivalent conformity assessment bodies must also be accepted by the contracting authority.

(3) In paragraphs (1) and (2), “conformity assessment body” means a body that performs conformity assessment activities including calibration, testing, certification and inspection accredited in accordance with Regulation (EC) No 765/2008 of the European Parliament and of the Council setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93^{M25}.

(4) Where the economic operator concerned has no access to the certificates or test reports referred to in paragraphs (1) and (2), or no possibility of obtaining them within the relevant time limits, a contracting authority must accept appropriate means of proof other than those referred to in paragraphs (1) and (2), such as a technical dossier of the manufacturer, provided that—

- (a) the lack of access is not attributable to the economic operator concerned; and
- (b) the means of proof provided by the economic operator concerned proves that the works, supplies or services provided by it meet the requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

Marginal Citations

M25 OJ No L 218, 13.8.2008, p.30.

Variants

46.—(1) A contracting authority may authorise or require tenderers to submit variants.

(2) A contracting authority must indicate in the contract notice or, where a prior information notice is used as a means of calling for competition, in the invitation to confirm interest, whether or not it authorises or requires variants.

(3) A contracting authority authorising or requiring variants must state in the procurement documents the minimum requirements to be met by the variants and any specific requirements for their presentation, in particular whether variants may be submitted only where the economic operator also submits a tender which is not a variant.

(4) A contracting authority must not take into consideration a variant which—

- (a) has not been authorised or required;
- (b) is not linked to the subject matter of the contract; or
- (c) does not meet the minimum requirements laid down by the contracting authority.

(5) A contracting authority must ensure that the award criteria can be applied to variants meeting those minimum requirements as well as to tenders which are not variants.

(6) In a procedure for awarding a public supply contract or public service contract, a contracting authority that has authorised or required variants must not reject a variant on the sole ground that it would, where successful, lead to either a public service contract rather than a public supply contract or a public supply contract rather than a public service contract.

Division of contracts into lots

47.—(1) A contracting authority may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots.

(2) Where a contracting authority decides not to award a contract in the form of separate lots the authority must indicate the main reasons for its decision in the procurement documents or in the report referred to in regulation 83(1) (reporting and documentation requirements).

(3) Where a contracting authority decides to award a contract in the form of separate lots it must indicate, in the contract notice or in the invitation to confirm interest, whether tenders may be submitted for one, for several or for all of the lots.

(4) A contracting authority may, even where tenders may be submitted for several or all lots, limit the number of lots that may be awarded to one tenderer, provided that the maximum number of lots per tenderer is stated in the contract notice or in the invitation to confirm interest.

(5) A contracting authority must indicate in the procurement documents the objective and non-discriminatory criteria or rules it intends to apply for determining which lots will be awarded where the application of the award criteria would result in one tenderer being awarded more lots than the maximum number.

(6) Where more than one lot may be awarded to the same tenderer, a contracting authority may award contracts combining several or all lots where the authority—

- (a) has specified in the contract notice or in the invitation to confirm interest that it reserves the possibility of doing so; and
- (b) indicated the lots or groups of lots that may be combined.

Setting time limits

48.—(1) When fixing the time limits for the receipt of tenders and requests to participate, a contracting authority must take account of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set out in regulations 28 to 32.

(2) Where tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the procurement documents, the time limits for the receipt of tenders, which shall be longer than the minimum time limits set out in regulations 28 to 32, must be fixed so that all economic operators concerned may be aware of all the information needed to produce tenders.

(3) A contracting authority must extend the time limits for the receipt of tenders, so that all economic operators concerned may be aware of all the information needed to produce tenders, where—

- (a) for whatever reason, additional information, although requested by the economic operator in good time, is not supplied at the latest 6 days before the time limit fixed for the receipt of tenders; or
- (b) significant changes are made to the procurement documents.

(4) In the case of an accelerated procedure, the period mentioned in paragraph (3)(a) shall be 4 days.

(5) The length of the extension given pursuant to paragraph (3) must be proportionate to the importance of the information or change.

(6) A contracting authority is not required to extend the time limit where—

- (a) additional information has not been requested in good time; or
- (b) the additional information requested is of insignificant importance with a view to preparing responsive tenders.

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Prior information notices

49.—(1) A contracting authority may make known its intentions of planned procurements through the publication of a prior information notice.

(2) A prior information notice must contain the information set out in section I of Part B of Annex V to the Directive.

(3) A contracting authority wishing to publish a prior information notice must—

- (a) send it for publication in accordance with regulation 52 (form and manner of sending notices for publication at EU level); or
- (b) publish it on the contracting authority's buyer profile in accordance with regulation 53 (publication at national level).

(4) Where the prior information notice is published by the contracting authority on its buyer profile, the contracting authority must send for publication, in accordance with regulation 52 (form and manner of sending notices for publication at EU level), a notice of the publication on its buyer profile.

(5) The notice of publication referred to in paragraph (4) must contain the information set out in Part A of Annex V to the Directive.

(6) Where a sub-central contracting authority uses a prior information notice as a call for competition pursuant to regulation 27(8) (choice of procedures), the notice must—

- (a) refer specifically to the works, supplies or services that will be the subject of the contract to be awarded;
- (b) indicate that the contract will be awarded by restricted procedure or competitive procedure with negotiation without further publication of a call for competition and invite interested economic operators to express their interest;
- (c) contain, in addition to the information set out in section I of Part B of Annex V to the Directive, the information set out in section II of that Part; and
- (d) have been sent for publication in accordance with regulation 52 (form and manner of sending notices for publication at EU level) between 35 days and 12 months prior to the date on which an invitation is sent for the purposes of regulation 55(2) (invitations to candidates).

(7) In addition to sending a prior information notice used for the purpose mentioned in paragraph (6) for publication in accordance with regulation 52 (form and manner of sending notices for publication at EU level), a contracting authority may publish such a notice on its buyer profile in accordance with regulation 53 (publication at national level).

(8) Subject to paragraph (9), the period covered by a prior information notice must be a maximum of 12 months from the date on which the notice is sent for publication.

(9) In the case of a public contract for social and other specific services, a prior information notice referred to in regulation 75(1)(b) (publication of notices) may cover a period which is longer than 12 months.

Contract notices

50. A contract notice must contain the information set out in Part C of Annex V to the Directive and must be sent for publication in accordance with regulation 52 (form and manner of sending notices for publication at EU level).

Contract award notices

51.—(1) Not later than 30 days after the award of a contract or conclusion of a framework agreement, a contracting authority must send for publication in accordance with regulation 52 (form and manner of sending notices for publication at EU level) a contract award notice on the results of the procurement procedure.

(2) A contract award notice must contain the information set out in Part D of Annex V to the Directive.

(3) Where the call for competition for the contract concerned has been made in the form of a prior information notice and the contracting authority has decided that it will not award further contracts during the period covered by the prior information notice, the contract award notice must contain a specific indication to that effect.

(4) Paragraph (1) does not apply where the contract awarded is a contract based on a framework agreement.

(5) In the case of the award of a contract based upon a dynamic purchasing system, a contracting authority must either—

- (a) send for publication in accordance with regulation 52 (form and manner of sending notices for publication at EU level) a contract award notice within 30 days after the award of each such contract; or
- (b) group notices referred to in sub-paragraph (a) on a quarterly basis, in which case the authority must send for publication the grouped notices within 30 days of the end of each quarter.

(6) A contracting authority may withhold from publication information on the contract award or the conclusion of the framework agreement where the release of the information—

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

Form and manner of sending notices for publication at EU level

52.—(1) The notices required by regulations 49, 50, 51, 72, 75 and 78 to be sent for publication in accordance with this regulation must—

- (a) be sent by electronic means to the EU Publications Office for publication; and
- (b) where the Commission has published standard forms for such notices, be set out using such forms.

(2) Contracting authorities must ensure that they are able to supply proof of the dates on which notices are sent to the EU Publications Office for publication.

(3) Where the EU Publications Office has given the contracting authority confirmation of the receipt of the notice and of the publication of the information sent, indicating the date of that publication, that confirmation shall constitute proof of publication.

(4) A contracting authority may send notices in respect of public contracts to the EU Publications Office for publication even where the authority is not required to do so by these Regulations, provided such notices are sent by electronic means.

Publication at national level

53.—(1) In addition to the publication of the notices referred to in regulations 49, 50, 51, 75 and 78 by the EU Publications Office, a contracting authority may publish the information contained in such notices on the internet on a buyer profile.

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- (2) A buyer profile may also include—
- (a) prior information notices which are published on it pursuant to regulation 49(3)(b) (prior information notices);
 - (b) information on ongoing invitations to tender, scheduled purchases, contracts concluded, procedures cancelled; and
 - (c) any useful general information, such as a contact point, a telephone and a fax number, a postal address and an e-mail address.
- (3) The notices referred to in regulations 49, 50, 51 and 78, and the information contained in them, must not be published at national level before the notices are published by the EU Publications Office.
- (4) Notwithstanding paragraph (3), publication may take place at national level where a contracting authority has not been notified of the publication by the EU Publications Office within 48 hours after confirmation of the receipt of the notice in accordance with Article 51(5) of the Directive.
- (5) A notice published at national level must not contain information other than that contained in the notice sent to the EU Publications Office or published on a buyer profile, but must indicate the date of sending of the notice to the EU Publications Office or its publication on the buyer profile.
- (6) Where a prior information notice is to be published on a buyer profile for the purposes of regulation 49(3) (prior information notices) —
- (a) the prior information notice may not be so published before the contracting authority sends to the EU Publications Office the notice referred to in regulation 49(4) (prior information notices); and
 - (b) the prior information notice must indicate the date of that sending.

Electronic availability of procurement documents

54.—(1) A contracting authority must offer on the internet unrestricted and full direct access free of charge to the procurement documents from the date of publication of a notice in accordance with regulation 52 (form and manner of sending notices for publication at EU level) or the date on which an invitation to confirm interest was sent.

(2) The text of the notice or the invitation to confirm interest must specify the internet address at which the procurement documents are accessible.

(3) Where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered for one of the reasons set out in regulation 23(3) (rules applicable to communication), a contracting authority may indicate in the notice or the invitation to confirm interest that the procurement documents concerned will be transmitted by means other than electronic means in accordance with the periods mentioned in paragraphs (6) and (7).

(4) Where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered because a contracting authority intends to apply regulation 22(3) (confidentiality), the authority must indicate in the notice or the invitation to confirm interest which measures, aimed at protecting the confidential nature of the information, the authority requires and how access can be obtained to the documents concerned.

(5) Where paragraph (3) or (4) applies, the time limit for the submission of tenders must be extended by 5 days, except in a case of duly substantiated urgency referred to in regulation 28(5) (open procedure), regulation 29(11) (restricted procedure), or regulation 30(11) (competitive procedure with negotiation).

(6) Provided that it has been requested in good time, a contracting authority must, not later than 6 days before the time limit fixed for the receipt of tenders, supply to all tenderers taking part in

the procurement procedure additional information relating to the specifications and any supporting documents.

(7) In the case of an accelerated procedure, the period mentioned in paragraph (6) shall be not later than 4 days before the time limit fixed for the receipt of tenders.

Invitations to candidates

55.—(1) In a restricted procedure, a competitive dialogue procedure, an innovation partnership and a competitive procedure with negotiation, an invitation by a contracting authority to selected candidates or to participants to submit a tender must be issued simultaneously and in writing.

(2) In a competitive dialogue procedure or an innovation partnership, an invitation by a contracting authority to selected candidates to participate must be issued simultaneously and in writing.

(3) Where the call for competition is made by means of a prior information notice, as referred to in regulation 27(8)(choice of procedure), the contracting authority must, simultaneously and in writing, invite all economic operators which have expressed their interest following the publication of the prior information notice, to confirm their interest in writing.

(4) The invitations required by paragraphs (1) to (3) must—

- (a) include a reference to the electronic address at which the procurement documents have been made directly available by electronic means; or
- (b) be accompanied by the procurement documents, where those documents have not been the subject of unrestricted and full direct access, free of charge, for the reasons referred to in regulation 54(3) or (4) (electronic availability of procurement documents) and have not already been made otherwise available.

