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STATUTORY INSTRUMENTS

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**1992 No. 3279**

**The Utilities Supply and Works Contracts Regulations 1992**

**PART I**  
**GENERAL**

**Title and commencement**

1. These Regulations may be cited as the Utilities Supply and Works Contracts Regulations 1992 and shall come into force on 13th January 1993.

**Interpretation**

2.—(1) In these Regulations—

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

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

“the Commission” means the Commission of the Communities;

“contract documents” means the invitation to tender for or to negotiate the contract, the proposed conditions of contract, the specifications or descriptions of the goods, services, work or works required by the utility and all documents supplementary thereto;

“contract notice” means a notice sent to the Official Journal in accordance with regulation 14(2) (b);

“contractor” has the meaning ascribed to it by regulation 4;

“ECU” means the European Currency Unit as defined in Council Regulation (EEC) No. 3180/78(1);

“established” means the same as it does for the purposes of the Community Treaties;

“financial year” means the period of 12 months ending on the date in any year in respect of which the accounts of a utility are prepared;

“framework agreement” means a contract or other arrangement which is not in itself a supply or a works contract but which establishes the terms (in particular the terms as to price and, where appropriate, quantity) under which the supplier or contractor will enter into supply or works contracts with a utility in the period during which the framework agreement applies;

“goods” includes substances, growing crops and things attached to or forming part of the land which are agreed to be severed before the purchase or hire under a supply contract, any ship, aircraft or vehicle, and, when the utility is an entity specified in Part T of Schedule 1, is deemed to include telecommunications software services;

“Minister” has the meaning ascribed to it by regulation 27;

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(1) OJ No. L379, 30.12.78, p.1, as amended by Council Regulation (EEC) No. 2626/84 (OJ No. L247), 16.9.84, p.1 and Council Regulation (EEC) No. 1971/89 (OJ No. L189, 4.7.89, p.1).

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

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

“negotiated procedure” means a procedure leading to the award of a contract whereby the utility negotiates the terms of the contract with one or more persons selected by it;

“Official Journal” means the Official Journal of the Communities;

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

“periodic indicative notice” means a notice sent to the Official Journal in accordance with regulation 13;

“public telecommunications network” means an infrastructure for the use of the public which enables signals to be conveyed by wire, microwave, optical means or other electromagnetic means between physical connections which are necessary for access to and efficient communication through the network;

“public telecommunications services” means services which consist in whole or in part in the transmission and routing of signals on a public telecommunications network by means of telecommunications process other than radio broadcasting and television;

“restricted procedure” means a procedure leading to the award of a contract whereby only persons selected by the utility may submit tenders for the contract;

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

“software services” means the design or adaptation of software;

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

“supplier” has the meaning ascribed to it by regulation 4;

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

- (a) for the purchase of goods by a utility (whether or not the consideration is given in instalments and whether or not the purchase is conditional upon the occurrence of a particular event), or
- (b) for the hire of goods by a utility (both where the utility becomes the owner of the goods after the end of the period of hire and where it does not),

and for any siting and installation of those goods, but where, under such a contract services are also to be provided, the contract shall only be a supply contract if the value of the consideration attributable to the goods and to any siting or installation of the goods is greater than the value attributable to the services;

“telecommunications software services” means software services for use in the operation of a public telecommunications network or which are intended to be used in a public telecommunications service as such;

“utility” has the meaning ascribed to it by regulation 3;

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

“working day” means a day other than a Saturday, Sunday or Bank Holiday within the meaning of the Banking and Financial Dealings Act 1971(2);

“works” means any of the activities specified in Schedule 3, being activities contained in the general industrial classification of economic activities within the Communities;

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

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

and

“year” means a calendar year.

(2) The value in the currency of any member State of any amount expressed in these Regulations in ECU shall be determined by reference to the rate for the time being applying for the purposes of Council Directive 90/531/EEC(3) as published from time to time in the Official Journal(4).

(3) Where a thing is required to be done under these Regulations—

- (a) within a period after an action is taken, the day on which that action was taken shall not be counted in the calculation of that period;
- (b) within a certain period, that period must include 2 working days;
- (c) within a period and the last day of that period is not a working day, the period shall be extended to include the following working day.

(4) References in these Regulations to a regulation are references to a regulation in these Regulations and references to a Schedule are references to a Schedule to these Regulations.

## Utilities

3. For the purposes of these Regulations a utility is a person specified in the first column of Schedule 1.

## Suppliers and Contractors

4.—(1) For the purposes of these Regulations a “supplier” means a person who sought, or who seeks, or would have wished, to be the person to whom a supply contract is awarded, and a “contractor” means a person who sought, or who seeks, or would have wished, to be the person to whom a works contract is awarded, and in either case means a person who is a national of and established in a member State.

(2) When these Regulations apply a utility shall not treat a person who is not a national of and established in a member State more favourably than one who is.

