

Subsidiary Legislation made under s.75.

## Procurement (Utilities Contracts) Regulations 2016

### LN.2016/085

Amending enactments	Relevant current provisions	Commencement date
		<i>Commencement</i> <b>18.4.2016</b>
LN. 2016/185	r. 112(4)(b)	15.9.2016
2017/130	rr. 2, 38(16)(c), (i)(cc), (ii)	29.6.2017
2020/453	rr. 2(1), 4(4)-(7), 6(3), 7(3), 16(1)(a)-(c), 17(6), (13), 18(2), 19(1)(b), (2), 20(1)(a), (2), (6), 21(1)(c)(i), (aa), (bb), (ii)(bb), (vi), 22, 24(2)(a), 25(1), (5)(a), (8), 26(4)(b), (6), 27(1)(a)-(b), (2), 28(1)(c), (2), (4)(c), 29(5)(a)-(b), 31, 34, 36(1), 38(15)(a)(i), (16)(c), (20), (b), 42(1), 43(2), (4)(a)-(b), (5), 44(2)(a), 47(5), 50(8)(a), (26), (26A), 55, 58(5), (7), 65(1), (2)(a), (3), (4)(c)-(d), 66(1), (1A), (3), (a), 67, 68(1)-(2), (4), (5)(a)-(b), (6), 69(1)-(6), 70, 71(1), 74(6), 79(2), (4)(a)-(c), (6), 81(4)(c), (5)-(6), 82(2)(f), (6)-(7), 83(1), (6), 85(5), 86(2)-(3), 87(c), 89(4)-(6), 92(2)(a)-(b), (3)(a), (c), 93(2), 95(1)(a)-(b), (2), 96(4), (10)-(11), 97-98, 102, (1)(b), (2), 106(3), 112(2), (3)(b)-(c), 4(a)(iii), (b)	1.1.2021
2021/029	rr. 41, 103	1.1.2021
2021/228	rr. 4(2), 5(2)(b)-(c)	1.1.2021
2022/241	r. 16(1)(a)-(b)	11.8.2022
2024/008	r. 16(1)(a)-(b)	25.1.2024
2025/275	r. 48(1)(k)-(l), (3), (4A)-(4B)	18.12.2025

#### Transposing:

Directive 2014/25/EU

Directive 2004/17/EC

**1977-09**

**Public Finance (Control and Audit)**

**2016/085**

**Procurement (Utilities Contracts) Regulations 2016**

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**ARRANGEMENT OF REGULATIONS**

Regulation

**PART 1  
PRELIMINARY AND GENERAL PRINCIPLES**

**Chapter 1  
Subject Matter and Definitions**

1. Title and commencement.
2. Interpretation.
3. Utilities.
4. Scope of economic operators and general principles.
5. Competent Authority.
6. Mixed procurement covering the same activity.
7. Procurement covering several activities.

**Chapter 2  
Activities**

8. Common Provisions.
9. Gas and heat.
10. Electricity.
11. Water.
12. Transport services.
13. Ports and airports.
14. Postal services.
15. Extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels.

**Chapter 3  
Material Scope**

**Subchapter 1  
Thresholds**

16. Threshold amounts.
17. Methods for calculating the estimated value of the procurement.

**Subchapter 2  
Excluded contracts and design contests; special provisions for procurement involving  
defence and security aspects**

*This version is out of date*

18. Contracts awarded for the purpose of resale or lease to third parties.
19. Contracts and design contests awarded or organised for purposes other than the pursuit of a covered activity or for the pursuit of such an activity outside Gibraltar
20. Contracts awarded and design contests organised pursuant to international rules.
21. Specific exclusions for service contracts.
22. Service contracts awarded on the basis of an exclusive right.
23. Contracts awarded by certain utilities for the purchase of water and for the supply of energy or of fuels for the production of energy.
24. Defence and security.
25. Mixed procurement covering the same activity and involving defence and security aspects.
26. Procurement covering several activities and involving defence or security aspects.
27. Contracts and design contests involving defence and security aspects which are awarded or organised pursuant to international rules.
28. Contracts between contracting authorities.
29. Contracts awarded to an affiliated undertaking.
30. Contracts awarded to a joint venture or to a utility forming part of a joint venture.
31. *Deleted.*
32. Research and development services.
33. Activities directly exposed to competition.
34. *Deleted.*

#### **Chapter 4 General Principles**

35. Principles of procurement.
36. Economic operators.
37. Confidentiality.
38. Rules applicable to communication.
39. Nomenclatures.
40. Conflicts of interest.

### **PART 2 RULES APPLICABLE TO CONTRACTS**

#### **Chapter 1 Procedures**

41. Conditions relating to international agreements.
42. Choice of procedures.
43. Open Procedure.
44. Restricted Procedure.

*This version is out of date*

- 45. Negotiated procedure with prior call for competition.
- 46. Competitive dialogue.
- 47. Innovation partnership.
- 48. Use of the negotiated procedure without prior call for competition.

### **Chapter 2**

#### **Techniques and Instruments for Electronic and Aggregated Procurement**

- 49. Framework agreements.
- 50. Dynamic purchasing systems.
- 51. Electronic auctions.
- 52. Electronic catalogues.
- 53. Centralised purchasing activities and central purchasing bodies.
- 54. Occasional joint procurement.
- 55. *Deleted.*

### **Chapter 3**

#### **Conduct of the Procedure**

##### **Subchapter 1**

##### **Preparation**

- 56. Preliminary market consultations.
- 57. Prior involvement of candidates or tenderers.
- 58. Technical specifications.
- 59. Labels.
- 60. Test reports, certification and other means of proof.
- 61. Communication of technical specifications.
- 62. Variants.
- 63. Division of contracts into lots.
- 64. Setting time limits.

##### **Subchapter 2**

##### **Publication and Transparency**

- 65. Periodic indicative notices.
- 66. Notices on the existence of a qualification system.
- 67. Contract notices.
- 68. Contract award notices.
- 69. Publication on the UK e-notification service.
- 70. Publication of notices otherwise than on the UK e-notification service.
- 71. Electronic availability of procurement documents.

*This version is out of date*

- 72. Invitations to candidates.
- 73. Informing applicants for qualification, candidates and tenderers.

**Subchapter 3**  
**Choice of participants and award of contracts**

- 74. General principles.
- 75. Qualification systems.
- 76. Criteria for qualitative selection.
- 77. Reliance on the capacities of other entities.
- 78. Use of exclusion grounds and selection criteria provided for under the Public Contracts Regulations.
- 79. Quality assurance standards and environmental management standards.
- 80. Contract award criteria.
- 81. Life-cycle costing.
- 82. Abnormally low tenders.

**Subchapter 4**  
**Tenders comprising products originating in third countries and relations with those countries**

- 83. Tenders comprising products originating in third countries.

**Chapter 4**  
**Contract Performance**

- 84. Conditions for performance of contracts.
- 85. Subcontracting.
- 86. Modification of contracts during their term.
- 87. Termination of contracts.

**PART 3**  
**PARTICULAR PROCUREMENT REGIMES**

**Chapter 1**  
**Social and Other Specific Services**

- 88. Award of contracts for social and other specific services.
- 89. Publication of notices.
- 90. Principles of awarding contracts.

**Chapter 2**

**1977-09**

**Public Finance (Control and Audit)**

**2016/085**

**Procurement (Utilities Contracts) Regulations 2016**

---

*This version is out of date*

**Rules Governing Design Contests**

- 91. Scope.
- 92. Notices.
- 93. Rules on the organisation of design contests and the selection of participants and the jury.
- 94. Decisions of the jury.

**PART 4  
INFORMATION AND DOCUMENTATION**

- 95. Retention of contract copies.
- 96. Individual reports on procedures for the award of contracts.
- 97. *Deleted.*
- 98. *Deleted.*

**PART 5  
REMEDIES**

**Chapter 1  
Facilitation of Remedies**

- 99. Information about contract award procedures.
- 100. Standstill period.

**Chapter 2  
Application to the Court**

- 101. Interpretation of Part Chapter.
- 102. Duty owed to economic operators from Gibraltar or the United Kingdom.
- 103. Duty owed to economic operators from other States.
- 104. Enforcement of duties through the Court.
- 105. General time limits for starting proceedings.
- 106. Special time limits for seeking a declaration of ineffectiveness.
- 107. Starting proceedings.
- 108. Contract-making suspended by challenge to award decision.
- 109. Interim orders.
- 110. Remedies where the contract has not been entered into.
- 111. Remedies where the contract has been entered into.
- 112. Grounds for ineffectiveness.
- 113. General interest grounds for not making a declaration of ineffectiveness.
- 114. The consequences of ineffectiveness.

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This version is out of date

- 115. Penalties in addition to, or instead of, ineffectiveness.
- 116. Ineffectiveness etc in relation to specific contracts under a framework agreement.
- 117. Injunctions against the Crown.

**PART 6**

**REVOCATION, SAVINGS AND TRANSITIONAL PROVISIONS**

- 118. Revocation.
- 119. Savings and transitional provisions.

**1977-09**

**Public Finance (Control and Audit)**

**2016/085**

**Procurement (Utilities Contracts) Regulations 2016**

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*This version is out of date*

*In exercise of the powers conferred on him by section 75 of the Public Finance (Control and Audit) Act 1977 and section 23(g)(i) of the Interpretation and General Clauses Act, and of all other enabling powers, and for the purpose of transposing into the law of Gibraltar Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, the Minister has made the following Regulations—*

**PART 1**

**PRELIMINARY AND GENERAL PRINCIPLES**

**Chapter 1**

**Subject matter and definitions**

**Title and commencement.**

1. These Regulations may be cited as the Procurement (Utilities Contracts) Regulations 2016 and come into operation on the day of publication.

**Interpretation.**

2.(1) In these Regulations, unless the context otherwise requires—

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

- (a) technical infrastructure enabling utilities to award public contracts or to conclude framework agreements for works, supplies or services;
- (b) advice on the conduct or design of procurement procedures;
- (c) preparation and management of procurement procedures on behalf and for the account of the utility concerned;

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

“buyer profile” means a page on the internet set up by a utility containing one or more of the following: periodic indicative notices, information on ongoing invitations to tender, prospective and concluded contracts, cancelled procedures and useful general



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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 or has been invited to take part in-

- (a) a restricted procedure;
- (b) a competitive procedure with negotiation;
- (c) a negotiated procedure without prior publication;
- (d) a competitive dialogue; or
- (e) an innovation partnership;

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

“central purchasing body” means a utility or a contracting authority providing centralised purchasing activities and, possibly ancillary purchasing activities: limited by the fact that procurement carried out by a central purchasing body in order to perform centralised purchasing activities must be deemed to be procurement for the pursuit of an activity as described in Articles 8 to 14 to the Utilities Directive, and that Article 18 to the Utilities Directive must not apply to procurement carried out by a central purchasing body in order to perform centralised purchasing activities;

“centralised purchasing activities” means activities conducted on a permanent basis, in one of the following forms-

- (a) the acquisition of supplies intended for utilities;
- (b) the acquisition of services intended for utilities;
- (c) a combination of paragraphs (a) and (b);
- (d) the award of public contracts or the conclusion of framework agreements for works, supplies or services intended for utilities;

“Common Procurement Vocabulary” or “CPV” means the reference nomenclature applicable to contracts as adopted by Regulation (EC) No 2195/2002 of 5 November

**1977-09**

## Public Finance (Control and Audit)

**2016/085**

## Procurement (Utilities Contracts) Regulations 2016

---

*This version is out of date*

2002 of the European Parliament and of the Council on the Common Procurement Vocabulary, as it has effect in EU law;

“common technical specification” means a technical specification in the field of ICT laid down in accordance with Articles 13 and 14 of Regulation (EU) 1025/2012, as it has effect in EU law;

“Competent Authority” has the same meaning as in the Procurement (Public Sector Contracts) Regulations 2016;

“contest notice” means the notice referred to in regulation 92(1);

“contract notice” means the notice referred to in regulation 67, or where relevant 89(1)(a);

“contracting authority” has the meaning given to it by regulation 3 of the Procurement (Public Sector Contracts) Regulations 2016;

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

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

“design contest” means those procedures which enable the utility 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 put out to competition with or without the award of prizes;

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

- (a) established by a utility to purchase commonly used goods, work, works or services; and
- (b) open throughout its duration for the admission of economic operators which satisfy the selection criteria specified by the utility;

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

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This version is out of date

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

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

as a result of which certain public services contracts and certain public works contracts having as their subject-matter intellectual performances, such as the design of works, may not be the object of electronic auctions;

“electronic document” has the meaning given in Article 3(35) of 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;

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

“electronic signature” has the meaning given in Article 3(35) of 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;

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

“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 respective 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, as may be amended from time to time;

“financial year” means, except where the context otherwise requires, the period of 12 months ending on 31 March in any year or, in relation to any person whose accounts are prepared in respect of a different 12 month period, that period of 12 months;

**This version is out of date**

“framework agreement” means an agreement between one or more utilities 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 with regard to price and, where appropriate, the quantity envisaged;

“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 practices, workplace organisation or external relations, inter alia, with the purpose of helping to solve societal challenges or to support sustainable and inclusive growth;

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

“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 and/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;

“Minister” means the Minister responsible for finance;

“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 economic operators selected by it;

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

“periodic indicative notice” means the notice referred to in regulation 65, or where relevant, regulation 89(1)(b);

“procurement” means the acquisition by means of a supply, works or service contract of works, supplies or services by one or more utilities from economic operators chosen by those utilities, provided that the works, supplies or services are intended for the pursuit of one of the activities referred to in Articles 8 to 14 to the Utilities Directive;

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This version is out of date

“procurement document” means any document produced or referred to by the utility to describe or determine elements of the procurement or the procedure, including the contract notice, the periodic indicative notice or the notices on the existence of a qualification system where they are 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;

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

“Public Sector Directive” means Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement and repealing Directive 2004/18/EC, as may be amended from time to time;

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

- (a) for the carrying out of a work or works for a 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;

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

“the Retained Treaties” means anything which is retained EU law by virtue of section 7 of the European Union (Withdrawal) Act 2019 because of the effect which the Treaty on European Union or TFEU had immediately before 1 January 2021 in giving rise to any of the rights, powers, liabilities, obligations, restrictions, remedies and procedures mentioned in that section;

“service contracts” means contracts which have as their object the provision of services other than those referred to in the definition of “works contracts”;

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

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

**1977-09**

## Public Finance (Control and Audit)

**2016/085**

## Procurement (Utilities Contracts) Regulations 2016

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*This version is out of date*

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

“supply contracts” means contracts having as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products, whether or not the contract also includes, as an incidental matter, siting and installation operations;

“supply, works and service contracts” means contracts for pecuniary interest concluded in writing between one or more utilities and one or more economic operators and having as their object the execution of works, the supply of products or the provision of services;

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

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

“the UK e-notification service” has the meaning set out in regulation 69(6);

“Utilities Directive” means Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC;

“utility” or “utilities” has the meaning given to it by regulation 3;

“work” means the outcome of building or civil engineering works taken as a whole, which is sufficient of itself to fulfil an economic and technical function;

“working day” means a day other than a Saturday, Sunday or a Bank Holiday within the meaning of the Banking and Financial Dealings Act or a public holiday within the meaning of section 58 of the Interpretation and General Clauses Act;

“works contracts” means contracts having as their object one of the following-

- (a) the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I to the Utilities Directive;
- (b) the execution, or both the design and execution, of a work;

This version is out of date

- (c) the realisation by whatever means of a work corresponding to the requirements specified by the utility exercising a decisive influence on the type or design of the work;

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

“year” means a calendar year.

**Utilities.**

3.(1) In these Regulations, utilities are entities which-

- (a) are contracting authorities or public undertakings and which pursue one of the activities referred to in regulations 9 to 15;
- (b) are not contracting authorities or public undertakings, but whose activities include an activity referred to in regulations 9 to 15 and operate on the basis of special or exclusive rights granted by a competent authority.

(2) In this regulation-

“network” in relation to a service in the field of transport, means a system operated in accordance with conditions laid down by or under the law in Gibraltar including such conditions as the routes to be served, the capacity to be made available and the frequency of the service;

“public undertaking” means a person over whom one or more contracting authorities are able to exercise directly or indirectly a dominant influence by virtue of-

- (a) their ownership of that person;
- (b) their financial participation in that person; or
- (c) the rights accorded to them by the rules which govern that person; and

“special or exclusive rights” means rights granted by a competent authority by way of any legislative, regulatory or administrative provision, the effect of which is to limit the exercise of activities referred to in regulations 9 to 15 to one or more entities, and which substantially affects the ability of other entities to carry out such activities.

*This version is out of date*

(3) For the purposes of the definition of “public undertaking” a contracting authority is considered to be able to exercise a dominant influence over a person when it directly or indirectly—

- (a) possesses the majority of the issued share capital of that person or controls the majority of the voting power attached to the issued share capital of that person; or
- (b) may appoint—
  - (i) more than half of the individuals who are ultimately responsible for managing that person's affairs;
  - (ii) more than half of its members; or
  - (iii) in the case of a group of individuals, more than half of those individuals.

**Scope of economic operators and general principles.**

4.(1) In these Regulations, an “economic operator” means—

- (a) any natural or legal person;
- (b) a utility;
- (c) group of such persons under paragraph (a);
- (d) group of such utilities under paragraph (b); or
- (e) both paragraphs (c) and (d) in combination,

including any temporary association of undertakings, which offers the execution of works or a work, a combination of works and work, the supply of products or the provision of services on the market;

(2) *Omitted.*

(3) A utility must—

- (a) treat economic operators equally and in a non-discriminatory way; and
- (b) act in a transparent way.



(4) These Regulations-

- (a) do not oblige Gibraltar to supply information the disclosure of which it considers contrary to the essential interests of its security;
- (b) do not preclude Gibraltar from taking such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production or trade in arms, munitions and war material, provided that such measures do not adversely affect the conditions of competition regarding products which are not intended specifically for military purposes.

(5) The arms, munitions and war material to which subregulation (4)(b) applies are, subject to subregulation (7), those included in the 1958 List.

(6) Subject to the effect of any regulations made under subregulation (7), any measures which, if they had been taken immediately before 1 January 2021, would have been covered by Article 346 of TFEU shall be regarded as measures covered by subregulation (4).

(7) In this regulation, “the 1958 List” means the list of arms, munitions and war material adopted by the Council of the European Economic Community in its decision 255/58 of 15<sup>th</sup> April 1958.

**Competent Authority.**

5.(1) For the purposes of these Regulations the Chief Secretary is the Competent Authority.