(5) The invitations required by paragraphs (1) and (2) must also contain at least the following information—

- (a) a reference to the call for competition published;
- (b) where tenders are to be submitted, the deadline for the receipt of the tenders, the address to which the tenders must be sent and the language in which the tenders must be drawn up;
- (c) in the case of competitive dialogue, the date and the address set for the start of consultation and the language or languages to be used;
- (d) a reference to any documents to be submitted, either in support of verifiable declarations by the tenderer in accordance with regulations 60 (European Single Procurement Document: use, content and form of ESPD) and 61 (means of proof) and, where appropriate, 63 (quality assurance standards and environmental management standards) or to supplement the information referred to in those regulations, and under the conditions laid down in regulations 60, 61 and 63; and
- (e) the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance of such criteria, where they are not given in the contract notice, in the invitation to confirm interest, in the technical specifications or the descriptive document.

(6) An invitation to confirm interest referred to in paragraph (3) must also contain at least the following information—

- (a) the nature and quantity, including all options concerning complementary contracts and, where possible, the estimated time available for exercising such options for renewable contracts, the nature and quantity and, where possible, the estimated publication dates of future notices of competition for works, supplies or services to be put out to tender;

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- (b) the type of procedure, namely restricted procedure or competitive procedure with negotiation;
- (c) where applicable, the date on which the delivery of supplies or the execution of works or services is to commence or terminate;
- (d) where electronic access cannot be offered, the address and closing date for the submission of requests for procurement documents and the language or languages in which they are to be drawn up;
- (e) the address of the contracting authority which is to award the contract;
- (f) economic and technical conditions, financial guarantees and information required from economic operators;
- (g) the form of the contract which is the subject of the invitation to tender, namely purchase, lease, hire or hire-purchase, or any combination of these; and
- (h) the contract award criteria and their relative weighting or, where appropriate, the descending order of importance of such criteria, where this information is not given in the prior information notice or the technical specifications or in the invitation to tender or to negotiate.

Informing candidates and tenderers

56.—(1) A contracting authority must as soon as possible after reaching a decision concerning the award of a contract, the conclusion of a framework agreement or admittance to a dynamic purchasing system, inform each candidate and tenderer of the decision reached.

(2) Information provided in accordance with paragraph (1) must, where applicable, include the grounds for any decision—

- (a) not to conclude a framework agreement;
- (b) not to award a contract for which there has been a call for competition;
- (c) to recommence the procedure; or
- (d) not to implement a dynamic purchasing system.

(3) On request from the candidate or tenderer concerned, the contracting authority must as soon as possible, and in any event within 15 days from receipt of a written request, inform—

- (a) any unsuccessful candidate of the reasons for the rejection of its request to participate;
- (b) any unsuccessful tenderer of the reasons for the rejection of its tender, including, for the cases referred to in regulation 43(13) and (14) (technical specifications), the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements;
- (c) any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement; and
- (d) any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.

(4) A contracting authority may decide to withhold certain information referred to in paragraphs (2) and (3), where the release of such information—

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

Choice of Participants and Awarding Contracts

General principles

57.—(1) A contracting authority must award a contract or conclude a framework agreement on the basis of criteria laid down in accordance with regulations 67 to 69, provided that the contracting authority has verified in accordance with regulations 60 to 62 that—

- (a) the tender complies with the requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents, taking into account, where applicable, regulation 46 (variants); and
- (b) the tenderer—
 - (i) is not excluded in accordance with regulation 58 (exclusion grounds);
 - (ii) meets the selection criteria set out by the contracting authority in accordance with regulation 59 (selection criteria); and
 - (iii) meets, where applicable, the non-discriminatory rules and criteria referred to in regulation 66 (reduction of the number of otherwise qualified candidates to be invited to participate).

(2) A contracting authority may decide not to award a contract to, or conclude a framework agreement with, the tenderer submitting the most economically advantageous tender where the authority has established that the tender does not comply with applicable obligations in the fields of environmental, social and labour law established by EU law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X to the Directive as amended from time to time.

(3) In open procedures, a contracting authority may decide to examine tenders before verifying the absence of grounds for exclusion and the fulfilment of the selection criteria in accordance with regulations 58 to 65.

(4) Where a contracting authority makes use of the possibility referred to in paragraph (3), the authority must ensure that the verification of absence of grounds for exclusion and of fulfilment of the selection criteria is carried out in an impartial and transparent manner so that no contract is awarded to, or framework agreement concluded with, a tenderer that—

- (a) should have been excluded under regulation 58 (exclusion grounds); or
- (b) does not meet the selection criteria set out by the contracting authority.

(5) Where information or documentation to be submitted by an economic operator is or appears to be incomplete or erroneous, or where specific documents are missing, a contracting authority may request the economic operator concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.

Exclusion grounds

58.—(1) A contracting authority must exclude an economic operator from participation in a procurement procedure where the authority has established, by verifying in accordance with regulations 60 (European Single Procurement Document: use, content and form of the ESPD), 61 (means of proof) and 62 (recourse to e-Certis), or is otherwise aware that that economic operator or a person to whom paragraph (2) applies has been convicted of any of the following offences—

- (a) the common law offence of conspiracy where that conspiracy relates to participation in a criminal organisation as defined in Article 2 of Council Framework Decision 2008/841/JHA on the fight against organised crime^{M26} or an offence under sections 28 or 30 of the Criminal Justice and Licensing (Scotland) Act 2010^{M27};

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- (b) corruption within the meaning of section 1(2) of the Public Bodies Corrupt Practices Act 1889 ^{M28} or section 1 of the Prevention of Corruption Act 1906 ^{M29}, where the offence relates to active corruption as defined in Article 3 of the Council Act of 26th May 1997 ^{M30} and Article 3(1) of Council Joint Action 98/742/JHA ^{M31};
 - (c) bribery or corruption within the meaning of sections 68 and 69 of the Criminal Justice (Scotland) Act 2003 ^{M32}, where the offence relates to active bribery or corruption;
 - (d) bribery within the meaning of sections 1 or 6 of the Bribery Act 2010 ^{M33};
 - (e) 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 ^{M34}—
 - (i) the offence of cheating the Revenue;
 - (ii) the common law offence of fraud;
 - (iii) the common law offence of theft or fraud;
 - (iv) fraudulent trading within the meaning of section 458 of the Companies Act 1985 ^{M35}, or section 993 of the Companies Act 2006 ^{M36};
 - (v) fraudulent evasion within the meaning of section 170 of the Customs and Excise Management Act 1979 ^{M37} or section 72 of the Value Added Tax Act 1994 ^{M38};
 - (vi) an offence in connection with taxation in the European Union within the meaning of section 71 of the Criminal Justice Act 1993 ^{M39};
 - (vii) the common law offence of uttering; or
 - (viii) the common law offence of attempting to pervert the course of justice;
 - (f) any offence listed in—
 - (i) section 41 of the Counter-Terrorism Act 2008 ^{M40}; or
 - (ii) Schedule 2 to that Act where the court has determined that there is a terrorist connection.
 - (g) money laundering within the meaning of sections 340(11) and 415 of the Proceeds of Crime Act 2002 ^{M41};
 - (h) 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 ^{M42};
 - (i) any offence under Part 1 of the Human Trafficking and Exploitation (Scotland) Act 2015 ^{M43} or under any provision referred to in the Schedule to that Act;
 - (j) an offence in connection with the proceeds of drug trafficking within the meaning of section 49, 50 or 51 of the Drug Trafficking Act 1994 ^{M44};
 - (k) any other offence within the meaning of Article 57(1) of the Directive as defined by the law of any EEA state or any part thereof.
- (2) This paragraph applies to a person who is a member of the administrative, management or supervisory body of the economic operator referred to in paragraph (1) or has powers of representation, decision or control in relation to such economic operator.
- (3) A contracting authority must exclude an economic operator from participation in a procurement procedure where—
- (a) subject to paragraphs (5) to (7), the contracting authority is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions and this has been established by a judicial or administrative decision having final and binding effect in accordance with the legal provisions of the country in which it is

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established or in accordance with those of any of the jurisdictions of the United Kingdom;
or

- (b) the contracting authority is aware that the economic operator has committed an act prohibited under the Employment Relations Act 1999 (Blacklists) Regulations 2010^{M45} and the commission of such an act has been admitted by the economic operator or established by a judicial decision having final and binding effect.

(4) Subject to paragraph (5), a contracting authority may exclude an economic operator from participation in a procurement procedure where the contracting authority can demonstrate by any appropriate means that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions.

(5) A contracting authority may not exclude an economic operator pursuant to paragraph (3)(a) or (4) where—

- (a) the economic operator has fulfilled its obligations by paying, or entering into a binding arrangement with a view to paying, the taxes or social security contributions due, including, where applicable, any interest accrued or fines; or
(b) the obligation to make repayment otherwise ceases.

(6) A contracting authority may disregard any of the prohibitions imposed by paragraphs (1) to (3), on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment.

(7) A contracting authority may also disregard the prohibition imposed by paragraph (3)(a) where an exclusion would be clearly disproportionate, in particular—

- (a) where only minor amounts of taxes or social security contributions are unpaid; or
(b) where the economic operator was informed of the exact amount due following its breach of its obligations relating to the payment of taxes or social security contributions at such time that it did not have the possibility of fulfilling its obligations in a manner described in paragraph (5) before expiration of the deadline for requesting participation or, in open procedures, the deadline for submitting its tender.

(8) A contracting authority may exclude an economic operator from participation in a procurement procedure where—

- (a) the contracting authority can demonstrate by any appropriate means a violation by the economic operator of applicable obligations referred to in regulation 57(2) (general principles);
(b) the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it is in an arrangement with creditors, where its business activities are suspended or it is in any analogous situation arising from a similar procedure under laws and regulations to which the economic operator may be subject;
(c) the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;
(d) the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;
(e) a conflict of interest exists within the meaning of regulation 25 (conflicts of interest) which cannot be effectively remedied by other less intrusive measures;
(f) a distortion of competition from the prior involvement of the economic operator in the preparation of the procurement procedure, as referred to in regulation 42 (prior

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involvement of candidates or tenderers), cannot be remedied by other, less intrusive measures;

- (g) the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions;
- (h) the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria;
- (i) the economic operator has withheld information referred to in sub-paragraph (h) or is not able to submit the supporting documents required under regulation 60 (European Single Procurement Document: use, content and form of the ESPD); or
- (j) the economic operator—
 - (i) has or has sought to unduly influence the decision-making process of the contracting authority,
 - (ii) has or has sought to obtain confidential information that may confer upon it undue advantages in the procurement procedure; or
 - (iii) has negligently provided misleading information that may have a material influence on decisions concerning exclusion, selection or award.

(9) A contracting authority must exclude an economic operator where the authority becomes aware, at any time during the procedure, that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs (1) to (3).

(10) A contracting authority may exclude an economic operator where the authority becomes aware, at any time during the procedure, that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs (4) or (8).

(11) In the cases referred to in paragraph (1) and subject to paragraph (6), the period during which the economic operator must be excluded is 5 years from the date of the conviction by final judgment.

(12) In the cases referred to in paragraph (3)(b) or (8), and subject to paragraph (14), the period during which the economic operator may be excluded is 3 years from the date of the relevant event.

(13) Any economic operator that is in one of the situations referred to in paragraph (1), (3)(b) or (8) may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion.

(14) If the contracting authority is satisfied that the evidence proves that the measures are sufficient for the purpose referred to in paragraph (13), the authority must not exclude the economic operator from the procurement procedure.

(15) For the purpose mentioned in paragraph (14), the economic operator must prove that it has—

- (a) paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct;
- (b) clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; and
- (c) taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

(16) The measures taken by the economic operator must be evaluated by the contracting authority taking into account the gravity and particular circumstances of the criminal offence or misconduct.

