

Subsidiary Legislation made under s. 75 of the Public Finance (Control and Audit) Act 1977 and section 23(g)(i) of the Interpretation and General Clauses Act.

**PROCUREMENT (UTILITIES CONTRACTS)
REGULATIONS 2012**

Repealed by LN. 2016/085 as from 18.4.2016¹

(LN. 2012/090)

Commencement **21.6.2012**

Amending enactments	Relevant current provisions	Commencement date
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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into operation of these Regulations in relation to that contract award procedure, as if those Regulations had not been revoked in accordance with regulation 118.

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.

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.

In this regulation, “contract notice” means a contract notice within the meaning of the Procurement (Utilities Contracts) Regulations 2012.

EU Legislation/International Agreements involved:

Directive 89/665/EEC
Directive 92/13/EEC.
Directive 93/38/EEC
Directive 2004/17/EC
Directive 2004/18/EC

Directive 2007/66/EC
Decision 97/367/EC
Regulation (EU) No 842/2011
Regulation (EC) No 2195/2002
Regulation (EC) No 1564/2005

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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 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, the Minister has made the following Regulations—

**PART 1
PRELIMINARY**

Title and commencement.

1. These Regulations may be cited as the Procurement (Utilities Contracts) Regulations 2012 and come into operation on the day of publication.

Interpretation.

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

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

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

“central purchasing body” means a contracting authority, and which—

- (a) acquires goods or services intended for one or more utilities;
- (b) awards contracts intended for one or more utilities; or
- (c) concludes framework agreements for work, works, goods or services intended for one or more utilities;

“Commission” means the European Commission;

“Commission Decision 97/367/EC” means Commission Decision of 30 May 1997 establishing that the exploitation of geographical areas for the purpose of exploring for or extracting oil or gas does not constitute in the United Kingdom an activity defined in Article 2(2)(b)(i) of Council Directive 93/38/EEC and that entities carrying on such an activity are not to be considered in the United Kingdom as operating under special or exclusive rights within the meaning of Article 2(3)(b) of the Directive, as the same may be amended from time to time;

“Commission Regulation (EU) No 842/2011” means Commission Implementing Regulation (EU) No 842/2011 of 19 August 2011 establishing standard forms for the publication of notices in the field of public procurement and repealing Regulation (EC) No 1564/2005, as the same may be amended from time to time;

“Common Procurement Vocabulary” means the reference nomenclature applicable to contracts as adopted by Regulation (EC) No 2195/2002 of 5 November 2002 of the European Parliament and of the Council on the Common Procurement Vocabulary, as amended from time to time;

“contract” means a public services contract, a public supply contract or a public works contract, and includes a framework agreement where required by regulation 18(1) (utility’s choice to regard a framework agreement as a contract);

“contract documents” means the invitation to tender for or to negotiate the contract, the descriptive document (if any), the proposed conditions of contract, the specifications or descriptions of the goods, services, work or works required by the contracting authority and of the materials or goods to be used in or for such work or works, and all documents supplementary thereto;

“contract notice” means a contract notice sent to the Official Journal in accordance with regulation 16(2)(b);

“contracting authority” has the meaning given to it by regulation 3 of the Procurement (Public Contracts) Regulations 2012;

“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 relevant State and is established in Gibraltar or in a relevant State;

“CPC” means Central Product Classification of the United Nations;

“CPV” means Common Procurement Vocabulary;

“design contest” means a competition, particularly in the fields of planning, architecture, civil engineering and data processing—

- (a) which is conducted by or on behalf of a utility and in which that utility invites the entry by economic operators of plans and designs;
- (b) under the rules of which the plans or designs entered will be judged by a jury;
- (c) under which prizes may or may not be awarded; and
- (d) which enables the utility to acquire the use or ownership of plans or designs selected by the jury;

“disabled person” means any person recognised as disabled within the meaning of the Disabled Persons Act 1992;

“disability” has the same meaning as in the Disabled Persons Act 1992;

“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—
 - (i) satisfy the selection criteria specified by the utility; and
 - (ii) submit an indicative tender to the utility or person operating the system on its behalf which complies with the specification required by that utility or person;

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

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

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

“European standard” has the meaning given to it by regulation 12(1);

“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;

“framework agreement” means an agreement or other arrangement, which is not in itself a public supply contract, a public works contract or a public services contract, between one or more utilities and one or more economic operators which establishes the terms (in particular the terms as to price and, where appropriate, quantity) under which the economic operator will enter into one or more contracts with a utility in the period during which the framework agreement applies;

“goods” includes electricity, substances, growing crops and things attached to or forming part of the land which are agreed to be severed before the purchase or hire under a public supply contract and any ship, aircraft or vehicle;

“indicative tender” means a tender prepared by an economic operator seeking admission to a dynamic purchasing system which sets out the terms on which it would be prepared to enter into a contract with a utility should that utility propose to award a contract under the system;

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

“Minister”, subject to regulation 41, means the Minister responsible for finance;

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

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

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

“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 a notice sent to the Official Journal in accordance with regulation 15;

“Public Sector Directive” means Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public services contracts, as the same may be amended from time to time;

“public services contract” means a contract, in writing, for consideration (whatever the nature of the consideration) under which a utility engages a person to provide services but does not include–

- (a) a public works contract; or
- (b) a public supply contract;

but a contract for both goods and services shall be considered to be a public services contract if the value of the consideration

attributable to those services exceeds that of the goods covered by the contract and a contract for services which includes activities specified in Schedule 2 that are only incidental to the principal object of the contract shall be considered to be a public services contract;

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

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

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

“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;

“relevant State” has the meaning given to it by regulation 4(4);

“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;

“services concession contract” means a public services contract under which the consideration given by the utility consists of or includes the right to exploit the service or services to be provided under the contract;

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

- (a) who sought, who seeks, or who would have wished—
 - (i) to be the person to whom a public services contract is awarded; or
 - (ii) to participate in a design contest; and
- (b) who is a national of a relevant State and established in Gibraltar or in a relevant State;

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

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

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

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

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

“Utilities Directive” means Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, as the same may be amended from time to time;

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

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

“working day” means a day other than a Saturday, Sunday 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” means any of the activities specified in Schedule 2;

“works concession contract” means a public works contract under which the consideration given by a utility consists of or includes the grant of a right to exploit the work or works to be carried out under the contract;

“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.

(2) Subject to subregulation (3), in these Regulations—

- (a) “a Part A services contract” is a contract under which services specified in Part A of Schedule 3 are to be provided;
- (b) “a Part B services contract” is a contract under which services specified in Part B of Schedule 3 are to be provided.

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

- (a) a Part A services contract if the value of the consideration attributable to the services specified in Part A is greater than that attributable to those specified in Part B; and
- (b) a Part B services contract if the value of the consideration attributable to the services specified in Part B is equal to or greater than that attributable to those specified in Part A.

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

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

(5) In the event of varying interpretations of the scope of these Regulations, owing to possible differences between the CPV and the Nomenclature of Economic Activities in the European Community (“NACE”) listed in Schedule 2, or between the CPV and the Central product Classification (“CPC”) (provisional version) nomenclatures listed in Schedule 3, the NACE or the CPC nomenclature respectively shall take precedence.

Utilities.

3.(1) In these Regulations a utility is a relevant person specified in one of the Parts of Schedule 1 carrying out an activity in that Part.

(2) In this regulation and in Schedule 1–

“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;

“relevant person” means a person who is–

- (a) a contracting authority;
- (b) a public undertaking; or
- (c) not a contracting authority or a public undertaking, but whose activities include an activity specified in the second column of Schedule 1 and who carries out that activity on the basis of a special or exclusive right; 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 specified in the second column of Schedule 1 to one or more entities, and which substantially affects the ability of other entities to carry out such activities.

(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.

Economic operators.

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

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

(3) A utility shall (in accordance with Article 10 of the Utilities Directive)—

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

(4) In these Regulations a relevant State is a Member State or a State listed in Schedule 4.

Application of these Regulations.

5.(1) These Regulations apply whenever a utility seeks offers in relation to a proposed public supply contract, public works contract or Part A services contract or a dynamic purchasing system other than a contract or dynamic purchasing system excluded from the operation of these Regulations by regulations 6, 7, 8, 9 or 11.

(2) Whenever a utility seeks offers in relation to a proposed Part B services contract other than one excluded from the operation of these Regulations by regulations 6, 7, 8, 9 or 11—

- (a) Part 1 and Parts 9 and 10 of these Regulations apply; and
- (b) the following provisions in Parts 2 to 8 apply—
 - (i) regulation 12 (technical specifications in contract documents);
 - (ii) regulation 33 (contract award notices);
 - (iii) regulation 40 (statistical and other reports);
 - (iv) regulation 41 (provision of reports); and
 - (v) regulation 42 (publication of notices).

(3) A utility shall not enter into separate contracts with the intention of avoiding the application of these Regulations or the Procurement (Public Contracts) Regulations 2012, where applicable.

(4) Where a utility seeks offers in relation to a contract for the purpose of carrying out—

- (a) one or more activities specified in the second column of Schedule 1; and
- (b) one or more activities not specified in the second column of Schedule 1 but to which the Procurement (Public Contracts) Regulations 2012 apply,

and it is impossible, on objective grounds, to determine the activity for which the contract is principally intended, the utility shall award the contract in accordance with the Procurement (Public Contracts) Regulations 2012.

(5) Where a utility seeks offers in relation to a contract for the purpose of carrying out—

- (a) one or more activities specified in the second column of Schedule 1; and
- (b) one or more activities not specified in the second column of Schedule 1 nor subject to the Procurement (Public Contracts) Regulations 2012,

and it is impossible, on objective grounds, to determine the activity for which the contract is principally intended, the utility shall award the contract in accordance with these Regulations.

General exclusions.

6. These Regulations do not apply to the seeking of offers in relation to a proposed contract or dynamic purchasing system—

- (a) other than for the purpose of carrying out an activity specified in the Part of Schedule 1 in which the utility is specified or in respect of a proposed contract referred to in regulation 5(5);
- (b) for the purpose of carrying out any activity outside the territory of the European Union but only if the carrying out of that activity does not involve the physical use of a network or geographical area within the European Union;
- (c) for the purpose of acquiring goods, works or services in order to sell, hire or provide them to another person unless the utility has a special or exclusive right to sell, hire or provide such goods, works or services or other persons are not free to sell, hire or provide them under the same conditions;
- (d) which is classified as secret or where the performance of the contract must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions of Gibraltar or when the protection of the essential interests of the security of Gibraltar requires it;
- (e) where different rules govern the procedures leading to the award of the contract and it is to be entered into in accordance with—
 - (i) an international agreement concluded in conformity with the TFEU applicable to Gibraltar with a State which is not a relevant State and it relates to goods or the carrying out of a work or works or the provision of services

intended for the joint implementation or exploitation of a project related to that agreement;

- (ii) an international agreement relating to the stationing of troops; or
 - (iii) the contract award procedures of an organisation of which only States are members (an “international organisation”) or of which only States or international organisations are members;
- (f) by a utility which engages in an activity specified in Category 1 of Schedule 1 for the purchase of water;
- (g) by a utility which engages in an activity specified in Categories 2 to 6 of Schedule 1 for the purchase of energy or of fuel for the production of energy;
- (h) under which services are to be provided by a contracting authority, or by a person which is a contracting authority in a relevant State because that contracting authority or person has an exclusive right—
- (i) to provide the services; or
 - (ii) which is necessary for the provision of the services;
- in accordance with any published law, regulation or administrative provision which is compatible with the TFEU;
- (i) for the acquisition of land, including existing buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land;
- (j) for arbitration or conciliation services;
- (k) for financial services in connection with the issue, purchase, sale or transfer of securities or other financial instruments, in particular transactions by the utility to raise money or capital;
- (l) for employment and other contracts of service;
- (m) for research and development services unless—
- (i) the benefits are to accrue exclusively to the utility for its use in the conduct of its own affairs; and

- (ii) the services are to be wholly paid for by the utility;
- (n) which is a works concession contract or a services concession contract which is awarded by a utility carrying out an activity specified in the second column of Schedule 1, where the concession contract is awarded for carrying out or providing that activity,

except where these Regulations apply by virtue of Part M of Schedule 1; or
- (o) where—
 - (i) the Procurement (Defence and Security Public Contracts) Regulations 2012 apply; or
 - (ii) the application of those Regulations is excluded by regulation 6 (general exclusions) or regulation 8 (thresholds) of those Regulations.

Exclusion of contracts awarded to affiliated undertakings or joint ventures.

7.(1) For the purposes of this regulation—

“affiliated undertaking” means—

- (a) in respect of a utility which is subject to the seventh Council Directive 83/349/EC on consolidated accounts, as the same may be amended from time to time, any undertaking the accounts of which are consolidated with those of that utility; or
- (b) in any other case, any undertaking which is either a parent undertaking, a subsidiary undertaking or a fellow subsidiary undertaking of the utility and—
 - (i) an undertaking is a parent undertaking of a utility if it exercises a dominant influence over it, directly or indirectly, and for these purposes an undertaking exercises a dominant influence over another if—
 - (aa) it possesses the greater part of the issued share capital of that undertaking or controls the majority of the voting power attached to the issued share capital of that undertaking; or

(bb) it may appoint more than half of the individuals who are ultimately responsible for managing the affairs of that company;

and an undertaking is a subsidiary of a utility if the utility exercises such dominant influence over it; or

(ii) an undertaking is a fellow undertaking of a utility if both are subsidiary undertakings of the same parent undertaking; and

“joint venture” means an association formed exclusively by a number of utilities for the purpose of carrying out any of the activities specified in the second column of Schedule 1.