(2) The Competent Authority must be responsible for-

- (a) the monitoring of the public procurement rules;
- (b) ensuring that-
  - (i) information and guidance on the interpretation and application of retained EU law on public procurement is available free of charge to assist contracting authorities and economic operators, in particular SMEs, in correctly applying public procurement rules; and
  - (ii) support is available to contracting authorities with regard to planning and carrying out procurement procedures;

(3) For the purpose of these Regulations the Competent Authority may also act as a utility.

**This version is out of date**

**Mixed procurement covering the same activity.**

6.(1) In the case of mixed contracts which have as their subject-matter different types of procurement all of which are covered by these Regulations-

- (a) contracts which have as their subject-matter two or more types of procurement (works, services or supplies) must be awarded in accordance with the provisions applicable to the type of procurement that characterises the main subject of the contract in question; and
- (b) in the case of-
  - (i) mixed contracts consisting partly of services to which Chapter 1 of Part 3 applies and partly of other services, or
  - (ii) mixed contracts consisting partly of services and partly of supplies,

the main subject-matter must be determined according to which of the estimated values of the respective services or supplies is the highest.

(2) In the case of contracts which have as their subject-matter procurement covered by these Regulations and procurement not covered by these Regulations-

- (a) where the different parts of a given contract are objectively separable-
  - (i) utilities may choose to award separate contracts for the separate parts or to award a single contract;
  - (ii) where utilities choose to award separate contracts for the separate parts, the decision as to which legal regime applies to any one of such separate contracts must be taken on the basis of the characteristics of the separate part concerned; and
  - (iii) where utilities choose to award a single contract, these Regulations apply to the ensuing mixed contract, irrespective of-
    - (aa) the value of the parts that would otherwise fall under a different legal regime, and
    - (bb) which legal regime those parts would otherwise have been subject to;

This version is out of date

- (b) where the different parts of a given contract are objectively not separable, the applicable legal regime must be determined on the basis of the main subject-matter of that contract;
  - (c) where the decision is taken to award a single contract then that mixed contract will, where it contains elements of supply, works and service contracts and of concessions, be awarded in accordance with these Regulations, provided that the estimated value of the part of the contract which constitutes a contract covered by these Regulations, calculated in accordance with regulation 17, is equal to or greater than the relevant threshold mentioned in regulation 16.
- (3) But where part of a given contract is covered by regulation 4(4) or the Procurement (Defence and Security Public Contracts) Regulations 2012, regulation 25 applies instead of subregulations (1) or (2).

**Procurement covering several activities.**

7.(1) In the case of contracts intended to cover several activities, utilities may choose to award separate contracts for the purposes of each separate activity or to award a single contract.

(2) Where utilities choose to award separate contracts, the decision as to which rules apply to any one of such separate contracts must be taken on the basis of the characteristics of the separate activity concerned.

(3) Notwithstanding regulation 6 and subject to subregulation (4), where utilities choose to award a single contract subregulations (5) and (6) apply, however, where one of the activities concerned is covered by the Procurement (Defence and Security Public Contracts) Regulations 2012 or regulation 4(4), regulation 26 applies instead of subregulations (5) and (6).

(4) The choice between awarding a single contract or awarding a number of separate contracts must not be made with the objective of excluding the contract or contracts from the scope of these Regulations or, where applicable, the Procurement (Public Sector Contracts) Regulations 2016 or the Procurement (Concession Contracts) Regulations 2016.

(5) A contract which is intended to cover several activities must be subject to the rules applicable to the activity for which it is principally intended.

(6) In the case of contracts where it is objectively impossible to determine for which activity the contract is principally intended, the applicable rules must be determined in accordance with the following-

*This version is out of date*

- (a) the contract must be awarded in accordance with the Procurement (Public Sector Contracts) Regulations 2016, if one of the activities for which the contract is intended is subject to these Regulations and the other to the Procurement (Public Sector Contracts) Regulations 2016;
- (b) the contract must be awarded in accordance with these Regulations, if one of the activities for which the contract is intended is subject to these Regulations and the other to the Procurement (Concession Contracts) Regulations 2016;
- (c) the contract must be awarded in accordance with these Regulations, if one of the activities for which the contract is intended is subject to these Regulations and the other is not subject to either these Regulations, the Procurement (Public Sector Contracts) Regulations 2016 or the Procurement (Concession Contracts) Regulations 2016.

## **CHAPTER 2**

### **ACTIVITIES**

#### **Common Provisions.**

8. For the purposes of regulations 9, 10 and 11, “supply” includes generation, production, wholesale or retail sale, however, production of gas in the form of extraction falls within the scope of regulation 15.

#### **Gas and heat.**

9.(1) In the case of gas and heat are concerned, these Regulations apply to the following activities-

- (a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas or heat;
- (b) the supply of gas or heat to such networks.

(2) The supply, by a utility which is not a contracting authority, of gas or heat to fixed networks which provide a service to the public must not be considered a relevant activity within the meaning of subregulation (1) where both of the following conditions are met-

- (a) the production of gas or heat by that utility is the unavoidable consequence of carrying out an activity other than one referred to in subregulation (1) or in regulations 10 to 12;

- (b) the supply to the public network is aimed only at the economic exploitation of such production and amount to not more than 20% of the utility's turnover, on the basis of the average for the preceding 3 years, including the current year.

**Electricity.**

10.(1) In the case of electricity, these Regulations apply to the following activities-

- (a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity;
- (b) the supply of electricity to such networks.

(2) The supply, by a utility other than one which is a contracting authority, of electricity to fixed networks which provide a service to the public must not be considered a relevant activity within the meaning of subregulation (1) where both of the following conditions are met-

- (a) the production of electricity by that utility takes place because its consumption is necessary for carrying out an activity other than one referred to in subregulation (1) or regulations 9, 11 and 12;
- (b) the supply to the public network depends only on that utility's own consumption and has not exceeded 30% of that utility's total production of energy, on the basis of the average for the preceding 3 years, including the current year.

**Water.**

11.(1) In the case of water, these Regulations apply to the following activities-

- (a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water;
- (b) the supply of drinking water to such networks.

(2) These Regulations also apply to contracts or design contests awarded or organised by utilities which pursue an activity referred to in subregulation (1) and which are connected with one of the following-

- (a) hydraulic engineering projects, irrigation or land drainage, provided that the volume of water to be used for the supply of drinking water represents more than

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20% of the total volume of water made available by such projects or irrigation or drainage installations;

(b) the disposal of treatment sewage.

(3) The supply, by a utility other than one which is a contracting authority, of drinking water to fixed networks which provide a service to the public must not be considered a relevant activity within the meaning of subregulation (1) where both of the following conditions are met-

(a) the production of drinking water by that utility takes place because its consumption is necessary for carrying out an activity other than one referred to in subregulation (1) and regulations 9 to 12;

(b) the supply to the public network depends only on that utility's own consumption and has not exceeded 30% of that utility's total production of drinking water, on the basis of the average for the preceding 3 years, including the current year.

#### **Transport services.**

12.(1) These Regulations apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus, or cable.

(2) For the purposes of subregulation (1), a network must be considered to exist where the service is provided under operating conditions laid down by a public body, such as, conditions on the routes to be served, the capacity to be made available, or the frequency of the service.

#### **Ports and airports.**

13. These Regulations apply to activities relating to the exploitation of a geographical area for the purpose of the provision of airports or maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway.

#### **Postal services.**

14.(1) These Regulations apply to activities relating to the provision of-

(a) postal services;

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- (b) services other than postal services, on condition that such services are provided by an entity which also provides postal services and provided that postal services are not directly exposed to competition within the meaning of regulation 33(2)

(2) For the purpose of this regulation and without prejudice to Directive 97/67/EC of the European Parliament and of the Council, as may be amended from time to time-

“postal item” means an item addressed in the final form in which it is to be carried, irrespective of weight, which includes-

- (a) correspondence;
- (b) books;
- (c) catalogues;
- (d) newspapers;
- (e) periodicals; and
- (f) postal packages containing merchandise with or without commercial value;

“postal services” means services consisting of the clearance, sorting, routing and delivery of postal items, including both services falling within as well as services falling outside the scope of the universal service set up in conformity with Directive 97/67/EC, as may be amended from time to time;

“services other than postal services” means services provided in the following areas-

- (a) mail service management services (services both preceding and subsequent to despatch, including mailroom management services);
- (b) services concerning postal items not included in the definition of “postal item”, such as direct mail bearing no address.

**Extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels.**

15. These Regulations apply to activities relating to the exploitation of a geographical area for the purpose of-

- (a) extracting oil or gas;

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- (b) exploring for or extracting coal or other solid fuels.

### **CHAPTER 3**

#### **MATERIAL SCOPE**

##### **Subchapter 1**

##### **Thresholds**

###### **Threshold amounts.**

16.(1) These Regulations apply to procurements with a value, net of VAT, estimated to be equal to or greater than the following thresholds-

- (a) for supply and service contracts and design contests, £429,809;
- (b) for works contracts, £5,372,609;
- (c) for contracts for social and other specific services listed in Annex XVII to the Utilities Contracts Directive, £884,720.

(2) The thresholds referred to in subregulation (1) do not apply to procurements excluded by regulations 18 to 23 or regulation 33.

###### **Methods for calculating the estimated value of the procurement.**

17.(1) The calculation of the estimated value of the procurement must be based on the total amount payable as estimated by the utility, including any form of option and any renewals of the contracts as explicitly set out in the procurement documents.

(2) Where the utility provides for prizes or payments to candidates or tenderers it must take them into account when calculating the estimated value of the procurement.

(3) Where a utility is comprised of separate operational units, account must be taken of the total estimated value for all those operational units, however where a separate operational unit is independently responsible for its procurement, or certain categories of its procurement, the values may be estimated at the level of the unit in question.

(4) The choice of the method used to calculate the estimated value of a procurement must not be made with the intention of excluding it from the scope of these Regulations.



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This version is out of date

(5) A procurement must not be subdivided with the effect of preventing it from falling within the scope of these Regulations, unless justified by objective reasons.

(6) The estimated value of a procurement must be calculated as at the moment at which the call for competition is submitted or, in cases where such call for competition is not foreseen, at the moment at which the utility commences the procurement procedure, for example, where appropriate, by contacting economic operators in relation to the procurement.

(7) For the purpose of framework agreements and dynamic purchasing systems, the value to be taken into consideration must be the maximum estimated value of all the contracts envisaged for the total term of the framework agreement or the dynamic purchasing system.

(8) For the purpose of innovation partnerships, the value to be taken into consideration must be the maximum estimated value, net of VAT, of the research and development activities to take place during all stages of the envisaged partnership as well as of the supplies, services or works to be developed and procured at the end of the envisaged partnership.

(9) For the purpose of public works contracts, utilities must include in the estimated value of a works contract both the cost of the works and the total estimated value of any supplies or services that are made available to the contractor by the utilities provided that they are necessary for the execution of the works.

(10) Where a proposed work or a proposed provision of services may result in contracts being awarded in the form of separate lots, account must be taken of the total estimated value of all such lots.

(11) Where a proposal for the acquisition of similar supplies may result in contracts being awarded in the form of separate lots, account must be taken of the total estimated value of all such lots when applying regulation 16(1)(b) and (c).

(12) For the purposes of subregulations (10) and (11), where the aggregate value of the lots is equal to or greater than the relevant threshold mentioned in regulation 16, these Regulations apply to the awarding of each lot.

(13) Notwithstanding subregulations (10) to (12), utilities may, subject to subregulation (14), award contracts for individual lots without applying the procedures provided for in these Regulations, provided that the estimated value of the lot concerned is less than-

- (a) £70,778 for supplies or services; or
- (b) £884,720 for works.

**This version is out of date**

(14) The aggregate value of the lots awarded in reliance on subregulation (13) must not exceed 20% of the aggregate value of all the lots into which the proposed work, the proposed acquisition of similar supplies or the proposed provision of services, has been divided.

(15) For the purposes of supply or service contracts, which are regular in nature or which are intended to be renewed within a given period, the calculation of the estimated contract value must be based on either of the following-

- (a) the total actual value of the successive contracts of the same type awarded during the preceding 12 months or financial year adjusted, where possible, to take account of the changes in quantity or value which would occur in the course of the 12 months following the initial 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.

(16) For the purpose of supply contracts relating to the leasing, hire, rental or hire purchase of products, the value to be taken as a basis for calculating the estimated contract value must be as follows-

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

(17) For the purpose of service contracts, the basis for calculating the estimated contract value must, where appropriate, be the following-

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

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(18) For the purpose of service contracts which do not indicate a total price, the basis for calculating the estimated contract value must be the following-

- (a) in the case of fixed-term contracts where that term is less than or equal to 48 months, the total value for their full term;
- (b) in the case of contracts without a fixed term or with a term greater than 48 months, the monthly value multiplied by 48.

### **Subchapter 2**

#### **Excluded contracts and design contests; special provisions for procurement involving defence and security aspects**

##### **Contracts awarded for the purpose of resale or lease to third parties.**

18.(1) Subject to subregulation (3), these Regulations do not apply to contracts awarded for purposes of resale or lease to third parties, provided that the utility enjoys no special or exclusive right to sell or lease the subject of such contracts, and other entities are free to sell or lease it under the same conditions as the utility.

(2) *Deleted*

(3) Subregulation (1) does not apply to procurement carried out by a central purchasing body in order to perform centralised purchasing activities.

##### **Contracts and design contests awarded or organised for purposes other than the pursuit of a covered activity or for the pursuit of such an activity outside Gibraltar**

19.(1) These Regulations do not apply to contracts awarded or design contests organised by utilities-

- (a) for purposes other than the pursuit of their activities as described in regulations 9 to 15; or
- (b) for the pursuit of such activities outside Gibraltar, in conditions involving the physical use of a network or geographical area within Gibraltar.

(2) *Deleted*

##### **Contracts awarded and design contests organised pursuant to international rules.**

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20.(1) These Regulations do not apply to contracts or design contests which the utility is obliged to award or organise in accordance with procurement procedures which are different from those laid down in these Regulations and are established by any of the following-

- (a) a legal instrument creating international law obligations, such as an international agreement, concluded in accordance with the Retained Treaties, which applies to Gibraltar and one or more other countries, or subdivisions of such countries, and covering works, supplies or services intended for the joint implementation or exploitation of a project by its signatories;
- (b) an international organisation.

(2) *Deleted*

(3) These Regulations do not apply to contracts, or design contests, which the utility awards or organises in accordance with procurement rules provided by an international organisation or international financing institution where the contracts or design contests concerned are fully financed by that organisation or institution.

(4) In the case of contracts or design contests co-financed for the most part by an international organisation or international financing institution, the parties must agree on applicable procurement procedures.

(5) In the case of contracts and design contests involving defence or security aspects which are awarded or organised pursuant to international rules, regulation 27 applies instead of subregulations (1) to (4) of this regulation.

**Specific exclusions for service contracts.**

21.(1) These Regulations do not apply to service contracts-

- (a) for the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or which concern interests in or rights over any of them;
- (b) for arbitration or conciliation services;
- (c) for any of the following legal services-
  - (i) legal representation of a client by a lawyer, in-

*This version is out of date*

- (aa) an arbitration or conciliation held in Gibraltar, another country or before an international arbitration or conciliation instance; or
- (bb) judicial proceedings before the courts, tribunals or public authorities of Gibraltar, another country or before international courts, tribunals or institutions;
- (ii) legal advice given-
  - (aa) in preparation of any of the 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,  
  
provided that the advice is given by a lawyer;
- (iii) document certification and authentication services which must be provided by notaries;
- (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 Gibraltar, or are designated by law to carry out specific tasks under the supervision of such tribunals or courts;
- (v) other legal services which in Gibraltar are connected, even occasionally, with the exercise of official authority;
- (vi) in this regulation “lawyer” means a person practising as an advocate, barrister or solicitor in any part of Gibraltar or the United Kingdom.
- (d) for-
  - (i) 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, as may be amended from time to time; or
  - (ii) operations conducted with the European Financial Stability Facility and the European Stability Mechanism;

**This version is out of date**

- (e) for loans, whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments;
  - (f) employment contracts;
  - (g) for public passenger transport services by rail or metro;
  - (h) for civil defence, civil protection, and danger prevention that are provided by non-profit organisations or associations, and which are covered by 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; or
  - (i) for broadcasting time or programme provision that are awarded to audiovisual or radio media service providers.
- (2) For the purposes of subregulation (1)(i), the following definitions must apply-
- (a) “media service providers” has the meaning given by Article 1(1)(d) of Directive 2010/13/EU, as may be amended from time to time;
  - (b) “programme” has the meaning given by Article 1(1)(b) of Directive 2010/13/EU, as may be amended from time to time, but also includes radio programmes and radio programme materials; and
  - (c) “programme material” has the same meaning as “programme”.

**Service contracts awarded on the basis of an exclusive right.**

22. These Regulations do not apply to service contracts awarded to a contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a law, regulation or published administrative provision which is compatible with anything which is retained EU law by virtue of section 7 of the European Union (Withdrawal) Act 2019 because of the effect which TFEU had immediately before 1 January 2021 in giving rise to any of the powers, rights etc. mentioned in that section.

**Contracts awarded by certain utilities for the purchase of water and for the supply of energy or of fuels for the production of energy.**

23. These Regulations do not apply to contracts-

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This version is out of date

- (a) for the purchase of water if awarded by utilities engaged in one or both of the activities relating to drinking water referred to in regulation 11(1);
- (b) awarded by utilities which are active in the energy sector by engaging in an activity referred to in regulation 9(1), regulation 10(1) or regulation 15 for the supply of-
  - (i) energy; or
  - (ii) fuels for the production of energy.

**Defence and security.**

24.(1) In respect of contracts awarded and design contests organised in the fields of defence and security, these Regulations do not apply to contracts-

- (a) falling within the scope of the Procurement (Defence and Security Public Contracts) Regulations 2012;
- (b) to which those Regulations do not apply by virtue of regulations 7 or 9 of those Regulations.

(2) These Regulations do not apply to contracts and design contests not otherwise exempted by subregulation (1) to the extent that-

- (a) the protection of the essential security interests of Gibraltar cannot be guaranteed by less intrusive measures, for example, by imposing requirements aimed at protecting the confidential nature of information which the utility makes available in a contract award procedure as provided for in these Regulations; or
- (b) the application of these Regulations would oblige Gibraltar to supply information the disclosure of which it considers contrary to the essential interests of its security.