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(17) Where the contracting authority considers that the measures are insufficient, the authority must give to the economic operator a statement of the reasons for that decision.

Modifications etc. (not altering text)

- C1** Reg. 58 modified by SSI 2013/50, Sch. 3 para. 10(2)(a) (as substituted (18.4.2016) by [The Utilities Contracts \(Scotland\) Regulations 2016 \(S.S.I. 2016/49\)](#), reg. 1, **sch. 3 para. 3(2)(c)**)
- C2** Regs. 58-62 modified (18.4.2016) by [The Utilities Contracts \(Scotland\) Regulations 2016 \(S.S.I. 2016/49\)](#), regs. 1, **78(5)**

Marginal Citations

- M26** OJ L 300, 11.11.2008, p.42.
- M27** 2010 asp 13.
- M28** 1889 c.69. This Act was repealed by Schedule 2 to the [Bribery Act 2010 \(c.23\)](#).
- M29** 1906 c.34. Section 1 was amended by section 47(2) and (3) of the [Criminal Justice Act 1988 \(c.33\)](#), **section 108(2)** of the [Anti-Terrorism, Crime and Security Act 2001 \(c.24\)](#) and section 68(2) of the [Criminal Justice \(Scotland\) Act 2003 \(asp 7\)](#) and repealed by Schedule 2 to the [Bribery Act 2010 \(c.23\)](#).
- M30** OJ C 195, 25.6.1997, p.2.
- M31** OJ L 358, 31.12.1998, p.2; repealed by Council Framework Decision 2003/568/JHA (OJ L 192, 31.7.2003, p.54).
- M32** 2003 asp 7. Sections 68 and 69 were repealed by Schedule 2 to the [Bribery Act 2010 \(c.23\)](#).
- M33** 2010 c.23.
- M34** OJ C 316, 27.11.1995, p.48.
- M35** 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 \(c.46\)](#).
- M36** 2006 c.46.
- M37** 1979 c.2. There are amendments to this Act which are not relevant to these Regulations.
- M38** 1994 c.23. Section 72 was amended by section 17(5) of the [Finance Act 2003 \(c.14\)](#) and partially repealed by Part 5(1) of Schedule 27 to the [Finance Act 2007 \(c.11\)](#). There are other amendments to this Act which are not relevant to these Regulations.
- M39** 1993 c.36. There are amendments to this Act which are not relevant to these Regulations.
- M40** 2008 c.28
- M41** 2002 c.29.
- M42** 1988 c.33; [sections 93A, 93B](#) and [93C](#) were inserted by sections 29, 30 and 31 of the [Criminal Justice Act 1993 \(c.36\)](#) and repealed by the [Proceeds of Crime Act 2002 \(c.29\)](#), **Schedule 12**.
- M43** 2015 asp 12.
- M44** 1994 c.37; [sections 49, 50](#) and [51](#) were repealed by the [Proceeds of Crime Act 2002 \(c.29\)](#), **Schedule 12**.
- M45** S.I. 2010/493.

Selection criteria

59.—(1) Selection criteria may relate to—

- (a) suitability to pursue a professional activity;
- (b) economic and financial standing;
- (c) technical and professional ability.

(2) A contracting authority may impose upon economic operators as requirements for participation only the criteria referred to in paragraphs (5) to (19).

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(3) A contracting authority must limit any requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded.

(4) All requirements must be related and proportionate to the subject-matter of the contract.

(5) With regard to suitability to pursue a professional activity, a contracting authority may require economic operators to be enrolled in one of the professional or trade registers kept in their member State of establishment, as described in Schedule 5, or to comply with any other request set out in that Schedule.

(6) In procurement procedures for services, in so far as economic operators have to possess a particular authorisation or to be a member of a particular organisation in order to be able to perform in their country of origin the service concerned, a contracting authority may require them to prove that they hold such authorisation or membership.

(7) With regard to economic and financial standing, a contracting authority may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract.

(8) A contracting authority may require that economic operators—

(a) in particular, have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract;

(b) provide information on their annual accounts showing the ratios, for example, between assets and liabilities;

(c) have an appropriate level of professional risk indemnity insurance.

(9) The minimum yearly turnover that economic operators are required to have must not exceed twice the estimated contract value, except in duly justified cases, such as by reference to special risks attached to the nature of the works, supplies or services.

(10) Where a contracting authority requires a higher minimum yearly turnover than that referred to in paragraph (9) the authority must state its main reasons for doing so in the procurement documents or in the report referred to in regulation 83(1) (reporting and documentation requirements).

(11) Ratios referred to in paragraph (8)(b) may be taken into consideration where the contracting authority specifies the methods and criteria for such consideration in the procurement documents, but such methods and criteria must be transparent, objective and non-discriminatory.

(12) Where a contract is divided into lots this regulation shall apply in relation to each individual lot.

(13) A contracting authority may set the minimum yearly turnover that economic operators are required to have by reference to groups of lots in the event that the successful tenderer is awarded several lots to be performed at the same time.

(14) In the case of a framework agreement under which contracts are to be awarded following a reopening of competition, the estimated contract value referred to in paragraph (9) must be calculated on the basis of the expected maximum size of specific contracts that will be performed at the same time, or, where it is not known, and in the case of any other framework, on the basis of the estimated value of the framework agreement.

(15) In the case of a dynamic purchasing system, the estimated contract value referred to in paragraph (9) must be calculated on the basis of the expected maximum size of specific contracts to be awarded under that system.

(16) With regard to technical and professional ability, a contracting authority may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard.

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(17) A contracting authority may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past.

(18) A contracting authority may assume that an economic operator does not possess the required professional abilities where the contracting authority has established that the economic operator has conflicting interests which may negatively affect the performance of the contract.

(19) In a procurement procedure for works, for supplies requiring siting or installation work or for services, a contracting authority may evaluate the professional ability of economic operators to execute or provide the works, siting or installation or the services with regard to the skills, efficiency, experience and reliability of the economic operator.

(20) A contracting authority must state the requirements for participation, which may be expressed as minimum levels of ability, together with the appropriate means of proof, in the contract notice or in the invitation to confirm interest.

Modifications etc. (not altering text)

C2 Regs. 58-62 modified (18.4.2016) by [The Utilities Contracts \(Scotland\) Regulations 2016 \(S.S.I. 2016/49\)](#), regs. 1, **78(5)**

European Single Procurement Document: Use, content and form of the ESPD

60.—(1) At the time of submission of requests to participate or of tenders, a contracting authority must accept the ESPD, consisting of an updated self-declaration as preliminary evidence instead of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfils any of the following conditions—

- (a) it is not in one of the situations referred to in regulation 58 (exclusion grounds) in which economic operators must or may be excluded;
- (b) it meets the relevant selection criteria that have been set out under regulation 59 (selection criteria);
- (c) where applicable, it fulfils the objective rules and criteria that have been set out under regulation 66 (reduction of the number of otherwise qualified candidates to be invited to participate).

(2) Where the economic operator relies on the capacities of other entities under regulation 64 (reliance upon the capacities of other entities), the ESPD must also contain the information referred to in paragraph (1) in respect of such entities.

(3) The ESPD must consist of a formal statement by the economic operator that the relevant ground for exclusion does not apply or that the relevant selection criterion is fulfilled and must provide the relevant information as required by the contracting authority.

(4) The ESPD must further identify the public authority or third party responsible for establishing the supporting documents and contain a formal statement to the effect that the economic operator will be able, upon request and without delay, to provide those supporting documents.

(5) Where the contracting authority can obtain the supporting documents directly by accessing a database as mentioned in paragraph (11), the ESPD must also contain the information required for this purpose, such as the internet address of the database, any identification data and, where applicable, the necessary declaration of consent.

(6) An economic operator may reuse an ESPD which has already been used in a previous procurement procedure, provided that the economic operator confirms that the information contained in it continues to be correct.

(7) The ESPD must be provided exclusively in electronic form.

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(8) A contracting authority may require candidates and tenderers at any moment during the procedure to submit all or any of the supporting documents where this is necessary to ensure the proper conduct of the procedure.

(9) Before awarding the contract, except a contract based on a framework agreement concluded in accordance with regulation 34(6) or (7)(a) (framework agreements), the contracting authority must require the tenderer to which it has decided to award the contract to submit up-to-date supporting documents in accordance with regulation 61 (means of proof) and, where appropriate, regulation 63 (quality assurance standards and environmental management standards).

(10) The contracting authority may invite economic operators to supplement or clarify the certificates received under regulations 61 (means of proof) and 63 (quality assurance standards and environmental management standards).

(11) Despite paragraphs (8) and (9), a contracting authority must not require economic operators to submit—

- (a) supporting documents or other documentary evidence where and in so far as the contracting authority has the possibility of obtaining the certificates or the relevant information directly by accessing a national database in any member State that is available free of charge, such as a national procurement register, a virtual company dossier, an electronic document storage system or a prequalification system; or
- (b) a supporting document which the contracting authority already possesses.

Modifications etc. (not altering text)

- C2** Regs. 58-62 modified (18.4.2016) by [The Utilities Contracts \(Scotland\) Regulations 2016 \(S.S.I. 2016/49\)](#), regs. 1, **78(5)**
- C3** Regs. 60-62 applied (18.4.2016) by [The Utilities Contracts \(Scotland\) Regulations 2016 \(S.S.I. 2016/49\)](#), regs. 1, **78(4)**
- C4** Reg. 60(7)-(10) applied (18.4.2016) by [The Utilities Contracts \(Scotland\) Regulations 2016 \(S.S.I. 2016/49\)](#), regs. 1, **50(24)**

Means of proof

61.—(1) A contracting authority may require the certificates, statements and other means of proof referred to in this regulation as evidence for the absence of grounds for exclusion under regulation 58 (exclusion grounds) and for the fulfilment of the selection criteria in accordance with regulation 59 (selection criteria).

(2) A contracting authority must not require means of proof other than those referred to in this regulation and in regulations 59(17) (selection criteria) and 63 (quality assurance standards and environmental management standards).

(3) In respect of regulation 64 (reliance upon the capacities of other entities), an economic operator may rely on any appropriate means to prove to the contracting authority that the economic operator will have the necessary resources at its disposal.

(4) A contracting authority must accept the following as sufficient evidence that none of the cases specified in regulation 58 (exclusion grounds) apply to the economic operator—

- (a) as regards regulation 58(1) to (3) (exclusion grounds), the production of an extract from the relevant register, such as judicial records or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the member State or country of origin or the country where the economic operator is established showing that those requirements have been met; and

- (b) as regards regulation 58(4) to (6) and (8)(b) (exclusion grounds), a certificate issued by the competent authority in the member State or country concerned.
- (5) Where the member State or country in question does not issue such documents or certificates, or to the extent that these do not cover all the cases specified in regulation 58(1) to (6) and (8) (b) (exclusion grounds), they may be replaced by a declaration on oath or, in member States or countries where there is no provision for declarations on oath, by a solemn declaration made by the person concerned before a competent judicial or administrative authority, a notary or a competent professional or trade body, in the member State or country of origin or in the member State or country where the economic operator is established.
- (6) Proof of the economic operator's economic and financial standing may be provided by one or more of the following references—
- (a) appropriate statements from banks or, where appropriate, evidence of relevant professional risk indemnity insurance;
 - (b) the presentation of financial statements or extracts from the financial statements, where publication of financial statements is required under the law of the country in which the economic operator is established;
 - (c) a statement of the economic operator's overall turnover and, where appropriate, of turnover in the area covered by the contract for a maximum of the last 3 financial years available, depending on the date on which the economic operator was set up or the economic operator started trading, as far as the information on those turnovers is available.
- (7) Where the references mentioned in paragraph (6) are not appropriate in a particular case, the contracting authority may require the economic operator to provide other information to prove its economic and financial standing.
- (8) Where, for any valid reason, the economic operator is unable to provide the references or other information required by the contracting authority, it may prove its economic and financial standing by any other document which the contracting authority considers appropriate.
- (9) Evidence of the economic operator's technical abilities may be provided by one or more of the following means, in accordance with the nature, quantity or importance, and the use, of the works, supplies or services—
- (a) a list of the works carried out over at the most the past 5 years, accompanied by certificates of satisfactory execution and outcome for the most important works; but, where necessary in order to ensure an adequate level of competition, a contracting authority may indicate that evidence of relevant works carried out more than 5 years before will be taken into account;
 - (b) a list of the principal deliveries effected or the main services provided over at the most the past 3 years, with the sums, dates and recipients, whether public or private, involved; but, where necessary in order to ensure an adequate level of competition, a contracting authority may indicate that evidence of relevant supplies or services delivered or performed more than 3 years before will be taken into account;
 - (c) an indication of the technicians or technical bodies involved, whether or not belonging directly to the economic operator's undertaking especially those responsible for quality control and, in the case of a public works contract, those upon whom the contractor can call in order to carry out the works;
 - (d) a description of the technical facilities and measures used by the economic operator for ensuring quality and the undertaking's study and research facilities;
 - (e) an indication of the supply chain management and tracking systems that the economic operator will be able to apply when performing the contract;