(2) Subject to subregulation (3), these Regulations do not apply to the seeking of offers in relation to contracts which—

- (a) a utility proposes to award to an affiliated undertaking; or
- (b) a joint venture proposes to award to an affiliated undertaking of one of its members.

(3) Subregulation (2) applies—

- (a) in relation to public services contracts, provided that at least 80% of the average turnover of the affiliated undertaking in respect of services for the preceding 3 years derives from the provision of such services to one or more of its affiliated undertakings;
- (b) in relation to public supply contracts, provided that at least 80% of the average turnover of the affiliated undertaking in respect of supplies for the preceding 3 years derives from the provision of such supplies to one or more of its affiliated undertakings; and
- (c) in relation to public works contracts, provided that at least 80% of the average turnover of the affiliated undertaking in respect of works for the preceding 3 years derives from the provision of such works to one or more of its affiliated undertakings.

(4) Where more than one of its affiliated undertakings provides the same or similar services, supplies or works, a utility shall calculate the percentages referred to in subregulation (3) by taking into account the total

turnover deriving respectively from the provision of services, supplies or works by those affiliated undertakings.

(5) For the purposes of subregulation (3), when turnover amounts are not available for the preceding 3 years because of the date upon which a relevant affiliated undertaking was created or commenced activities, it is sufficient for that affiliated undertaking to show, particularly by means of business projections, that the turnover in respect of the provision of services, supplies or works is credible.

(6) These Regulations do not apply to the seeking of offers in relation to contracts which—

- (a) a joint venture proposes to award to one of its members; or
- (b) a utility proposes to award to a joint venture of which it is a member provided that—
 - (i) the joint venture has been set up in order to carry out the activity for which the contract is being sought over a period of at least 3 years; and
 - (ii) the instrument setting up the joint venture stipulates that its members will be part of the joint venture for at least the same period.

(7) A utility which relies on the exclusions in subregulations (2) or (6) shall, if the Commission requests it, send to the Minister—

- (a) the names of the undertakings or joint ventures concerned;
- (b) the value of the consideration and the type of—
 - (i) services to be provided under any public services contract;
 - (ii) goods to be purchased or hired under any public supply contract; or
 - (iii) work or works to be carried out under any public works contracts;

excluded in accordance with subregulations (2) or (6); and

- (c) any information which is necessary to justify the use of the exclusion.

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

8.(1) A utility carrying out one or more of the activities referred to in Commission Decision 97/367/EC is excluded from having to comply with Parts 2 to 5 of these Regulations and regulations 36, 37, 39, 40 other than subregulations (2)(a), 42 and 45 in seeking offers in relation to a contract to be awarded for the purpose of carrying out one or more such activities.

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

- (a) hold a competition unless it can objectively justify not doing so; and
- (b) in—
 - (i) making information about its procurement intentions available to economic operators;
 - (ii) specifying its requirements to them;
 - (iii) establishing and using a qualification system;
 - (iv) selecting economic operators to tender for or to negotiate the contract;
 - (v) holding any design contest; and
 - (vi) awarding the contract,

make decisions objectively on the basis of relevant criteria.

(3) A utility which relies on the exemption in subregulation (1) shall—

- (a) in respect of a contract awarded by it the value of which, calculated in accordance with regulation 11, exceeds 5,000,000 euro, send to the Commission not later than 48 days after the award the following information—
 - (i) the name and address of the utility;

- (ii) the nature of the contract, namely whether it is a public supply contract, a public services contract or a public works contract and whether it is a framework agreement;
- (iii) a clear indication of the nature (for example, by using the Classification of Products by Activity) of—
 - (aa) the goods to be purchased or hired under the contract;
 - (bb) the work or works to be carried out under the contract; or
 - (cc) the services to be provided under the contract;
- (iv) whether the contract was advertised and, if so, in which publication and, if not, the procedure or method used to decide to whom the contract should be awarded;
- (v) the number of offers received;
- (vi) the date of the award of the contract;
- (vii) the name and address of the person to whom the contract was awarded;
- (viii) the value of the contract, calculated in accordance with regulation 11;
- (ix) the expected duration of the contract;
- (x) any share of the contract which has been, or may be, sub-contracted, to which over 10% of the value of the consideration to be given under the contract is attributable;
- (xi) in the case of a public supply contract, the country of origin of the goods and in the case of a public works contract or a public services contract, the principal country from which the contract is to be performed;
- (xii) where the contract was awarded on the basis of the offer which was the most economically advantageous, the main criteria on which the decision was based; and

- (xiii) whether the contract was awarded to an economic operator which offered a variant on the requirements specified in the contract documents; and
- (b) in respect of a public supply contract or a public services contract awarded by it the value of which, calculated in accordance with regulation 11, equals or exceeds 400,000 euro but does not exceed 5,000,000 euro—
 - (i) retain the information specified in paragraphs (a)(i) to (ix) for not less than 4 years after the award; and
 - (ii) either—
 - (aa) if the Commission requests that information in relation to any such contract, forthwith send it to the Minister; or
 - (bb) where no such request has been made, send that information to the Commission not later than 48 days after the end of the period of 3 months ending on the last day of March, June, September or December in which the contract was awarded.

Exemption of contracts where activity is directly exposed to competition.

9. (1) These Regulations do not apply to the seeking of offers in relation to a contract awarded by a utility for the purpose of carrying out an activity specified in Column 2 of Schedule 1 where that activity is directly exposed to competition on markets to which access is unrestricted, and this will be the case if one of the following conditions is satisfied—

- (a) the Minister has notified the Commission in accordance with Article 30 of the Utilities Directive of all the relevant facts and—
 - (i) the Commission has adopted a decision that an exemption should apply in response to such a notification; or

- (ii) the Commission has not adopted a decision in relation to such a notification within the time limits specified in Article 30(6) of the Utilities Directive;
- (b) the Commission has, on the application of a utility–
 - (i) adopted a decision that an exemption should apply to the activity concerned; or
 - (ii) not adopted such a decision within the time limit specified in Article 30(6) of the Utilities Directive; or
- (c) the Commission has, of its own initiative–
 - (i) adopted a decision that an exemption should apply to the activity concerned; or
 - (ii) not adopted such a decision within the time limit specified in Article 30(6) of the Utilities Directive, and for the purposes of this subparagraph that time limit commences on the date that the Commission has informed the Minister in accordance with that Article that the matter was under consideration.

(2) A utility may make an application to the Commission in accordance with Article 30 of the Utilities Directive for a decision that an activity that utility carries out or is proposing to carry out which is specified in the second column of Schedule 1 is directly exposed to competition on markets to which access is not restricted.

(3) An application made by a utility in accordance with subregulation (2) shall be in writing and shall specify–

- (a) the activity in respect of which the notification or application is made;
- (b) the relevant facts and in particular, any law, regulation, administrative provision or agreement concerning compliance with the conditions that the activity is not directly exposed to competition on markets to which access is not restricted; and
- (c) whether the activity concerned is subject to any of the EU legislation referred to in Annex XI to the Utilities Directive and where it is, the relevant implementing legislation in Gibraltar.

Reserved Contracts.

10.(1) In this regulation—

“supported business” means a service where more than 50% of the workers are disabled persons who by reason of the nature or severity of their disability are unable to take up work in the open labour market and “supported businesses” shall be interpreted accordingly;

“supported employment programme” means a scheme under which work is provided for disabled persons and where more than 50% of the workers so supported are disabled persons who by reason of the nature or severity of their disability are unable to take up work in the open labour market and “supported employment programmes” shall be interpreted accordingly; and

“supported factory” means an establishment where more than 50% of the workers are disabled persons who by reason of the nature or severity of their disability are unable to take up work in the open labour market and “supported factories” shall be interpreted accordingly.

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

(3) Where a utility has reserved the right to participate in a contract, framework agreement or dynamic purchasing system in accordance with subregulation (2), it shall follow the contract award procedures set out in these Regulations.

(4) When seeking offers in relation to a public contract, a framework agreement or a dynamic purchasing system, a utility shall specify in the contract notice if it is using the approach referred to in subregulation (2).

Thresholds.

11.(1) These Regulations do not apply to the seeking of offers in relation to a proposed contract, dynamic purchasing system or framework agreement where the estimated value of the contract, dynamic purchasing system or framework agreement at the relevant time is less than the relevant threshold.

(2) Except where subregulation (17) applies, for the purposes of subregulation (1), the relevant threshold is—

- (a) the sum mentioned in Article 16(a) of the Utilities Directive for a public supply contract or a public services contract; and
- (b) the sum mentioned in Article 16(b) of the Utilities Directive for a public works contract.

(3) The value in pounds sterling of any amount expressed in these Regulations in euro is calculated by reference to the rate for the time being applying for the purposes of the Utilities Directive as published from time to time in the Official Journal.

(4) For the purposes of subregulation (1) the estimated value of a contract is the value of the total consideration payable, (calculated in accordance with this regulation), which the utility expects to be payable under the contract.

(5) In determining the value of the total consideration which the utility expects to be payable under a contract it shall, where appropriate, take account of—

- (a) any form of option;
- (b) any renewal of the contract;
- (c) any prize or payment awarded by the utility to the economic operator;
- (d) the premium payable and other forms of remuneration for insurance services;
- (e) fees, commissions, interest or other forms of remuneration payable for banking and other financial services; or
- (f) fees, commissions or other forms of remuneration payable for design services.

(6) For the purposes of subregulation (1) the estimated value of a public supply contract for the hire of goods is—

- (a) the value of the consideration which the utility expects to be payable under the contract if the term of the contract is fixed for 12 months or less;
- (b) the value of the consideration which the utility expects to be payable under the contract if the term of the contract is fixed for more than 12 months; or

- (c) the value of the monthly consideration payable under the contract multiplied by 48 if the term of the contract is indefinite or uncertain at the time the contract is entered into.

(7) For the purposes of subregulation (1) the estimated value of a public services contract which does not indicate a total price, is—

- (a) the aggregate of the value of the consideration which the utility expects to be payable under the contract if the term of the contract is fixed for 48 months or less; or
- (b) the value of the consideration which the utility expects to be payable in respect of each month of the period multiplied by 48 if the term of the contract is fixed for more than 48 months, or over an indefinite period.

(8) Subject to subregulations (9) and (12), where a utility has a single requirement for goods or services or for the carrying out of a work or works and a number of contracts have been entered into or are to be entered into to fulfil that requirement, the estimated value for the purposes of subregulation (1) of each of those contracts is the aggregate of the value of the consideration which the utility expects to be payable under each of those contracts.

(9) Subregulation (8) does not apply to any contract (unless the utility chooses to apply that subregulation to a contract) if the contract has an estimated value of less than—

- (a) 80,000 euro for a public services contract or a public supply contract; or
- (b) 1,000,000 euro for a public works contract,

and the aggregate value of that contract and any other such contract is less than 20% of the aggregate of the value of the consideration which the utility has given or expects to be payable under all the contracts entered into or to be entered into to fulfil the single requirement for goods, services or for the carrying out of a work or works.

(10) Subject to subregulation (12), where a utility has a requirement over a period for goods or services and for that purpose enters into—

- (a) a series of contracts; or
- (b) a contract which under its terms is renewable,

the estimated value for the purposes of subregulation (1) of the contract shall be the amount calculated in accordance with subregulation (11).

(11) The utility shall calculate the amount referred to in subregulation (10) either—

(a) by taking the aggregate of the value of the consideration payable under contracts which—

(i) have similar characteristics; and

(ii) are for the same type of goods or services;

during the last financial year of the utility ending before, or the period of 12 months ending immediately before, the relevant time, and by adjusting that amount to take account of any expected changes in quantity and cost of the goods to be purchased or hired or services to be provided in the period of 12 months commencing with the relevant time; or

(b) by estimating the aggregate of the value of the consideration which the utility expects to be payable under contracts which have similar characteristics, and which are for the same type of goods or services during—

(i) in the case of public supply contracts, the period of 12 months from the first date of the delivery of the goods to be purchased or hired, or in the case of public services contracts, from the first date on which the services will be performed; or

(ii) the financial year if that is longer than 12 months.

(12) Notwithstanding subregulations (8) and (10), in relation to a public supply contract or a public services contract, when the goods or services are required for the sole purposes of a discrete operational unit within the organisation of a utility and—

(a) the decision whether to procure those goods or services has been devolved to such a unit; and

(b) that decision is taken independently of any other part of the utility;

the valuation methods described in subregulations (8) and (11) shall be adapted by aggregating only the value of the consideration which was

payable or the utility expects to be payable, as the case may be, under a public supply contract or a public services contract which was or is required for the sole purpose of that unit.