(3) Where the procurement and performance of the 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 Gibraltar, these Regulations do not apply provided that Gibraltar has determined that the essential interests concerned cannot be guaranteed by less intrusive measures, such as those referred to in subregulation (2)(a).

**Mixed procurement covering the same activity and involving defence and security aspects.**

**This version is out of date**

25.(1) This regulation applies in the case of mixed contracts covering the same activity, which have as their subject-matter procurement covered by these Regulations and procurement or other elements covered by regulation 4(4) or the Procurement (Defence and Security Public Contracts) Regulations 2012.

(2) Where the different parts of a given contract are objectively separable, utilities may choose to award separate contracts for the separate parts or to award a single contract.

(3) The decision to award a single contract must not, however, be taken for the purpose of excluding contracts from the application of either these Regulations or the Procurement (Defence and Security Public Contracts) Regulations 2012.

(4) Where utilities choose to award separate contracts for separate parts, the decision of which legal regime applies to any one of such separate contracts must be taken on the basis of the characteristics of the separate part concerned.

(5) Where utilities choose to award a single contract, the following criteria apply to determine the applicable legal regime-

- (a) where part of a given contract is covered by regulation 4(4), the contract may be awarded without applying these Regulations, provided that the award of a single contract is justified by objective reasons;
- (b) where part of a given contract is covered by the Procurement (Defence and Security Public Contracts) Regulations 2012, the contract may be awarded in accordance with those Regulations provided that the award of a single contract is justified for objective reasons.

(6) Subregulation 5(b) is without prejudice to the thresholds and exclusions for which the Procurement (Defence and Security Public Contracts) Regulations 2012 provide.

(7) Subregulation 5(a) applies to mixed contracts to which both subregulations 5(a) and (b) could otherwise apply.

(8) Where the different parts of a given contract are objectively not separable, the contract may be awarded without applying these Regulations where it includes elements to which regulation 4(4) applies; otherwise it may be awarded in accordance with the Procurement (Defence and Security Public Contracts) Regulations 2012.

**Procurement covering several activities and involving defence or security aspects.**



This version is out of date

26.(1) For the purposes of contracts intended to cover several activities utilities may choose to award separate contracts for the purposes of each separate activity or to award a single contract.

(2) Where utilities choose to award separate contracts for separate activities, the decision of which legal regime applies to any one of such separate contracts must be taken on the basis of the characteristics of the separate activity concerned.

(3) The choice between awarding a single contract and awarding a number of separate contracts must not be made with the objective of excluding the contract or contracts from the scope of these Regulations or the Procurement (Defence and Security Public Contracts) Regulations 2012.

(4) Where utilities choose to award a single contract, the following must apply-

- (a) in the case of a contract intended to cover an activity which is covered by these Regulations and another which is covered by the Defence and Security Regulations, the utility may award the contract in accordance with the Procurement (Defence and Security Public Contracts) Regulations 2012;
- (b) in the case of a contracts intended to cover an activity which is covered by these Regulations and another which is covered by regulation 4(4), the utility may award the contract without applying these Regulations.

(5) Subregulation (4)(a) is without prejudice to the thresholds and exclusions for which the Procurement (Defence and Security Public Contracts) Regulations 2012 provide.

(6) Contracts referred to in subregulation (4)(a), which also includes procurement or other elements which are covered by regulation 4(4) may be awarded without applying these Regulations.

(7) Subregulations (4) to (6) apply provided that the award of a single contract is justified by objective reasons and the decision to award a single contract is not taken for the purpose of excluding contracts from the application of these Regulations.

**Contracts and design contests involving defence and security aspects which are awarded or organised pursuant to international rules.**

27.(1) These Regulations do not apply to contracts or design contests involving defence or security aspects which the utility is obliged to award or organise in accordance with procurement procedures which are different from those laid down in these Regulations and are established by any of the following-

*This version is out of date*

- (a) an international agreement or arrangement, concluded in accordance with the Retained Treaties, which applies to Gibraltar and one or more other countries, or subdivisions of such countries, and covering works, supplies or services intended for the joint implementation or exploitation of a project by its signatories;
- (b) an international agreement or arrangement relating to the stationing of troops and concerning the undertakings of Gibraltar or another country;
- (c) an international organisation.

(2) *Deleted*

(3) These Regulations do not apply to contracts or design contests involving defence or security aspects which the utility awards or organises in accordance with procurement rules provided by an international organisation or international financing institution where the contracts or design contests concerned are fully financed by that organisation or institution.

(4) In the case of contracts or design contests co-financed for the most part by an international organisation or international financing institution the parties must agree on applicable procurement procedures.

#### **Contracts between contracting authorities.**

28.(1) A contract awarded by a utility that is a contracting authority to a legal person falls outside the scope of these Regulations where all of the following conditions are fulfilled-

- (a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;
- (b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and
- (c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Retained Treaties, which do not exert a decisive influence on the controlled legal person.

(2) A contract also falls outside the scope of these Regulations where a controlled legal person which is a contracting authority awards a contract to-

This version is out of date

- (a) its controlling contracting authority; or
- (b) another legal person controlled by the same contracting authority,

provided that there is no direct private capital participation in the legal person being awarded the contract with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions in conformity with the Retained Treaties, which do not exert a decisive influence on the legal person being awarded the contract.

(3) A contracting authority must be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of subregulation (1)(a) where-

- (a) it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person; or
- (b) the control is exercised by another legal person which is itself controlled in the same way by the contracting authority,

and references to “control”, “controlled” and “controlling” in subregulations (1) to (3) must be interpreted accordingly.

(4) A contracting authority which does not exercise over a legal person control within the meaning of subregulation (3) may nevertheless award a contract to that legal person without applying these Regulations where all of the following conditions are fulfilled-

- (a) the contracting authority exercises jointly with other contracting authorities a control over that legal person which is similar to that which they exercise over their own departments;
- (b) more than 80% of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or by other legal persons controlled by the same contracting authorities; and
- (c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Retained Treaties, which do not exert a decisive influence on the controlled legal person.

**This version is out of date**

(5) For the purposes of subregulation 4(a), contracting authorities must be deemed to exercise joint control over a legal person where all of the following conditions are fulfilled-

- (a) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities;
- (b) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and
- (c) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities.

(6) For the purposes of subregulation 5(a), individual representatives may represent several or all of the participating contracting authorities.

(7) A contract concluded exclusively between two or more contracting authorities falls outside the scope of these Regulations where all of the following conditions are fulfilled-

- (a) the contract establishes or implements a co-operation between the participating 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 participating contracting authorities perform on the open market less than 20% of the activities concerned by the cooperation.

(8) For the determination of the percentage of activities referred to in subregulations (1)(b), (4)(b) and (7)(c), the average total turnover, or an appropriate alternative activity-based measure such as costs incurred by the relevant legal person or contracting authority with respect to services, supplies and works for the 3 years preceding the contract award must be taken into consideration.

(9) Where, because of-

- (a) the date on which the relevant legal person was created or commenced activities;  
or
- (b) a reorganisation of its activities

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This version is out of date

the turnover, or alternative activity-based measure such as costs, are either not available for the preceding 3 years or no longer relevant, it must be sufficient to show that the measurement of activity is credible, particularly by means of business projections.

**Contracts awarded to an affiliated undertaking.**

29.(1) These Regulations do not apply to contracts awarded-

- (a) by a utility to an affiliated undertaking; or
- (b) by a joint venture, formed exclusively by a number of utilities for the purpose of carrying out activities described in regulations 9 to 15, to an affiliated undertaking of one of its members.

(2) The conditions referred to in subregulation (1) are-

- (a) in respect of service contracts, at least 80% of the average total turnover of the affiliated undertaking over the preceding 3 years, taking into account all services provided by that undertaking, derives from the provision of services to the utility or one or more of its affiliated undertakings;
- (b) in respect of supply contracts, at least 80% of the average total turnover of the affiliated undertaking over the preceding 3 years, taking into account all supplies provided by that undertaking, derives from the provision of supplies to the utility or one or more of its affiliated undertakings;
- (c) in respect of works contracts, at least 80% of the average total turnover of the affiliated undertaking over the preceding 3 years, taking into account all works provided by that undertaking, derives from the provision of works to the utility or one or more of its affiliated undertakings.

(3) Where, because of the date on which an affiliated undertaking was created or commenced activities, the turnover referred to in subregulation (2) is not available for the preceding 3 years, it must be sufficient for that undertaking to show that the turnover is credible, in particular by means of business projections.

(4) Where more than one affiliated undertaking provides the same or similar services, supplies or works to the utility with which they form an economic group, the percentages referred to in subregulation (2) must be calculated taking into account the total turnover deriving respectively from the provision of services, supplies or works by those affiliated undertakings.

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(5) In this regulation, “affiliated undertaking” means-

- (a) any undertaking the annual accounts of which are consolidated with those of the utility in accordance with the requirements of Directive 2013/34/EU of the European Parliament and of the Council, as it had effect immediately before 1 January 2021; and
- (b) in the case of an undertaking which is not subject to that Part, any undertaking that-
  - (i) may be, directly or indirectly, subject to a dominant influence by the utility;
  - (ii) may exercise a dominant influence over the utility; or
  - (iii) in common with the utility, is subject to the dominant influence or another undertaking by virtue of ownership, financial participation, or the rules which govern it.

(6) This regulation applies despite the provisions of regulation 28.

**Contracts awarded to a joint venture or to a utility forming part of a joint venture.**

30. Notwithstanding the provisions of regulation 28, these Regulations do not apply to contracts awarded-

- (a) by a joint venture, formed exclusively by a number of utilities for the purpose of carrying out activities within the meaning of regulations 9 to 15, to one of those utilities; or
- (b) by a utility to such a joint venture of which it forms part,

provided that the joint venture has been set up in order to carry out the activity concerned over a period of at least 3 years and the instrument setting up the joint venture stipulates that the utilities which form it will be part of the joint venture for at least the same period.

31. *Deleted*

**Research and development services.**

32. These Regulations apply to service contracts for research and development services which are covered by CPV codes 73000000-2 to 73120000-9, 73300000-5, 73420000-2 and 73430000-5 only if both the following conditions are fulfilled-

*This version is out of date*

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

**Activities directly exposed to competition.**

33.(1) These Regulations do not apply to contracts or design contests intended to enable an activity mentioned in regulations 9 to 15 to be carried out where-

- (a) that activity is directly exposed to competition on markets to which access is not restricted; or
- (b) it is a design contest that is organised for the pursuit of such an activity in that geographical area.

(2) For the purposes of subregulation (1), the activity is directly exposed to competition on markets to which access is not restricted, must be decided in the basis of criteria that are in conformity with the provisions on competition of the TFEU.

(3) Access to a market must be deemed not to be restricted if-

- (a) Gibraltar has implemented and applied the European Union legislation listed in Annex III to the Utilities Contracts Directive; or
- (b) if free access to a given market cannot be presumed on the basis of paragraph (a), it must be demonstrated that access to the market in question is free as a matter of fact and of law.

34. *Deleted*

**CHAPTER 4**

**General Principles**

**Principles of procurement.**

35.(1) Utilities must treat economic operators equally and without discrimination and must act in a transparent and proportionate manner.

(2) The design of the procurement must not be made with the intention of excluding it from the scope of these Regulations or of artificially narrowing competition.

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(3) For the purposes of subregulation (2), competition must be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

(4) Utilities must take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by European Union law, Gibraltar law, collective agreements or by the international environmental, social and labour law provisions listed in Annex XIV to the Utilities Contracts Directive.

#### **Economic operators.**

36.(1) *Deleted*

(2) In the case of service contracts, works contracts, and supply contracts which cover in addition services or siting and installation operations, legal persons may be required to indicate, in the tender or the request to participate, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract in question.

(3) Groups of economic operators, including temporary associations, may participate in procurement procedures and must not be required by utilities to have a specific legal form in order to submit a tender or a request to participate.

(4) Where necessary, utilities may clarify in the procurement documents how groups of economic operators are to meet the criteria and requirements for qualification and qualitative selection referred to in regulations 75 to 79 provided that this is justified by objective reasons and is proportionate.

(5) Any conditions for the performance of a contract by such groups of economic operators which are different from those imposed on individual participants must also be justified by objective reasons and must be proportionate.

(6) Notwithstanding subregulations (3) and (4), utilities may require groups of economic operators to assume a specific legal form once they have been awarded the contract, to the extent that such a change is necessary for the satisfactory performance of the contract.

#### **Confidentiality.**

37.(1) A utility must not disclose information which has been forwarded to it by an economic operator and designated by that economic operator as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.



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- (2) Subregulation (1) is without prejudice to-
- (a) any other provision of these Regulations, such as the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in regulations 68 and 73 respectively;
  - (b) any enactments relating to access to information;
  - (c) any other requirement, or permission, for the disclosure of information that is applicable under Gibraltar law.
- (3) Utilities may impose on economic operators requirements aimed at protecting the confidential nature of information which the utilities make available throughout the procurement procedure, including information made available in connection with the operation of a qualification system, whether or not this has been the subject of a notice on the existence of a qualification system used as a means of calling for competition.

**Rules applicable to communication.**

38.(1) Subject to subregulations (3), (5), (8) and (10), all communication and information exchange under these Regulations, including electronic submission, must be performed using electronic means of communication in accordance with the requirements of this regulation.

(2) Subject to subregulation (13), the tools and devices to be used for communicating by electronic means, and their technical characteristics, must be non-discriminatory, generally available and interoperable with the information and communication technology products in general use and must not restrict economic operators' access to the procurement procedure.

(3) Utilities are not obliged to require electronic means of communication in the submission process in the following situations-

- (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 licensing scheme and cannot be made available for downloading or remote use by the utility;
- (c) the use of electronic means of communication would require specialised office equipment that is not generally available to utilities; or

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- (d) the procurement documents require the submission of physical or scale models which cannot be transmitted using electronic means.
- (4) Where, in accordance with subregulation (3), electronic means of communication are not used, communication must be carried out-
- (a) by post or other suitable carrier; or
  - (b) by a combination of post or other suitable carrier and electronic means.
- (5) Utilities are 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 either-
- (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 requiring such a high level of protection that it cannot be properly ensured by using electronic tools and devices that are either generally available to economic operators or can be made available to them by alternative means of access within the meaning of subregulation (14).
- (6) Where utilities require, in accordance with subregulation (3), means of communication other than electronic means in the submission process, they must indicate in the documentation referred to in regulation 96 the reasons for this requirement.
- (7) Where applicable, utilities must indicate in that documentation the reasons why use of means of communication other than electronic means has been considered necessary in accordance with subregulation (5).
- (8) Subject to subregulations (9), (10) and (11), 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 to a sufficient degree.
- (9) With regards to subregulation (8), the essential elements of the procurement procedure include the procurement documents, requests to participate, confirmations of interest and tenders.
- (10) Oral communications with tenderers which could have a substantial impact on the content and assessment of the tenders must be documented to a sufficient extent and by

appropriate means, such as written or audio records or summaries of the main elements of the communication.

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

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

(13) Utilities may, where necessary, require the use of tools and devices which are not generally available, provided that the utilities offer alternative means of access.

(14) Utilities must be deemed to offer suitable alternative means of access where they do any of the following-

- (a) offer unrestricted and full direct access free of charge by electronic means to the tools and devices from the date of publication of the call for competition or from the date on which the invitation to confirm interest is sent;
- (b) ensure 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 concerned, may access the procurement procedure through the use of provisional tokens made available free of charge online; or
- (c) support an alternative channel for electronic submission of tenders.

(15) For the purposes of subregulation 14(a)-

- (a) “publication of the call for competition” means whichever of the following is relevant, and where both are relevant, the earliest of them-
  - (i) its publication on the UK e-notification service after being submitted in accordance with regulation 69; or
  - (ii) its publication on a buyer profile in accordance with regulation 70; and
- (b) the text of the call for competition notice or the invitation to confirm interest must specify the internet address at which those tools and devices are accessible.

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(16) In addition to the requirements set out in Annex V to the Utilities Contracts Directive, the following rules must apply 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) the Competent Authority or a utility acting within an overall framework established by the Competent Authority must, acting in accordance with subregulations (18) and (19), specify the level of security required for the electronic means of communication to be used in various stages of the specific procurement procedure, and that level must be proportionate to the risks attached;
- (c) the Competent Authority or a utility acting within an overall framework established by the Competent Authority must conclude that the level of risk, assessed in accordance with subregulations (18) and (19), is such that advanced electronic signatures as defined by 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 may be amended from time to time are required, utilities must act in accordance with Article 27 of that Regulation (and for this purpose the submission of the tender or request is to be treated as the use of an online service to which that Article applies).

(17) The Competent Authority must ensure that the Commission is notified of information on the provider of validation services.

(18) 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, the Competent Authority must assess the risks having regard to both the likelihood that particular risks will materialise and the potential adverse consequences if those risks materialise.

(19) Pursuant to subregulation (18), regard must be had, in particular, have regard to such of the following matters as are relevant-

- (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;

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- (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 utility 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;
- (f) other material risks relating to the procurement procedure in question;
- (g) the need for consistency as between similar procurements performed by the same utility;
- (h) the need for proportionality between, on the one hand the expected benefits of any particular security requirements, in terms of eliminating or reducing any of the risks referred to in paragraphs (a) to (g), and on the other hand the costs, burdens and obligations which those requirements may impose on economic operators.

(20) The Competent Authority or utility may establish the required advanced signature format in a format other than those referred to in Article 1 of Commission Implementing Decision (EU) 2015/1506 laying down specifications relating to formats of advanced electronic signatures and advanced seals to be recognised by public sector bodies, 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 document must contain in the electronic signature or in the electronic document carrier information on existing validation possibilities that comply with the requirements of Article 2(1)(b) of that Decision (or would comply with those requirements if the person seeking to validate the signature were a public sector body within the meaning of that Article).

#### **Nomenclatures.**

39. Any references to nomenclatures in the context of public procurement must be made using the CPV.

#### **Conflicts of interest.**

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40.(1) Utilities that are contracting authorities must take appropriate measures to effectively 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) For the purposes of subregulation (1), the concept of conflicts of interest must at least cover 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 this regulation-

“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.

## **PART 2**

### **RULES APPLICABLE TO CONTRACTS**

#### **CHAPTER 1**

##### **Procedures**

##### **Conditions relating to international agreements.**

41. (1) Where a relevant international agreement applies to a procurement, utilities shall accord to the works, supplies, services and economic operators of the State or other subject of international law that is party to that agreement treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of Gibraltar.