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- (f) where the products or services to be supplied are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authority or on behalf of the authority by a competent official body of the country in which the supplier or service provider is established, subject to that body's agreement, on the production capacities of the supplier or the technical capacity of the service provider and, where necessary, on the means of study and research which are available to it and the quality control measures it will operate;
- (g) the educational and professional qualifications of the service provider or contractor or those of the economic operator's managerial staff, provided that they are not to be evaluated as an award criterion;
- (h) an indication of the environmental management measures that the economic operator will be able to apply when performing the contract;
- (i) a statement of the average annual manpower of the service provider or contractor and the number of managerial staff for the last 3 years;
- (j) a statement of the tools, plant or technical equipment available to the service provider or contractor for carrying out the contract;
- (k) an indication of the proportion of the contract which the economic operator intends possibly to subcontract;
- (l) with regard to the products to be supplied, one or more of the following means—
 - (i) samples, descriptions or photographs, the authenticity of which must be certified where the contracting authority so requests;
 - (ii) certificates drawn up by official quality control institutes or agencies of recognised competence attesting the conformity of products clearly identified by references to technical specifications or standards.

Modifications etc. (not altering text)

- C2** Regs. 58-62 modified (18.4.2016) by [The Utilities Contracts \(Scotland\) Regulations 2016 \(S.S.I. 2016/49\)](#), regs. 1, **78(5)**
- C3** Regs. 60-62 applied (18.4.2016) by [The Utilities Contracts \(Scotland\) Regulations 2016 \(S.S.I. 2016/49\)](#), regs. 1, **78(4)**

Recourse to e-Certis

62.—(1) A contracting authority must have recourse to e-Certis and must require primarily such types of certificates or forms of documentary evidence as are covered by e-Certis.

(2) In this regulation, “e-Certis” means the online repository established by the Commission and referred to as “e-Certis” in the Directive.

Modifications etc. (not altering text)

- C2** Regs. 58-62 modified (18.4.2016) by [The Utilities Contracts \(Scotland\) Regulations 2016 \(S.S.I. 2016/49\)](#), regs. 1, **78(5)**
- C3** Regs. 60-62 applied (18.4.2016) by [The Utilities Contracts \(Scotland\) Regulations 2016 \(S.S.I. 2016/49\)](#), regs. 1, **78(4)**

Quality assurance standards and environmental management standards

63.—(1) A contracting authority must, where it requires the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain quality assurance standards, including on accessibility for disabled persons, refer to quality assurance systems based on the relevant European standards series certified by accredited bodies.

(2) A contracting authority must recognise equivalent certificates from bodies established in other member States.

(3) A contracting authority must also accept other evidence of equivalent quality assurance measures where the economic operator concerned had no possibility of obtaining such certificates within the relevant time limits for reasons that are not attributable to that economic operator, provided that the economic operator proves that the proposed quality assurance measures comply with the required quality assurance standards.

(4) Where a contracting authority requires the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain environmental management systems or standards, the authority must refer to—

- (a) the Eco-Management and Audit Scheme of the EU referred to in Regulation (EC) No 1221/2009 of the European Parliament and of the Council on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC^{M46};
- (b) other environmental management systems as recognised in accordance with Article 45 of that Regulation; or
- (c) other environmental management standards based on the relevant European or international standards by accredited bodies,

and must recognise equivalent certificates from bodies established in other member States.

(5) Where an economic operator had demonstrably no access to such certificates referred to in paragraph (4), or no possibility of obtaining them within the relevant time limits for reasons that are not attributable to that economic operator, the contracting authority must accept other evidence of environmental management measures, provided that the economic operator proves that these measures are equivalent to those required under the applicable environmental management system or standard.

Marginal Citations

M46 OJ No L 342, 22.12.2009, p.1, amended by Council Regulation (EU) No 517/2013 (OJ No L 158, 10.6.2013, p.1).

Reliance upon the capacities of other entities

64.—(1) With regard to—

- (a) criteria relating to economic and financial standing as set out under regulation 59(7) to (15) (selection criteria); and
- (b) criteria relating to technical and professional ability as set out under regulation 59(16) to (19) (selection criteria),

an economic operator may, where appropriate and for a particular contract, rely upon the capacities of other entities, regardless of the legal nature of the links which it has with them.

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(2) With regard to criteria relating to the educational and professional qualifications mentioned in regulation 61(9)(g) (means of proof), or to relevant professional experience, economic operators may however only rely upon the capacities of other entities where the latter will perform the works or services for which these capacities are required.

(3) Where an economic operator wants to rely upon the capacities of other entities, it must prove to the contracting authority that it will have at its disposal the resources necessary, for example by producing a commitment by those entities to that effect.

(4) The contracting authority must, in accordance with regulations 60 to 62, verify whether the entities upon whose capacity the economic operator intends to rely fulfil the relevant selection criteria and whether there are grounds for exclusion of those entities under regulation 58 (exclusion grounds).

(5) The contracting authority—

- (a) must require the economic operator to replace an entity which does not meet a relevant selection criterion, or in respect of which there are compulsory grounds for exclusion; and
- (b) may require the economic operator to substitute an entity in respect of which there are non-compulsory grounds for exclusion.

(6) Where an economic operator relies upon the capacities of other entities with regard to criteria relating to economic and financial standing, the contracting authority may require the economic operator and those entities to be jointly liable for the performance of the contract.

(7) A group of economic operators as referred to in regulation 20(4) (economic operators) may rely upon the capacities of participants in the group or of other entities, and paragraphs (1) to (6) apply in relation to such a group in the same way that they apply in relation to an economic operator.

(8) In the case of works contracts, supply contracts requiring siting or installation work or services contracts, a contracting authority may require certain critical tasks to be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators as referred to in regulation 20(4) (economic operators), by a participant in that group.

Recognition of official lists of approved economic operators and certification by certification bodies.

65.—(1) Economic operators registered on an official list or having a certificate issued by a certification body may, for each contract, submit to the contracting authority a certificate of registration issued by the competent authority or the certificate issued by the certification body.

(2) A certificate of either kind shall constitute a presumption of suitability with regard to requirements for qualitative selection encompassed by the certificate or the official list to which it relates.

(3) Information that can be deduced from registration on official lists or certification by certification bodies must not be questioned without justification.

(4) With regard to the payment of social security contributions and taxes, an additional certificate may be required of any registered economic operator whenever a contract is to be awarded.

(5) In relation to an official list established or maintained by a member State other than the United Kingdom, paragraphs (1) and (3) apply only in favour of economic operators established in the member State holding the official list.

(6) The requirements of proof for the criteria for qualitative selection encompassed by the official list or certificate must comply with regulation 61 (means of proof) and, where appropriate, regulation 63 (quality assurance standards and environmental management standards)..

(7) A contracting authority must not require an economic operator to be registered on an official list or to provide a certificate issued by a certification body in order to participate in a public contract.

(8) A contracting authority must—

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- (a) recognise equivalent certificates from bodies established in other member States; and
- (b) accept other equivalent means of proof.

(9) In this regulation—

“official list” means an official list of approved contractors, suppliers or service providers established or maintained by a member State under Article 64 of the Directive;

“certification body” means a certification body complying with European standards of certification, and “certificate issued by a certification body” means a certificate issued by such a body in accordance with certification arrangements for which a member State has provided for the purpose of Article 64 of the Directive.

(10) For the purposes of this regulation, no official list or certification arrangements are established, maintained or provided for in relation to the jurisdictions to which these Regulations extend and, accordingly, in paragraph (9), “member State” includes the United Kingdom only insofar as the official list or the certification arrangements are established, maintained or provided for in respect of any other jurisdiction of the United Kingdom.

Reduction of the number of otherwise qualified candidates to be invited to participate

66.—(1) This regulation applies to restricted procedures, competitive procedures with negotiation, competitive dialogue procedures and innovation partnerships.

(2) In the context of the same procedure, the contracting authority must not include economic operators that did not request to participate, or candidates that do not have the required capabilities.

(3) A contracting authority must indicate, in the contract notice or in the invitation to confirm interest, the objective and non-discriminatory criteria or rules that the authority intends to apply, the minimum number of candidates the authority intends to invite and, where applicable the maximum number.

(4) The minimum number of candidates that may be indicated by a contracting authority is—

- (a) in the restricted procedure, 5;
- (b) in the competitive procedure with negotiation, the competitive dialogue procedure and in the innovation partnership procedure, 3.

(5) In any event the number of candidates invited must be sufficient to ensure genuine competition.

(6) Subject to paragraph (7), a contracting authority must invite a number of candidates at least equal to the minimum number indicated in accordance with paragraph (3).

(7) Where the number of candidates meeting the selection criteria and the minimum levels of ability as referred to in regulation 59(20) (selection criteria) is below the minimum number, the contracting authority may continue the procedure by inviting the candidates with the required capabilities.

(8) In the context of the same procedure, the contracting authority must not include economic operators that did not request to participate, or candidates that do not have the required capabilities.

Contract award criteria

67.—(1) A contracting authority—

- (a) must base the award of public contracts on the most economically advantageous tender assessed from the point of view of the contracting authority; and
- (b) may not use price only or cost only as the sole award criteria.

Status: Point in time view as at 18/04/2020.

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(2) A contracting authority must identify the most economically advantageous tender on the basis of the best price-quality ratio, which must be assessed on the basis of criteria linked to the subject-matter of the public contract in question and must include the price or cost, using a cost-effectiveness approach.

(3) A cost-effectiveness approach referred to in paragraph (2) may include life-cycle costing in accordance with regulation 68 (life-cycle costing).

(4) Criteria referred to in paragraph (2) may comprise or include—

- (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;
- (b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or
- (c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

(5) The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.

(6) Award criteria must be considered to be linked to the subject-matter of the contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in—

- (a) the specific process of production, provision or trading of those works, supplies or services; or
- (b) a specific process for another stage of their life cycle,

even where such factors do not form part of their material substance.

(7) Award criteria must—

- (a) not have the effect of conferring an unrestricted freedom of choice upon the contracting authority;
- (b) ensure the possibility of effective competition; and
- (c) be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria.

(8) In case of doubt, the contracting authority must verify effectively the accuracy of the information and proof provided by the tenderers.

(9) The contracting authority must specify, in the procurement documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

(10) The weightings referred to in paragraph (9) may be expressed by providing for a range with an appropriate maximum spread.

(11) Where weighting is not possible for objective reasons, the contracting authority must indicate the criteria in decreasing order of importance.