(13) Where a utility intends to provide any goods or services to the economic operator awarded a public works contract for the purpose of carrying out that contract, the value of the consideration of the public works contract for the purposes of subregulations (2) and (8) shall be taken to include the estimated value at the relevant time of those goods and services.

(14) Where the estimated value of a public works contract is less than the threshold and where goods or services which are not necessary for its execution are to be purchased, hired or provided under it, the estimated value of the contract for the purposes of subregulation (1) shall be the value of the consideration which the utility expects to give for the goods and services and the relevant contract shall be treated as a supply or public services contract, as appropriate.

(15) Where under a contract both goods are to be purchased or hired and services are to be provided, the estimated value of the contract is the aggregate of the values of the consideration attributable to the purchase or hire of the goods including any siting and installation of the goods and of the consideration attributable to the provision of the services, regardless of whether the estimated value of either the goods or services is less than the threshold specified in subregulation (2).

(16) The estimated value of a dynamic purchasing system or of a framework agreement is the aggregate of the values estimated in accordance with this regulation of all the contracts which could be entered into under the framework agreement or dynamic purchasing system.

(17) The relevant threshold for the purposes of subregulation (1) for a dynamic purchasing system or a framework agreement is the threshold for—

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

(18) A utility shall not enter into separate contracts nor exercise a choice under a valuation method with the intention of avoiding the application of these Regulations to those contracts.

(20) The relevant time for the purposes of subregulations (1), (11) and (13) means—

- (a) if the utility selects economic operators to tender for or to negotiate the contract in accordance with a qualification system established in accordance with regulation 25, the date on which the selection commences;
- (b) if the utility satisfies the requirement that there be a call for competition by indicating the intention to award the contract in a periodic indicative notice in accordance with regulation 16(2)(a)(i), the date on which the notice is sent to the Official Journal; or
- (c) in any other case, the date on which a contract notice would be sent to the Official Journal if the requirement that there be a call for competition applied and the utility decided to satisfy that requirement by sending such a notice.

PART 2

TECHNICAL SPECIFICATIONS

Technical specifications in contract documents.

12.(1) In this regulation—

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

“common technical specification” means a technical specification drawn up in accordance with a procedure recognised by the Member States with a view to uniform application in all Member States and which has been published in the Official Journal;

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

“European technical approval” means an approval of the fitness for use of a product, issued by an approval body designated for the purpose by a Member State, following a technical assessment of whether the product fulfils the essential requirements for building works,

having regard to the inherent characteristics of the product and the defined conditions of application and use;

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

“recognised bodies” means test and calibration laboratories and certification and inspection bodies which comply with applicable European standards and “recognised body” shall be interpreted accordingly;

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

“technical reference” means any product produced by European standardisation bodies, other than official standards, according to procedures adopted for the development of market needs; and

“technical specifications” means—

- (a) in the case of a public services contract or a public supply contract, a specification in a document defining the required characteristics of materials, goods or services, such as quality levels, environmental performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of a product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods and conformity assessment procedures; and
- (b) in the case of a public works contract, the totality of the technical prescriptions contained, in particular, in the contract documents, defining the characteristics required of the work, works, materials or goods, which permits the work, works, materials or goods to be described in a manner such that it fulfils the use for which it is intended by the utility and these characteristics shall include—
 - (i) levels of environmental performance, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, including the procedures concerning

quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions and production processes and methods;

- (ii) rules relating to design and costing, the test, inspection and acceptance conditions for work or works and methods or techniques of construction; and
- (iii) all other technical conditions which the utility is in a position to prescribe, under general or specific regulations, in relation to the finished work or works and to the materials or parts which they involve.

(2) Where a utility wishes to lay down technical specifications which must be met by—

- (a) the services to be provided under a public services contract and the materials and goods used in or for it;
- (b) the goods to be purchased or hired under a public supply contract; or
- (c) the work or works to be carried out under a public works contract and the materials and goods used in or for it,

it shall specify those technical specifications in the contract documents.

(3) When laying down technical specifications in accordance with subregulation (2), a utility shall wherever possible take into account accessibility criteria for disabled persons or the suitability of the design for all users.

(4) A utility shall ensure that technical specifications afford equal access to economic operators and do not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

(5) Subject to technical requirements which are mandatory in Gibraltar and to the extent that those requirements are compatible with EU obligations, a utility shall define the technical specifications required for a contract in accordance with subregulations (6), (7), (8) or (9).

(6) A utility may define the technical specifications referred to in subregulation (5)—

- (a) by reference to technical specifications defined in subregulation (1) in the following order of preference-

- (i) British standards transposing European standards;
 - (ii) European technical approvals;
 - (iii) common technical specifications;
 - (iv) international standards; or
 - (v) other technical reference systems established by the European standardisation bodies; or
- (b) in the absence of the technical specifications referred to in subregulation (a), by reference to the following technical specifications–
- (i) British standards;
 - (ii) British technical approvals; or
 - (iii) British technical specifications relating to the design, calculation and execution of the work or works and use of the products,

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

(7) A utility may define the technical specifications referred to in subregulation (5) in terms of performance or functional requirements (which may include environmental characteristics) provided that the requirements are sufficiently precise to allow an economic operator to determine the subject of the contract and a utility to award the contract.

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

(9) A utility may define the technical specifications referred to in subregulation (5) by reference to technical specifications referred to in subregulation (6) for certain characteristics and by reference to performance or functional requirements referred to in subregulation (7) for other characteristics.

(10) Where a utility defines technical specifications as referred to in subregulation (6), it shall not reject an offer on the basis that the materials, goods or services offered do not comply with those technical specifications if an economic operator proves to the satisfaction of the utility by any appropriate means that the one or more solutions that economic operator proposes in its tender satisfy the requirements of the technical specifications in an equivalent manner.

(11) Where a utility defines technical specifications in terms of performance or functional requirements as referred to in subregulation (7), it shall not reject an offer for materials, goods, services, work or works which complies with—

- (a) a British standard transposing a European standard;
- (b) a European technical approval;
- (c) a common technical specification;
- (d) an international standard; or
- (e) a technical reference system established by a European standardisation body,

if those technical specifications address the performance or functional requirements referred to by the utility and the economic operator proves in its tender to the satisfaction of the utility by any appropriate means that the work, works, materials, goods or services meet the performance or functional requirements of the utility.

(12) Where a utility lays down environmental characteristics in terms of performance or functional requirements as referred to in subregulation (7), it may use the detailed technical specifications, or if necessary, parts thereof, as defined by European, national or multi-national eco-labels or by any other eco-label, provided that-

- (a) those technical specifications are appropriate to define the characteristics of the materials, goods or services that are the object of the contract;
- (b) the eco-label requirements are drawn up on the basis of scientific information;
- (c) the eco-label is adopted using a procedure in which all stakeholders, such as government bodies, consumers,

manufacturers, distributors and environmental organisations, are able to participate; and

- (d) the technical specifications are accessible to any party interested.

(13) A utility may indicate in the contract documents that the materials, goods or services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents and shall accept any other appropriate means of proof that the materials, goods or services comply with those technical specifications.

(14) The term “appropriate means” referred to in subregulations (10), (11) and (13) includes a technical dossier of a manufacturer or a test report from a recognised body.

(15) A utility shall accept certificates from recognised bodies established in a Member State when considering whether a tender for a contract conforms with the technical specifications laid down by the utility in accordance with subregulation (2).

(16) Subject to subregulation (17), a utility shall not lay down technical specifications in the contract documents which refer to—

- (a) materials or goods of a specific make or source or to a particular process; or
- (b) trademarks, patents, types, origin or means of production,

which have the effect of favouring or eliminating particular economic operators.

(17) Notwithstanding subregulation (16), exceptionally, a utility may incorporate the references referred to in subregulation (16) into the technical specifications in the contract documents, provided that the references are accompanied by the words “or equivalent”, where—

- (a) the subject of the contract makes the use of such references indispensable; or
- (b) the subject of the contract cannot otherwise be described by reference to technical specifications which are sufficiently precise and intelligible to all economic operators.

(18) Subject to subregulation (19), a utility shall provide to any economic operator which is interested in obtaining a contract and which makes a

request, a copy of the technical specifications which are regularly laid down as terms of the contracts which that utility awards or which it intends to lay down as terms of a contract which has been indicated in a periodic indicative notice sent to the Official Journal in accordance with regulation 15.

(19) Where the technical specifications referred to in subregulation (18) are based on documents which are separately available to economic operators, the obligation in subregulation (18) shall be satisfied by informing any economic operator which makes a request, of the documents which include those technical specifications.

Variants.

13.(1) Where a utility intends to award a contract on the basis of the offer which is the most economically advantageous in accordance with regulation 31(1)(a), it shall indicate in the contract notice whether or not it authorises economic operators to submit offers which contain variants on the requirements specified in the contract documents and a utility shall not accept an offer which contains a variant without that indication.

(2) Where a utility authorises a variation in accordance with subregulation (1), it shall state in the contract notice the minimum requirements to be met by the variants and any specific requirements for the presentation of an offer which contains variants.

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

(4) A utility shall not reject an offer which contains variants on the requirements specified in the contract documents on the ground that—

- (a) where it intends to award a public services contract, the offer would lead to the award of a public supply contract; or
- (b) where it intends to award a public supply contract, the offer would lead to the award of a public services contract.

PART 3
PROCEDURES LEADING TO THE AWARD OF A CONTRACT

The open, restricted and negotiated procedures.

14. For the purposes of seeking offers in relation to a proposed contract a utility shall use the open procedure, the restricted procedure or the negotiated procedure.

Periodic indicative notices.

15.(1) Subject to subregulations (4), (6) and (7), a utility shall, at least once every 12 months, send a notice in the form of the periodic indicative notice in Annex IV to Commission Regulation (EU) No 842/2011 and containing the information therein specified to the Commission or publish it on that utility's buyer profile as soon as possible after—

- (a) the beginning of the financial year in the case of public supply contracts, public services contracts or framework agreements for the purchase or hire of goods or for the provision of services; or
- (b) the decision authorising the programme of public works contracts or framework agreements for the carrying out of work or works, in the case of public works contracts or framework agreements for the carrying out of work or works.

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

- (a) the public supply contracts, the public services contracts or the framework agreements referred to in subregulation (1)(a) which the utility expects to award during the period of 12 months beginning with the date of the notice; and
- (b) the public works contracts or the framework agreements referred to in subregulation (1)(b) which the utility expects to award during the period of 12 months beginning with the date of the notice;

and that notice shall be sub-divided to give that information separately for each product area of goods by reference to the CPV nomenclature of each category of works or services as specified in Schedules 2 and 3.

(3) Where a utility publishes a notice on its buyer profile in accordance with subregulation (1), it shall also send a notice informing of such publication to the Commission by electronic means in accordance with the format and procedure for sending notices specified in paragraph 3 of Annex XX to the Utilities Directive.

(4) The obligation to publish a periodic indicative notice in accordance with subregulation (1) applies only to proposed contracts or framework agreements which are not excluded from the application of these Regulations by regulations 6, 7, 8, 9 or 11 and where, at the date of despatch of the notice—

- (a) the total consideration which the utility expects to be payable under—
 - (i) public supply contracts or framework agreements for the purchase or hire of goods falling within the same product area; or
 - (ii) Part A services contracts or framework agreements for the provision of services falling within the same category specified in Part A of Schedule 3,

is equal to or exceeds 750,000 euro; or

- (b) the total consideration which the utility expects to be payable under public works contracts or framework agreements for the carrying out of work or works is equal to or exceeds the sum mentioned in Article 16(b) of the Utilities Directive.

(5) A notice sent to the Commission or published on the utility's buyer profile in accordance with subregulation (1) need not repeat information about contracts included in a previous periodic indicative notice, provided that the notice clearly states that it is an additional notice.

(6) The obligation to publish a periodic indicative notice applies only where the utility takes the option of shortening time limits for the receipt of tenders in accordance with regulation 22(3).

(7) This regulation does not apply to a proposed contract or framework agreement where the procedure for the award or conclusion of the framework agreement is a contract award procedure without a call for competition in accordance with regulation 17.

Call for competition.

16.(1) Subject to regulation 17, for the purposes of seeking offers in relation to a proposed contract, a utility shall make a call for competition.