## Application of the Regulations

5. These Regulations apply whenever a utility seeks offers in relation to a proposed supply contract or a proposed works contract other than contracts excluded from the operation of these Regulations by regulations 6, 7 and 9 below.

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(2) 1971 c. 80.

(3) OJ No. L297, 29.10.90, p.1.

(4) The rates are determined for each successive period of two years by calculating the average of the daily exchange rates between each currency and the ECU in a period of 24 months preceding the determination.

## General exclusions

6. These Regulations shall not apply to the seeking of offers in relation to a contract—
- (a) other than for the purpose of carrying out an activity specified in the Part of Schedule 1 in which the utility is specified;
  - (b) for the purpose of carrying out any activity outside the territory of the Communities but only if the carrying out of that activity does not involve the physical use of a network or geographical area within the Communities;
  - (c) for the purpose of acquiring goods or works in order to sell or hire them to another person unless the utility has a special or exclusive right to sell or hire such goods or works or other persons are not free to sell or hire them under the same conditions;
  - (d) which is classified as secret by the Minister or where the performance of the contract must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions of any part of the United Kingdom or when the protection of the basic interests of the security of the United Kingdom require it;
  - (e) where different procedures govern the procedures leading to the award of the contract and it is to be entered into—
    - (i) pursuant to an international agreement to which the United Kingdom and a State which is not a member State are parties and it relates to goods or provides for the carrying out of works intended for the joint implementation or exploitation of a project pursuant to that agreement;
    - (ii) pursuant to an international agreement relating to the stationing of troops; or
    - (iii) in accordance with the contract award procedures of an organisation of which only States are members (an “international organisation”) or of which only States or international organisations are members.
  - (f) by a utility which engages in an activity specified in Part A, B or C of Schedule 1 for the purchase of water; and
  - (g) by a utility which engages in an activity specified in Parts D to N of Schedule 1 for the purchase of energy or of fuel for the production of energy;

## Exclusion in respect of certain contracts awarded by utilities operating in the telecommunications sector

7.—(1) These Regulations shall not apply to the seeking of offers in relation to a contract by a utility specified in Schedule 2 for the exclusive purpose of enabling it to provide one or more of the public telecommunications services specified in the Part of Schedule 2 in which the utility is specified.

(2) A utility specified in Schedule 2 when requested shall send a report to the Minister for onward transmission to the Commission describing the public telecommunications services provided by it which it considers are services specified in the Part of Schedule 2 in which the utility is specified.

(3) A utility may indicate that any of the information included in the report referred to in paragraph (2) above is of a sensitive commercial nature and request that it not be published.

## Exemption in respect of certain utilities operating in the energy sector

8.—(1) Where the Commission has decided that an activity specified in Parts M or N of Schedule 1 to these Regulations is not to be considered an activity defined in article 2(2)(b)(i) of Council Directive 90/531/EEC<sup>(5)</sup> and that entities undertaking that activity shall not be considered

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(5) OJ No. L297, 29.10.90, p.1.

as operating under special or exclusive rights by virtue of article 2(3)(b) of that Directive, a utility need not comply with Parts II to V of these Regulations and regulations 23, 24, 25, 26 other than paragraph 2(a), and 28 below in seeking offers in relation to a contract to be awarded for the purpose of carrying out any activity referred to in that decision.

(2) A utility which relies on the exemption in paragraph (1) above shall observe the principles of non-discrimination and competitive procurement, and in particular shall—

- (a) hold a competition unless it can objectively justify not doing so; and
- (b) in making information about its procurement intentions available to suppliers and contractors, in specifying its requirements to them, in establishing and using a qualification system, in selecting suppliers or contractors to tender for or to negotiate the contract and in awarding the contract, make decisions objectively on the basis of relevant criteria.

### **Thresholds**

9.—(1) These Regulations shall not apply to the seeking of offers in relation to a proposed contract where the estimated value of the contract (net of value added tax) at the relevant time is less than the relevant threshold.

(2) The relevant threshold for the purposes of paragraph (1) above—

- (a) in relation to a supply contract to be awarded by a utility other than one specified in Part T of Schedule 1, is 400,000 ECU;
- (b) in relation to a supply contract to be awarded by a utility specified in Part T of Schedule 1, is 600,000 ECU; and
- (c) in relation to a works contract, is 5,000,000 ECU.

(3) Subject to paragraphs (4), (5), (6), (9), (14) and (15) below in the case of a supply contract, and subject to paragraphs (10), (11), (12), (13), (14) and (15) below in the case of a works contract, the estimated value of a contract for the purposes of paragraph (1) above shall be the value of the consideration which the utility expects to give under the contract.

(4) The estimated value for the purposes of paragraph (1) above of a supply contract for the hire of goods for an indefinite period, or for a period which is uncertain at the time the contract is entered into, shall be the value of the consideration which the utility expects to give in respect of the first four years of the hire.