Life-cycle costing

68.—(1) Life-cycle costing must, to the extent relevant, cover part or all of the following costs over the life cycle of a product, service or works—

- (a) costs, borne by the contracting authority or other users, such as—
 - (i) costs relating to acquisition;
 - (ii) costs of use, such as consumption of energy and other resources;

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- (iii) maintenance costs;
 - (iv) end of life costs, such as collection and recycling costs; and
 - (b) costs imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified.
- (2) The costs mentioned in paragraph (1)(b) may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.
- (3) The method used for the assessment of costs imputed to environmental externalities must fulfil all of the following conditions—
- (a) it is based on objectively verifiable and non-discriminatory criteria and, in particular, where it has not been established for repeated or continuous application, it must not unduly favour or disadvantage certain economic operators;
 - (b) it is accessible to all interested parties;
 - (c) the data required can be provided with reasonable effort by normally diligent economic operators, including economic operators from third countries party to the GPA or other international agreements by which the EU is bound.
- (4) Where a contracting authority assesses costs using a life-cycle costing approach, the authority must indicate in the procurement documents—
- (a) the data to be provided by the tenderers; and
 - (b) the method which the contracting authority will use to determine the life-cycle costs on the basis of those data.
- (5) Whenever a common method for the calculation of life-cycle costs has been made mandatory by a legislative act of the EU, that common method must be applied for the assessment of life-cycle costs.
- (6) Legislative acts referred to in paragraph (5) include those set out in Annex XIII to the Directive as amended from time to time.

Abnormally low tenders

- 69.**—(1) A contracting authority must require a tenderer to explain the price or costs proposed in the tender where the tender appears to be abnormally low in relation to the works, supplies or services.
- (2) The explanations given in accordance with paragraph (1) may, in particular, relate to—
- (a) the economics of the manufacturing process, of the services provided or of the construction method;
 - (b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the execution of the works or for the supply of the products or services;
 - (c) the originality of the works, supplies or services proposed by the tenderer;
 - (d) compliance with obligations referred to in regulation 57(2) (general principles);
 - (e) compliance with obligations referred to in regulation 71 (subcontracting);
 - (f) the possibility of the tenderer obtaining State aid.
- (3) The contracting authority must assess the information provided by consulting the tenderer.
- (4) The contracting authority may only reject the tender where the explanations given and any evidence supplied do not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph (2).

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(5) The contracting authority must reject the tender where the authority has established that the tender is abnormally low because it does not comply with applicable obligations referred to in regulation 57(2) (general principles).

(6) Where the contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone—

- (a) after consultation with the tenderer; and
- (b) where the tenderer is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 of the TFEU.

(7) Where the contracting authority rejects a tender in the circumstances referred to in paragraph (6), it must inform the Commission.

SECTION 6

Contract Performance

Conditions for performance of contracts

70.—(1) A contracting authority may lay down special conditions relating to the performance of a contract, provided that they are—

- (a) linked to the subject-matter of the contract within the meaning of regulation 67(6) (contract award criteria); and
- (b) indicated in the call for competition or in the procurement documents.

(2) Such conditions may include economic, innovation-related, environmental, social or employment-related considerations.

[^{F9}Electronic invoicing

70A.—(1) It shall be an implied term of all public contracts that contracting authorities must accept and process electronic invoices for the provision of works, supplies or services in the performance of a contract where such invoices—

- (a) comply with the European standard on electronic invoicing reference to which has been published pursuant to Article 3(2) of [Directive 2014/55/EU](#) of the European Parliament and of the Council on electronic invoicing in public procurement, and
- (b) contain any of the syntaxes on the list published pursuant to Article 3(2) of that Directive.

(2) In this regulation—

“electronic invoice” means an invoice containing the information components referred to in regulation 70A(3) that has been issued, transmitted and received in a structured electronic format which allows for its automatic and electronic processing,

“GDPR” means the General Data Protection Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing [Directive 95/46/EC](#), and

“syntax” means the machine readable language or dialect used to represent the data elements contained in an electronic invoice.

(3) An electronic invoice referred to in this regulation must contain the following information components—

- (a) process and invoice identifiers,
- (b) the invoice period,

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- (c) seller information,
- (d) buyer information,
- (e) payee information,
- (f) seller's tax representative information,
- (g) contract reference,
- (h) delivery details,
- (i) payment instructions,
- (j) allowance or charge information,
- (k) invoice line item information,
- (l) invoice totals, and
- (m) VAT breakdown.

(4) This regulation is without prejudice to applicable law on data protection.

(5) Subject to any provisions to the contrary in any enactments and without prejudice to the exemptions and restrictions set out in GDPR and the Data Protection Act 2018, personal data obtained for the purpose of electronic invoicing may be used only for that purpose or for purposes compatible with it.

(6) This regulation is without prejudice to any provision made by or under Schedule 11 of the Value Added Tax Act 1994.]

Textual Amendments

- F9** [Reg. 70A](#) inserted (18.4.2019 for specified purposes, 18.4.2020 in so far as not already in force) by [The Electronic Invoicing \(Public Contracts etc.\) Amendment \(Scotland\) Regulations 2019 \(S.S.I. 2019/7\)](#), regs. 1(2), **2(2)**

Subcontracting

71.—(1) In the procurement documents, the contracting authority may ask the tenderer to indicate in its tender any share of the contract that the tenderer may intend to subcontract to third parties and information about any proposed subcontractors including their name and contact details.

(2) Paragraph (1) is without prejudice to the liability of the main contractor under the contract.

(3) Where paragraph (4) applies, the contracting authority must require the main contractor to notify it, at the latest when the performance of the contract commences, of the name, contact details and legal representatives of its subcontractors, involved in such works or services, in so far as known at the time.

(4) This paragraph applies in the case of—

- (a) a public works contract;
- (b) a public services contract including services to be provided at a facility under the direct oversight of the contracting authority.

(5) The contracting authority must require the main contractor to notify the authority of—

- (a) any changes to that information during the course of the contract; and
- (b) the name, contact details and legal representatives for any new subcontractors which the contractor subsequently involves in such works or services.

(6) Paragraphs (3) and (5) do not apply to subcontractors who provide only supplies.

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(7) Where necessary for the purposes of paragraph (9), the required information must be accompanied by ESPDs in respect of the subcontractors.

(8) A contracting authority may require a contractor to provide information of the kind referred to in paragraphs (3) and (5) in respect of any one or more of the following—

- (a) supply contracts or services contracts (other than those concerning services to be provided at the facilities under the direct oversight of the contracting authority);
- (b) suppliers involved in works or services contracts;
- (c) subcontractors of the main contractor's subcontractors and other contractors further down the subcontracting chain.

(9) A contracting authority may, in accordance with regulations 60 (European Single Procurement Document: use, content and form of the ESPD), 61 (means of proof) and 62 (recourse to e-Certis), verify whether there are grounds for exclusion of subcontractors under regulation 58 (exclusion grounds).

(10) The contracting authority must require the economic operator to replace a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion.

(11) The contracting authority may require the economic operator to replace a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.

Modification of contracts during their term

72.—(1) A contract and framework agreement may be modified without a new procurement procedure—

- (a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses or options, provided that such clauses—
 - (i) state the scope and nature of possible modifications or options as well as the conditions under which they may be used; and
 - (ii) do not provide for modifications or options that would alter the overall nature of the contract or framework agreement;
- (b) to provide for additional works, supplies or services by the original contractor that have become necessary and were not included in the initial procurement, where a change of contractor—
 - (i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement; and
 - (ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority,
 provided that any increase in price does not exceed 50% of the initial contract value;
- (c) where all of the following conditions are fulfilled—
 - (i) the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen;
 - (ii) the modification does not alter the overall nature of the contract or framework;
 - (iii) any increase in price does not exceed 50 % of the initial contract value or framework agreement;
- (d) where a new contractor replaces one to which the contracting authority had initially awarded the contract or framework as a consequence of—

- (i) an unequivocal review clause or option in conformity with sub-paragraph (a); or
 - (ii) complete or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, by another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract or framework and is not aimed at circumventing the application of this Part;
- (e) where the modifications, irrespective of their value, are not substantial (as defined in paragraph (8)); or
- (f) where paragraph (5) applies.
- (2) Where several successive modifications are made—
- (a) the limitations imposed by the proviso at the end of paragraph (1)(b) and in paragraph (1)(c)(iii) shall apply to the value of each modification; and
 - (b) such successive modifications must not be aimed at circumventing these Regulations.
- (3) A contracting authority which has modified a contract or framework in either of the cases described in paragraph (1)(b) and (c) must send a notice to that effect for publication in accordance with regulation 52 (form and manner of sending notices for publication on EU level).
- (4) Such a notice must contain the information set out in Part G of Annex V to the Directive.
- (5) This paragraph applies where the value of the modification is below both of the following values—
- (a) the relevant threshold mentioned in regulation 5 (thresholds); and
 - (b) 10 % of the initial contract value for service and supply contracts or frameworks and 15% of the initial contract value for works contracts or frameworks,
- provided that the modification does not alter the overall nature of the contract or framework agreement.
- (6) For the purposes of paragraph (5), where several successive modifications are made, the value must be the net cumulative value of the successive modifications.
- (7) For the purpose of the calculation of—
- (a) the price mentioned in paragraph (1)(b) and (c); and
 - (b) the values mentioned in paragraph (5)(b),
- the updated figure shall be the reference figure when the contract or framework includes an indexation clause.
- (8) A modification of a contract or a framework agreement during its term must be considered substantial for the purpose of paragraph (1)(e) where—
- (a) the modification renders the contract or the framework agreement materially different in character from the one initially concluded;
 - (b) the modification introduces conditions which, had they been part of the initial procurement procedure, would have—
 - (i) allowed for the admission of candidates other than those initially selected;
 - (ii) allowed for the acceptance of a tender other than that originally accepted; or
 - (iii) attracted additional participants in the procurement procedure;
 - (c) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;

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- (d) the modification extends the scope of the contract or framework agreement considerably;
or
 - (e) a new contractor replaces one to which the contracting authority had initially awarded the contract or framework in cases other than those provided for in paragraph (1)(d).
- (9) A new procurement procedure in accordance with these Regulations is required for modifications of the provisions of a public contract or a framework agreement during its term other than those provided for in this regulation.

Termination of contracts

73.—(1) A contracting authority must ensure that every public contract or framework which the authority awards contains provisions enabling the authority to terminate the contract or framework where—

- (a) the contract or framework has been subject to a substantial modification which would have required a new procurement procedure in accordance with regulation 72(9) (modification of contracts during their term);
- (b) the contractor has, at the time of contract award, been in one of the situations referred to in regulation 58(1) (exclusion grounds), including as a result of the application of regulation 58(2), and should therefore have been excluded from the procurement procedure; or
- (c) the contract or framework should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and the Directive that has been declared by the Court of Justice of the European Union in a procedure under Article 258 of the TFEU.

(2) Those provisions may address the basis on which the power is to be exercisable in those circumstances, for example by providing for notice of termination to be given and by addressing consequential matters that will or might arise from the termination.

(3) To the extent that a public contract or framework does not contain provisions enabling the contracting authority to terminate the contract or framework on any of the grounds mentioned in paragraph (1), a power for the contracting authority to do so on giving notice to the contractor shall be an implied term of that contract or framework.

CHAPTER 3

PARTICULAR PROCUREMENT REGIMES

SECTION 7

Social and Other Specific Services

Award of contracts for social and other specific services

74. A public contract or framework for social and other specific services listed in Schedule 3 must be awarded in accordance with this Section, where the value of the contract or framework is equal to or greater than the threshold indicated in regulation 5(1)(d) (thresholds).

Publication of notices

75.—(1) A contracting authority intending to award a public contract or framework for the services referred to in regulation 74 (award of contracts for social and other specific services) must make known its intention by means of—

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- (a) a contract notice, which must contain the information set out in Part H of Annex V to the Directive; or
 - (b) a prior information notice, which must—
 - (i) be published continuously;
 - (ii) contain the information set out Part I of Annex V to the Directive;
 - (iii) refer specifically to the types of services that will be the subject of the contract or framework to be awarded; and
 - (iv) indicate that the contract or framework will be awarded without further publication and invite interested economic operators to express their interest in writing.
- (2) Paragraph (1) shall not apply where a negotiated procedure without prior publication could have been used in accordance with regulation 33 (use of the negotiated procedure without prior publication) for the award of the contract.
- (3) A contracting authority that has awarded a contract or framework for the services referred to in regulation 74 (award of contracts for social and other specific services) must make known the results of the procurement procedure by means of a contract award notice, which must contain the information referred to in Part J of Annex V to the Directive.
- (4) A contracting authority may, however, group notices referred to in paragraph (3) on a quarterly basis, in which case it must send the grouped notices within 30 days of the end of each quarter.
- (5) A contracting authority must send the notices, referred to in this regulation, for publication in accordance with regulation 52 (form and manner of sending notices for publication at EU level).