(2) The requirement under subregulation (1) to make a call for competition is satisfied—

- (a) in the case of a contract to be awarded using the restricted procedure or the negotiated procedure-
 - (i) if the intention to award the contract has been indicated in a periodic indicative notice and the requirements referred to in subregulation (3) are satisfied in relation to the contract; or
 - (ii) if a notice indicating the existence of a qualification system for economic operators has been sent to the Official Journal in accordance with regulation 25(17) and the requirement referred to in subregulation (5) is satisfied; or
 - (b) in any case by sending to the Official Journal a contract notice in the form of Annex V to Commission Regulation (EU) No 842/2011 and containing the information therein specified in respect of the contract.
- (3) The requirements referred to in subregulation (2)(a)(i) are that–
- (a) the periodic indicative notice refers specifically to the goods, works or services which are to be the subject of the proposed contract;
 - (b) the notice states that offers are to be sought using the restricted procedure or the negotiated procedure without further publication of a notice calling for competition and invites economic operators to express their interest in writing;
 - (c) the utility sends to all economic operators which express an interest, detailed information, including the information described in subregulation (4), on the contract concerned and before beginning the selection of economic operators invites them to confirm their wish to be selected to tender for or to negotiate the contract; and
 - (d) the notice referred to in paragraph (b) was published not more than 12 months before the date on which the invitation is sent out in accordance with paragraph (c).
- (4) The information referred to in subregulation (3)(b) shall include–
- (a) the nature and quantity or extent of the goods, work, works or services to be supplied under the contract;

- (b) any options for further supplies, work, works or services and, if known, an estimate of the timing when such options may be exercised;
- (c) in the case of recurring contracts for goods, work, works or services, their nature and quantity or extent, and, if known, the estimated date of the subsequent calls for competition for the goods to be supplied, the work or works to be carried out or the services to be provided;
- (d) a statement of whether the contract is to be awarded using the restricted procedure or the negotiated procedure;
- (e) any date for beginning or completing the delivery of goods or for the carrying out of work or works or for providing services;
- (f) the address to which and the date by which an application to be invited to tender must be submitted and the one or more languages in which it must be submitted;
- (g) the address of the utility and any information needed to obtain specifications and other documents relating to the proposed contract;
- (h) any economic and technical requirements, financial guarantees and information required from economic operators;
- (i) the amount to be paid for and the terms of payment in respect of the documents relating to the proposed contract;
- (j) a statement of whether the utility is inviting offers for purchase, lease, rental or hire-purchase or involving more than one of these methods; and
- (k) the contract award criteria and their weighting in accordance with regulation 31(3) and 31(4) or the descending order of importance of such criteria in accordance with regulation 31(5), if this information is not specified in the periodic indicative notice or the contract documents.

(5) The requirement referred to in subregulation (2)(a)(ii) is that the economic operators selected to tender for or to negotiate the contract are selected from the candidates which qualify in accordance with the system.

Award without a call for competition.

17.(1) A utility may seek offers in relation to a proposed contract without a call for competition in the following circumstances—

- (a) in the absence of tenders, suitable tenders or applications in response to a procedure with a call for competition but only if the original terms of the proposed contract offered in the discontinued procedure have not been substantially altered;
- (b) when the contract is to be awarded purely for the purposes of research, experiment, study or development but not where it has the purpose of securing profit or of recovering research and development costs and insofar as its award will not prejudice the competitive award of subsequent contracts which are, in particular, for the same purposes;
- (c) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may only be performed by a particular economic operator;
- (d) when (but only if it is strictly necessary) for reasons of extreme urgency brought about by events unforeseeable by the utility the time limits specified in regulation 22(2) to (11) cannot be met;
- (e) when the contract to be awarded is a public supply contract and the goods to be purchased or hired under the contract are required by the utility as a partial replacement for, or in addition to, existing goods or an installation and when to obtain the goods from a supplier other than the supplier which supplied the existing goods or the installation would oblige the utility to acquire goods having different technical characteristics which would result in-
 - (i) incompatibility between the existing goods or the installation and the goods to be purchased or hired under the contract; or
 - (ii) disproportionate technical difficulties in the operation and maintenance of the goods or the installation;
- (f) when a utility wants an economic operator which has entered into a public works contract or a public services contract with that utility to carry out additional work or works or provide additional services which were not included in the project initially considered or in the original public works contract or public services contract but which through unforeseen

circumstances have become necessary, and such work, works or services—

- (i) cannot for technical or economic reasons be carried out or provided separately from those under the original contract without major inconvenience to the utility; or
 - (ii) can be carried out or provided separately from those under the original contract but are strictly necessary to the later stages of the performance of that contract;
- (g) subject to subregulation (2), when the utility wants an economic operator which has entered into a public works contract with that utility following a call for competition which satisfies the requirement of regulation 16(1) to carry out new work or works which are a repetition of the work or works carried out under the original contract and which are in accordance with the project for the purpose of which the first contract was entered into;
- (h) in respect of a public supply contract for the purchase or hire of goods quoted and purchased on a commodity market;
- (i) when the contract to be awarded is to be awarded under a framework agreement which has been concluded in accordance with these Regulations and to which the provisions of regulation 18 apply;
- (j) when the contract to be awarded is a public supply contract, to take advantage of a particularly advantageous bargain available for a very short period of time at a price considerably lower than normal market prices;
- (k) when the contract to be awarded is a public supply contract, to take advantage of particularly advantageous conditions for the purchase of goods in a closing down sale or in a sale brought about because a supplier is subject to a procedure referred to in regulation 26(5)(a), (b) and (c); and
- (l) in the case of public services contracts, when the rules of a design contest require the contract to be awarded to the successful contestant or to one of the successful contestants, provided that all successful contestants are invited to negotiate the contract.

(2) A utility shall not seek offers without a call for competition in accordance with subregulation (1)(g) unless—

- (a) the original contract was awarded after a call for competition;
- (b) when the utility invited contractors to tender for or negotiate the contract it gave notice that a public works contract for new work or works which would be a repetition of the work or works carried out under the original contract may be awarded without a call for competition in accordance with subregulation (1)(g); and
- (c) in determining the estimated value of the original contract for the purposes of regulation 11 the utility took into account the value of the consideration which it expected to be payable for the new works.

Framework agreements.

18.(1) A utility may regard a framework agreement as a contract within the meaning of these Regulations and award it in accordance with these Regulations and in such a case a reference in these Regulations to a contract includes a framework agreement, except where the context otherwise requires.

(2) A utility which has entered into a framework agreement awarded in accordance with these Regulations may rely on regulation 17(1)(i) when awarding a contract under a framework agreement.

(3) A utility which has not entered into a framework agreement awarded in accordance with these Regulations shall not rely on regulation 17(1)(i) when awarding a contract under a framework agreement.

(4) A utility may not misuse a framework agreement in order to prevent, restrict or distort competition.

Dynamic purchasing systems.

19.(1) A utility using a dynamic purchasing system shall comply with this regulation.

(2) The utility which seeks to establish a dynamic purchasing system shall comply with the requirements of regulation 44(2) to (7) and shall use only electronic means to—

- (a) establish that system; and

(b) award contracts under it.

(3) The utility shall use the open procedure in accordance with these Regulations to establish a dynamic purchasing system up to the beginning of the procedure for the award of contracts under the system set out in this regulation.

(4) When establishing a dynamic purchasing system, the utility shall—

(a) send to the Official Journal as soon as possible after forming the intention a notice, in the form of the contract notice in Annex V to Commission Regulation (EU) No 842/2011 stating that a dynamic purchasing system is to be established; and

(b) produce a specification which indicates—

(i) the nature of the goods, work, works or services intended to be purchased under that system; and

(ii) information concerning the purchasing system, the electronic equipment to be used in its operation, the arrangements for technical connection to the system, the rules governing its operation and any other necessary information relating to the system.

(5) When establishing a dynamic purchasing system the utility may also produce additional documents relating to the operation of the system.

(6) Where the utility establishes a dynamic purchasing system it shall—

(a) offer unrestricted, direct and full access to the specification and to any additional documents by electronic means from the date of publication of the contract notice to the date when the system ceases to be operated; and

(b) indicate in the contract notice the internet address at which such documents may be examined.

(7) Throughout the duration of the dynamic purchasing system, the utility shall—

(a) give any economic operator the opportunity to—

(i) submit an indicative tender; and

(ii) be admitted to that system under the conditions referred to in subregulation (8); and

(b) complete the evaluation of an indicative tender within 15 days from the date of its submission or such longer period as that utility may determine if no invitation to tender is issued under the system as provided in subregulation (13) within the 15 day period.

(8) The utility shall admit to the dynamic purchasing system each economic operator which satisfies the selection criteria and has submitted an indicative tender which complies with the specification and any additional documents produced in accordance with subregulation (5) by the utility when establishing the system.

(9) The utility shall as soon as possible notify an economic operator of its admission to a dynamic purchasing system or of the rejection of its indicative tender and shall do so in writing if requested by the economic operator.

(10) An economic operator which is admitted to a dynamic purchasing system may improve its indicative tender at any time provided that the improved tender complies with the specification described in subregulation (4)(b).

(11) Where the utility proposes to award a contract under a dynamic purchasing system, it shall send to the Official Journal as soon as possible after forming the intention a notice, in the form of a simplified contract notice on a dynamic purchasing system in Annex IX to Commission Regulation (EU) No 842/2011, inviting economic operators to submit an indicative tender in accordance with subregulation (7)(a)(i) not less than 15 days from the date of the despatch of the simplified contract notice.

(12) The indicative tenders received within the period specified in subregulation (11) shall be evaluated by the utility for admittance to the dynamic purchasing system before it proceeds with the issue of invitations to submit tenders in relation to any contract to be awarded under the dynamic purchasing system to an economic operator admitted to the system.

(13) The utility shall invite all economic operators admitted to the dynamic purchasing system to submit a tender for each contract within a time limit specified by the utility.

(14) For each contract to be awarded under the dynamic purchasing system the utility—

- (a) shall award the contract to the economic operator which submits the tender which best meets the award criteria specified in the contract notice for the establishment of the dynamic purchasing system; and
- (b) may, if appropriate, formulate those award criteria more precisely in the invitation to submit tenders.

(15) The utility shall not charge any economic operator seeking admission to a dynamic purchasing system or which has been admitted to such a system in relation to any aspect of that system.

(16) A dynamic purchasing system established by the utility shall not be operated for more than 4 years, unless there are exceptional circumstances.

(17) The utility shall not use a dynamic purchasing system improperly or in such a way as to prevent, restrict or distort competition.

Electronic auctions.

20.(1) A utility which holds an electronic auction shall comply with this regulation.

(2) Subject to subregulation (3), the utility may hold an electronic auction when using—

- (a) the open procedure;
- (b) the restricted procedure;
- (c) the negotiated procedure with a prior call for competition; or
- (d) the procedure set out in regulation 19 on the opening of competition for contracts to be awarded under a dynamic purchasing system.

(3) The utility shall not hold an electronic auction to precede the award of a public services contract or a public works contract having as its subject matter intellectual performance, such as the design of works.

(4) The utility may only hold an electronic auction to precede the award of a contract when the contract specification can be established with precision.

(5) The utility shall base an electronic auction on—

- (a) price alone where the contract is to be awarded on the basis of the lowest price; or
- (b) price or the values of quantifiable elements of tenders indicated in the contract specification, where the contract is to be awarded on the basis of the offer which is the most economically advantageous in accordance with regulation 31(1)(a).

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

(7) A contract specification prepared by the utility in relation to a contract the award of which is to be preceded by an electronic auction shall include—

- (a) the quantifiable elements of tenders capable of expression in figures or percentages which will be the subject of the electronic auction;
- (b) any limitations on the values for the quantifiable elements of tenders (resulting from the contract specification) which may be submitted in the electronic auction;
- (c) the information to be made available to economic operators during the electronic auction and, where appropriate, an indication of when it will be made available to them;
- (d) a description of the electronic auction process;
- (e) the conditions under which economic operators will be able to bid and, in particular, the minimum differences which may be required when bidding; and
- (f) all relevant information concerning—
 - (i) the electronic system to be used in the electronic auction; and
 - (ii) the arrangements for and technical specifications relevant to connection to the electronic system to be used.

(8) Before proceeding with an electronic auction, the utility shall—

- (a) make an initial evaluation of the tenders in accordance with the award criteria specified and with any weighting fixed for them; and

- (b) by electronic means simultaneously invite all the economic operators which have submitted admissible tenders to submit new prices or new values in the electronic auction.

(9) Where the utility is to award a contract on the basis of the offer which is most economically advantageous to it in accordance with regulation 31(1)(a), each invitation referred to in subregulation (8)(b) shall include the outcome of the evaluation of the tender submitted by the economic operator to which the invitation is sent, carried out in accordance with the weighting described in regulation 31(3).

(10) The utility shall include in the invitation referred to in subregulation (8)(b)–

- (a) all relevant information concerning individual connection to the electronic system to be used in the electronic auction;
- (b) the date and time of the start of the electronic auction;
- (c) the number of phases in the electronic auction;
- (d) the mathematical formula to be used in the electronic auction to determine automatic re-ranking of tenders on the basis of the new prices or new values to be submitted by economic operators and incorporating the weighting of all the criteria set to determine the most economically advantageous tender;
- (e) where variant bids are authorised by the utility, a separate mathematical formula for each variant; and
- (f) the basis on which the electronic auction is to be closed and the appropriate additional information specified in subregulation (16).

(11) In relation to the formula referred to in subregulation (10)(d), any ranges used in the weighting of criteria shall be set at a specified value before the invitation is sent to economic operators.

(12) At least two working days must elapse between the date on which the invitation referred to in subregulation (8)(b) is sent and the date of the electronic auction.