(2) For the purposes of paragraph (1), a relevant international agreement applies if the procurement is covered by an agreement listed in the Schedule to the European Union Withdrawal (Application of International Agreements) Act 2019.

##### **Choice of procedures.**

42.(1) When awarding supply, works or service contracts, utilities must apply procedures that conform to these Regulations, and such contracts may be awarded only if a call for competition

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has been published in accordance with these Regulations, except where regulation 48 permits utilities to apply a negotiated procedure without prior call for competition.

(2) Utilities may apply-

- (a) open procedure;
- (b) restricted procedure;
- (c) a negotiated procedure with prior call for competition;
- (d) a competitive dialogue; or
- (e) an innovation partnership,

as regulated by these Regulations.

(3) The call for competition may be made by one of the following means-

- (a) a periodic indicative notice in accordance with regulation 65 where the contract is awarded by restricted or negotiated procedure;
- (b) a notice on the existence of a qualification system in accordance with regulation 66 where the contract is awarded by restricted or negotiated procedure or by a competitive dialogue or an innovation partnership;
- (c) a contract notice in accordance with regulation 67.

(4) For the purposes of subregulation (3)(a), economic operators which have expressed their interest following the publication of the periodic indicative notice must subsequently be invited to confirm their interest in writing by means of an invitation to confirm interest in accordance with regulation 72.

### **Open Procedure.**

43.(1) In open procedures, any interested economic operator may submit a tender in response to a call for competition.

(2) The minimum time limit for the receipt of tenders must, subject to subregulations (4) to (6), be 35 days from the date on which the contract notice is submitted.

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(3) A tender must under this regulation must be accompanied by the information for qualitative selection that is requested by the utility.

(4) Where utilities have published a periodic indicative notice which was not itself used as a means of calling for competition, the minimum time limit for receipt of tenders, as laid down in subregulation (2), may be shortened to 15 days, provided that both of the following conditions are fulfilled-

- (a) the periodic indicative notice included all the information required by regulation 65(1) and (4)(c), insofar as the information in Section II was available at the time the periodic indicative notice was published;
- (b) the periodic indicative notice was submitted for publication between 35 days and 12 months before the date on which the contract notice was submitted.

(5) Where a state of urgency duly substantiated by the utility renders impracticable the time limit laid down in subregulation (2), it may fix a time limit which must be not less than 15 days from the date on which the contract notice is submitted.

(6) The utility may reduce by 5 days the time limit for receipt of tenders set out in subregulation (2) where it accepts that tenders may be submitted by electronic means in accordance with regulation 38.

### **Restricted Procedure.**

44.(1) In restricted procedures, any economic operator may submit a request to participate in response to a call for competition by providing the information for qualitative selection that is requested by the utility.

(2) The minimum time limit for the receipt of the requests to participate must, in general, be fixed at no less than 30 days-

- (a) from the date on which the contract notice is submitted; or
- (b) where a periodic indicative notice is used as a means of calling for competition, from the date on which the invitation to confirm interest is sent and must in any event not be less than 15 days.

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



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(4) Utilities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 76(1) and (2).

(5) The time limit for the receipt of tenders may be set by mutual agreement between the utility and the selected candidates, provided that all selected candidates have the same time to prepare and submit their tenders.

(6) In the absence of such an agreement on the time limit for receipt of tenders, the time limit must be at least 10 days from the date on which the invitation to tender is sent.

**Negotiated procedure with prior call for competition.**

45.(1) In negotiated procedures with prior call for competition, any economic operator may submit a request to participate in response to a call for competition by providing the information for qualitative selection that is requested by the utility.

(2) The minimum time limit for the receipt of requests to participate must, in general, be fixed at no less than 30 days-

- (a) from the date on which the contract notice is sent; or
- (b) where a periodic indicative notice is used as a means of calling for competition, from the date on which the invitation to confirm interest is sent,

and must in any event not be less than 15 days.

(3) Only those economic operators invited by the utility following its assessment of the information provided may participate in the negotiations.

(4) Utilities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 76(1) and (2).

(5) The time limit for the receipt of tenders may be set by mutual agreement between the utility and the selected candidates, provided that they all have the same time to prepare and submit their tenders.

(6) In the absence of such an agreement on the time limit for the receipt of tenders, the time limit must be at least 10 days from the date on which the invitation to tender is sent.

**Competitive dialogue.**

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46.(1) In competitive dialogues, any economic operator may submit a request to participate in response to a call for competition in accordance with subregulations 42(3)(b) and (c) by providing the information for qualitative selection that is requested by the utility.

(2) The minimum time limit for receipt of requests to participate must, in general, be fixed at no less than 30 days-

- (a) from the date on which the contract notice is sent; or
- (b) where a periodic indicative notice is used as a means of calling for competition, the date on which the invitation to confirm interest is sent,

and must in any event not be less than 15 days.

(3) Only those economic operators invited by the utility following the assessment of the information provided may participate in the dialogue.

(4) Utilities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 76(1) and (2).

(5) The contract under this regulation must be awarded on the sole basis of the award criterion of the tender presenting the best price-quality ratio in accordance with regulation 80(1) to (3).

(6) Utilities must set out and define their needs and requirements in-

- (a) the call for competition;
- (b) in a descriptive document,

or in both, and at the same time and in the same documents, utilities must also set out and define the chosen award criteria and set out an indicative timeframe.

(7) Utilities-

- (a) must open, with the participants selected in accordance with the relevant provisions of regulations 74 to 79, a dialogue the aim of which must be to identify and define the means best suited to satisfying their needs; and
- (b) may discuss all aspects of the procurement with the chosen participants during this dialogue.

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(8) During the dialogue, utilities must ensure equality of treatment among all participants and, to that end, they must not provide information in a discriminatory manner which may give some participants an advantage over others.

(9) In accordance with regulation 37, utilities must not reveal to the other participants solutions proposed or other confidential information communicated by a participating candidate or tenderer in the dialogue without its agreement.

(10) The agreement referred to in subregulation (9), must not take the form of a general waiver but must be given with reference to the intended communication of specific information.

(11) Competitive dialogues may take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria laid down in the call for competition or in the descriptive document.

(12) In the call for competition or the descriptive document, the utility must indicate whether it will use the option described in subregulation (11).

(13) The utility must continue the dialogue until it can identify the solution or solutions which are capable of meeting its needs.

(14) Having declared that the dialogue is concluded and having so informed the remaining participants, utilities must ask them to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue.

(15) The tenders referred to in subregulation (14), must contain all the elements required and necessary for the performance of the project, and subject to subregulation (16) those tenders may be clarified, specified and optimised at the request of the utility.

(16) Such clarification, specification or optimisation or any additional information, may not involve changes to the essential aspects of the tender or of the procurement, including the needs and requirements set out in the call for competition or in the descriptive document, where variations to those aspects, needs and requirements are likely to distort competition or have a discriminatory effect.

(17) Utilities must assess the tenders received on the basis of the award criteria laid down in the call for competition or in the descriptive document.

(18) At the request of the utility, negotiations with the tenderer identified as having submitted the tender presenting the best price-quality ratio in accordance with regulation 80(1) to (3) may

**This version is out of date**

be carried out to confirm financial commitments or other terms contained in the tender by finalising the terms of the contract, provided such negotiations-

- (a) do not have the effect of materially modifying essential aspects of the tender or of the procurement, including the needs and requirements set out in the call for competition or in the descriptive document; and
- (b) do not risk distorting competition or causing discrimination.

(19) Utilities may specify prizes or payments to the participants in the dialogue.

**Innovation partnership.**

47.(1) In innovation partnerships, any economic operator may submit a request to participate in response to a call for competition in accordance with regulation 42(3)(b) and (c) by providing the information for qualitative selection that is requested by the utility.

(2) In the procurement documents, the utility must-

- (a) identify the need for an innovative product, service or works that cannot be met by purchasing products, services or works already available on the market; and
- (b) indicate which elements of this description define the minimum requirements to be met by all tenders.

(3) The information provided under subregulation (2) 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.

(4) The utility may decide to set up the innovation partnership with one partner or with several partners conducting separate research and development activities.

(5) The minimum time limit for receipt of requests to participate must, in general, be fixed at no less than 30 days from the date on which the contract notice is submitted and must in any event not be less than 15 days.

(6) Only those economic operators invited by the utility following the assessment of the information provided may participate in the procedure.

(7) Utilities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 76(1) and (2).

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(8) The contracts must be awarded on the sole basis of the award criterion of the tender presenting the best price-quality ratio in accordance with regulation 80(1) to (3).

(9) The innovation partnership must aim at the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works, provided that they correspond to the performance levels and maximum costs agreed between the utility and the participants.

(10) 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 services or the completion of the works.

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

(12) Based on those targets, the utility may decide after each phase to-

- (a) terminate the innovation partnership; or
- (b) in the case of an innovation partnership with several partners, to reduce the number of partners by terminating individual contracts,

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

(13) Notwithstanding any other provision of this regulation, utilities must negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve their content.

(14) The minimum requirements and the award criteria must not be subject to negotiations.

(15) During the negotiations, utilities must ensure the equal treatment of all tenderers and to that end they must-

- (a) not provide information in a discriminatory manner which may give some tenderers an advantage over others;
- (b) inform all tenderers, whose tenders have not been eliminated under subregulation (18) in writing, of any changes to the technical specifications or other procurement documents, other than those setting out the minimum requirements; and

**This version is out of date**

- (c) following any such changes, utilities must provide sufficient time for tenderers to modify and re-submit amended tenders, as appropriate.
- (16) In accordance with regulation 37, utilities must not reveal to the other participants confidential information communicated by a candidate or tenderer participating in the negotiations without its agreement.
- (17) The agreement referred to in subregulation (16), must not take the form of a general waiver but must be given with reference to the intended communication of specific information.
- (18) Negotiations during innovation partnership procedures may take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria specified in the call for competition, in the invitation to confirm interest or in another procurement document.
- (19) In the call for competition, the invitation to confirm interest or in another procurement document, the utility must indicate whether it will use the option described in subregulation (18).
- (20) In selecting candidates, utilities must in particular apply criteria concerning the candidates' capacity in the field of research and development and of developing and implementing innovative solutions.
- (21) Only those economic operators invited by the utility following its assessment of the requested information may submit research and innovation projects aimed at meeting the needs identified by the utility that cannot be met by existing solutions.
- (22) In the procurement documents, the utility must define the arrangements applicable to intellectual property rights.
- (23) In the case of an innovation partnership with several partners, the utility must not, in accordance with regulation 37, 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.
- (24) The agreement referred to in subregulation (23), must not take the form of a general waiver but must be given with reference to the intended communication of specific information.
- (25) The utility 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

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the sequence of the research and innovation activities required for the development of an innovative solution not yet available on the market.

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

**Use of the negotiated procedure without prior call for competition.**

48.(1) Utilities may use the negotiated procedure without prior call for competition in the following cases-

- (a) where no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted in response to a procedure with a prior call for competition, provided that the initial conditions of the contract are not substantially altered;
- (b) where a contract is purely for the purpose of research, experiment, study or development and not for the purpose of securing a profit or of recovering research and development costs, and insofar as the award of such contract does not prejudice the competitive award of subsequent contracts which do seek, in particular, those ends;
- (c) 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 subparagraphs (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;

- (d) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the utility, the time limits laid down for open procedures, restricted procedures and negotiated procedures with prior call for competition cannot be complied with;

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- (e) in the case of supply contracts 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 utility to acquire supplies having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance;
- (f) for new works or services consisting in the repetition of similar works or services assigned to the contractor to which the same utility awarded an earlier contract, provided that such works or services conform to a basic project for which a first contract was awarded following a procedure in accordance with regulation 42(1);
- (g) for supplies quoted and purchased on a commodity market;
- (h) for bargain purchases, where it is possible to procure supplies by taking advantage of a particularly advantageous opportunity available for a very short time at a price considerably lower than normal market prices;
- (i) for purchases of supplies or services under particularly advantageous conditions 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;
- (j) where the service contract concerned-
  - (i) follows a design contest organised in accordance with these Regulations; and
  - (ii) is to be awarded, under the rules provided for in the design contest, to the winner or to one of the winners of that contest, provided that all the winners are invited to participate in the negotiations.
- (k) where this is necessary and proportionate in cases where the Minister has reasonable grounds to believe that the negotiated procedure without prior publication is necessary to protect one or more of the following-
  - (i) public morals, order or safety;
  - (ii) human, animal or plant life or health; or
  - (iii) intellectual property;



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- (1) on the basis of the circumstances and on the conditions set out in Article XIII of the World Trade Organisation Agreement on Government Procurement 2012 as amended from time to time.
- (2) For the purposes of subregulation 1(a)-
- (a) a tender must be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the utility's needs and requirements as specified in the procurement documents;
  - (b) a request for participation must be considered not to be suitable where the economic operator concerned-
    - (i) is to be or may be excluded in accordance with regulations 76(1) or 78(1); or
    - (ii) does not meet the selection criteria.
- (3) *Deleted.*
- (4) For the purposes of subregulation 1(f)-
- (a) the basic project must indicate the extent of the possible additional works or services and the conditions under which they will be awarded;
  - (b) as soon as the first contract is put up for tender, the possible use of the procedure must be disclosed and the total estimated cost of subsequent works or services must be taken into consideration by the utilities when they apply regulations 16 and 17.
- (4A) In determining whether to award a contract in the circumstances set out in subregulation (2)(l), the contracting authority may take into account public interest considerations including but not limited to those listed in subregulations (2)(k) and (4B).
- (4B) In determining whether to award a contract in the circumstances set out in subregulation (2)(k), the Minister may take into account public interest considerations, including but not limited to the following-
- (a) risk of disruption to the provision of services;
  - (b) safeguarding jobs;

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- (c) safeguarding critical infrastructure;
- (d) the economic and financial stability of Gibraltar and its businesses.

## **CHAPTER 2**

### **Techniques and instruments for electronic and aggregated procurement**

#### **Framework agreements.**

49.(1) Utilities may conclude framework agreements, provided that they apply the procedures provided for in these Regulations.

(2) The term of a framework agreement must not exceed 8 years, save in exceptional cases duly justified, in particular, by the subject-matter of the framework agreement.

(3) Contracts based on a framework agreement must be awarded on the basis of objective rules and criteria, which may include reopening the competition among those economic operators party to the framework agreement as concluded.

(4) For the purposes of subregulation (3)-

- (a) the objective rules and criteria must-
  - (i) be set out in the procurement documents for the framework agreement;
  - (ii) ensure equal treatment of the economic operators who are parties to the framework agreement;
- (b) where a reopening of competition is included, utilities must-
  - (i) set a time limit which is sufficiently long to allow tenders for each specific contract to be submitted; and
  - (ii) award each contract to the tenderer that has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.

(5) Utilities must not use framework agreements improperly or in such a way as to prevent, restrict or distort competition.

#### **Dynamic purchasing systems.**

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50.(1) Utilities may use a dynamic purchasing system for commonly used purchases, the characteristics of which, as generally available on the market and meet their requirements.

(2) The dynamic purchasing system must be operated as a completely electronic process and must be open throughout the period of validity of the purchasing system to any economic operator that satisfies the selection criteria.

(3) The dynamic purchasing system may be divided into categories of products, works 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 subregulation (3) may include reference to the maximum allowable size of the subsequent specific contracts or to a specific geographic area in which subsequent specific contracts will be performed.

(5) In order to procure under a dynamic purchasing system, utilities must follow the rules of the restricted procedure, subject to the following provisions of this regulation.

(6) All the candidates satisfying the selection criteria must be admitted to the system, and the number of candidates to be admitted to the system must not be limited in accordance with regulations 44(4), 76(1) and 76(2);

(7) Where utilities have divided the system into categories of products, works or services in accordance with subregulation (3), they must specify the applicable selection criteria for each category.

(8) Notwithstanding regulation 44, the following time limits must apply-

- (a) the minimum time limit for receipt of requests to participate must be 30 days from the date on which-
  - (i) the contract notice is submitted; or
  - (ii) where a periodic indicative notice is used as a means for calling for competition, the date on which the invitation to confirm interest is submitted,

and must in any event not be less than 15 days;

- (b) the minimum time limit for receipt of tenders must, subject to subregulation (10), be at least 10 days from the date on which the invitation to tender is sent.

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(9) Where subregulation (8)(a) applies, no further time limits for receipt of requests to participate must apply once the invitation to tender for the first specific procurement under the dynamic purchasing system has been sent.

(10) The time limit for the receipt of tenders may be set by mutual agreement between the utility and the selected candidates, provided that all selected candidates have the same time to prepare and submit their tenders.

(11) All communications in the context of a dynamic purchasing system must only be made by electronic means in accordance with regulation 38(1) to (7) to (19).

(12) For the purposes of awarding contracts under a dynamic purchasing system, utilities 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 purchases envisaged, as well as all the necessary information concerning the dynamic purchasing system, including how the dynamic purchasing system operates, the electronic equipment used and the technical connection arrangements and specifications;
- (c) indicate in the procurement documents any division into categories of products, works or services and the characteristics defining them;
- (d) offer unrestricted and full direct access, as long as the system is valid, to the procurement documents in accordance with regulation 71.

(13) Utilities must give any economic operator, throughout the entire period of validity of the dynamic purchasing system, the possibility of requesting to participate in the system under the conditions referred to in subregulations (5) to (10).

(14) Utilities must finalise their assessment of such requests, referred to in subregulation (13), in accordance with the selection criteria within 10 working days following their receipt.

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

(16) Notwithstanding subregulations (14) and (15), as long as the invitation to tender for the first specific procurement under the dynamic purchasing system has not been sent, utilities

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may extend the assessment period provided that no invitation to tender is issued during the extended evaluation period.

(17) Where utilities intend to extend the assessment period in accordance with subregulation (16), they must indicate in the procurement documents the length of the extended period that they intend to apply.

(18) Utilities 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) Utilities must invite all admitted participants to submit a tender for each specific procurement under the dynamic purchasing system, in accordance with regulation 72.

(20) Where the dynamic purchasing system has been divided into categories of works, products or services, utilities must invite all participants having been admitted to the category corresponding to the specific procurement concerned to submit a tender.

(21) Subject to subregulation (22), utilities must award the contract to the tenderer that submitted the best tender on the basis of the award criteria set out in-

- (a) the contract notice for the dynamic purchasing system;
- (b) the invitation to confirm interest; or
- (c) where the means of calling for competition is a notice on the existence of a qualification system, in the invitation to tender.

(22) The award criteria referred to in subregulation (21) may, where appropriate, be formulated more precisely in the invitation to tender.