Principles of awarding contracts

- 76.**—(1) A contracting authority must determine the procedure that is to be applied in connection with the award of a contract or framework subject to this Section and may take into account—
- (a) the specificities of the services in question; and
 - (b) the requirements and needs of users.
- (2) The procedure must be at least sufficient to ensure compliance with the principles of transparency and equal treatment of economic operators.
- (3) The procedure must provide for the exclusion from participation in the procurement of any economic operator in relation to which mandatory exclusion referred to in regulation 58(1) and (3) (exclusion grounds) applies and the contracting authority must not award a contract or framework agreement to such economic operator.
- (4) In particular, where, in accordance with regulation 75 (publication of notices), a contract notice or prior information notice has been published in relation to a procurement, the contracting authority must, except in the circumstances mentioned in paragraph (5), conduct that procurement, and award any resulting contract, in conformity with the information contained in the notice about—
- (a) conditions for participation;
 - (b) time limits for contacting the contracting authority; and
 - (c) the award procedure to be applied.
- (5) The contracting authority may, however, conduct the procurement, and award any resulting contract, in a way which is not in conformity with that information, but only if all of the following conditions are met—
- (a) the failure to conform does not, in the particular circumstances, amount to a breach of the principles of transparency and equal treatment of economic operators;
 - (b) the contracting authority has—

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- (i) after giving due consideration to the matter, concluded that sub-paragraph (a) is applicable;
- (ii) documented that conclusion and the reasons for it in accordance with regulation 83(7) and (8) (reporting and documentation requirements); and
- (iii) informed the participants of the respects in which the contracting authority intends to proceed in a way which is not in accordance with the information contained in the notice.

(6) In paragraph (5)(b)(iii), “participants” means any economic operators which have responded to the notice and not been informed by the contracting authority that they are no longer under consideration for the award of a contract within the scope of the procurement concerned.

(7) All time limits imposed upon economic operators for the purposes of this regulation, whether for responding to a contract notice or taking any other steps in the relevant procedure, must be reasonable and proportionate having regard to the nature of the requirement and the needs of service users.

(8) Without prejudice to the generality of paragraph (1), a contracting authority may apply procedures for the purposes of this regulation which correspond (with or without variations) to procedures, techniques or other features otherwise provided for in these Regulations, as well as procedures which do not.

(9) In relation to the award of contracts subject to this regulation, a contracting authority may take into account—

- (a) the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services;
- (b) the specific needs of different categories of users, including disadvantaged and vulnerable groups;
- (c) the involvement and empowerment of users;
- (d) innovation; and
- (e) any other relevant consideration.

(10) A contracting authority must award a contract or framework for services listed in Schedule 3 on the basis of the tender representing the best price quality ratio, taking into account quality and sustainability criteria for such services.

SECTION 8

Rules Governing Design Contests

Scope of Section 8

77.—(1) This Section applies to—

- (a) design contests organised as part of a procedure leading to the award of a public service contract;
- (b) design contests with prizes or payments to participants.

(2) In the cases referred to in paragraph (1)(a), the threshold referred to in regulation 5 (thresholds) is calculated on the basis of the estimated value net of VAT of the public service contract, including any possible prizes or payments to participants.

(3) In the cases referred to in paragraph (1)(b), the threshold referred to in regulation 5 (thresholds) is calculated on the basis of the total amount of the prizes and payments, including the estimated value net of VAT of the public services contract which might subsequently be concluded

following a negotiated procedure without prior publication in accordance with regulation 33(6) and (7) (use of the negotiated procedure without prior publication) if the contracting authority has announced its intention to award such a contract in the contest notice.

Notices

78.—(1) A contracting authority that intends to carry out a design contest must make known its intention by means of a contest notice which includes the information set out in Part E of Annex V to the Directive.

(2) Where a contracting authority intends to award a subsequent service contract under regulation 33(6) (use of the negotiated procedure without prior publication), this must be indicated in the contest notice.

(3) The contracting authority must send the contest notice for publication in accordance with regulation 52 (form and manner of sending notices for publication at EU level).

(4) A contracting authority that has held a design contest must—

- (a) send a notice of the results of the contest for publication in accordance with regulation 52 (form and manner of sending notices for publication at EU level); and
- (b) be able to prove the date of dispatch of such notice.

(5) The notice of the results of the contest must include the information set out in Part F of Annex V to the Directive.

(6) A contracting authority may withhold from publication information on the result of the contest where the release of the information—

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

Rules on the organisation of design contests and the selection of participants

79.—(1) When organising a design contest, a contracting authority must apply procedures which are adapted to the provisions of Chapter 1 and this Section.

(2) The contracting authority must not limit admission of participants to a design contest by reference to the territory or part of the territory of a member State.

(3) Where a design contest is restricted to a limited number of participants, the contracting authority must—

- (a) lay down clear and non-discriminatory selection criteria; and
- (b) ensure that the number of candidates invited to participate is sufficient to ensure genuine competition in so far as there are enough qualified candidates.

Modifications etc. (not altering text)

C5 [Reg. 79](#) modified by SSI 2013/50, Sch. 3 para. 10(2)(a) (as substituted (18.4.2016) by [The Utilities Contracts \(Scotland\) Regulations 2016 \(S.S.I. 2016/49\)](#), reg. 1, [sch. 3 para. 3\(2\)\(c\)](#))

Appointment and composition of the jury

80.—(1) A contracting authority must appoint a jury which must be composed exclusively of natural persons who are independent of participants in the contest.

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(2) Where a particular professional qualification is required from participants in a contest, at least a third of the members of the jury must have that qualification or an equivalent qualification.

Decisions of the jury

81.—(1) The jury must be autonomous in its decisions and opinions.

(2) The jury must examine the plans and projects submitted by the candidates anonymously and solely on the basis of the criteria indicated in the contest notice.

(3) The jury must record its ranking of projects in a report, signed by its members, made according to the merits of each project, together with its remarks and any points that may need clarification.

(4) Anonymity must be observed until the jury has reached its opinion or decision.

(5) Candidates may be invited, if need be, to answer questions that the jury has recorded in the minutes to clarify any aspect of the projects.

(6) Complete minutes must be recorded of the dialogue between jury members and candidates.

CHAPTER 4

RECORDS AND REPORTS

Retention of contract copies

82.—(1) A contracting authority must, at least for the duration of the contract, keep copies of all concluded contracts with a value equal to or greater than—

- (a) 1 000 000 EUR in the case of public supply contracts or public service contracts;
- (b) 10 000 000 EUR in the case of public works contracts.

(2) A contracting authority must grant access to those contracts, but access to specific documents or items of information may be denied to the extent and on the conditions provided for in the applicable EU or national rules on access to documents and data protection.

Reporting and documentation requirements

83.—(1) Subject to paragraph (2), every contract or framework agreement covered by this Part, and every time a dynamic purchasing system is established, a contracting authority must draw up a written report which must include—

- (a) the name and address of the contracting authority, the subject-matter and value of the contract, framework agreement or dynamic purchasing system;
- (b) where applicable, the results of the qualitative selection and reduction of numbers pursuant to regulations 66 (reduction of the number of otherwise qualified candidates to be invited to participate) and 67 (contract award criteria), namely—
 - (i) the names of the selected candidates or tenderers and the reasons for their selection; and
 - (ii) the names of the candidates or tenderers rejected and the reasons for their rejection;
- (c) the reasons for the rejection of any tenders found to be abnormally low;
- (d) the name of the successful tenderer and the reasons why its tender was selected;
- (e) where known by the contracting authority—
 - (i) the share (if any) of the contract or framework agreement which the successful tenderer intends to subcontract to third parties; and
 - (ii) the names of the main contractor's subcontractors (if any);

- (f) for competitive procedures with negotiation and competitive dialogues, the circumstances as laid down in regulation 27 (choice of procedures) which justify the use of those procedures;
 - (g) for negotiated procedures without prior publication, the circumstances referred to in regulation 33 (use of the negotiated procedure without prior publication) which justify the use of this procedure;
 - (h) where applicable, the reasons why the contracting authority has decided not to award a contract or framework agreement or to establish a dynamic purchasing system;
 - (i) where applicable, the reasons why means of communication other than electronic means have been used for the submission of tenders; and
 - (j) where applicable, conflicts of interests detected and subsequent measures taken.
- (2) A report referred to in paragraph (1) is not required in respect of contracts based on framework agreements where these are concluded in accordance with regulation 34(6) or (7)(a) (framework agreements).
- (3) To the extent that the contract award notice drawn up in accordance with regulation 51 (contract award notices) or 75(3) (publication of notices) contains the information required in this paragraph, a contracting authority may refer to that notice.
- (4) Where the Commission so requests, the contracting authority must communicate the report, or its main elements, to the Commission.
- (5) Where the Scottish Ministers so request, the report, or its main elements, must be communicated to the Scottish Ministers or to such other body as the Scottish Ministers may direct in connection with any functions which that body exercises for the purposes of Article 83 of the Directive.
- (6) A contracting authority must, for the purpose of enabling the Scottish Ministers to provide the Commission with information, send to the Scottish Ministers a report containing such other information as the Scottish Ministers may from time to time request in respect of procurements—
- (a) within the scope of this Part; or
 - (b) which would have been within the scope of this Part if their value had exceeded the relevant threshold mentioned in regulation 5 (thresholds).
- (7) A contracting authority must document the progress of all procurement procedures, whether or not those are conducted by electronic means.
- (8) To that end, a contracting authority must ensure that the authority keeps sufficient documentation to justify decisions taken in all stages of the procurement procedure, such as documentation on—
- (a) communications with economic operators and internal deliberations;
 - (b) preparation of the procurement documents;
 - (c) dialogue or negotiation (if any);
 - (d) selection and award of the contract.
- (9) The documentation must be kept for a period of at least 3 years from the date of award of the contract.

Status: Point in time view as at 18/04/2020.

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PART 3

REMEDIES

CHAPTER 5

FACILITATION OF REMEDIES

Scope of Chapter 5

84. This Chapter applies to procurements falling within the scope of Part 2.

Notices of decisions to award a contract or conclude a framework agreement

85.—(1) Subject to paragraphs (4) and (5), a contracting authority must, by notice in writing as soon as possible after the decision has been made, inform all tenderers and candidates concerned of its decision to award the contract, conclude the framework agreement or establish a dynamic purchasing system.

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

- (a) the criteria for the award of the contract, conclusion of the framework agreement or establishment of the dynamic purchasing system;
- (b) where practicable, the score obtained by the economic operator which is to receive the notice;
- (c) the name of and, where practicable, the score obtained by the economic operator—
 - (i) to be awarded the contract;
 - (ii) to become a party to the framework agreement; or
 - (iii) to be admitted to the dynamic purchasing system;
- (d) in the case of an unsuccessful tenderer—
 - (i) a summary of the reasons why the tenderer was unsuccessful; and
 - (ii) the characteristics and relative advantages of the successful tender;
- (e) in the case of an unsuccessful candidate concerned, a summary of the reasons why the candidate was unsuccessful; and
- (f) a precise statement of the effect of regulation 86 (standstill period) on the economic operator which is to receive the notice.