(13) During each phase of an electronic auction, the utility–

- (a) shall instantaneously communicate to all economic operators participating in the auction at least sufficient information to enable them to ascertain their relative rankings in the auction at any time;
- (b) may communicate to each economic operator other information concerning prices or values submitted by other economic operators provided that this has been stated in the contract specification; and
- (c) may disclose the number of economic operators participating in that phase of the auction.

(14) During any phase of an electronic auction the utility shall not disclose the identity of any economic operator participating in the auction.

(15) The utility shall close an electronic auction—

- (a) at the date and time fixed for closure in the invitation referred to in subregulation (8)(b);
- (b) when it receives no further new prices or new values which meet the requirements concerning minimum differences; or
- (c) when the number of phases in the electronic auction specified in the invitation referred to in subregulation (8)(b) has been completed.

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

- (a) as described in subregulation (15)(b), it shall state in the invitation referred to in subregulation (8)(b) the period which it intends to allow to elapse before it closes the auction after receiving a submission from an economic operator participating in the auction; or
- (b) as described in subregulation (15)(c), it shall state in the invitation referred to in subregulation (8)(b) the timetable for each phase in the auction.

(17) After closing an electronic auction a utility shall award the contract in accordance with regulation 31 on the basis of the results of the electronic auction.

(18) The utility shall not use an electronic auction improperly or in such a way as to prevent, restrict or distort competition or to change the subject

matter of the contract as referred to in the contract notice and defined in the specification.

(19) The references to values in subregulations (5)(b), (8)(b), (10)(d), (13)(b) and (15)(b) shall be interpreted as including price.

Central purchasing bodies.

21.(1) A utility may purchase work, works, goods or services from or through a central purchasing body.

(2) Where a utility makes purchases in accordance with subregulation (1), it shall be deemed to have complied with these Regulations, or where appropriate the Procurement (Public Contracts) Regulations 2012, to the extent that the central purchasing body has complied with them.

Time limits.

22.(1) Subject to the minimum time limits specified in this regulation, a utility shall take account of all the circumstances, in particular, the complexity of the contract and the time required for drawing up tenders when fixing time limits for receipt by it of requests to be selected to tender for or to negotiate the contract and for the receipt by it of tenders.

(2) Subject to subregulations (3), (6) and (7), the date which a utility using the open procedure fixes as the last date for the receipt by it of tenders made in response to the contract notice shall be specified in the notice and shall be not less than 52 days from the date of despatch of the notice.

(3) Where—

- (a) the utility has published a periodic indicative notice in accordance with regulation 15;
- (b) the periodic indicative notice contained as much of the information specified in the form of periodic indicative notice used to call for competition in Annex IV to Commission Regulation (EU) No 842/2011 as was available at the time of publication; and
- (c) the periodic indicative notice was sent to the Official Journal at least 52 days and not more than 12 months before the date on which the contract notice was despatched,

a utility using the open procedure may substitute for the period of not less than 52 days specified in subregulation (2) a shorter period of generally not less than 36 days and in any event not less than 22 days.

(4) The date which a utility using the restricted procedure or the negotiated procedure with a call for competition fixes as the last date for the receipt by it of requests to be selected to tender for or to negotiate the contract shall be specified in the contract notice or, where the call for competition is made by means of a periodic indicative notice, in the invitation to economic operators made in accordance with regulation 16(3)(b), and shall in general be at least 37 days from the date of the despatch of the notice or invitation and shall in any case be not less than 22 days from that date, apart from when the notice is transmitted by electronic means in accordance with subregulation (6) or facsimile in which case it shall be not less than 15 days.

(5) The date which is the last date for the receipt of tenders made in response to an invitation to tender by a utility using the restricted procedure or the negotiated procedure with a call for competition may be agreed between the utility and the economic operators invited to tender and shall be the same date for all economic operators or, in the absence of agreement as to the date, shall be fixed by the utility and shall be as a general rule at least 24 days and in any event not less than 10 days from the despatch of the invitation to tender.

(6) Where a contract notice is transmitted by electronic means in accordance with the format and procedures referred to in paragraph 3 of Annex XX to the Utilities Directive, a utility may reduce the time limits by 7 days for—

- (a) the receipt by it of requests to be selected to tender for or to negotiate the contract; and
- (b) the receipt by it of tenders when using the open procedure.

(7) Subject to subregulation (5), a utility using the open procedure, the restricted procedure or the negotiated procedure may reduce the time limits for the receipt by it of tenders by 5 days provided that—

- (a) the utility offers unrestricted and full direct access by electronic means to the contract documents from the date of publication of the contract notice; and
- (b) the contract notice specifies the internet address at which the documents referred to in paragraph (a) are available.

(8) When using the reductions specified in subregulations (3), (6) and (7), the date which a utility using the open procedure fixes as the last date for the receipt by it of tenders, shall be not less than 15 days from the date of despatch of the contract notice.

(9) Where the contract notice is not transmitted by facsimile or electronic means and when using the reductions specified in subregulations (3), (6) and (7), the date which a utility using the open procedure fixes as the last date for the receipt by it of tenders, shall be not less than 22 days from the date of despatch of the contract notice.

(10) When using the reductions specified in subregulations (3), (6) and (7) the date which a utility using the restricted procedure or the negotiated procedure with a call for competition fixes as the last date for the receipt by it of requests to be selected to tender for or to negotiate the contract, shall be not less than 15 days from the date of despatch of the notice or invitation.

(11) Subject to subregulation (5) and when using the reductions specified in subregulations (3), (6) and (7), the date which a utility using the restricted procedure or the negotiated procedure with a call for competition fixes as the last date for the receipt by it of tenders, shall be not less than 10 days from the date of despatch of the invitation to tender.

(12) Subject to subregulation (5), a utility shall extend the time limit for receipt by it of tenders in order that all the information necessary for the preparation of a tender is available to all economic operators where—

- (a) an economic operator requests the contract documents in sufficient time to allow a utility to respond in accordance with subregulations (13) and (14) and, for whatever reason, the contract documents are not supplied in accordance with those subregulations; or
- (b) it is necessary that the economic operators be given the opportunity to inspect the site or premises or documents relating to the contract documents.

(13) Where a utility using the open procedure does not offer unrestricted and full direct access by electronic means to the contract documents in accordance with subregulation (7), the utility shall send the contract documents to an economic operator within 6 days of the receipt of a request from that economic operator, provided that the documents are requested in good time before the date specified in the contract notice as the final date for the receipt by it of tenders.

(14) A utility using the open procedure, the restricted procedure or the negotiated procedure shall supply to an economic operator such further information relating to the contract documents as may be reasonably requested by that economic operator provided that the request is received in sufficient time to enable the utility to supply the information not later than 6 days before the date specified in the contract notice as the final date for the receipt by it of tenders.

(15) A utility using the restricted procedure or the negotiated procedure with or without a call for competition shall send invitations in writing simultaneously to each of the economic operators selected to tender for or to negotiate the contract and the invitation shall—

- (a) be accompanied by the contract documents;
- (b) specify the internet address which offers unrestricted and full direct access by electronic means to the contract documents in accordance with subregulation (7); or
- (c) where the contract documents are held by an entity other than the utility, specify the address to which requests for contract documents should be sent including any final date for making such requests and the amount and any method of payment of any fee which may be charged for supplying that information.

(16) Where the contract documents are held by an entity other than the utility, the utility shall ensure that the contract documents are sent to economic operators by the most rapid means of communication practicable.

(17) The utility shall include the following information in the invitation—

- (a) the final date for making requests for further information and the amount and method of payment of any fee which may be charged for supplying that information;
- (b) the final date for receipt by it of tenders, the address to which they must be sent and the one or more languages in which they must be drawn up;
- (c) a reference to any contract notice;
- (d) an indication of the information to be included with the tender;
- (e) the criteria for the award of the contract if this information was not specified in the contract notice, the notice on the existence

of a qualification system used as a means of calling for competition published in accordance with regulation 16(2)(a)(ii) or the contract documents; and

- (f) the relative weighting of the contract award criteria or, where appropriate, the descending order of importance of such criteria if this information was not specified in the contract notice, the notice on the existence of a qualification system or the contract documents.

PART 4
QUALIFICATION AND SELECTION OF ECONOMIC
OPERATORS

General.

23.(1) Where a utility establishes criteria for the rejection of economic operators in accordance with regulations 26(1), 26(3), 27(1) or 27(2), it shall exclude any economic operator which meets those criteria when making its selection of the economic operators to be awarded a contract, to be invited to tender for, or to negotiate the contract.

(2) A utility shall make its selection of the economic operators to be awarded a contract, to be invited to tender for, or to negotiate the contract in accordance with the selection criteria established by it in accordance with regulations 26 and 27.

(3) A utility using the restricted or negotiated procedure with a call for competition shall reduce, where appropriate and in accordance with regulation 27, the number of economic operators selected in accordance with subregulations (1) and (2) of this regulation.

(4) Where a utility makes a call for competition in respect of a contract by publishing a notice on the existence of a qualification system, when making its selection of the economic operators to be invited to tender for or to negotiate that contract, the utility shall—

- (a) qualify economic operators in accordance with regulation 25; and
- (b) apply the provisions of subregulations (1), (2) and (3) which are relevant to the restricted procedure or the negotiated procedure to such qualified economic operators.

(5) A utility shall verify that the tenders submitted by the economic operators which have been selected by the utility comply with the rules and

requirements applicable to tenders and shall award the contract on the basis of the criteria referred to in regulation 31.

Mutual recognition concerning administrative, technical or financial conditions.

24.(1) When using the negotiated procedure or the restricted procedure and in determining what rules and criteria are to be met by economic operators to be invited to tender for or to negotiate a contract or to qualify under a qualification system, a utility shall not—

- (a) impose conditions of an administrative, technical or financial nature on some economic operators which are not imposed on others; or
- (b) require tests or the submission of evidence which duplicates objective evidence already available.

(2) For the purpose of assessing an economic operator's technical ability, a utility may request that economic operator to provide—

- (a) a certificate—
 - (i) attesting its conformity to quality assurance standards based on the relevant European standard; and
 - (ii) from an independent body established in any relevant State conforming to the European standard concerning certification; or
- (b) any other evidence of its conformity to quality assurance measures which are equivalent to the standards referred to in paragraph (a)(i).

(3) Where the contract to be awarded is a public works contract or a public services contract, for the purposes of verifying the economic operator's technical abilities, a utility may, where appropriate, request an indication of the environmental management measures which the economic operator will apply when performing the contract and a utility may request that economic operator to provide—

- (a) a certificate—
 - (i) attesting its conformity to environmental management standards based on—

- (aa) the Community Eco-Management and Audit Scheme; or
 - (bb) the relevant European standard or international standard; and
- (ii) from an independent body established in any relevant State conforming to EU law or the relevant European standard or international standard concerning certification; or
- (b) any other evidence of its conformity to environmental management measures which are equivalent to the standards referred to in paragraph (a)(i).

Qualification system.

25.(1) A utility may establish and operate a system of qualification of economic operators if that system complies with this regulation.

(2) The utility shall permit economic operators to apply for qualification under the system at any time during its operation.

(3) The system may involve different stages of qualification and shall be based on objective rules and criteria as determined from time to time by the utility and those criteria and rules may include technical specifications in which case the provisions of regulation 12 apply.

(4) The rules and criteria referred to in subregulation (3) may include the rejection criteria referred to in regulation 26(3) and (5).

(5) Where the utility is a contracting authority, the rules and criteria referred to in subregulation (3) shall include the rejection criteria referred to in regulation 26(1).

(6) Where the criteria referred to in subregulation (3) includes requirements relating to the economic and financial capacity or the technical or professional abilities of an economic operator—

- (a) the economic operator, or a group of economic operators as referred to in regulation 28, may rely on the capacity or abilities of other entities or members in the group, whatever the legal nature of the link between the economic operator or the group of economic operators and the other entities; and

- (b) the economic operator or the group of economic operators shall prove to the utility that the necessary resources will be available to it, and such proof may in particular include an undertaking from those entities to that effect.

(7) In determining what rules and criteria are to be met by applicants to qualify under the system a utility shall comply with regulation 24.

(8) Where the utility makes a call for competition in respect of a contract by publishing a notice on the existence of a qualification system, it shall comply with regulation 23(4).

(9) The rules of and criteria applying to the system shall be made available on request to economic operators and any amendment of those rules and criteria shall be sent to them as the amendment is incorporated into the system.

(10) The utility may establish a system of qualification where an economic operator may qualify under the system of, or be certified by, another person, and in those circumstances the utility shall inform economic operators which apply to qualify the name of that other person.

(11) The utility shall inform applicants for qualification of the success or failure of their application within 6 months from the date of presentation of an application and, if the decision will take longer than 4 months, the utility shall inform the applicant, within 2 months of the date of presentation of the application of—

- (a) the reasons justifying a longer period; and
- (b) the date by which its application will be accepted or refused.

(12) The utility shall inform any applicant whose application to qualify is refused of the decision and the reasons for refusal as soon as possible and under no circumstances later than 15 days after the date of the decision.

(13) An application may only be refused if the applicant fails to meet the requirements for qualification laid down in accordance with subregulation (3).