(23) Subject to subregulation (24), utilities who, in accordance with regulation 78, apply exclusion grounds and selection criteria provided for under the Public Contracts Regulations, may, at any time during the period of validity of the dynamic purchasing system, require admitted participants to submit a renewed and updated self-declaration as provided for in regulation 59(1) of the Procurement (Public Sector Contracts) Regulations 2016, within 5 working days from the date on which that request is transmitted.

(24) Regulation 59(7) to (10) of the Procurement (Public Sector Contracts) Regulations 2016, must apply throughout the entire period of validity of the dynamic purchasing system.

(25) Utilities must indicate the period of validity of the dynamic purchasing system in the call for competition.

(26) Where the period of validity is changed without terminating the dynamic purchasing system, the utility shall submit for publication on the UK e-notification service a notice of the kinds used initially for the call for competition for the dynamic purchasing system

(26A) Where a dynamic purchasing system is terminated before the end of the period of validity that had most recently been indicated under subregulation (25) or (26), the utility shall submit for publication on the UK e-notification service a contract award notice under regulation 68.

(27) No charges may be billed prior to or during the period of validity of the dynamic purchasing system to the economic operators which are interested in or party to the dynamic purchasing system.

#### **Electronic auctions.**

51.(1) Utilities may use electronic auctions in which there is presented-

- (a) new prices, revised downwards;
- (b) new values concerning certain elements of tenders; or
- (c) both paragraphs (a) and (b) together.

(2) Utilities 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) Service contracts and works contracts which have as their subject-matter intellectual performances, such as the design of works, which cannot be ranked using automatic evaluation methods, must not be the object of electronic auctions.

(4) In open or restricted procedures or negotiated procedures with a prior call for competition, utilities may decide that the award of a contract must be preceded by an electronic auction when the content of the procurement documents, in particular the technical specifications, can be established with precision.

(5) In procurements where the content of procurement documents, in particular the technical specifications, can be established with precision, an electronic auction may be held-

- (a) on the reopening of competition among the parties to a framework agreement as provided for in regulation 49(3) to (5); and

*This version is out of date*

- (b) on the opening for competition of contracts to be awarded under a dynamic purchasing system referred to in regulation 50.
- (6) The electronic auction must be based on one of the following elements of the tenders-
- (a) solely on prices where the contract is awarded on the basis of price only;
  - (b) on prices or on the new values of the features of the tenders indicated in the procurement documents, or on both, where the contract is awarded-
    - (i) on the basis of the best price-quality ratio; or
    - (ii) to the tender with the lowest cost using a cost-effectiveness approach.
- (7) Utilities which decide to hold an electronic auction must state that fact in the contract notice, in the invitation to confirm interest or, where a notice on the existence of a qualification system is used as a means of calling for competition, in the invitation to tender.
- (8) Where utilities have decided to hold an electronic auction, the procurement documents must include at least the information set out in Annex VII to the Utilities Contracts Directive.
- (9) Before proceeding with the electronic auction, utilities must make a full initial evaluation of the tenders in accordance with the award criteria and with the weighting fixed for them.
- (10) A tender must be considered admissible where-
- (a) it has been submitted by a tenderer which has not been excluded under regulations 76(1) or 78(1), and which meets the selection criteria; and
  - (b) it is in conformity with the technical specifications without being irregular, unacceptable or unsuitable.
- (11) For the purposes of subregulation (10)(b) tenders must be considered-
- (a) irregular if-
    - (i) they do not comply with the procurement documents;
    - (ii) they were received late;
    - (iii) there is evidence of collusion or corruption; or

**This version is out of date**

- (iv) they have been found by the utility to be abnormally low; and
- (b) unacceptable if-
  - (i) they are submitted by tenderers that do not have the required qualifications; and
  - (ii) they are tenders whose price exceeds the utility's budget as determined and documented prior to the launching of the procurement procedure.

(12) For the purposes of subregulation (10)(b)-

- (a) a tender must be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the utility's needs and requirements as specified in the procurement documents; and
- (b) a request to participate must be considered not to be suitable where the economic operator concerned-
  - (i) is to be or may be excluded under regulation 76(1) or 78(1); or
  - (ii) does not meet the selection criteria.

(13) All tenderers that have submitted admissible tenders must be invited simultaneously by electronic means to participate in the electronic auction using, as of the specified date and time, the connections in accordance with the instructions set out in the invitation.

(14) The electronic auction may take place in a number of successive phases, and must not start sooner than 2 working days after the date on which invitations are sent out.

(15) 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 80(7).

(16) The invitation must also state the mathematical formula to be used in the electronic auction to determine automatic re-rankings on the basis of the new prices or new values submitted, or both.

(17) Except where the most economically advantageous offer is identified on the basis of price alone, that formula 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.



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(18) For the purposes of subregulation (17), any ranges must, however, be reduced beforehand to a specified value.

(19) Where variants are authorised in accordance with regulation 62, a separate formula must be provided for each variant.

(20) Throughout each phase of an electronic auction the utilities must instantaneously communicate to all tenderers sufficient information to enable them to ascertain their relative rankings at any moment.

(21) Utilities may also communicate other information concerning other prices or values submitted, provided that this is stated in the specifications, and may at any time announce the number of participants in the current phase of the auction.

(22) Notwithstanding any provision of this regulation, in no case, may utilities disclose the identities of the tenderers during any phase of an electronic auction.

(23) Utilities must close an electronic auction in one or more of the following manners-

- (a) at the previously indicated date and time;
- (b) when they receive no more new prices or new values which meet the requirements concerning minimum differences, provided that they have previously stated the time which they will allow to elapse after receiving the last submission before they close the electronic auction; or
- (c) when the previously indicated number of phases in the auction has been completed.

(24) Where utilities intend to close an electronic auction in accordance with subregulation (23)(c), whether or not in combination with subregulation (23)(b), the invitation to take part in the auction must indicate the timetable for each phase of the auction.

(25) After closing an electronic auction, the utility must award the contract in accordance with regulation 80 on the basis of the results of the electronic auction.

#### **Electronic catalogues.**

52.(1) Where the use of electronic means of communication is required, utilities may require tenders to be presented in the format of an electronic catalogue or to include an electronic catalogue.

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(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 utility, and must comply with the requirements for electronic communication tools set out in regulation 38 as well as with any additional requirements set by the utility in accordance with that regulation.

(4) Where the presentation of tenders in the form of electronic catalogues is accepted or required, utilities must-

- (a) state so in the contract notice, in the invitation to confirm interest, or, where the means of calling for competition is a notice on the existence of a qualification system, in the invitation to tender or negotiate; and
- (b) indicate in the procurement documents all the necessary information relating to the matters covered by regulation 38(16) to (20) so far as they concern the format, the electronic equipment used and the technical connection arrangements and specifications for the catalogue.

(5) Where a framework agreement has been concluded with more than one economic operator following the submission of tenders in the form of electronic catalogues, utilities may provide that the reopening of competition for specific contracts is to take place on the basis of updated catalogues, and in such a case, utilities must use one of the following methods-

- (a) invite tenderers to resubmit their electronic catalogues, adapted to the requirements of the contract in question; or
- (b) notify tenderers that they intend 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.

(6) Where utilities reopen competition for specific contracts in accordance with subregulation (5)(b), they must-

- (a) notify the tenderers of the date and time at which they intend to collect the information needed to constitute tenders adapted to the requirements of the specific contract in question; and
- (b) give tenderers the possibility to refuse such collection of information.

This version is out of date

(7) Utilities must allow for an adequate period between the notification and the actual collection of information.

(8) Before awarding a contract under this regulation, utilities must present the collected information to the tenderer concerned so as to give it the opportunity to contest or confirm that the tender thus constituted does not contain any material errors.

(9) Utilities may award contracts 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.

(10) Utilities may also award contracts based on a dynamic purchasing system in accordance with subregulations (5)(b) and (6) to (8) provided that the request to participate in the dynamic purchasing system is accompanied by an electronic catalogue in accordance with the technical specifications and format established by the utility.

(11) For the purposes of subregulation (10), the catalogue must be completed subsequently by the candidates, when they are informed of the utility's intention to constitute tenders by means of the procedure set out in subregulation (5)(b).

**Centralised purchasing activities and central purchasing bodies.**

53.(1) A utility fulfils its obligations under these Regulations when it-

- (a) acquires supplies or services from a central purchasing body offering the centralised purchasing activity referred to in paragraphs (a), (b) or (c) of the definition of "centralised purchasing activity" at regulation 2.;
- (b) acquires works, supplies or services by-
  - (i) using contracts awarded by the central purchasing body;
  - (ii) using dynamic purchasing systems operated by the central purchasing body; or
  - (iii) using a framework agreement concluded by the central purchasing body offering the centralised purchasing activity referred to in paragraph (d) of the definition of "centralised purchasing activity" at regulation 2.

(2) Without prejudice to subregulation (1), the utility concerned must be responsible for fulfilling the obligations imposed by these Regulations in respect of any parts of the procedure that it conducts itself, such as-

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- (a) awarding a contract under a dynamic purchasing system which is operated by a central purchasing body; or
- (b) conducting a reopening of competition under a framework agreement that has been concluded by a central purchasing body.

(3) 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 38.

(4) Utilities may, without applying the procedures provided for in these Regulations, award a service contract for the provision of centralised purchasing activities to a central purchasing body, and such service contracts may also include the provision of ancillary purchasing activities.

#### **Occasional joint procurement.**

54.(1) Two or more utilities may agree to perform certain specific procurements jointly.

(2) Subject to subregulation (3), where the conduct of the procurement procedure in its entirety is carried out jointly in the name and on behalf of all the utilities concerned, they must be jointly responsible for fulfilling their obligations under these Regulations.

(3) The joint responsibility referred to in subregulation (2) also applies in cases where one utility manages the procurement procedure, acting on its own behalf and on the behalf of the other utilities concerned.

(4) Where the conduct of a procurement procedure is not in its entirety carried out in the name and on behalf of the utility concerned-

- (a) they must be jointly responsible only for those parts carried out jointly; and
- (b) each utility must 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.

55. *Deleted*

### **CHAPTER 3**

#### **Conduct of the procedure**

**Subchapter 1**

**Preparation**

**Preliminary market consultations.**

56.(1) Before commencing a procurement procedure, utilities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements.

(2) For this purpose, utilities may for example seek or accept 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 such advice 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.**

57.(1) Where a candidate or tenderer, or an undertaking related to a candidate or tenderer-

- (a) has advised the utility, whether in the context of regulation 56 or not; or
- (b) has otherwise been involved in the preparation of the procurement procedure,

the utility must take appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer.

(2) Such measures referred to in subregulation (1) 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) The candidate or tenderer concerned must only be excluded from the procedure where there are no other means to ensure compliance with the duty to treat economic operators equally in accordance with regulation 35(1).

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

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(5) The measures taken under this regulation must be documented in accordance with regulation 96.

**Technical specifications.**

58.(1) The technical specifications, as defined in regulation 2, must be set out in the procurement documents, and the technical specifications must lay down the characteristics required of works, services or supplies.

- (2) Without prejudice to subregulation (1), 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.

(3) The technical specifications may also specify whether the transfer of intellectual property rights will be required.

(4) For all procurement which is intended for use by natural persons, whether the general public or staff of the utility, 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.

(5) Where mandatory accessibility requirements are imposed by retained EU law, technical specifications must, as far as accessibility criteria for persons with disabilities or design for all users are concerned, be defined by reference thereto.

(6) 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.

(7) Without prejudice to mandatory national technical rules, to the extent that they are compatible with retained European Union law, the technical specifications must be formulated in one of the following ways-

- (a) in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow

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tenderers to determine the subject-matter of the contract and to allow utilities to award the contract;

- (b) by reference to technical specifications and, in order of preference, to-
  - (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 referred to in paragraph (a), with reference to the technical specifications referred to in paragraph (b) as a means of presuming conformity with such performance or functional requirements;
- (d) by reference to the technical specifications referred to in paragraph (b) for certain characteristics, and by reference to the performance or functional requirements referred to in paragraph (a) for other characteristics.

(8) Subject to subregulation (9) and unless justified by the subject-matter of the contract, technical specifications must not refer to a specific make or source, or to a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products.

(9) For the purposes of subregulation (8), such reference must be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract in accordance with subregulation (7) is not possible, in which case the reference must be accompanied by the words “or equivalent”.

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(10) Where a utility uses the option of referring to the technical specifications referred to in subregulation (7)(b), it must not reject a tender on the ground that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred, once the tenderer proves in its tender, by any appropriate means, including the means of proof referred to in regulation 60, that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications.

(11) Subject to subregulation (12), where a utility uses the option provided for in subregulation (7)(a) to formulate technical specifications in terms of performance or functional requirements, it must not reject a tender for works, supplies or services which comply with a national standard transposing a European standard, a European technical approval, a common technical specification, an international standard or a technical reference system established by a European standardisation body, where those address the performance or functional requirements which it has laid down.

(12) In its tender, the tenderer must prove by any appropriate means including those referred to in regulation 60, that the work, supply or service in compliance with the standard meets the performance or functional requirements of the utility.

### **Labels.**

59.(1) Where utilities intend to purchase works, supplies or services with specific environmental, social or other characteristics they may, in the technical specifications, the award criteria or the contract performance conditions, require a specific label as means of proof that the works, supplies or services 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 the characteristics of the works, supplies or services that are the subject-matter of the contract;
- (b) the label requirements are based on objectively verifiable and non-discriminatory criteria;
- (c) the labels are 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 labels are accessible to all interested parties;
- (e) the label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.



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(2) Where utilities do not require the works, supplies or services to meet all of the label requirements, they must indicate which label requirements are required.

(3) Utilities 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 utility, or an equivalent label, within the relevant time limits for reasons that are not attributable to that economic operator, the utility must accept other appropriate means of proof, which may include a technical dossier of 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 utility.

(5) Where a label fulfils the conditions mentioned in subregulations (1)(b), (c), (d) and (e) but also sets out requirements not linked to the subject-matter of the contract, utilities must not require the label as such 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.

#### **Test reports, certification and other means of proof.**

60.(1) Utilities may require that economic operators 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 utilities require the submission of certificates drawn up by a specific conformity assessment body, certificates from equivalent other conformity assessment bodies must also be accepted by the utilities.

(3) In subregulations (1) and (2), a “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 the Council, as may be amended from time to time.

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

(a) the lack of access is not attributable to the economic operator concerned; and

- (b) the economic operator concerned thereby proves that the works, supplies or services meet the requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

(5) If a Member State requests information related to the evidence and documents submitted in accordance with regulation 58(11), 59 and this regulation, the Competent Authority must ensure that this information is provided in accordance with regulation 98.

**Communication of technical specifications.**

61.(1) On request from economic operators interested in obtaining a contract, utilities must make available-

- (a) the technical specifications regularly referred to in their supply, works or service contracts; or
- (b) the technical specifications which they intend to apply to contracts for which the call for competition is a periodic indicative notice.

(2) Subject to subregulation (3), the technical specifications referred to in subregulation (1) must be made available by electronic means of communication through unrestricted and full direct access free of charge.

(3) Technical specifications must be transmitted by means other than electronic means where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered-

- (a) for one of the reasons set out in regulations 38(3); or
- (b) because the utilities intend to apply regulation 37(3).

(4) Where the technical specifications are based on documents available by electronic means through unrestricted and full direct access free of charge to interested economic operators, the inclusion of a reference to those documents must be sufficient.

**Variants.**

62.(1) Utilities may authorise or require tenderers to submit variants which meet the minimum requirements specified by those utilities.

(2) Utilities must indicate in the procurement documents whether or not they authorise or require variants, and if so, the minimum requirements to be met by the variants and any specific

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requirements for their presentation, in particular whether variants may be submitted only where a tender, which is not a variant, has also been submitted.

(3) Utilities must ensure that the chosen award criteria can be applied to variants meeting those minimum requirements as well as to conforming tenders which are not variants.

(4) In procedures for awarding supply or service contracts, utilities that have authorised or required variants must not reject a variant on the sole ground that it would, where successful, lead either to a service contract rather than a supply contract or to a supply contract rather than a service contract.

**Division of contracts into lots.**

63.(1) Utilities may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots.

(2) Utilities must indicate whether tenders may be submitted for one, for several, or for all of the lots in the-

- (a) contract notice;
- (b) invitation to confirm interest; or
- (c) means of calling for competition is a notice on the existence of a qualification system, in the invitation to tender or to negotiate.

(3) Utilities 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-

- (a) the contract notice; or
- (b) the invitation to confirm interest, to tender or to negotiate.

(4) Utilities must indicate in the procurement documents the objective and non-discriminatory criteria or rules they intend 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.

**Setting time limits.**

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64.(1) When fixing the time limits for requests to participate and the receipt of tenders, utilities must take particular 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 43 to 47.

(2) Where tenders can be made only after a visit to the site or after on-the-spot inspection of documents supporting the procurement documents, the time limits for the receipt of tenders, which must be longer than the minimum time limits set out in regulations 43 to 47, must be fixed so that all economic operators concerned may be aware of all the information needed to produce tenders.

(3) Utilities 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 in the following cases-

(a) where, 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 receipt of tenders;

(b) where significant changes are made to the procurement documents.

(4) The length of the extension must be proportionate to the importance of the information or change.

(5) In the case of an accelerated open procedure, the period mentioned in subregulation (3)(a) must be 4 days.

(6) Where additional information has either not been requested in good time or its importance with a view to preparing responsive tenders is insignificant, utilities are not required to extend the time limits.

## **Subchapter 2**

### **Publication and transparency**

#### **Periodic indicative notices.**

65.(1) Utilities may make known their intentions of planned procurements through the publication of a periodic indicative notice, and such notices must contain the information set out in Part A, section I of Annex VI to the Utilities Contracts Directive, but as if both references to “dispatch of the notice” in paragraph 4 were references to the submission of the notice to the UK e-notification service for the purposes of these Regulations.