(3) The reasons referred to in paragraph (2)(d)(i) and (2)(e) must include any reason for the contracting authority's decision that the economic operator did not meet the technical specifications—

- (a) in an equivalent manner as mentioned in [F10]regulation 43(14) (technical specifications)]; or
 - (b) because compliance with a specification mentioned in [F11]regulation 43(13) (technical specifications)] does not address the performance or functional requirements laid down by the contracting authority.
- (4) Paragraph (1) does not apply where—
- (a) the only tenderer is the economic operator to be awarded the contract or to become a party to the framework agreement, and there are no candidates concerned;
 - (b) the contract is a contract awarded under a framework agreement or a dynamic purchasing system; or

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- (c) the contract or framework agreement is exempt from the requirement for prior publication of a contract notice.
- (5) A contracting authority may withhold any information to be provided in accordance with the preceding requirements of this regulation where the release of such information—
- (a) would impede law enforcement or would otherwise be contrary to the public interest;
 - (b) would prejudice the legitimate commercial interests of a particular economic operator, whether public or private; or
 - (c) might prejudice fair competition between economic operators.
- (6) Subject to paragraph (5), a contracting authority must within 15 days of the date on which it receives a request in writing from any economic operator—
- (a) if it was unsuccessful, inform that economic operator of the reasons why it was unsuccessful, including any reason referred to in paragraph (3);
 - (b) in the case of an unsuccessful tenderer, other than a tenderer which has been informed by notice under paragraph (1), inform that tenderer of the characteristics and relative advantages of the successful tender and the name of—
 - (i) the economic operator to be awarded the contract;
 - (ii) the parties to the framework agreement; or
 - (iii) the economic operators admitted to the dynamic purchasing system; and
 - (c) if it was successful, a description of any improvements the contracting authority considers the tenderer could have made to its tender.
- (7) Subject to paragraph (5), a contracting authority must by notice in writing, as soon as possible after the decision has been made, inform all candidates and tenderers of its decision to abandon or recommence a contract award procedure in respect of which a contract notice has been published in relation to—
- (i) the award of a contract;
 - (ii) the conclusion of a framework agreement; or
 - (iii) the establishment of a dynamic purchasing system.
- (8) Where a contracting authority provides information in accordance with paragraph (7) it must include the reasons for its decision and, if so requested by an economic operator, must provide the information and reasons in writing.
- (9) In this regulation—
- “candidate” means a candidate, as defined in regulation 2(1), which—
 - (a) is not a tenderer; and
 - (b) has not been informed of the rejection of its application and the reasons for it;
 - “tenderer” means a tenderer, as defined in regulation 2(1), which has not been definitively excluded.
- (10) For the purposes of paragraph (9), an exclusion is definitive if, and only if, the tenderer has been notified of the exclusion and either—
- (a) the exclusion has been held to be lawful in proceedings under Chapter 6 (applications to the court); or
 - (b) the time limit for starting such proceedings has expired even on the assumption that the Court would have granted the maximum extension permitted by regulation 88(4) (enforcement of duties through the courts).

Status: Point in time view as at 18/04/2020.

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Textual Amendments

- F10** Words in reg. 85(3)(a) substituted (18.4.2016) by [The Public Contracts \(Scotland\) Amendment Regulations 2016 \(S.S.I. 2016/47\)](#), regs. 1, **2(7)(a)**
- F11** Words in reg. 85(3)(b) substituted (18.4.2016) by [The Public Contracts \(Scotland\) Amendment Regulations 2016 \(S.S.I. 2016/47\)](#), regs. 1, **2(7)(b)**

Standstill period

86.—(1) A contracting authority must allow a period of at least the relevant standstill period to elapse between the date of despatch of the notice referred to in regulation 85(1) (notices of decisions to award a contract or conclude a framework agreement) and the date on which that contracting authority enters into the contract or concludes the framework agreement.

(2) Paragraph (1) does not apply where—

- (a) the contract or framework agreement is exempt from the requirement for prior publication of a contract notice;
- (b) there are no tenderers concerned or candidates concerned;
- (c) a notice is not required to be given under regulation 85(1) (notices of decisions to award a contract or conclude a framework agreement).

(3) Where notice is sent to all economic operators by facsimile or electronic means, the standstill period is a period of 10 days ending at midnight at the end of the 10th day after that on which the last notice is sent.

(4) Where the notice is sent to any economic operators only by other means, the standstill period is a period of 15 days ending at midnight at the end of the 15th day after that on which the last notice is sent.

CHAPTER 6

APPLICATIONS TO THE COURT

Modifications etc. (not altering text)

- C6** Pt. 3 Ch. 6 modified by SSI 2010/390 reg. 6 (as amended) (18.4.2016) by [The Public Contracts \(Scotland\) Regulations 2015 \(S.S.I. 2015/446\)](#), reg. 1(2), **sch. 6 para. 5(3)** (with regs. 3-18, 99-101)

Duty owed to economic operators

87.—(1) The obligation on a contracting authority to comply with the provisions of these Regulations (except where otherwise specified), and with any enforceable EU obligation in respect of a contract, framework agreement, dynamic purchasing system or design contest falling within the scope of these Regulations, is a duty owed to an economic operator from an EEA State.

(2) The duty owed in accordance with paragraph (1) is a duty owed also to—

- (a) an economic operator from a GPA state, but only where the GPA applies to the procurement concerned; and
- (b) an economic operator which is not from an EEA State or a GPA state, but only if a relevant bilateral agreement applies.

(3) For the purposes of paragraph (2)(a), the GPA applies to a procurement if—

- (a) the procurement may result in the award of a contract of any description; and

- (b) at the relevant time—
 - (i) a GPA state has agreed with the EU that the GPA shall apply to a contract of that description; and
 - (ii) the economic operator is from that GPA state.
- (4) For the purpose of paragraph (2)(b), a relevant bilateral agreement applies if—
 - (a) there is an international agreement, other than the GPA, by which the EU is bound; and
 - (b) in accordance with that agreement, the economic operator is, in respect of the procurement concerned, to be accorded remedies no less favourable than those accorded to economic operators from the EU in respect of matters falling within the scope of the duty owed in accordance with paragraph (1).
- (5) In this regulation—
 - except in paragraph (1), references to an “economic operator”, include a reference to a GPA economic operator;
 - “GPA economic operator” means a person from a GPA state who sought, who seeks, or would have wished, to be the person to whom the contract is awarded;
 - “GPA state” means any country, other than an EEA state, which at the relevant time is a signatory to the GPA;
 - “relevant time” means the date on which the contracting authority sent a call for competition in respect of the contract to the EU Publications Office or would have done so had it been required by these Regulations to do so.

Enforcement of duties through the courts

- 88.**—(1) A breach of the duty owed in accordance with regulation 87 (duty owed to economic operators) is actionable by any economic operator which, in consequence of the breach, suffers, or risks suffering, loss or damage.
- (2) Any proceedings for the purposes of paragraph (1) must be brought in the Sheriff Court or the Court of Session.
- (3) Proceedings under this regulation may not be brought unless—
 - (a) the economic operator bringing the proceedings has informed the contracting authority of—
 - (i) the breach or apprehended breach of the duty owed to it in accordance with regulation 87 (duty owed to economic operators); and
 - (ii) of its intention to bring proceedings under this Part in respect of that breach or apprehended breach; and
 - (b) the proceedings are brought in accordance with paragraph (4).
- (4) For the purpose of paragraph (3)(b), proceedings must be brought—
 - (a) in the case of proceedings seeking an ineffectiveness order (as defined in regulation 91 (ineffectiveness orders))—
 - (i) where paragraph (5) applies, within 30 days from the relevant date referred to in that paragraph; and
 - (ii) in any other case, within 6 months from the date of the contract being entered into or the date of conclusion of the framework agreement; and
 - (b) in any other case, within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen unless the court considers that there is a good reason for extending the period within

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which proceedings may be brought, in which case the court may extend that period up to a maximum of 3 months from that date.

- (5) For the purpose of paragraph (4)(a)(i), this paragraph applies where—
- (a) the contracting authority has sent a contract award notice to the Official Journal in accordance with regulation 52 (form and manner of sending notices for publication at EU level), including reasons for its decision to enter into the contract or conclude the framework agreement without prior publication of a contract notice, in which case the relevant date is the date of publication of the notice in the Official Journal; or
 - (b) the contracting authority has by notice in writing informed all tenderers concerned and all candidates concerned (if any) of its decision in relation to the award of the contract or the conclusion of the framework agreement, and the notice includes the information referred to in regulation 85(2)(d)(i), or as the case may be, (e)(notices of decisions to award a contract or conclude a framework agreement), in which case the relevant date is the date of sending of the notice.

Automatic Suspension of authority power to proceed with contract award

89.—(1) Without prejudice to the application of any relevant standstill period, where proceedings under this Part are served on a contracting authority in relation to a contract that has not been entered into, a framework agreement that has not been concluded or a dynamic purchasing system that has not been established, the contracting authority must not enter into the contract, conclude the framework agreement or establish the dynamic purchasing system unless—

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

Powers and duties of the court

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

- (a) may by interim order suspend one or more of the following—
 - (i) the procedure leading to the award of a contract, the conclusion of a framework agreement, the establishment of a dynamic purchasing system or the determination of a design contest;
 - (ii) the implementation of any decision or action taken by the contracting authority in the course of following a procedure referred to in paragraph (i);
- (b) if satisfied that a decision or action taken by a contracting authority was in breach of the duty owed under regulation 87 (duty owed to economic operators), may do one or more of the following—
 - (i) order the setting aside of that decision or action;
 - (ii) order the contracting authority to amend any document;
 - (iii) award damages to an economic operator which has suffered loss or damage as a consequence of the breach.

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

- (a) that decisions taken by a contracting authority must be reviewed effectively and, in particular, as rapidly as possible;
- (b) the probable consequences of an interim order for all interests likely to be harmed; and

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(c) the public interest.

(3) Where the court is satisfied that regulation 91(8)(a) (ineffectiveness orders) applies but the second ground for ineffectiveness is not otherwise met, the court must, without prejudice to the other powers of the court, order—

- (a) the payment by the contracting authority of a financial penalty; or
- (b) the shortening of the duration of the contract or framework agreement awarded following the procurement in relation to which the breach occurred.

(4) In determining what order to make under paragraph (3) the court must—

- (a) ensure that the order is effective, proportionate and dissuasive; and
- (b) have regard to all relevant factors including—
 - (i) the seriousness of the breach; and
 - (ii) the behaviour of the contracting authority.

(5) Where the court makes an order under paragraph (3)(b) the court must, without prejudice to the other powers of the court, make such other order as the court considers appropriate to address the consequences of the shortening of the duration of the contract or framework agreement on the rights and obligations of the parties to the contract or framework agreement.

(6) Before making an order under paragraph (5), the court must have regard to any terms of the contract or framework agreement relating to the rights and obligations of the parties should the duration of the contract or framework agreement be shortened.

(7) Subject to paragraph (3) and regulation 91 (ineffectiveness orders), in proceedings under this Part the court does not have power to order any remedy other than an award of damages in respect of a breach of the duty owed under regulation 87 (duty owed to economic operators) if the contract in relation to which the breach occurred has been entered into, or the framework agreement in relation to which the breach occurred has been concluded.

(8) Sections 21 and 42 of the Crown Proceedings Act 1947 ^{M47} do not apply in proceedings brought under this Part against the Crown.

Marginal Citations

M47 1947 c.44.

Ineffectiveness orders

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

(2) Subject to any order made under [F12regulation 92(1)(b) (powers of the court)], obligations rendered unenforceable by an ineffectiveness order made in relation to a contract must not be performed by the parties to the contract.

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

(4) Subject to paragraph (5) and regulation 93 (general interest grounds for not making a declaration of ineffectiveness), the court must make an ineffectiveness order where—

- (a) the first ground for ineffectiveness referred to in paragraph (6) applies;

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- (b) the second ground for ineffectiveness referred to in paragraph (8) applies; or
- (c) the third ground for ineffectiveness referred to in paragraph (9) applies.

(5) In proceedings under this Part to which regulation 88(4)(b) (enforcement of duties through the courts) applies, the court does not have power to make an ineffectiveness order if the proceedings would be incompetent if regulation 88(4)(a) applied to the proceedings.