(14) The utility shall keep a written record of qualified economic operators which may be divided into categories according to the type of contract for which the qualification is valid.

(15) The utility may cancel the qualification of an economic operator which has qualified under the qualification system only if it does not

continue to meet the rules and criteria laid down in accordance with subregulation (3).

(16) The utility may not cancel a qualification unless it notifies the economic operator in writing at least 15 days before the qualification is due to be cancelled of the reasons for the proposed cancellation.

(17) The utility shall send a notice in the form of the qualification system notice in Annex VII to Commission Regulation (EU) No 842/2011 and containing the information relating to the qualification system therein specified to the Official Journal when the system is first established.

(18) If the utility expects to operate the system for more than 3 years, or if it has operated the system for more than 3 years, it shall send a notice as referred to in subregulation (17) on an annual basis after the year in which the system is first established.

Criteria for rejection of economic operators.

26.(1) Subject to subregulation (2), where a utility is a contracting authority, it shall treat as ineligible and shall not select an economic operator in accordance with these Regulations if the utility has actual knowledge that the economic operator or its directors or any other person who has powers of representation, decision or control of the economic operator has been convicted of any of the following offences—

- (a) participation in a criminal organisation, as defined in Article 2(1) of Council Joint Action 98/733/JHA of 21 December 1998, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union (OJ L 351, 29.12.1998, p. 1), as the same may be amended from time to time;
- (b) corruption, as defined in Article 3 of the Council Act of 26 May 1997 drawing up, on the basis of Article K.3 (2) (c) of the Treaty on European Union, the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (OJ C 195, 25.6.1997, p.1), as the same may be amended from time to time;
- (c) corruption as defined in Article 2(1) of Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (OJ L 192, 31.7.2003, p.54), as the same may be amended from time to time;

- (d) fraud within the meaning of Article 1 of the Convention relating to the protection of the financial interests of the European Communities (OJ C 316, 27.11.1995, p.49), as the same may be amended from time to time;
- (e) terrorist offences or offences linked to terrorist activities, as respectively defined in Articles 1 and 3 of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (OJ L 164, 22.6.2002, p.3), as the same may be amended from time to time or inciting, aiding or abetting or attempting to commit an offence, as referred to in Article 4 of that Framework Decision;
- (f) money laundering and terrorist financing, as defined in Article 1 of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ L 309, 25.11.2005, p.15), as the same may be amended from time to time and as more specifically set out in sections 2, 3 and 4 of the Crime (Money Laundering and Proceeds) Act 2007; or
- (g) any other offence within the meaning of Article 45 (1) of the Public Sector Directive as defined by the national laws of the Member States.

(2) In any case where an economic operator or its directors or any other person who has powers of representation, decision or control has been convicted of an offence described in subregulation (1), a utility may disregard the prohibition described there if it is satisfied that there are overriding requirements in the general interest which justify doing so in relation to that economic operator.

(3) Where a utility is not a contracting authority, the criteria which the utility uses for deciding not to select an economic operator may include the fact that the economic operator or its directors or any other person who has powers of representation, decision or control of the economic operator has been convicted of any of the offences in subregulation (1).

(4) A utility may apply to the relevant competent authority to obtain further information regarding the economic operator and in particular details of convictions of the offences listed in subregulation (1) if it considers it needs such information to reach the decision referred to in subregulations (1) and (3).

(5) The criteria which a utility uses for deciding not to select an economic operator in accordance with these Regulations may include the following, namely that the economic operator—

- (a) being an individual is a person in respect of whom a debt relief order has been made or is bankrupt or has had a receiving order or administration order made against him or has made any composition or arrangement with or for the benefit of his creditors or has made any conveyance or assignment for the benefit of his creditors or appears unable to pay, or to have no reasonable prospect of being able to pay, a debt provable in bankruptcy within the meaning of the Bankruptcy Act has granted a trust deed for creditors or become otherwise apparently insolvent, or is the subject of a petition presented for sequestration of his estate, or is the subject of any similar procedure under the law of any other State;
- (b) being a partnership constituted under the law of Gibraltar, granted a trust deed or become otherwise apparently insolvent, or is the subject of a petition presented for sequestration of its estate;
- (c) being a company or any other entity within the meaning of section 2 or 351 of the Companies Act has passed a resolution or is the subject of an order by the court for the company's winding up otherwise than for the purpose of bona fide reconstruction or amalgamation, or has had a receiver, manager or administrator on behalf of a creditor appointed in respect of the company's business or any part thereof or is the subject of the above procedures or is the subject of similar procedures under the law of any State;
- (d) has been convicted of a criminal offence relating to the conduct of the economic operator's business or profession;
- (e) has committed an act of grave misconduct in the course of his business or profession;
- (f) has not fulfilled obligations relating to the payment of social security contributions under the law of Gibraltar or of the relevant State in which the economic operator is established;
- (g) has not fulfilled obligations relating to the payment of taxes under the law of Gibraltar or of the relevant State in which the economic operator is established ; or

- (h) is guilty of serious misrepresentation in providing any information required of him under this regulation.

(6) A utility may require an economic operator to provide such information as it considers it needs to make the evaluation in accordance with subregulations (1), (3) and (5) except that it shall accept as conclusive evidence that an economic operator does not fall within the grounds specified in subregulations, (1), (3), (5)(a), (b), (c), (d), (f) or (g) if that economic operator provides to the utility–

- (a) in relation to the grounds specified in subregulations (1), (3), (5)(a), (b), (c) or (d)–
- (i) an extract from the judicial record; or
- (ii) in a relevant State which does not maintain such a judicial record or equivalent document, a document issued by the relevant judicial or administrative authority;
- (b) in relation to the grounds specified in subregulation (5)(f) or (g), a certificate issued by the relevant competent authority; and
- (c) in a relevant State where the documentary evidence specified in subregulation 6(a) and (b) is not issued in relation to one of the grounds specified in subregulations (1), (3) or (5)(a), (b), (c) (d), (f) or (g), a declaration on oath made by the economic operator before the relevant judicial, administrative or competent authority or a relevant notary public or Commissioner for oaths.

(7) In this regulation, “relevant” in relation to a judicial, administrative or competent authority, notary public or Commissioner for oaths means an authority designated by, or a notary public or Commissioner for oaths, in Gibraltar or in the relevant State in which the economic operator is established.

Criteria for selection of economic operators.

27.(1) A utility using the open procedure shall establish selection criteria on the basis of objective criteria and rules which it determines and which it makes available to economic operators which request them.

(2) A utility using the restricted procedure or the negotiated procedure, with or without a call for competition, shall make the selection of the economic operators to be invited to tender for or to negotiate the contract on

the basis of objective criteria and rules which it determines and which it makes available to economic operators which request them.

(3) Where the criteria referred to in subregulations (1) and (2) include requirements relating to the economic and financial capacity or the technical or professional abilities of the economic operator—

- (a) the economic operator, or a group of economic operators as referred to in regulation 28, may rely on the capacity or abilities of other entities or members in the group, regardless of the legal nature of the link between the economic operator or the group of economic operators and the other entities; and
- (b) the economic operator, or the group of economic operators shall prove to the utility that the resources necessary to perform the contract will be available to it, and such proof may in particular include an undertaking from those entities to that effect.

(4) Without prejudice to the generality of subregulation (2), the criteria may be based on the need of the utility to reduce the number of economic operators selected to tender for or to negotiate the contract to a level which is justified by the characteristics of the award procedure and the resources required to complete it.

(5) The utility shall take account of the need to ensure adequate competition in determining the number of economic operators selected to tender for or to negotiate the contract.

Consortia.

28.(1) In this regulation a "consortium" means two or more persons, at least one of whom is an economic operator, acting jointly for the purpose of being awarded a contract.

(2) Subject to subregulation (3), a utility shall not treat the tender of a consortium as ineligible nor decide not to include a consortium amongst those economic operators from which it will make the selection of economic operators to be invited to tender for or to negotiate a contract or to be admitted to a dynamic purchasing system on the grounds that the consortium has not formed a legal entity for the purpose of tendering for or negotiating the contract or being admitted to a dynamic purchasing system.

(3) Where a utility awards a contract to a consortium it may, if it is justified for the satisfactory performance of the contract, require the consortium to form a legal entity before entering into, or as a term of, the contract.

(4) In these Regulations references to an economic operator where the economic operator is a consortium include a reference to each person who is a member of that consortium.

Corporations.

29.(1) A utility shall not treat the tender of a services provider as ineligible nor decide not to include a services provider amongst those services providers from which it will make the selection of services providers to be invited to tender for or to negotiate a contract or to be admitted to a dynamic purchasing system on the ground that under the law of Gibraltar the services provider is required to be an individual, a corporation or other type of body, if under the law of the relevant State in which the services provider is established, that services provider is authorised to provide such services.

(2) In the case of—

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

a utility may require an economic operator which is not an individual to indicate in the tender, the indicative tender or in the request to be selected to tender for or to negotiate the contract, the names and relevant professional qualifications of the staff who will be responsible for the performance of the contract.

Notification.

30.(1) Where a utility decides, prior to the stage at which it makes a decision to which regulation 34(1) (award decision) applies, to exclude an applicant, the utility shall notify the applicant of that exclusion.

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

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

- (a) the applicant is not invited to tender for, or to negotiate, the contract; or
- (b) having been so invited, is excluded from consideration prior to the stage mentioned in subregulation (1).

(4) This regulation does not apply in relation to a procedure for the award of a contract–

- (a) under a dynamic purchasing system; or
- (b) which is permitted by these Regulations to be awarded without a call for competition.

PART 5
THE AWARD OF A CONTRACT

Criteria for the award of a contract.

31.(1) Subject to regulation 32 and subregulations (6) and (9) of this regulation, a utility shall award a contract on the basis of the offer which–

- (a) is the most economically advantageous from the point of view of the utility; or
- (b) offers the lowest price.

(2) A utility shall use criteria linked to the subject matter of the contract to determine that an offer is the most economically advantageous including delivery date or period for completion, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, environmental characteristics, technical merit, after sales service and technical assistance, commitments with regard to parts, security of supply and price or otherwise.

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

(4) When stating the weightings referred to in subregulation (3), a utility may give the weighting a range and specify a minimum and maximum weighting where it considers it appropriate in view of the subject matter of the contract.

(5) Where, in the opinion of the utility, it is not possible to provide weightings for the criteria referred to in subregulation (3) on objective grounds, the utility shall indicate the criteria in descending order of importance in the contract notice or contract documents.

(6) If an offer for a contract is abnormally low, the utility may reject that offer but only if it has—

- (a) requested in writing an explanation of the offer or of those parts which it considers contribute to the offer being abnormally low;
- (b) taken account of any evidence provided in response to a request in writing; and
- (c) subsequently verified the offer or parts of the offer being abnormally low with the economic operator.

(7) Where a utility requests an explanation in accordance with subregulation (6), the information requested may, in particular, include—

- (a) the economics of the method of construction, the manufacturing process or the services provided;
- (b) the technical solutions suggested by the economic operator or the exceptionally favourable conditions available to the economic operator for the execution of the work or works, for the supply of goods or for the provision of the services;

- (c) the originality of the work, works, goods or services proposed by the economic operator;
- (d) compliance with the provisions relating to employment protection and working conditions in force at the place where the contract is to be performed; or
- (e) the possibility of the economic operator obtaining State aid.

(8) Where a utility establishes that a tender is abnormally low because the economic operator has obtained State aid, the offer may be rejected on that ground alone only after–

- (a) consultation with the economic operator; and
- (b) the economic operator is unable to prove within a reasonable time limit fixed by the utility, that the aid has been granted in a way which is compatible with the TFEU.

(9) Where a utility rejects an abnormally low offer in accordance with subregulation (8), it shall send a report justifying the rejection to the Minister for onward transmission to the Commission.

(10) In this regulation “offer” includes a bid by one part of a utility to provide services, to carry out work or works or to make goods available to another part of the utility when the former part is invited by the latter part to compete with the offers sought from other persons.

Rejection of third country tenders - public supply contracts.

32.(1) In this regulation–

“an offer of third country origin” means an offer to enter a public supply contract under which more than 50% of the total value of the goods offered originate in States with which the European Union has not concluded, multilaterally or bilaterally, an agreement ensuring comparable and effective access for undertakings in the European Union to the markets of those States or in States to which the benefit of the provisions of the Utilities Directive has not been extended; and

“goods” includes software used in telecommunications network equipment.

(2) The origin of the goods shall be determined in accordance with Council Regulation (EC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended from time to time.

(3) Notwithstanding regulation 31, a utility need not accept an offer of third country origin.

(4) Notwithstanding regulation 31, where an offer of third country origin is equivalent to an offer which is not of third country origin a utility shall not accept the offer of third country origin unless not to accept that offer would oblige the utility to acquire—

- (a) goods having technical characteristics different from those of existing goods; or
- (b) an installation resulting in incompatibility, technical difficulties in operation and maintenance or disproportionate costs.

(5) In the case of a public supply contract to be awarded on the basis of the offer which offers the lowest price, offers are equivalent for the purposes of subregulation (4) if their prices are to be treated as equivalent in accordance with subregulation (7).