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- (2) A utility wishing to publish a periodic indicative notice must-
- (a) submit it for publication in accordance with regulation 69; or
  - (b) publish it on the utility's buyer profile in accordance with regulation 70.
- (3) Where the periodic indicative notice is published by the utility on its buyer profile-
- (a) the utility must submit for publication, in accordance with regulation 69, a notice of the publication on its buyer profile; and
  - (b) such a notice must contain the information set out in Part B of Annex VI to the Utilities Contracts Directive, but as if "date of dispatch" in paragraph 5 were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations.
- (4) When a call for competition is made by means of a periodic indicative notice in respect of restricted procedures and negotiated procedures with prior call for competition, the notice must meet all the following requirements-
- (a) it refers specifically to the supplies, works or services that will be the subject of the contract to be awarded;
  - (b) it indicates that the contract will be awarded by restricted or negotiated procedure without further publication of a call for competition and invites interested economic operators to express their interest;
  - (c) it contains, in addition to the information required by subregulation (1), the information set out in section II of part A of Annex 6 to the Utilities Contracts Directive, but as if-
    - (i) in paragraph 7, "the third and fourth subparagraph of Article 73(1)" were a reference to regulation 71(4) and (5) of these Regulations"; and
    - (ii) in paragraph 21-
      - (aa) "Article 82" were a reference to regulation 80 of these Regulations; and
      - (bb) "point (b) of Article 67(2)" were a reference to regulation 65(4)(b) of these Regulations.;

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(d) it has been sent for publication between 35 days and 12 months prior to the date on which the invitation to confirm interest is submitted for the purposes of regulation 72(1) or (2).

(5) Where subregulation (4) applies, subregulation (3)(b) must not apply to the notice, but additional publication at national level under regulation 51, if any, may be made on a buyer profile.

(6) The period covered by the periodic indicative notice must be a maximum of 12 months from the date on which the notice is transmitted for publication.

(7) In the case of contracts for social and other specific services, the periodic indicative notice referred to in regulation 89(1)(b) may cover a period which is longer than 12 months.

#### **Notices on the existence of a qualification system.**

66.(1) Where utilities choose to set up a qualification system in accordance with regulation 75, the system must be the subject of a notice indicating the purpose of the qualification system and how to have access to the rules concerning its operation.

(1A) Such a notice shall include the information set out in Annex 10 to the Utilities Contracts Directive, but as if, in paragraph 10, “Article 82” were a reference to regulation 80 of these Regulations.

(2) Utilities must indicate the period of validity of the qualification system in the notice on the existence of the system.

(3) Utilities must give notice of any change in the period of validity by submitting to the UK e-notification service -

(a) where the period of validity is changed without terminating the system, the a notice on the existence of qualification systems;

(b) where the system is terminated, a contract award notice referred to in regulation 68.

#### **Contract notices.**

67. (1) Contract notices shall contain the information set out in the relevant part of Annex II to the Utilities Contracts Directive, but as if-

(a) in paragraph 10 of Part A, “the third and fourth subparagraph of Article 73(1)” were a reference to regulation 71(4) and (5) of these Regulations;

(b) in-

- (i) paragraph 19 of Part A,
- (ii) paragraph 16 of Part B, and
- (iii) paragraph 15 of Part C,

“Article 82” were a reference to regulation 80 of these Regulations;

(c) in-

- (i) paragraph 20 of Part A,
- (ii) paragraph 18 of Part B, and
- (iii) paragraph 18 of Part C,

“in the Official Journal of the European Union” read “on the UK e-notification service (within the meaning of the Procurement (Utilities Contracts) Regulations 2016)”; and

(d) in-

- (i) paragraph 22 of Part A,
- (ii) paragraph 20 of Part B, and
- (iii) paragraph 20 of Part C,

“date of dispatch” were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations.

(2) Such notices shall be submitted for publication in accordance with regulation 69.

**Contract award notices.**

68.(1) Not later than 30 days after the award of a contract or the conclusion of a framework agreement, following the decision to award or conclude it, utilities must submit for publication a contract award notice on the results of the procurement procedure.

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(2) Such notices shall-

(a) contain the information set out in Annex 12 to the Utilities Contracts Directive, but as if-

- (i) in paragraph 5(b), “in the Official Journal of the European Union” read “on the UK e-notification service (within the meaning of the Procurement (Utilities Contracts) Regulations 2016)”;
- (ii) in paragraph 5(c), “Article 50” were a reference to regulation 48(1) of these Regulations;
- (iii) in paragraph 9, “Article 50(h)” were a reference to regulation 48(1)(h) of these Regulations;
- (iv) in paragraph 17, the words in brackets were deleted;
- (v) in paragraph 19, “Article 64(1)” were a reference to regulation 62(1) of these Regulations;
- (vi) in paragraph 20, “Article 84” were a reference to regulation 82 of these Regulations; and
- (vii) in paragraph 21, “date of transmission” were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations; and

(b) be submitted for publication in accordance with regulation 69.

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

(4) In the case of framework agreements concluded in accordance with regulation 49, utilities must not be bound to submit a notice of the results of the procurement procedure for each contract based on such an agreement.

(5) In the case of dynamic purchasing systems, utilities must either-

- (a) submit a contract award notice within 30 days after the award of each contract based on a dynamic purchasing system; or



- (b) group such notices on a quarterly basis, in which case they must submit the grouped notices within 30 days of the end of each quarter.
- (6) The information provided in accordance with Annex XII to the Utilities Contracts Directive and intended for publication must be published in accordance with regulation 69.
- (7) Certain information on the contract award or the conclusion of the framework agreement may be withheld from publication where its release-
- (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.
- (8) In the case of contracts for research and development services, the information concerning the nature and quantity of the services may be limited to-
- (a) the indication 'R & D services' where the contract has been awarded by a negotiated procedure without a call for competition in accordance regulation 48(1)(b);
  - (b) information as least as detailed as was indicated in the notice that was used as a means of calling for competition.
- (9) Information provided in accordance with Annex XII to the Utilities Directive and marked as not being intended for publication must be published only in simplified form and in accordance with Annex IX to the Utilities Directive for statistical purposes.

**Publication on the UK e-notification service.**

69.(1) *Deleted*

(2) The notices required by regulations 50, 65 to 68, 86, 89 and 92 to be sent for publication in accordance with this regulation must be submitted to the UK e-notification service for publication, and published in accordance with Annex IX to the Utilities Contracts Directive, and must be published not later than 5 days after they are submitted.

**1977-09**

## Public Finance (Control and Audit)

**2016/085**

## Procurement (Utilities Contracts) Regulations 2016

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This version is out of date

(3) Utilities must ensure that they are able to supply proof of the dates on which notices are sent to the the UK e-notification service for publication.

(4) Where the UK e-notification service has given the utility confirmation of the publication of the information sent, indicating the date of that publication, that confirmation must constitute proof of publication.

(5) Utilities may publish notices for works, supply or service contracts to the UK e-notification service for publication even where they are not required by these Regulations to do so.

(6) In these Regulations, “the UK e-notification service” has the meaning given by regulation 51(6) of the Procurement (Public Sector Contracts) Regulations 2016.

### **Publication of notices otherwise than on the UK e-notification service.**

70.(1) In addition to the publication of the notices referred to in regulations 50, 65 to 68, 89 and 92 by the UK e-notification service, utilities may publish the information contained in them on a buyer profile.

(2) The notices referred to in regulations 50, 65 to 68, 89 and 92, and the information contained in them must not be published otherwise than on the UK e-notification service before they are published on that service.

(3) Notwithstanding subregulation (2), publication may in any event take place where utilities have not been notified of the publication on the UK e-notification service within 48 hours after the notice was submitted to that service;

(4) Notices published must not contain information other than that contained in the notices sent to the UK e-notification service or published on a buyer profile, but must indicate the date the notice was submitted to the UK e-notification service or its publication on the buyer profile.

(5) Where a periodic indicative notice is to be published on a buyer profile for the purposes of regulation 65(2)(b)-

- (a) the periodic indicative notice may not be so published before the notice referred to in regulation 65(3)(a) is submitted to the UK e-notification service; and
- (b) the periodic indicative notice must indicate the date of that submission.

### **Electronic availability of procurement documents.**

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71.(1) Utilities must, by means of a website, offer unrestricted and full direct access free of charge to the procurement documents from the date of publication on the UK e-notification service of a notice in accordance with regulation 69 or the date on which an invitation to confirm interest is sent.

(2) Notwithstanding subregulation (1), where the means of calling for competition is a notice on the existence of a qualification system, the access referred to in subregulation (1) must be offered as soon as possible and at the latest when the invitation to tender or to negotiate is sent.

(3) The text of the notice or of the invitation must specify the website address at which the procurement documents are accessible.

(4) Where unrestricted and full direct access free of charge to certain procurement documents cannot be offered by means of a website for one of the reasons set out in regulation 38(3), utilities may indicate in the notice or the invitation to confirm interest that the procurement documents concerned will be transmitted by means other than a website in accordance with subregulations (7) and (8).

(5) Where unrestricted and full direct access free of charge to certain procurement documents cannot be offered by means of a website because utilities intend to apply regulation 37(3), utilities must indicate in-

- (a) the notice;
- (b) the invitation to confirm interest; or
- (c) where the means of calling for competition is a notice on the existence of a qualification system, the procurement documents,

which measures aimed at protecting the confidential nature of the information they require and how access can be obtained to the documents concerned.

(6) In the cases referred to in subregulations (4) and (5), the time limit for the submission of tenders must be prolonged by 5 days, except-

- (a) in the cases of duly substantiated urgency referred to in regulation 43(5); and
- (b) where the time limit is set by mutual agreements in accordance with regulations 44(5) or 45(5).

(7) Provided that it has been requested in good time, utilities must supply to all tenderers taking part in the procurement procedure additional information relating to the specifications

and any supporting documents no later than 6 days before the time limit fixed for the receipt of tenders.

(8) In the case of an accelerated open procedure, the period mentioned in subregulation (7) must be 4 days.

**Invitations to candidates.**

72.(1) In restricted procedures, competitive dialogue procedures, innovation partnerships and negotiated procedures with prior call for competition, utilities must simultaneously and in writing invite the selected candidates to submit their tenders, to take part in the dialogue or to negotiate.

(2) Where a periodic indicative notice is used as a call for competition in accordance with regulation 42(3)(a), utilities must simultaneously and in writing invite the economic operators that have expressed their interest to confirm their continuing interest.

(3) The invitations required by subregulations (1) and (2) must-

- (a) include a reference to the electronic address at which the procurement documents have been made directly available by electronic means; and
- (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 71(4) or (5) and have not been made otherwise available.

(4) The invitations required by subregulation (1) must include the information set out in Annex XIII to the Utilities Contracts Directive.

**Informing applicants for qualification, candidates and tenderers.**

73.(1) Utilities must as soon as possible inform each candidate and tenderer of decisions reached concerning the conclusion of a framework agreement, the award of a contract, or admittance to a dynamic purchasing system, including 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

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- (d) not to implement a dynamic purchasing system.
- (2) On request from the candidate or tenderer concerned, a utility 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 58(11) and (12), the reasons for its decision of non- equivalence or their 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;
  - (d) any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.
- (3) Utilities may decide to withhold certain information referred to in subregulations (1) and (2), regarding the contract award, the conclusion of the framework agreement or the admittance to a dynamic purchasing system, where the release of such information-
- (a) would impede law enforcement or otherwise be contrary to the public interest;
  - (b) would prejudice the legitimate commercial interests of a particular economic operator, public or private; or
  - (c) might prejudice fair competition between economic operators.
- (4) Utilities which establish and operate a system of qualification must inform applicants of their decision as to qualification within a period of 6 months.
- (5) If the decision referred to in subregulation (4), will take longer than 4 months from the presentation of an application, the utility must inform the applicant, within 2 months of the application, of the reasons justifying the longer period and of the date by which his application will be accepted or refused.
- (6) Applicants whose qualification is refused must be informed of the refusal decision and the reasons for that decision as soon as possible and no more than 15 days later than the date

of the refusal decision, and the reasons must be based on the criteria for qualification referred to in regulation 75(3) to (5).

(7) Utilities which establish and operate a system of qualification may bring the qualification of an economic operator to an end only for reasons based on the criteria for qualification referred to in regulation 75(3) to (5).

(8) Any intention to bring the qualification to an end must be notified in writing to the economic operator at least 15 days before the date on which the qualification is due to end, together with the reason or reasons justifying the proposed action.

### **Subchapter 3**

#### **Choice of participants and award of contracts**

##### **General principles.**

74.(1) For the purpose of selecting participants in their procurement procedures, the following rules must apply-

- (a) utilities which have provided rules and criteria for the exclusion of tenderers or candidates in accordance with regulations 76(1) or 78(1), must exclude economic operators identified in accordance with such rules and fulfilling such criteria;
- (b) utilities must select tenderers and candidates in accordance with the objective rules and criteria mentioned in regulations 76 and 78;
- (c) utilities must, where appropriate and in accordance with regulation 76(1) and (2), reduce the number of candidates selected in accordance with paragraphs (a) and (b) in-
  - (i) restricted procedures;
  - (ii) negotiated procedures with a call for competition;
  - (iii) competitive dialogues; and
  - (iv) innovation partnerships.

(2) When a call for competition is made by means of a notice on the existence of a qualification system and for the purpose of selecting participants in procurement procedures for the specific contracts which are the subject of the call for competition, utilities must-

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- (a) qualify economic operators in accordance with regulation 75;
  - (b) apply to such qualified economic operators those provisions of subregulation (1) that are relevant to restricted or negotiated procedures, to competitive dialogues or to innovation partnerships.
- (3) When selecting participants for a restricted or negotiated procedure, a competitive dialogue or an innovation partnership, in reaching their decision as to qualification or when the criteria and rules are being updated, utilities must not-
- (a) impose administrative, technical or financial conditions on certain economic operators which would not be imposed on others;
  - (b) require tests or evidence which would duplicate objective evidence already available.
- (4) Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous, or where specific documents are missing, utilities may request the economic operators 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.
- (5) Utilities must verify that the tenders submitted by the selected tenderers comply with the rules and requirements applicable to tenders and award the contract on the basis of the criteria laid down in regulations 80 and 82, taking into account regulation 62.
- (6) Utilities may decide not to award a contract to the tenderer submitting the best tender where they have established that the tender does not comply with applicable obligations in the fields of environmental, social and labour law established by Gibraltar law, collective agreements or by the international environmental, social and labour law provisions listed in Annex XIV to the Utilities Contracts Directive.
- (7) In open procedure utilities may decide to examine tenders before verifying the suitability of tenderers, provided that the relevant provisions of regulations 74 to 82 are observed.

**Qualification systems.**

75.(1) Utilities may establish and operate a system of qualification of economic operators.

(2) Utilities which establish or operate a system of qualification must ensure that economic operators are at all times able to request qualification.

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(3) The system under subregulation (1) may involve different qualification stages, and must establish objective rules and criteria for-

- (a) the exclusion and selection of economic operators requesting qualification, and
- (b) the operation of the qualification system, covering matters such as-
  - (i) inscription in the system;
  - (ii) periodic updating of the qualifications, if any; and
  - (iii) the duration of the system.

(4) Where the rules and criteria referred to in subregulation (3) include technical specifications, regulations 58 to 60 must apply.

(5) The rules and criteria referred to in subregulation (3)-

- (a) must be made available to economic operators upon request;
- (b) may be updated as required and if so, must be communicated to interested economic operators.

(6) Where a utility considers that the qualification system of certain other utilities or other bodies meets its requirements, it must communicate the names of those utilities and bodies to interested economic operators.

(7) A written record of qualified economic operators must be kept and may be divided into categories according to type of contract for which the qualification is valid.

(8) When a call for competition is made by means of a notice on the existence of a qualification system, specific contracts for the works, supplies or services covered by the qualification system must be awarded by restricted procedures or negotiated procedures, in which all tenderers and participants are selected among the candidates already qualified in accordance with such a system.

(9) Any charges that are billed in connection with requests for qualification or with updating or conserving an already obtained qualification in accordance with the system must be proportionate to the generated costs.

**Criteria for qualitative selection.**



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76.(1) Utilities may establish objective rules and criteria for the exclusion and selection of tenderers or candidates, and those rules and criteria must be available to interested economic operators.

(2) Where utilities need to ensure an appropriate balance between the particular characteristics of the procurement procedure and the resources required to conduct it, they may, in restricted and negotiated procedures, in competitive dialogues or in innovation partnerships, establish objective rules and criteria that reflect that need and enable utilities to reduce the number of candidates that will be invited to tender or to negotiate.

(3) Utilities must take account of the need to ensure adequate competition when selecting the number of candidates.

**Reliance on the capacities of other entities.**

77.(1) Where the objective rules and criteria for the exclusion and selection of-

- (a) economic operators requesting qualification in a qualification system; or
- (b) candidates and tenderers in-
  - (i) open procedures;
  - (ii) restricted procedures;
  - (iii) negotiated procedures;
  - (iv) competitive dialogues; or
  - (v) innovation partnerships,

include requirements relating to the economic and financial capacity of the economic operator, or its technical and professional abilities, the economic operator may, where necessary, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them, subject to the following provisions of this regulation.

(2) With regard to criteria relating to the educational and professional qualifications of the service provider or contractor or those of the undertaking's managerial staff or to relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required.

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(3) Where an economic operator wants to rely on the capacities of other entities, it must prove to the utility that the necessary resources will be available to it, for example by producing a commitment by those entities to that effect.

(4) For the purposes of subregulation (3), an economic operator requesting qualification in a qualification system must prove that the necessary resources will be available to it throughout the period of validity of the qualification system.

(5) Where, in accordance with regulation 78, utilities have referred to exclusion or selection criteria provided for under the Procurement (Public Sector Contracts) Regulations 2016, utilities must verify, in accordance with regulation 78(4), whether the other entities on whose capacity the economic operator intends to rely fulfil the relevant selection criteria or whether there are grounds for exclusion, to which the utilities have referred, under regulation 57 of the Procurement (Public Sector Contracts) Regulations 2016.

(6) The utility must require that the economic operator replaces an entity in respect of which there are compulsory grounds for exclusion to which the utility has referred to.

(7) The utility may require that the economic operator replaces an entity in respect of which there are non-compulsory grounds for exclusion to which the utility has referred to.

(8) Where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the utility may require that the economic operator and those entities be jointly liable for the execution of the contract.

(9) A group of economic operators within the meaning of regulation 36(3) may rely on the capacities of participants in the group or of other entities, and subregulations (1) to (8) apply in relation to such a group in the same way that they apply in relation to an economic operator.

(10) In the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, utilities may require that certain critical tasks be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators within the meaning of regulation 36(3), by a participant in that group.

### **Use of exclusion grounds and selection criteria provided for under the Public Contracts Regulations.**

78.(1) The objective rules and criteria for the exclusion and selection of-

- (a) economic operators requesting qualification in a qualification system; and
- (b) candidates and tenderers in-

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- (i) open procedures;
- (ii) restricted procedures;
- (iii) negotiated procedures;
- (iv) competitive dialogues; or
- (v) innovations partnerships,

may include the exclusion grounds listed in regulation 57 of the Procurement (Public Sector Contracts) Regulations 2016 on the terms and conditions set out in those Regulations.