(5) Subject to paragraph (8) below where a utility proposes to enter into two or more supply contracts at the same time in order to purchase or hire goods of a particular type, the estimated value for the purposes of paragraph (1) above of each of those contracts shall be the aggregate of the value of the consideration which the utility expects to give under each of those contracts.

(6) Subject to paragraph (8) below where a utility has a requirement over a period to purchase or hire goods of the type to be purchased or hired under the contract and for that purpose enters into—

- (a) a series of supply contracts,
- (b) a supply contract which under its terms is renewable, or
- (c) a supply contract which is for the purchase of goods over an indefinite period,

the estimated value for the purposes of paragraph (1) above of the supply contract shall be the amount calculated under paragraph (7) below.

(7) The utility shall calculate the amount referred to in paragraph (6) above either—

- (a) by taking the aggregate of the value of the consideration given by the utility under supply contracts which have similar characteristics, and which are for the purchase or hire of goods of the type to be purchased or hired under the contract, during the last financial year of the utility ending before, or the period of 12 months ending immediately before,

the relevant time, and by adjusting that amount to take account of any expected changes in quantity and cost of the goods to be purchased or hired in the period of 12 months commencing with the relevant time, or

- (b) by estimating the aggregate of the value of the consideration which the utility expects to give under supply contracts which have similar characteristics, and which are for the purchase or hire of goods of the type to be purchased or hired under the contract, during the period of 12 months from the first date of delivery of the goods to be purchased or hired under the contract or, where the contract is for a definite term of more than 12 months, during the term of the contract.

(8) Notwithstanding paragraphs (5) and (6) above when the goods to be purchased or hired under the contract are required for the sole purposes of a discrete operational unit within the organisation of a utility and—

- (a) the decision whether to purchase or hire goods of that type has been devolved to such a unit, and
- (b) that decision is taken independently of any other part of the utility,

the valuation methods described in paragraphs (5) and (7) above shall be adapted by aggregating only the value of the consideration which the utility has given or expects to give, as the case may be, under contracts for the purchase or hire of goods which were or are required for the sole purposes of that unit.

(9) Where a supply contract includes one or more options the estimated value of the contract shall be determined by calculating the highest possible amount which could be payable under the contract.

(10) Subject to paragraphs (11) and (12) below, the estimated value for the purposes of paragraph (1) above of a works contract which is one of a number of contracts entered or to be entered into for the carrying out of a work shall be the aggregate of the value of the consideration which the utility has given or expects to give under all the contracts for the carrying out of the work.

(11) Paragraph (10) above shall not apply to any works contract (unless the utility chooses to apply that paragraph to that contract) if that contract has an estimated value (calculated in accordance with paragraph 3 above) of less than 1,000,000 ECU, and the aggregate value of that contract and of any other works contract for the carrying out of the work in respect of which the utility takes advantage of the disapplication of paragraph (10) above by virtue of this paragraph is less than 20 per cent of the aggregate of the value of the consideration which the utility has given or expects to give under all the contracts for the carrying out of the work.

(12) Where a utility intends to provide any goods or services to the person awarded a works contract for the purpose of carrying out that contract, the value of the consideration for the purposes of paragraphs (3) and (10) above shall be taken to include the estimated value at the relevant time of those goods and services.

(13) Where the estimated value of a works contract estimated in accordance with paragraph (3) above is less than the relevant threshold and where goods which are not necessary for its execution are to be purchased or hired under it the estimated value of the contract for the purposes of paragraph (1) above shall be the value of the consideration which the utility expects to give for the goods and the relevant threshold shall be determined in accordance with paragraph (2) above as if the works contract were a supply contract.

(14) The estimated value of a framework agreement shall be the aggregate of the values estimated in accordance with this regulation of all the contracts which could be entered into under the framework agreement.

(15) A utility shall not enter into separate contracts nor select nor exercise a choice under a valuation method in accordance with paragraph (7) above with the intention of avoiding the application of these Regulations to those contracts.

- (16) The relevant time for the purposes of paragraphs (1), (7) and (12) above means—
- (a) if the utility selects suppliers or contractors to tender for or to negotiate the contract in accordance with a qualification system established in accordance with regulation 17 below, the date on which the selection commences, or
  - (b) if the utility satisfies the requirement that there be a call for competition by indicating the intention to award the contract in a periodic indicative notice in accordance with regulation 14(2)(a)(i) below, the date on which the notice is sent to the Official Journal; or
  - (c) in any other case, the date on which a contract notice would be sent to the Official Journal if the requirement that there be a call for competition applied and the utility decided to satisfy that requirement by sending such a notice.

### **Framework agreements**

**10.**—(1) A utility which is proposing to enter into a framework agreement may choose to treat that agreement as a contract to which these Regulations apply; and, accordingly, in respect of such an agreement references in these Regulations to a contract shall include a reference to such a framework agreement.

(2) A utility which chooses to treat a framework agreement as a contract under paragraph (1) above shall not use the framework agreement to hinder, limit or distort competition.