(6) In the case of a public supply contract to be awarded on the basis of the offer which is the most economically advantageous to the utility, offers are equivalent for the purposes of subregulation (4) if—

- (a) their prices are to be treated as equivalent in accordance with subregulation (7); and
- (b) disregarding any difference in price the offer which is not of third country origin is at least as economically advantageous to the utility as the offer of third country origin.

(7) The prices of offers are to be treated as equivalent for the purposes of subregulations (5) and (6) if the price of the offer which is not of third country origin is the same as or is not more than 3% greater than the offer of third country origin.

Contract award notices.

33.(1) Subject to subregulations (2) and (3), a utility which has awarded a contract or concluded a framework agreement shall, not later than 2 months after the award or conclusion, send to the Official Journal a notice, in the form of the contract award notice in Annex VI to Commission Regulation (EU) No 842/2011 including the information therein specified.

(2) When sending the contract award notice to the Official Journal, a utility may indicate that information regarding–

- (a) the number of tenders received;
- (b) the identity of the economic operator; or
- (c) prices,

is of a sensitive commercial nature, and require that it not be published.

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

(4) A utility which has awarded a contract under a dynamic purchasing system in accordance with regulation 19 may–

- (a) send the contract award notice in accordance with subregulation (1); or
- (b) retain any notice it is proposing to send to the Official Journal in accordance with subregulation (1) for a period of 3 months commencing on the date that the first notice was retained.

(5) Where a utility retains contract award notices in accordance with subregulation (4)(b), it shall send those contract award notices to the Official Journal not later than 48 days after the end of each period of 3 months.

(6) A utility which has awarded a Part B services contract shall state in the contract award notice whether or not it agrees to its publication.

(7) Where a utility has awarded a research and development public services contract it may, if the contract was awarded without a call for competition in accordance with regulation 17(1)(b), insert in section II.1.4 of the form of contract award notice in Annex VI to Commission Regulation (EU) No 842/2011 only the title of the category of services.

(8) Where the public services contract referred to in subregulation (7) was not awarded in accordance with regulation 17(1)(b), the utility may provide limited information at section II.1.4 of the form of contract award notice in Annex VI to Commission Regulation (EU) No 842/2011 if the information which would otherwise be given is of a commercially sensitive nature, provided that the information given is no less detailed than that already

provided in either its call for competition in accordance with regulation 16(2), or where a qualification system is used, than that recorded in accordance with regulation 25(14).

Information about contract award procedures.

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

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

- (a) the criteria for the award of the contract;
- (b) the reasons for the decision, including the characteristics and relative advantages of the successful tender, the score (if any) obtained by—
 - (i) the economic operator which is to receive the notice; and
 - (ii) the economic operator 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 35, 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 35, enter into the contract.

(3) Where it is to be sent to a candidate, the notice referred to in subregulation (1) shall 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 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 shall 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 shall inform that economic operator of the characteristics and relative advantages of the successful tender and—
 - (i) the name of the economic operator to be awarded the contract, or
 - (ii) the names of the economic operators admitted to the dynamic purchasing system.

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

- (a) as specified in regulation 12(6) by an equivalent means; or
- (b) in terms of the performance or functional requirements in regulation 12(7) by an equivalent means.

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

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

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

- (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.

(12) For the purposes of this regulation—

- (a) “candidate” means an economic operator (other than a tenderer) which applied to be included amongst the economic operators to be selected to tender or to negotiate the contract, but does not include any economic operator which has been informed of the rejection of its application, and the reasons for it; and
- (b) “tenderer” means an economic operator which submitted an offer and has not been definitively excluded.

(13) For the purposes of subregulation (12)(b)

- (a) a tenderer has been excluded if its offer has been excluded from consideration; and
- (b) an exclusion is definitive if, and only if, the tenderer has been notified of the exclusion and either—
 - (i) the exclusion has been held to be lawful in proceedings under Part 9; or

- (ii) the time limit for starting such proceedings has expired even on the assumption that the Court would have granted the maximum extension permitted by regulation 49(4) and (5).

Standstill period.

35.(1) Where regulation 34(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 34(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 34(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 34(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 34(1) notice to one or more of the relevant economic operators by facsimile or electronic means and to the others by other means, the standstill period ends at whichever of the following two times occurs latest—

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

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

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

(7) In this regulation—

“regulation 34(1) notice” means a notice given in accordance with regulation 34(1); and

“relevant economic operators” means economic operators to which regulation 34(1) requires information to be given.

PART 6 SPECIALISED CONTRACTS

Design contests.

36.(1) A utility which organises a design contest shall—

- (a) establish the rules for that design contest in accordance with the provisions of this regulation; and
- (b) shall not limit the admission of any economic operator to the design contest by reference to the territory, or part of the territory of a relevant State, in which it is established.

(2) This regulation applies to a design contest if it is organised as part of a procedure leading to the award of a public services contract whose estimated value (including the value of any prizes or payments) is not less than the sum mentioned in Article 61(1) of the Utilities Directive.

(3) This regulation applies to a design contest whether or not it is organised as part of a procedure leading to the award of a public services contract if—

- (a) the contest is conducted for the purpose of carrying out an activity specified in any Part of Schedule 1 in which the utility is specified; and
- (b) the aggregate value of the prizes or payments for the contest, including the estimated value of the contract which might subsequently be awarded in accordance with regulation 17(1)(l)

provided that the utility does not exclude such an award in the contest notice, is not less than the sum mentioned in Article 61(2) of the Utilities Directive.

- (4) This regulation does not apply to a design contest—
- (a) which is organised by the utility other than for the purpose of carrying out an activity specified in the Part of Schedule 1 in which the utility is specified;
 - (b) which is organised by the utility for the purpose of carrying out any activity outside the territory of the European Union but only if the carrying out of that activity does not involve the physical use of a network or geographical area within the European Union;
 - (c) which is classified as secret or where it must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions of Gibraltar or when the protection of the essential interests of the security of Gibraltar requires it;
 - (d) where different rules govern the procedures of the design contest and it is to be entered into in accordance with—
 - (i) an international agreement applicable to Gibraltar with a State which is not a relevant State and it relates to a design contest intended for the joint implementation or exploitation of a project related to that agreement;
 - (ii) an international agreement relating to the stationing of troops; or
 - (iii) the design contest procedures of an organisation of which only States are members (an “international organisation”) or of which only States or international organisations are members; or
 - (e) organised by the utility for the purpose of carrying out an activity specified in Column 2 of Schedule 1 where that activity is directly exposed to competition on markets to which access is unrestricted, and this will be the case if one of the following conditions is satisfied—
 - (i) the Minister has notified the Commission in accordance with Article 30 of the Utilities Directive that the activity

concerned is directly exposed to competition on markets to which access is not restricted and–

- (aa) the Commission has adopted a decision that an exemption should apply in response to such a notification; or
 - (bb) the Commission has not adopted a decision in relation to such a notification within the time limits specified in Article 30(6) of the Utilities Directive;
- (ii) the Commission has, on the application of the utility–
- (aa) adopted a decision that an exemption should apply to the activity concerned; or
 - (bb) has not adopted such a decision within the time limit specified in Article 30(6) of the Utilities Directive; or
- (iii) the Commission has, of its own initiative adopted a decision that an exemption should apply to the activity concerned,

and for the purposes of this paragraph that time limit commences on the date that the Commission has informed the Minister in accordance with Article 30 of the Utilities Directive that the matter is under consideration.

(6) The utility shall publicise its intention to hold a design contest by sending to the Official Journal a notice in the form of the design contest notice in Annex XII to Commission Regulation (EU) No 842/2011 and containing the information therein specified.

(7) The utility shall make the rules of the design contest available to economic operators which wish to participate in the contest.

(8) Regulations 28(2) and 29 apply to design contests as they apply to the seeking of offers in relation to a proposed contract.

(9) Regulation 42(1)(b) to (7) applies to notices relating to design contests as it applies to notices in relation to a proposed contract.

(10) Regulation 44(1), (2) and (4) applies to all communications relating to design contests as it applies to a proposed contract.

(11) The utility shall ensure that the specified means of communication and the storage of information enables–

- (a) the integrity and confidentiality of information provided by those economic operators participating in the design contest to be maintained; and
- (b) the jury to ascertain the contents of proposals only after the time limit for their submission has expired.

(12) Where the utility requires that proposals are to be transmitted by electronic means, it shall ensure that–

- (a) details of the equipment which is necessary for the electronic receipt of proposals, including encryption, are available to all economic operators which wish to participate in the design contest; and
- (b) the equipment for the electronic receipt of proposals complies with the requirements of regulation 44(6).

(13) Where the utility restricts the number of economic operators in the design contest, it shall–

- (a) establish clear and non-discriminatory criteria to select those economic operators; and
- (b) ensure that the number of economic operators selected is sufficient to ensure adequate competition.

(14) The utility shall ensure that–

- (a) the members of the jury are all individuals who are independent of those economic operators participating in the design contest;
- (b) where the economic operators are required to possess a particular professional qualification, that at least one third of the members of the jury also possess that qualification or an equivalent qualification;
- (c) the proposals of the economic operators are submitted to the jury without any indication as to the authorship of each proposal;

- (d) the jury makes its decisions or opinions independently and solely on the basis of the criteria specified in the notice referred to in subregulation (6);
- (e) the jury is not informed of the authorship of any proposal until after it has reached its decision or opinion;
- (f) the jury prepares minutes signed by its members in which it records—
 - (i) its ranking of the proposals based upon its assessment of each proposal's merits; and
 - (ii) its observations or details of any issues upon which clarification is required in relation to each proposal; and
- (g) the jury may invite the economic operators to answer any questions to clarify issues noted in the minutes referred to in sub-subregulation (f) and shall record complete minutes of any such communications with economic operators.

(15) The utility shall, not later than 2 months after the date the jury makes its selection, publicise the results of the design contest by sending to the Official Journal a notice in the form of the notice of the results of a design contest in Annex XIII to Commission Regulation (EU) No 842/2011 and including the information therein specified.

(16) When sending the notice of the results of a design contest to the Official Journal in accordance with subregulation (15), the utility may indicate that information regarding—

- (a) the number of proposals received;
- (b) the identity of the economic operators; or
- (c) prices,

is of a sensitive commercial nature, and require that it not be published.

PART 7

MATTERS RELATING TO A CONTRACT

Obligations relating to taxes, environmental protection, employment protection and working conditions.

37.(1) A utility may include in the contract documents relating to a public works contract or a public services contract information as to where a contractor or services provider may obtain information about the obligations relating to taxes, environmental protection, employment protection and working conditions which will apply to—

- (a) the work or works to be carried out under the public works contract; or
- (b) the services to be provided under the public services contract.

(2) A utility which provides the information referred to in subregulation (1) shall request contractors or services providers to indicate that they have taken account of the obligations relating to those employment protection provisions and those working conditions in preparing their tender or in negotiating the contract.

Conditions for performance of contracts.

38.(1) A utility may stipulate conditions relating to the performance of a contract, provided that those conditions are compatible with EU law and are indicated in—

- (a) the notice used as a means of calling for competition and the contract documents; or
- (b) the contract documents.

(2) The conditions referred to in subregulation (1) may, in particular, include social or environmental considerations.

PART 8
MISCELLANEOUS

Preservation of records.

39.(1) When these Regulations apply to the seeking of offers in relation to a contract, a utility shall keep appropriate information on each contract sufficient to justify decisions taken in connection with—

- (a) the qualification and selection of economic operators and the award of contracts; and
- (b) the use of a procedure without a prior call for competition by virtue of regulation 17.

(2) When a utility decides not to apply these Regulations to the seeking of offers in relation to a contract in accordance with regulation 6, 7, 8, 9 or 11, it shall keep appropriate information on such a contract sufficient to justify that decision.

(3) A utility shall take appropriate steps to document the progress of contract award procedures conducted by electronic means.

(4) The information referred to in subregulations (1), (2) and (3) shall be preserved for at least 4 years from the date of the award of the contract.

Statistical and other reports.

40.(1) A utility shall, not later than 31 July in each year, send to the Minister a report specifying—

- (a) the aggregate value (estimated if necessary) of the consideration payable under contracts awarded in the previous year which have been excluded from the operation of these Regulations by regulation 11 for the purpose of carrying out the activities in each Part of Schedule 1 in which the utility is specified; and
- (b) the type of activities for which those contracts were awarded.

(2) A utility shall, when requested by the Minister for the purpose of informing the Commission, send to the Minister a report—

- (a) containing such information as the Minister may from time to time require in respect of a particular contract (including contracts excluded or exempted from the application of all or some of these Regulations by regulations 6, 7, 8, 9 or 11);
- (b) specifying which of its activities it considers are not activities specified in the Part of Schedule 1 in which the utility is specified, or are activities outside the territory of the European Union not involving the physical use of a network or geographical area within the European Union; and
- (c) specifying the categories of goods, work, works or services it considers comprise the goods, work, works or services which it acquires in order to sell, hire or provide them to another person, but which it does not have a special or exclusive right to sell, hire or provide and which other persons are free to sell, hire or provide under the same conditions.