(2) Where the utility is a contracting authority, the criteria and rules referred to in subregulation (1) must include the exclusion grounds listed in regulation 57(1) to (5) of the Procurement (Public Sector Contracts) Regulations 2016 on the terms and conditions set out in that regulation.

(3) The criteria and rules referred to in subregulation (1) may include the selection criteria set out in regulation 58 of the Procurement (Public Sector Contracts) Regulations 2016 on the terms and conditions set out in that regulation, notably as regards the limits to requirements concerning yearly turnovers, as provided for under that regulation 58(9) of the Procurement (Public Sector Contracts) Regulations 2016.

(4) For the purposes of applying subregulations (1), (2) and (3), regulations 59 to 61 of the Procurement (Public Sector Contracts) Regulations 2016 apply.

(5) For the purposes of subregulations (1), (3) and (4), any reference to a contracting authority in regulations 57 to 59, and 61 of the Procurement (Public Sector Contracts) Regulations 2016 must be deemed to be a reference to a utility.

#### **Quality assurance standards and environmental management standards.**

79.(1) Utilities must, where they require 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) *Deleted*

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(3) Utilities 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 utilities require the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain environmental management systems or standards, they must refer to-

(a) *Deleted*

(b) *Deleted*

(c) environmental management standards based on the relevant European or international standards by accredited bodies,

(5) Where an economic operator had demonstrably no access to the certificates referred to in subregulation (3), or no possibility of obtaining them within the relevant time limits for reasons that are not attributable to that economic operator, the utility 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.

**Contract award criteria.**

80.(1) Utilities must base the award of contracts on the most economically advantageous tender assessed from the point of view of the utility.

(2) The tender referred to in subregulation (1), must be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with regulation 81, and may include the best price-quality ratio, which must be assessed on the basis of criteria, such as qualitative, environmental and/or social aspects, linked to the subject-matter of the contract in question.

(3) The criteria referred to in subregulation (2) may comprise, for example-

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;

This version is out of date

- (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, commitments with regard to parts and security of supply.
- (4) 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.
- (5) 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.
- (6) Award criteria must not have the effect of conferring an unrestricted freedom of choice on the utility, and they must-
- (a) ensure the possibility of effective competition; and
  - (b) 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.
- (7) In case of doubt, utilities must verify effectively the accuracy of the information and proof provided by the tenderers.
- (8) The utility 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, except where this is identified on the basis of price alone.
- (9) For the purposes of subregulation (8), those weightings may be expressed by providing for a range with an appropriate maximum spread.

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(10) Where the weighting is not possible for objective reasons, the utility must indicate the criteria in descending order of importance.

**Life-cycle costing.**

81.(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 utility or other users, such as-
  - (i) costs relating to acquisition;
  - (ii) costs of use, such as consumption of energy and other resources;
  - (iii) maintenance costs;
  - (iv) end of life costs, such as collection and recycling costs;
- (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 subregulation (1)(b) may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

(3) Where utilities assess the costs using a life-cycle costing approach, they must indicate in the procurement documents-

- (a) the data to be provided by the tenderers; and
- (b) the method which the utility will use to determine the life-cycle costs on the basis of those data.

(4) 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;

This version is out of date

- (c) the data required can be provided with reasonable effort by normally diligent economic operators, including economic operators from countries party to international agreements by which Gibraltar is bound.

**Abnormally low tenders.**

82.(1) Utilities must require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.

(2) The explanations given in accordance with subregulation (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 supply of the products or services or for the execution of the work;
- (c) the originality of the work, supplies or services proposed by the tenderer;
- (d) compliance with the applicable obligations referred to in regulation 74(6);
- (e) compliance with obligations referred to in regulation 85;

(3) The utility must assess the information provided by consulting the tenderer, and it may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in subregulation (2).

(4) The utility must reject the tender where it has established that the tender is abnormally low because it does not comply with applicable obligations referred to in regulation 74(6).

(5) Where the utility establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only-

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

**Subchapter 4**

**Tenders comprising products originating in third countries and relations with those countries**

**Tenders comprising products originating in third countries.**

83.(1) This regulation applies to tenders covering products originating in third countries with which the European Union has not, before 1 January 2021, concluded, whether multilaterally or bilaterally, an agreement ensuring comparable and effective access for European Union undertakings to the markets of those third countries.

(2) Utilities may reject any tender submitted for the award of a supply contract where the proportion of the products originating in third countries exceeds 50% of the total value of the products constituting the tender.

(3) For the purposes of this regulation-

- (a) the origin of products must be determined in accordance with Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as may be amended from time to time;
- (b) software used in telecommunications network equipment must be regarded as products; and
- (c) those third countries to which the benefits of the Utilities Contracts Directive has been extended by an European Union Council Decision, must not be taken into account by utilities for determining the proportion, referred to in subregulation (2), of products originating in third countries.

(4) Where 2 or more tenders are equivalent in the light of the contract award criteria defined in regulation 80-

- (a) utilities must give preference to those tenders which may not be rejected in accordance with subregulation (2);
- (b) paragraph (a) must not apply if acceptance would oblige the utility to acquire equipment having technical characteristics different from those of existing equipment, resulting in-
  - (i) incompatibility;
  - (ii) technical difficulties in operation and maintenance; or



- (iii) disproportionate costs.

(5) For the purposes of subregulation (4), tenders must be considered equivalent if the price difference between those tenders does not exceed 3%.

## CHAPTER 4

### Contract performance

#### Conditions for performance of contracts.

84.(1) Utilities 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 80(5); and
- (b) indicated in the call for competition or in the procurement documents.

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

#### Subcontracting.

85.(1) In the procurement documents, the utility may ask the tenderer to indicate in its tender any share of the contract that it may intend to subcontract to third parties and any proposed subcontractors.

(2) Subregulation (1) is without prejudice to the main contractor's liability.

(3) In the case of works contracts and in respect of services to be provided at a facility under the direct oversight of the utility, after the award of the contract and at the latest when the performance of the contract commences, the utility must require the main contractor to notify to the utility the name, contact details and legal representatives of its subcontractors, involved in such works or services, insofar as known at the time.

(4) The utility must require the main contractor to notify the utility of-

- (a) any changes to the information notified under subregulation (3) during the course of the contract; and

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- (b) the name, contact details and legal representatives of any new subcontractors which the main contractor subsequently involves in such works or services.
  
- (5) Where necessary for the purposes of subregulation (8), the required information must be accompanied by SPDs, within the meaning of regulation 59 of the Procurement (Public Sector Contracts) Regulations 2016, in respect of subcontractors.
  
- (6) Subregulations (3) and (4) do not apply to suppliers.
  
- (7) Utilities may extend the obligations provided for in subregulations (3) and (4) to, for example-
  - (a) supply contracts, service contracts, other than those concerning services to be provided at the facilities under the direct oversight of the utility, or suppliers involved in works or services contracts;
  
  - (b) subcontractors of the main contractor's subcontractors or subcontractors further down the subcontracting chain.
  
- (8) Utilities that are contracting authorities may, in accordance with regulations 59, 60 and 61 of the Procurement (Public Sector Contracts) Regulations 2016 verify whether there are grounds for exclusion of subcontractors under regulation 57 of the Procurement (Public Sector Contracts) Regulations 2016.
  
- (9) In such cases referred to in subregulation (8), the utility-
  - (a) must require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion; and
  
  - (b) may require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.
  
- (10) For the purposes of subregulation (5), any reference to a contracting authority in regulation 59 of the Procurement (Public Sector Contracts) Regulations 2016 must be deemed to be a reference to a utility.

**Modification of contracts during their term.**

86.(1) Contracts and framework agreements may be modified without a new procurement procedure in accordance with these Regulations in any of the following cases-

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- (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 the framework agreement;
- (b) for additional works, services or supplies by the original contractor, irrespective of their value, 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, software, services or installations procured under the initial procurement; or
  - (ii) would cause significant inconvenience or substantial duplication of costs for the utility;
- (c) where all of the following conditions are fulfilled-
  - (i) the need for modification has been brought about by circumstances which a diligent utility could not have foreseen;
  - (ii) the modification does not alter the overall nature of the contract;
- (d) where a new contractor replaces the one to which the utility had initially awarded the contract as a consequence of either-
  - (i) an unequivocal review clause or option in conformity with subparagraph (a); or
  - (ii) complete or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of these Regulations;

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(e) where the modifications, irrespective of their value, are not substantial within the meaning of subregulation (7); or

(f) where subregulation (4) applies.

(2) Utilities which have modified a contract in either of the cases described in subregulation (1)(b) and (c) must submit a notice to that effect, in accordance with regulation 69, for publication.

(3) Such a notice must contain the information set out in Annex XVI to the Utilities Contracts Directive, but as if paragraph 10 (financing by EU funds) were deleted).

(4) This regulation applies where the value of the modification is below both of the following values-

(a) the relevant threshold mentioned in regulation 16; and

(b) 10% of the initial contract value for service and supply contracts and 15% of the initial contract value for works contracts,

provided that the modification does not alter the overall nature of the contract or framework agreement.

(5) For the purposes of subregulation (4), where several successive modifications are made, the value must be assessed on the basis of the net cumulative value of the successive modifications.

(6) For the purpose of the calculation of the values referred to in subregulation (4)(b), the updated figure must be the reference figure when the contract includes an indexation clause.

(7) A modification of a contract or a framework agreement during its term must be considered to be substantial within the meaning of subregulation (1)(e) where one or more of the following conditions is met-

(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 other candidates than those initially selected;

*This version is out of date*

- (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;
- (d) the modification extends the scope of the contract or framework agreement considerably;
- (e) a new contractor replaces the one to which the utility had initially awarded the contract in cases other than those provided for in subregulation (1)(d).

(8) A new procurement procedure in accordance with these Regulations must be required for modifications of the provisions of a contract or a framework agreement during its term other than those provided for in this regulation.

#### **Termination of contracts.**

87. Utilities must ensure that every contract which they award contains provisions enabling the utility to terminate the contract where-

- (a) the contract has been subject to a substantial modification which would have required a new procurement procedure in accordance with regulation 86(8);
- (b) the contractor has, at the time of contract award, been in one of the situations referred to in regulation 57(1) of the Procurement (Public Sector Contracts) Regulations 2016 and should therefore have been excluded from the procurement procedure in accordance with regulation 78(2) of these Regulations;

### **PART 3**

#### **PARTICULAR PROCUREMENT REGIMES**

##### **CHAPTER 1**

##### **Social and other specific services**

##### **Award of contracts for social and other specific services.**

88. Contracts for social and other specific services listed in Annex XVII to the Utilities Directive, must be awarded in accordance with this Chapter, where the value of the contracts is equal to or greater than the threshold indicated in regulation 16(c).

**Publication of notices.**

89.(1) Utilities intending to award a contract for the services referred to in regulation 88 must make known their intention by any of the following means-

- (a) by means of a contract notice;
- (b) by means of a periodic indicative notice, which must-
  - (i) be published continuously;
  - (ii) refer specifically to the types of services that will be the subject of the contract to be awarded; and
  - (iii) indicate that the contracts will be awarded without further publication and invite interested economic operators to express their interest in writing; or
- (c) by means of a notice on the existence of a qualification system, which must be published continuously.

(2) Subregulation (1) must not apply where a negotiated procedure without prior call for competition could have been used, in accordance with regulation 48, for the award of a service contract.

(3) Utilities that have awarded a contract for the services referred to in regulation 88 must make known the results by mean of a contract award notice.

(4) For the purposes of subregulation (3), utilities may, however, group such notices on a quarterly basis, in which case they must submit the grouped notices within 30 days of the end of each quarter.

(5) The notices referred to in subregulations (1), (3) and (4) must contain the information referred to in the relevant part of Annex XVIII to the Utilities Contracts Directive, but as if, in paragraph 4 of part D, “in the Official Journal of the European Union” read “on the UK e-notification service (within the meaning of the Procurement (Utilities Contracts) Regulations 2016).

(6) Utilities must submit the notices referred to in this regulation for publication in accordance with regulation 69.

**Principles of awarding contracts.**

90.(1) Utilities must determine the procedures that are to be applied in connection with the award of contracts subject to this Chapter, and may take into account the specificities of the services in question.

(2) Those procedures must be at least sufficient to ensure compliance with the principles of transparency and equal treatment of economic operators.

(3) In relation to the award of contracts utilities may take into account any relevant considerations, including-

- (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; and
- (d) innovation.

**CHAPTER 2**

**Rules governing design contests**

**Scope.**

91. This Chapter applies to-

- (a) design contests organised as part of a procurement procedure for a service contract, provided that the estimated value of the contract and including any possible prizes or payments to participants is equal to or greater than the threshold mentioned in regulation 16(1)(a);
- (b) design contests where the total amount of contest prizes and payments to participants including the value of the service contract, which might subsequently be concluded following a negotiated procedure without prior call for competition in accordance with regulation 48(1)(j) if the utility does not exclude such an award

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in the contest notice, is equal to or greater than the threshold mentioned in regulation 16(1)(a).

**Notices.**

92.(1) Utilities that intend to organise a design contest must call for competition by means of a contest notice.

(2) The call for competition must-

- (a) include the information set out in Annex XIX to the Utilities Contracts Directive, but as if, in paragraph 15, “date of dispatch” were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations; and
- (b) be submitted for publication in accordance with Regulation 69.

(3) Utilities that have held a design contest must make the results known by means of a notice, which must be submitted for publication-

- (a) in accordance with regulation 69;
- (b) within 30 days of the closure of the design contest; and
- (c) include the information set out in Annex XX to the Utilities Contracts Directive, but as if, in paragraph 11, “date of dispatch” were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations.

(4) But where the release of the information on the outcome of the contest-

- (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, such information may be withheld from publication.

**Rules on the organisation of design contests and the selection of participants and the jury.**



93.(1) When organising design contests, utilities must apply procedures which are adapted to the provisions of Part I and this Chapter.

(2) *Deleted*

(3) Where design contests are restricted to a limited number of participants, utilities must establish clear and non-discriminatory selection criteria.

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

(5) The jury must be composed exclusively of natural persons who are independent of participants in the contest.

(6) Where a particular professional qualification is required of 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.**

94.(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 aspects of the projects.

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

### **PART 4**

#### **INFORMATION AND DOCUMENTATION**

##### **Retention of contract copies.**

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95.(1) Utilities that are contracting authorities must, at least for the duration of the contract, keep copies of all concluded contracts with a value equal to or greater than-

- (a) £884,720 in the case of supply contracts or service contracts;
- (b) £8,847,200 in the case of works contracts.

(2) Contracting authorities 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 rules on access to documents and data protection applicable in Gibraltar.

**Individual reports on procedures for the award of contracts.**

96.(1) Utilities must keep appropriate information on each contract and framework agreement covered by these Regulations and each time a dynamic purchasing system is established.

(2) The information referred to in subregulation (1) must be sufficient to permit utilities at a later date to justify decisions taken in connection with-

- (a) the qualification and selection of economic operators and the award of contracts;
- (b) the use of negotiated procedures without a call for competition in accordance with regulation 48;
- (c) the derogations provided for in Chapters 2 and 3 of Part 1 to these Regulations relating to Chapters 2 to 4 of Part 2 to these Regulations;
- (d) where necessary, the reasons why means of communication other than electronic means have been used for the submission of tenders.

(3) To the extent that the contract award notice drawn up in accordance with regulations 68 or 89(3) contains the information required in this regulation, utilities may refer to that notice.

(4) Where the Chief Minister so requests, utilities must communicate the information and documentation referred to in this regulation, or its main elements, to the Chief Minister.

(5) Utilities must document the progress of all procurement procedures, whether or not the procedures are conducted by electronic means.

(6) For the purposes of subregulation (5), utilities must ensure that they keep sufficient documentation to justify decisions taken in all stages of the procurement procedure, such as documentation on-

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- (a) communications with economic operators;
- (b) internal deliberations;
- (c) preparation of the procurement documents;
- (d) dialogue or negotiation, if any;
- (e) selection and award of the contract.

(7) The documentation referred to in this regulation must be kept for at least 3 years from the date of award of the contract.

(8) The Competent Authority must monitor the application of public procurement rules, and where it identifies specific violations or systemic problems, it must bring these issues to the Ministers' attention.

(10) The results of any monitoring activities referred to in subregulation (4) must be made publicly available.

97. *Deleted*

98. *Deleted*

## **PART 5**

### **REMEDIES**

#### **Chapter 1**

##### **Facilitation of remedies**

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

99.(1) Subject to subregulation (11), a utility must, as soon as possible after the decision has been made, inform the tenderers and candidates of its decision to award the contract, and must do so by notice in writing by the most rapid means of communication practicable.

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

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- (a) the criteria for the award of the contract;
  - (b) the reasons for the decision, including the characteristics and relative advantages of the successful tender, the score (if any) obtained by—
    - (i) the economic operator which is to receive the notice; and
    - (ii) the economic operator to be awarded the contract,
- and anything required by subregulation (8);
- (c) the name of the economic operator to be awarded the contract; and
  - (d) a precise statement of either—
    - (i) when, in accordance with regulation 100, the standstill period is expected to end and, if relevant, how the timing of its ending might be affected by any and, if so what, contingencies; or
    - (ii) the date before which the utility will not, in conformity with regulation 100, enter into the contract.
- (3) Where it is to be sent to a candidate, the notice referred to in subregulation (1) must include—
- (a) the reasons why the candidate was unsuccessful; and
  - (b) the information mentioned in subregulation (2), but as if the words “and relative advantages” were omitted from sub-subregulation (b).
- (4) Where the contract is permitted by these Regulations to be awarded without a call for competition, the utility need not comply with subregulation (1).
- (5) Where the only tenderer is the one who is to be awarded the contract, and there are no candidates, the utility need not comply with subregulation (1).
- (6) Where a utility awards a contract under a framework agreement or a dynamic purchasing system, that utility need not comply with subregulations (1) to (3).
- (7) Except to the extent that the utility has already informed the economic operator (whether by notice under subregulation (1) or otherwise), and subject to subregulation (11), a utility

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must within 15 days of the date on which it receives a request in writing from any economic operator which was unsuccessful—

- (a) inform that economic operator of the reasons why it was unsuccessful; and
- (b) if the economic operator submitted an admissible tender, the utility must inform that economic operator of the characteristics and relative advantages of the successful tender and—
  - (i) the name of the economic operator to be awarded the contract, or
  - (ii) the names of the economic operators admitted to the dynamic purchasing system.