First ground for ineffectiveness

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

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

- (a) the contracting authority sent to the Official Journal a notice in the form of the voluntary ex ante transparency notice in Annex XII to Commission Implementing Regulation (EU) No 2015/1986 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) No 842/2011^{M48} expressing its intention to enter into the contract or to conclude the framework agreement and containing—
 - (i) the name and contact details of the contracting authority;
 - (ii) a description of the object of the contract or framework agreement;
 - (iii) a justification of the decision of the contracting authority to award the contract or conclude the framework agreement without prior publication of a contract notice;
 - (iv) the name and contact details of the economic operator to be awarded the contract or to become party to the framework agreement; and
 - (v) any other information which the contracting authority considered useful; and
- (b) the contracting authority allowed a period of at least 10 days to elapse between the date of publication in the Official Journal of the notice referred to in sub-paragraph (a) and the date on which the contracting authority entered into the contract or concluded the framework agreement.

Second ground for ineffectiveness

(8) The second ground for ineffectiveness applies where all of the following apply—

- (a) the contracting authority has breached regulation 85(1) (notices of decisions to award a contract or conclude a framework agreement), 86(1) (standstill period) or 89 (automatic suspension of authority power to proceed with contract award);
- (b) the contracting authority's breach referred to in sub-paragraph (a) prevented the economic operator from bringing proceedings or obtaining a remedy before the contract was entered into or the framework agreement was concluded;
- (c) in awarding the contract or concluding the framework agreement there has been a breach of the duty owed to the economic operator under these Regulations, other than a breach of regulations 85(1) (notices of decisions to award a contract or conclude a framework agreement), 86(1) (standstill period) or this Part;
- (d) the contracting authorities' breach referred to in sub-paragraph (c) has affected the chances of the economic operator bringing proceedings under this Part to obtain the contract or become a party to the framework agreement.

Third ground for ineffectiveness

- (9) The third ground for ineffectiveness applies where—
- (a) the contract is a contract based on a framework agreement or a contract awarded under a dynamic purchasing system;
 - (b) the contract was awarded in breach of—
 - (i) regulations 34(7)(b) or (c) or 34(10) (framework agreement), in the case of a contract based on a framework agreement (rules governing the award of contracts based on a framework agreement); or
 - (ii) regulation 35(19) to (23) (dynamic purchasing systems), in the case of a contract awarded under a dynamic purchasing system (rules governing the award of contracts under a dynamic purchasing system); and
 - (c) the estimated value of the contract at the relevant time is equal to or greater than the relevant threshold.
- (10) The third ground for ineffectiveness does not apply where the contracting authority—
- (a) considered the award of the contract to be in accordance with the provisions mentioned in paragraph (9)(b);
 - (b) has, despite regulation 85(4)(b) (notices of decisions to award a contract or conclude a framework agreement), by notice in writing informed the economic operators that submitted tenders of its decision in relation to the award of the contract and the notice included the information referred to in regulation 85(1) to (3) (notices of decisions to award a contract or conclude a framework agreement); and
 - (c) has allowed a period of at least the relevant standstill period to elapse between the date of sending of the notice of its decision to award the contract and the date on which the contracting authority entered into the contract.

Textual Amendments

F12 Words in [reg. 91\(2\)](#) substituted (18.4.2016) by [The Public Contracts \(Scotland\) Amendment Regulations 2016 \(S.S.I. 2016/47\)](#), [regs. 1, 2\(8\)](#)

Marginal Citations

M48 OJ L 222, 12.11.2015 p.1.

Powers of the court

92.—(1) If an ineffectiveness order is made, the court must, without prejudice to the other powers of the court—

- (a) order the payment by the contracting authority of a financial penalty; and
- (b) make such other order as the court considers appropriate to address the consequences of the ineffectiveness order on the rights and obligations of the parties to the contract or framework agreement.

(2) In the case of an order made under paragraph (1)(a), the court must have regard to the extent to which the contract or framework agreement will remain in effect in respect of the period leading up to the date of the ineffectiveness order.

(3) Before making an order under paragraph (1)(b), the court must have regard to any terms of the contract or framework agreement relating to the rights and obligations of the parties should an ineffectiveness order be made in relation to the contract or framework agreement.

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General interest grounds for not making a declaration of ineffectiveness

93.—(1) The court may decline to make an ineffectiveness order where the court is satisfied that overriding reasons relating to a general interest require that the enforceability of the rights and obligations arising from the contract or framework agreement should be maintained.

(2) For the purposes of paragraph (1)—

- (a) economic interests directly linked to the contract or framework agreement do not constitute overriding reasons relating to a general interest; and
- (b) economic interests in the effectiveness of the contract or framework agreement may only be considered as overriding reasons relating to a general interest in exceptional circumstances where ineffectiveness would lead to disproportionate consequences.

(3) For the purposes of paragraph (2)(a), economic interests directly linked to the contract or framework agreement include the costs—

- (a) resulting from the delay in the performance of the contract or framework agreement;
- (b) resulting from the commencement of a new procurement procedure;
- (c) resulting from the change of the economic operator performing the contract or framework agreement; and
- (d) of legal obligations resulting from an ineffectiveness order.

Other orders

94.—(1) Where the court declines to make an ineffectiveness order under regulation 93, the Court must, without prejudice to the other powers of the court, order—

- (a) the payment by the contracting authority of a financial penalty; or
- (b) the shortening of the duration of the contract or framework agreement.

(2) In determining what order to make under paragraph (1)(a), regulation 90(4) (powers and duties of the court) applies.

(3) Regulation 90(5) and (6) (powers and duties of the court) applies to an order made under paragraph (1)(b) as it applies to an order made under regulation 90(3)(b) (powers and duties of the court).

Financial penalties

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

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

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

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

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

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

(5) In this regulation, “an office in the Scottish Administration which is not a ministerial office” is construed in accordance with section 126(8) of the Scotland Act 1998^{M49}.

Marginal Citations

M49 1998 c.46.

PART 4

REVOCATIONS, CONSEQUENTIAL AMENDMENTS, SAVINGS AND TRANSITIONAL PROVISIONS

Interpretation of Part 6

96. In this Part, “the 2012 Regulations” means the Public Contracts (Scotland) Regulations 2012(a).

Revocations and consequential amendments

97.—(1) Subject to regulation 98, the 2012 Regulations are revoked.

(2) The consequential and miscellaneous amendments set out in Schedule 6 have effect.

Transitional provision and saving where procurement procedure commenced before 18th April 2016

98.—(1) Nothing in these Regulations affects any contract award procedure or design contest commenced before 18th April 2016 which continues to be subject to the application of the 2012 Regulations as if those Regulations had not been revoked.

(2) For that purpose, a contract award procedure or design contest has been commenced before 18th April 2016 if, before that date—

- (a) a contract notice or, as the case may be, design contest notice, has been sent to the Official Journal in accordance with the 2012 Regulations in order to invite offers or requests to be selected to tender for or to negotiate in respect of a proposed public 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 a proposed public 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, 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, framework agreement or dynamic purchasing system.

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

- (a) before 18th April 2016; or
- (b) on or after that date following a contract award procedure which, by virtue of paragraph (1), was not affected by these Regulations,

which continues to be subject to the application of the 2012 Regulations as if those Regulations had not been revoked.

Status: Point in time view as at 18/04/2020.

Changes to legislation: The Public Contracts (Scotland) Regulations 2015 is up to date with all changes known to be in force on or before 06 July 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details)

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

- (a) before 18th April 2016; or
- (b) on or after that date following a contract award procedure which, by virtue of paragraph (1), was not affected by these Regulations,

which continues to be subject to the application of the 2012 Regulations as if those Regulations had not been revoked.

(5) Nothing in these Regulations, except regulations 72 (modification of contracts during their term) and 73(1)(a), (2) and (3) (termination of contracts), affects a contract awarded—

- (a) before 18th April 2016; or
- (b) on or after that date but where the award itself was not, by virtue of paragraphs (1) to (4), affected by these Regulations,

which continues to be subject to the application of the 2012 Regulations as if those Regulations had not been revoked.

(6) In this regulation, “contract notice”, “dynamic purchasing system”, “design contest”, “framework agreement” and “public contract” have the same meanings as in the 2012 Regulations.

Transitional Provision and saving where utilities procurement procedures commenced before 18th April 2016

99.—(1) The Utilities amendments do not affect any contract award procedure commenced before 18th April 2016.

(2) For that purpose, a contract award procedure has been commenced before 18th April 2016 if, before that date—

- (a) a contract notice has been sent to the Official Journal in accordance with the UCR in order to invite offers or requests to be selected to tender for or to negotiate in respect of a proposed contract or dynamic purchasing system;
- (b) a periodic indicative notice has been sent to the Official Journal, in which case the contract award procedure that is not affected by the Utilities amendments is the procedure for the award of any proposed contract the intention to award which was indicated in the notice, but only if the requirements in regulation 16(3)(a) and (b) of the UCR are satisfied;
- (c) the utility has had published any form of advertisement seeking offers or expressions of interest in a proposed contract or dynamic purchasing system; or
- (d) the utility has contacted any economic operator in order to—
 - (i) seek expressions of interest or offers in respect of a proposed contract 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 contract or dynamic purchasing system.

(3) The Utilities amendments do not affect the award of a specific contract under a framework agreement where the framework agreement was concluded—

- (a) before 18th April 2016; or
- (b) on or after 18th April 2016 following a contract award procedure which, by virtue of paragraph (1), was not affected by the Utilities amendments.

(4) The Utilities amendments do not affect the award of a specific contract under a dynamic purchasing system where the system was established—

- (a) before 18th April 2016; or

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(b) on or after 18th April 2016 following a contract award procedure which, by virtue of paragraph (1), was not affected by the Utilities amendments.

(5) In this regulation—

“contract”, “contract notice”, “dynamic purchasing system”, “economic operator”, “framework agreement” and “periodic indicative notice” have the same meanings as in the UCR;

“the UCR” means the Utilities Contracts (Scotland) Regulations 2012 ^{M50}; and

“the Utilities amendments” means the amendments made to the UCR by [^{F13}paragraph 8 of Schedule 6].

Textual Amendments

F13 Words in reg. 99(5) substituted (18.4.2016) by [The Public Contracts \(Scotland\) Amendment Regulations 2016 \(S.S.I. 2016/47\)](#), regs. 1, 2(9)

Marginal Citations

M50 [S.S.I. 2012/89](#) was amended by the [Public Contracts and Utilities Contracts \(Scotland\) Amendment Regulations 2012 \(S.S.I. 2012/108\)](#).

Transitory provision prior to full commencement of regulation 23(1) to (7)

100.—(1) This regulation applies during the period beginning on 18th April 2016 and ending immediately before 18th October 2018.

(2) During that period, a contracting authority may choose between the following means of communication for the purposes mentioned in paragraph (3)—

- (a) electronic means in accordance with regulation 23 (rules applicable to communication);
- (b) post or other suitable carrier;
- (c) fax; or
- (d) a combination of those means.

(3) That choice is available for all communication and information exchange in respect of which both the following criteria are met—

- (a) the use of electronic means would, in accordance with regulation 23(1) to (7) (rules applicable to communication), have been required if those provisions had been in force;
- (b) the use of electronic means is not required by any provision of these Regulations other than regulation 23(1) (rules applicable to communication).

Transitory Provision: temporary exemption

101.—(1) Notwithstanding paragraphs (4) to (6) of regulation 1 nothing in the provisions commenced by those paragraphs affect—

- (a) any procurement or design contest that is commenced before the dates respectively mentioned in those paragraphs; or
- (b) any contract awarded as a result of such procurement or following such contest.

(2) For that purpose, a procurement or design contest has been commenced before the dates mentioned if, before such date—

- (a) a contract notice or, as the case may be, design contest notice, has been sent to the Official Journal in accordance with regulation 52 in order to invite offers or requests to be selected

Status: Point in time view as at 18/04/2020.

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- to tender for or to negotiate in respect of a proposed public 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 a proposed public 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, 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, framework agreement or dynamic purchasing system.

St Andrew's House,
Edinburgh

KEITH BROWN
A member of the Scottish Government

Status:

Point in time view as at 18/04/2020.

Changes to legislation:

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