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## EXPLANATORY NOTE

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

These Regulations implement in its entirety Council Directive [90/531/EEC](#) (OJ No.L297,29.10.90,p.1) concerning the co-ordination of procedures for the award of supply and works contracts by certain entities operating in the water, energy, transport and telecommunications sectors. These entities are specified in Schedule 1, and in the Regulations are called “utilities” (regulation 3).

The Regulations apply when utilities are seeking offers in relation to certain contracts for the purchase or hire of goods called in the Regulations “supply contracts” (regulation 2(1) and 5) and when they are seeking offers in relation to certain contracts providing for, or engaging a person to procure, the carrying out or the design and carrying out of certain building and engineering works called in the Regulations “works contracts” (regulations 2(1) and 5). They deal in particular with the treatment to be accorded to suppliers or contractors or potential suppliers or contractors who are nationals of and established in member States (regulation 4). Certain contracts are excluded from the application of the Regulations, principally where the contract is not for the purpose of carrying out an activity specified in the Part of Schedule 1 in which the utility is specified, where the contract is for the purpose of carrying out an activity outside the territory of the Communities, contracts for resale, secret contracts, contracts connected with international agreements (regulation 6), certain contracts awarded by utilities operating in the telecommunications sector (regulation 7 and Schedule 2) and those contracts where the value of the contract is beneath the threshold for coverage (regulation 9). Certain contracts awarded by utilities operating in the energy sector may be exempt from the detailed rules of the Regulations, in which case the utility must comply with the principles of non-discrimination and competitive procurement in seeking offers in relation to them (regulation 8).

The principal requirement of the Regulations is that, in seeking offers in relation to a supply or a works contract, a utility must use one of three procedures: the open procedure, whereby any person who is interested may submit a tender; the restricted procedure whereby only those persons selected by the utility may submit tenders; and the negotiated procedure whereby the utility negotiates the terms of the contract with one or more persons selected by it (regulation 12).

The utility is required to publicise the supply or works contracts which it expects to award in the Official Journal at least once a year (regulation 13) and again when it starts the procedure leading to the award (regulation 14), although this latter requirement is dispensed with in certain cases (regulations 14 and 15). The Regulations permit the operation of a system of qualification of suppliers or contractors, from which a utility may select suppliers or contractors to tender for or negotiate a contract without advertisement at the start of the award procedure. In this case the existence of the qualification system must be advertised (regulation 17).

The form of the different advertisements and the information which it has to contain in relation to the proposed contract is specified in Schedule 4. If the notice is also to be published in the press it must be limited to the information published in the Official Journal (regulation 28).

The various procedures also lay down the time to be allowed for the response by potential suppliers or contractors to the invitations and for obtaining the relevant documents (regulation 16). The Regulations also specify the matters to which the utility may have regard in excluding tenders from suppliers or contractors who are regarded as ineligible or in selecting suppliers or contractors to tender for or to negotiate the contract (regulation 18).

*Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.*

The utility is required to award a supply or works contract on the basis either of the offer (including in-house bids) which offers the lowest price or the one which is the most economically advantageous (regulation 20).

There are various other requirements in the Regulations. The most important is the requirement that where the utility wishes to lay down technical specifications which the goods or materials to be purchased or hired or the work or works to be carried out under the contract must meet all such specifications must be specified in the contract documents and that, except in certain circumstances, these specifications must be defined by reference to European specifications. It is also provided that, except where it is not possible to describe the goods or materials otherwise, the technical specifications may not refer to goods of a specific make or source or to a particular process with the effect of favouring or eliminating particular suppliers or contractors (regulation 11). A utility is permitted to advertise an arrangement which establishes the terms under which suppliers or contractors will enter supply or works contracts with it over a period of time, in which case it need not advertise the supply and works contracts (regulation 10). In certain circumstances a utility may, and in other limited circumstances must, reject an offer for a supply contract if more than 50% of the value of the goods are goods which originate in States with which the Communities have not concluded an agreement ensuring comparable and effective access to markets for undertakings in member States (regulation 21). Utilities are required to publicise in the Official Journal information about the supply and works contracts they have awarded (regulation 22). The utilities are required to preserve relevant records, and to submit various reports to the responsible Minister (regulations 25 and 26).

The Regulations also implement Council Directive [92/13/EEC](#) (OJ No. L76, 23.3.92,p.14) concerning the co-ordination of laws, regulations and administrative provisions relating to the application of Community rules on the procurement of entities operating in the water, energy, transport and telecommunications sectors. They provide that the obligation on a utility to comply with the Regulations, and with any enforceable Community obligation in relation to the award of a supply or works contract, is a duty owed to suppliers and contractors. A breach of the duty is not a criminal offence, but is actionable by a supplier or contractor. Proceedings are assigned to the High Court in England, Wales and Northern Ireland and to the Court of Session in Scotland. The court is given power to grant appropriate interim and final relief and to award damages except that, where the contract in respect of which there has been an infringement has already been entered into, the court's powers are restricted to awarding damages.

Finally, the Regulations amend the Public Works Contracts Regulations 1991 and the Public Supply Contracts Regulations 1991 to ensure that not more than one set of Regulations applies to any contract.