(8) The reasons referred to in subregulations (2)(b) and (7)(a) must include any reason for the utility's decision that the economic operator did not meet the technical specifications—

- (a) as specified in regulation 58(10) by an equivalent means; or
- (b) in terms of the performance or functional requirements in regulation 58(11) by an equivalent means.

(9) Subject to subregulation (11), a utility must as soon as possible after the decision has been made, inform any candidates and tenderers of its decision to abandon or to recommence a contract award procedure in respect of which a contract notice has been published, in relation to—

- (a) the award of a contract; or
- (b) admittance to a dynamic purchasing system.

(10) A utility which informs an economic operator of its decision in accordance with subregulation (9) must—

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

(11) A utility may withhold any information to be provided in accordance with subregulation (1), (2), (7), (9), or (10) where the disclosure of such information—

- (a) would impede law enforcement;

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

**Standstill period.**

100.(1) Where regulation 99(1) applies, the utility must not enter into the contract before the end of the standstill period.

(2) Subject to subregulation (6), where the utility sends a regulation 99(1) notice to all the relevant economic operators by facsimile or electronic means, the standstill period ends at midnight at the end of the 10th day after the relevant sending date.

(3) Subject to subregulation (6), where the utility sends a regulation 99(1) notice to all the relevant economic operators only by other means, the standstill period ends at whichever of the following occurs first—

- (a) midnight at the end of the 15th day after the relevant sending date;
- (b) midnight at the end of 10th day after the date on which the last of the economic operators to receive such a notice receives it.

(4) In subregulations (2) and (3), “the relevant sending date” means the date on which the regulation 99(1) notices are sent to the relevant economic operators, and if the notices are sent to different relevant economic operators on different dates, the relevant sending date is the date on which the last of the notices is sent.

(5) Subject to subregulation (6), where the utility sends a regulation 99(1) notice to one or more of the relevant economic operators by facsimile or electronic means and to the others by other means, the standstill period ends at whichever of the following two times occurs latest—

- (a) midnight at the end of the 10th day after the date on which the last notice is sent by facsimile or electronic means;
- (b) the time when whichever of the following occurs first—
  - (i) midnight at the end of the 15th day after the date on which the last notice is sent by other means;

This version is out of date

- (ii) midnight at the end of the 10th day after the date on which the last of the economic operators to receive a notice sent by any such other means receives it.

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

## CHAPTER 2

### APPLICATION TO THE COURT

#### **Interpretation of Part Chapter.**

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

“contract”, except in regulation 116, includes a framework agreement;

“Court” means the Supreme Court;

“declaration of ineffectiveness” means a declaration made under regulation 111(2)(a) or 116(3);

“economic operator” has the meaning given to it by subregulation (3);

“grounds for ineffectiveness” has the meaning given to it by regulation 112;

“proceedings” means court proceedings taken for the purposes of regulation 104; and

“standstill period”, and references to its end, has the same meaning as in regulation 100.

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

(3) In regulations 102 and 103, “economic operator” has its usual meaning, but in the other provisions of this Part “economic operator” has the narrower meaning of an economic operator to which a duty is owed in accordance with regulations 102 or 103.

#### **Duty owed to economic operators from Gibraltar or the United Kingdom.**

102.(1) This regulation applies to the obligation on a utility to comply with—

- (a) the provisions of these Regulations; and
- (b) any retained EU obligation that is enforceable by virtue of section 7 of the European Union (Withdrawal) Act 2019 in the field of procurement in respect of a contract or design contest falling within the scope of these Regulations.

(2) That obligation is a duty owed to an economic operator in Gibraltar or the United Kingdom.

**Duty owed to economic operators from other States.**

103.(1) The duty owed in accordance with regulation 102 is a duty owed also to an economic operator from a State or other subject of international law in respect of which a relevant international agreement applies, but only where the agreement applies to the procurement concerned.

(2) For the purposes of paragraph (1), a relevant international agreement applies if the procurement is covered by an agreement listed in the Schedule to the European Withdrawal (Application of International Agreements) Act 2019.

**Enforcement of duties through the Court.**

104.(1) A breach of the duty owed in accordance with regulations 102 or 103 is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage.

(2) Proceedings for that purpose must be started in the Court, and regulations 105 to 117 apply to such proceedings.

**General time limits for starting proceedings.**

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

(2) Subject to subregulations (3) to (5), such proceedings must be started 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.

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



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

(4) Subject to subregulation (5), the Court may extend the time limit imposed by subregulation (2) (but not any of the limits imposed by regulation 106) where the Court considers that there is a good reason for doing so.

(5) The Court must not exercise its power under subregulation (4) so as to permit proceedings to be started more than 3 months after the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.

(6) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is served.

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

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

- (2) Such proceedings must be started—
- (a) where subregulation (3) or (5) applies, within 30 days beginning with the relevant date mentioned in that subregulation;
  - (b) in any event, within 6 months beginning with the day after the date on which the contract was entered into.
- (3) This subregulation applies where a relevant contract award notice has been published on the UK e-notification service, in which case the relevant date is the day after the date on which the notice was published.
- (4) For the purposes of subregulation (3), a contract award notice is relevant if, and only if—
- (a) the contract was awarded without prior publication of a contract notice; and
  - (b) the contract award notice includes justification of the decision of the utility to award the contract without prior publication of a contract notice.
- (5) This subregulation applies where the utility has informed the economic operator of—
- (a) the conclusion of the contract; and
  - (b) a summary of the relevant reasons,
- in which case the relevant date is the day after the date on which the economic operator was informed of the conclusion or, if later, was informed of a summary of the relevant reasons.
- (6) In subregulation (5), “the relevant reasons” means the reasons which the economic operator would have been entitled to receive in response to a request under regulation 73(2).
- (7) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is served.

**Starting proceedings.**

107.(1) Where proceedings are to be started, the economic operator must serve the claim form on the utility within 7 days after the date of issue.

- (2) Subregulation (3) applies where proceedings are started—

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- (a) seeking a declaration of ineffectiveness; or
- (b) alleging a breach of regulation 100, 108 or 109(1)(b) where the contract has not been fully performed.

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

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

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

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

108.(1) Where—

- (a) a claim form is issued in respect of a utility's decision to award the contract;
- (b) the utility has become aware that the claim form has been issued and that it relates to that decision; and
- (c) the contract has not been entered into,

the utility is required to refrain from entering into the contract.

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

- (a) the Court brings the requirement to an end by interim order under regulation 109(1)(a);
- (b) the proceedings at first instance are determined, discontinued or otherwise disposed of and no order has been made continuing the requirement (for example in connection with an appeal or the possibility of an appeal).

(3) This regulation does not affect the obligations imposed by regulation 100.

**Interim orders.**

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

- (a) bringing to an end the requirement imposed by regulation 108(1);
- (b) restoring or modifying that requirement;
- (c) suspending the procedure leading to—
  - (i) the award of the contract; or
  - (ii) the determination of the design contest,

in relation to which the breach of the duty owed in accordance with regulations 102 or 103 is alleged;

- (d) suspending the implementation of any decision or action taken by the utility in the course of following such a procedure.

(2) When deciding whether to make an order under subregulation (1)(a)—

- (a) the Court must consider whether, if regulation 103(1) were not applicable, it would be appropriate to make an interim order requiring the utility to refrain from entering into the contract; and
- (b) only if the Court considers that it would not be appropriate to make such an interim order may it make an order under subregulation (1)(a).

(3) If the Court considers that it would not be appropriate to make an interim order of the kind mentioned in subregulation (2)(a) in the absence of undertakings or conditions, it may require or impose such undertakings or conditions in relation to the requirement in regulation 108(1).

(4) The Court may not make an order under subregulation (1)(a) or (b) or (3) before the end of the standstill period.

(5) This regulation does not prejudice any other powers of the Court.

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

110.(1) This regulation applies where—

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- (a) the Court is satisfied that a decision or action taken by a utility was in breach of the duty owed in accordance with regulations 102 or 103; and
  - (b) the contract has not yet been entered into.
- (2) In those circumstances, the Court may do one or more of the following—
- (a) order the setting aside of the decision or action concerned;
  - (b) order the utility to amend any document;
  - (c) award damages to an economic operator which has suffered loss or damage as a consequence of the breach.
- (3) Where the Court is satisfied that an economic operator would have had a real chance of being awarded the contract if that chance had not been affected by the breach mentioned in subregulation (1)(a), the economic operator is entitled to damages amounting to its costs in preparing its tender and in participating in the procedure leading to the award of the contract.
- (4) Subregulation (3)—
- (a) does not affect a claim by an economic operator that it has suffered other loss or damage or that it is entitled to relief other than damages; and
  - (b) is without prejudice to the matters on which an economic operator may be required to satisfy the Court in respect of any such other claim.
- (5) This regulation does not prejudice any other powers of the Court.

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

111.(1) Subregulation (2) applies if—

- (a) the Court is satisfied that a decision or action taken by a utility was in breach of the duty owed in accordance with regulations 102 or 103; and
  - (b) the contract has already been entered into.
- (2) In those circumstances, the Court—

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- (a) must, if it is satisfied that any of the grounds for ineffectiveness applies, make a declaration of ineffectiveness in respect of the contract unless regulation 113 requires the Court not to do so;
- (b) must, where required by regulation 115, impose penalties in accordance with that regulation;
- (c) may award damages to an economic operator which has suffered loss or damage as a consequence of the breach, regardless of whether the Court also acts as described in sub-subregulations (a) and (b);
- (d) must not order any other remedies.

(3) Subregulation (2)(d) is subject to regulation 116(3) and (9) (additional relief in respect of specific contracts where a framework agreement is ineffective) and does not prejudice any power of the Court under regulation 114(3) or 115(10) (orders which supplement a declaration of ineffectiveness or a contract-shortening order).

(4) Regulation 110(3) and (4) (entitlement to tendering costs etc as damages for loss of a real chance of being awarded the contract) apply for the purposes of this subregulation.

### **Grounds for ineffectiveness.**

112.(1) There are three grounds for ineffectiveness.

#### *The first ground*

(2) Subject to subregulation (3), the first ground applies where the contract has been awarded without prior publication of a notice on the UK e-notification service in any case in which these Regulations required the prior publication of such a notice.

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

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

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- (4) In subregulation (3), “voluntary transparency notice” means a notice—
- (a) which contains the following information—
    - (i) the name and contact details of the utility;
    - (ii) a description of the object of the contract;
    - (iii) a justification of the decision of the utility to award the contract without prior publication of a notice on the UK e-notification service;
    - (iv) the name and contact details of the economic operator to be awarded the contract; and
    - (v) where appropriate, any other information which the utility considers it useful to include; and
  - (b) *Deleted*

*The second ground*

- (5) The second ground applies where all the following apply—
- (a) the contract has been entered into in breach of any requirement imposed by—
    - (i) regulation 100 (the standstill period);
    - (ii) regulation 108 (contract-making suspended by challenge to award); or
    - (iii) regulation 109(1)(b) (interim order restoring or modifying a suspension originally imposed by regulation 108);
  - (b) there has also been a breach of the duty owed to the economic operator in accordance with regulations 102 or 103 in respect of obligations other than those imposed by regulation 100(the standstill period) and this Part;
  - (c) the breach mentioned in sub-subregulation (a) has deprived the economic operator of the possibility of starting proceedings in respect of the breach mentioned in sub-subregulation (b), or pursuing them to a proper conclusion, before the contract was entered into; and

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- (d) the breach mentioned in sub-subregulation (b) has affected the chances of the economic operator obtaining the contract.

*The third ground*

(6) Subject to subregulation (7), the third ground applies where all the following apply—

- (a) the contract was awarded under a dynamic purchasing system;
- (b) the contract was awarded in breach of any requirement imposed by regulation 50(19) to (22) (award of contracts under dynamic purchasing systems); and
- (c) the estimated value of the contract is equal to or exceeds] the relevant threshold for the purposes of regulation 16.

(7) The third ground does not apply if all the following apply—

- (a) the utility considered the award of the contract to be in accordance with regulation 50(19) to (22);
- (b) the utility has, despite regulation 99(6), voluntarily complied with the requirements set out in regulation 99(1) to (3); and
- (c) the contract has not been entered into before the end of the standstill period.

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

113.(1) Where the Court is satisfied that any of the grounds for ineffectiveness applies, the Court must not make a declaration of ineffectiveness if—

- (a) the utility or another party to the proceedings raises an issue under this regulation; and
- (b) the Court is satisfied that overriding reasons relating to a general interest require that the effects of the contract should be maintained.

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

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



- (4) For that purpose, economic interests directly linked to the contract include—
- (a) the costs resulting from the delay in the execution of the contract;
  - (b) the costs resulting from the commencement of a new procurement procedure;
  - (c) the costs resulting from change of the economic operator performing the contract;  
and
  - (d) the costs of legal obligations resulting from the ineffectiveness.
- (5) For the purposes of subregulation (1)(b), overriding reasons may be taken to require that the effects of the contract should be maintained even if they do not require the Court to refrain from shortening the duration of the contract by an order under regulation 115(3)(a).

**The consequences of ineffectiveness.**

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

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

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

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

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

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

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

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

115.(1) Where the Court makes a declaration of ineffectiveness, it must also order that the utility pay a civil financial penalty of the amount specified in the order.

(2) Subregulation (3) applies where—

- (a) in proceedings for a declaration of ineffectiveness, the Court is satisfied that any of the grounds for ineffectiveness applies but does not make a declaration of ineffectiveness because regulation 113 requires it not to do so; or
- (b) in any proceedings, the Court is satisfied that the contract has been entered into in breach of any requirement imposed by regulation 100, 108 or 109(1)(b), and does not make a declaration of ineffectiveness (whether because none was sought or because the Court is not satisfied that any of the grounds for ineffectiveness applies).

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

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

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

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

- (a) the seriousness of the relevant breach of the duty owed in accordance with regulations 102 or 103;

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- (b) the behaviour of the utility;
- (c) where the order is to be made under subregulation (3), the extent to which the contract remains in force.

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

*Civil financial penalties*

(7) Where a utility is ordered by the Supreme Court to pay a civil financial penalty under this regulation—

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

(8) Where a utility is not a Government body any payment due under subregulation (7) may be enforced by the Minister as a judgment debt due to the Minister; and

*Contract shortening*

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

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

(11) Subregulation (12) applies where the parties to the contract have, at any time before the order under subregulation (3)(a) is made, agreed by contract any provisions for the purpose of regulating their mutual rights and obligations in the event of such an order being made.

(12) In those circumstances, the Court must not exercise its power to make an order under subregulation (9) in any way which is inconsistent with those provisions, unless and to the extent that the Court considers that those provisions are incompatible with the primary order that is being made, or has been made, under subregulation (3)(a).

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

**Ineffectiveness etc in relation to specific contracts under a framework agreement.**

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

- (a) was awarded under a framework agreement; and
- (b) was entered into before a declaration of ineffectiveness (if any) was made in respect of the framework agreement.

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

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

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

- (a) within the time limits mentioned in regulation 106 as applicable to the circumstances of the specific contract;
- (b) regardless of whether the claim was made at the same time as any claim for a declaration of ineffectiveness in respect of the framework agreement.

(5) Regulation 113 (general interest grounds for not making a declaration of ineffectiveness) applies for the purposes of subregulation (3), insofar as the overriding reasons relate specifically to the circumstances of the specific contract.

(6) This regulation does not prejudice the making of a declaration of ineffectiveness in relation to a specific contract in accordance with other provisions of these Regulations on the basis of the second ground of ineffectiveness set out in regulation 112(5), where—

- (a) the relevant breach of the kind mentioned in regulation 112(5)(a) is entering into the specific contract in breach of regulation 108 or 109(1)(b); and
- (b) the relevant breach of the kind mentioned in regulation 112 (5)(b) relates specifically to the award of the specific contract and the procedure relating to that

award, rather than to the award of the framework agreement and the procedure relating to it.

(7) A declaration of ineffectiveness must not be made in respect of a specific contract otherwise than in accordance with subregulation (3) or on the basis mentioned in subregulation (6).

(8) Where a declaration of ineffectiveness is made in respect of a specific contract in accordance with subregulation (3)–

(a) regulation 114 (the consequences of ineffectiveness) applies;

(b) regulation 115(1) (requirement to impose a civil financial penalty) does not apply.

(9) Where the Court refrains, by virtue of subregulation (5), from making a declaration of ineffectiveness which would otherwise have been required by subregulation (3), the Court must, subject to subregulation (10), order that the duration of the specific contract be shortened to the extent specified in the order.

(10) The extent by which the duration of the specific contract is to be shortened under subregulation (9) is the maximum extent, if any, which the Court considers to be possible having regard to what is required by the overriding reasons mentioned in subregulation (5).

(11) In subregulations (9) and (10), “duration of the specific contract” refers only to its prospective duration as from the time when the Court makes the order.

### **Injunctions against the Crown.**

117. In proceedings against the Crown, the Court has power to grant an injunction despite section 14 of the Crown Proceedings Act.

## **PART 6**

### **REVOCATION, SAVINGS AND TRANSITIONAL PROVISIONS**

#### **Revocation.**

118. The Procurement (Utilities Contracts) Regulations 2012 are revoked.

#### **Savings and transitional provisions.**

**1977-09**

**Public Finance (Control and Audit)**

**2016/085**

**Procurement (Utilities Contracts) Regulations 2016**

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119.(1) Where a utility has commenced a contract award procedure before the coming into operation of these Regulations, the Procurement (Utilities Contracts) Regulations 2012 must continue to have effect on and after the coming into operation of these Regulations in relation to that contract award procedure, as if those Regulations had not been revoked in accordance with regulation 118.

(2) A utility has commenced a contract award procedure as referred to in subregulation (1) where before the coming into operation of these Regulations, in relation to that procedure—

- (a) that utility has sent a contract notice to the Official Journal in order to invite tenders, requests to be selected to tender for or to negotiate in respect of a proposed contract;
- (b) in any case where there is no requirement to send a contract notice to the Official Journal in accordance with these Regulations, that utility has despatched any form of advertisement seeking offers or expressions of interest in a proposed contract; or
- (c) where there is no advertising as referred to in sub-subregulation (b), that utility has contacted any economic operator in order to seek expressions of interest or offers in respect of a proposed contract.

(3) Where a framework agreement has been concluded before the coming into operation of these Regulations, these Regulations do not apply to the award of any specific contract under that framework agreement.

(4) In this regulation, “contract notice” means a contract notice within the meaning of the Procurement (Utilities Contracts) Regulations 2012.