(3) Subject to subregulation (4), a utility specified in Parts A to F, H, I, or J of Schedule 1 shall, not later than 31 July in each year, send to the Minister a report specifying in relation to each contract awarded by it in the previous year (including contracts excluded or exempted from the application of some or all of these Regulations by regulations 6, 7, 8, 9 or 11)–

- (a) the value (estimated if necessary) of the consideration payable under the contract;
- (b) the principal category of works or services carried out or to be carried out under the contract according to the nomenclature used in Schedule 2 or 3 or the type of goods purchased or hired under the contract; and
- (c) the nationality of the economic operator to which the contract was awarded and the relevant State in which that economic operator is established.

(4) The report referred to in subregulation (3) need not include information concerning contracts for–

- (a) research and development services specified in category 8 of Part A of Schedule 3;
- (b) telecommunications services specified under CPV references 64221000-1, 64227000-3, 64228000-0, 64228100-1, 64228200-2 within category 5 of Part A of Schedule 3; or

- (c) the services specified in Part B of Schedule 3.

(5) A utility may indicate that any of the information in a report sent to the Minister in accordance with subregulation (2)(c) is of a sensitive commercial nature, and require that it not be published.

Provision of reports.

41.(1) Where a utility—

- (a) is not a Government Department; and
- (b) is required in accordance with these Regulations to send a report,

it shall send the report to the Minister responsible for the area of activity of that utility.

(2) The Minister responsible for the area of activity of that utility shall be the Minister whose area of responsibility is most closely connected with the functions of the utility.

(3) Any questions as to which Minister's areas of responsibility are most closely connected with the functions of a utility in accordance with subregulation (2) shall be determined by the Chief Minister whose determination shall be final.

(4) The requirement on a utility to send any report in accordance with subregulation (1) to the Minister responsible for the area of activity of that utility shall be enforceable, on the application of the Minister responsible, to the Supreme Court by mandatory order.

Publication of notices.

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

- (a) in the correct format and contain the necessary information specified by Commission Regulation (EU) No 842/2011 and contain any other information which the utility considers useful; and
- (b) sent to the Office for Official Publications of the European Union by electronic means in the format and in accordance

with the procedures specified in paragraph 3 of Annex XX to the Utilities Directive or by other means.

(2) Where a notice is not sent by electronic means in accordance with subregulation (1)(b), the utility may in exceptional cases request the Official Journal to publish a contract notice within 5 days of the date of despatch, provided that the notice is sent to the Official Journal by facsimile.

(3) The utility shall not place a notice in any publication—

- (a) before the date on which the notice is despatched in accordance with subregulation (1)(b); or
- (b) which contains any additional information to that contained in the notice despatched in accordance with subregulation (1)(b) or published on the utility's buyer profile in accordance with regulation 15.

(4) The utility shall refer in the notice to the date of despatch of that notice to the Official Journal or the date of its publication on its buyer profile where it publishes a notice in the circumstances referred to in subregulation (3).

(5) A utility shall not publish a periodic indicative notice on its buyer profile before the date on which notice of its publication in that form is despatched to the Commission in accordance with regulation 15(3) and the utility shall refer to the date of that despatch on its buyer profile.

(6) A utility shall retain evidence of the date of despatch to the Official Journal of each notice.

(7) Where a utility is not required to publish a contract notice in respect of a particular contract, it may nevertheless publish such a notice in accordance with the provisions of this regulation.

Confidentiality of information.

43.(1) A utility which makes information available to an economic operator in accordance with these Regulations may impose requirements on that operator for the purpose of protecting the confidentiality of that information.

(2) Subject to the provisions of these Regulations the utility shall not disclose information forwarded to it by an economic operator which the economic operator has reasonably designated as confidential.

(3) In this regulation, confidential information includes technical or trade secrets and the confidential aspects of tenders.

Means of communication.

44.(1) A utility may specify that any communications referred to in these Regulations may be made by–

- (a) post;
- (b) facsimile;
- (c) electronic means in accordance with subregulations (4) and (5);
- (d) telephone in the circumstances referred to in subregulation (8);
or
- (e) any combination of the means of communication referred to in paragraphs (a) to (d).

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

(3) A utility shall ensure that the specified means of communication and the storage of information enables–

- (a) the integrity of data provided by economic operators and the confidentiality of tenders and requests to be selected to tender for or to negotiate the contract to be maintained; and
- (b) tenders and requests to be selected to tender for or to negotiate the contract to be opened only after the time limit for their submission has expired.

(4) The equipment used for communications made by electronic means shall be—

- (a) non-discriminatory;
- (b) generally available; and
- (c) interoperable with information and communication technology products in general use.

(5) Where a utility requires that tenders and requests to be selected to tender for or to negotiate the contract are to be transmitted by electronic means, it shall ensure that—

- (a) details of the equipment including any software which is necessary for the electronic receipt of tenders and requests to be selected to tender for or to negotiate the contract, including encryption, are available to all interested economic operators; and
- (b) the equipment for the electronic receipt of tenders and requests to be selected to tender for or to negotiate the contract complies with the requirements of subregulation (6).

(6) The requirements referred to in subregulation (5)(b) are—

- (a) electronic signatures relating to tenders and requests to participate comply with the Electronic Commerce Act 2001 and the utility may require that these signatures be accompanied by an advanced electronic signature;
- (b) the exact time and date of the receipt of tenders and requests to participate are capable of being determined precisely;
- (c) it may reasonably be considered that—
 - (i) data is not capable of being accessed before the time limits specified by the utility; and
 - (ii) any such unauthorised access is clearly detectable;
- (d) only authorised persons shall set or change the dates for opening data received from economic operators;

- (e) access to any data is possible only through simultaneous action by authorised persons and only after the prescribed date; and
- (f) data received and opened in accordance with these requirements must remain accessible only to authorised persons.

(7) A utility may require any documents, certificates and declarations referred to in regulation 24(2), (3), 25, 26 and 27 which do not exist in electronic format to be submitted before the time limit has expired for the receipt by it of tenders or requests to be selected to tender for or to negotiate the contract.

(8) Requests to be selected to tender for or to negotiate the contract may be made—

- (a) in writing; or
- (b) by telephone.

(9) Where a request to be selected to tender for or to negotiate the contract is made by telephone, an economic operator shall confirm the request in writing before the deadline for receipt of such requests has expired.

(10) Where a request to be selected to tender for or to negotiate the contract is made by facsimile, a utility—

- (a) may require that the request be confirmed by post or by electronic means where this is necessary for the purposes of legal proof; and
- (b) shall specify any requirement for such confirmation and the time limit for sending it in the notice used as a means of calling for competition or in the invitation referred to in regulation 16(3)(b).

Sub-contracting.

45. A utility may require an economic operator to indicate in its tender—
- (a) any part of the contract that the economic operator intends to sub-contract to another person; and
 - (b) the identity of any person to whom that economic operator proposes to sub-contract any part of the contract.

PART 9
APPLICATION TO THE COURT

Interpretation of Part 9.

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

“contract”, includes a framework agreement which the utility—

- (a) purports to have entered into, or to be intending to enter into, in accordance with these Regulations; and
- (b) has relied on, is relying on, or intends to rely on, for the purposes of regulation 17(1)(i) (award, without a call for competition, of contracts under a framework agreement);

“Court” means the Supreme Court;

“declaration of ineffectiveness” means a declaration made under regulation 54(2)(a) or 60(3);

“grounds for ineffectiveness” has the meaning given to it by regulation 56;

“proceedings” means court proceedings taken for the purposes of regulation 48; and

“standstill period”, and references to its end, have the same meaning as in regulation 35.

- (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.

Duty owed to economic operators.

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

- (a) the provisions of these Regulations, other than regulations 31(9) and 40; and
- (b) any enforceable EU obligation in respect of a contract or design contest (other than one excluded from the application of these Regulations by regulation 6, 7, 8, 9, 11 or 36).

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

Enforcement of duties through the Court.

48.(1) A breach of the duty owed in accordance with regulation 47 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 49 to 61 apply to such proceedings.

General time limits for starting proceedings.

49.(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—

- (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 50) 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.

50.(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 in the Official Journal, in which case the relevant date is the day after the date on which the notice was published.

(4) For the purposes of 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 34 (9).

(7) In this regulation, “contract award notice” means a notice in accordance with regulation 33(1).

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

Starting proceedings.

51.(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—

- (a) seeking a declaration of ineffectiveness; or
- (b) alleging a breach of regulation 35, 52 or 53(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.

52.(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 53(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 35.

Interim orders.

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

- (a) bringing to an end the requirement imposed by regulation 52(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 regulation 47 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 52(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 52(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.

54.(1) This regulation applies where—

- (a) the Court is satisfied that a decision or action taken by a utility was in breach of the duty owed in accordance with regulation 47; 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.

55.(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 regulation 47; and

(b) the contract has already been entered into.

(2) In those circumstances, the Court—

(a) must, if it is satisfied that any of the grounds for ineffectiveness applies, make a declaration of ineffectiveness in respect of the contract unless regulation 57 requires the Court not to do so;

(b) must, where required by regulation 59, 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-regulations (a) and (b);

(d) must not order any other remedies.

(3) Subregulation (2)(d) is subject to regulation 60(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 58(3) or 59(10) (orders which supplement a declaration of ineffectiveness or a contract-shortening order).

(4) Regulation 54(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.

56.(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 in the Official Journal 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 in the Official Journal a voluntary transparency notice expressing its intention to enter into the contract; and
 - (c) the contract has not been entered into before the end of a period of at least 10 days beginning with the day after the date on which the voluntary transparency notice was published in the Official Journal.
- (4) In 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 in the Official Journal;
 - (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) which, if Commission Regulation (EU) No 842/2011 sets out a form to be used for the purposes of subregulation (3), is in that form.

The second ground

- (5) The second ground applies where all the following apply–
- (a) the contract has been entered into in breach of any requirement imposed by–
 - (i) regulation 35 (the standstill period);
 - (ii) regulation 52 (contract-making suspended by challenge to award); or
 - (iii) regulation 53(1)(b) (interim order restoring or modifying a suspension originally imposed by regulation 52);

- (b) there has also been a breach of the duty owed to the economic operator in accordance with regulation 47 in respect of obligations other than those imposed by regulation 35 (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
- (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 19(11) to (14) (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 11.

(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 19(11) to (14);
- (b) the utility has, despite regulation 34(7), voluntarily complied with the requirements set out in regulation 34(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.

57.(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 59(3)(a).

The consequences of ineffectiveness.

58.(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.

(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.

59.(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 57 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 35, 52 or 53(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 regulation 47;
- (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.

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

- (a) was awarded under a framework agreement;
- (b) was awarded without a call for competition in reliance on regulation 17(1)(i) (framework concluded in accordance with these Regulations); and
- (c) 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 50 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 57 (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 56(5), where—

- (a) the relevant breach of the kind mentioned in regulation 56(5)(a) is entering into the specific contract in breach of regulation 52 or 53(1)(b); and
- (b) the relevant breach of the kind mentioned in regulation 56(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 58 (the consequences of ineffectiveness) applies;

- (b) regulation 59(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.

61. In proceedings against the Crown, the Court has power to grant an injunction despite section 14 of the Crown Proceedings Act.

PART 10

REVOCATION, SAVINGS AND TRANSITIONAL PROVISIONS

Revocation.

62. The Utilities Contracts Regulations 1997 are revoked.

Savings and transitional provisions.

63.(1) Where a utility has commenced a contract award procedure before the coming into operation of these Regulations, the Utilities Contracts Regulations 1997 shall 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 62.

(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 Utilities Contracts Regulations 1997.

SCHEDULE 1

Regulations 3, 5, 6, 7, 9, 36 and 40

UTILITIES AND ACTIVITIES

CATEGORY 1 – WATER	
PART A	
Utility	Activity
A company holding a licence or appointment as a water undertaker.	<ol style="list-style-type: none"> 1. The provision or operation of a fixed network which provides or will provide a service to the public in connection with the production, transport or distribution of drinking water. 2. Desalination of sea-water intended for the supply of drinking water. 3. The disposal or treatment of sewage.
PART B	
A relevant person not specified in Part C.	<ol style="list-style-type: none"> 4. The supply of drinking water to a network referred to in subregulation 1 above.
PART C	
A relevant person, other than a contracting authority, who produces drinking water because its consumption is necessary for the purpose of carrying out an activity not specified in the second column of this Schedule, and who supplies only the excess to a network which is referred to in subregulation 1 above.	<ol style="list-style-type: none"> 5. The supply of drinking water to a network referred to in subregulation 1 above, but only if the drinking water supplied in the period of 36 months ending at the relevant time as defined in regulation 11(19) of these Regulations has exceeded 30% of the total produced by the utility in that period.

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CATEGORY 2 – ELECTRICITY	
PART D	
A person licensed or appointed as an electricity supplier.	6. The provision or operation of a fixed network which provides or will provide a service to the public in connection with the production, transport or distribution of electricity.
PART E	
A relevant person not specified in Part F.	7. The supply of electricity to a network referred to in subregulation 6 above.
PART F	
A relevant person, other than a contracting authority, who produces electricity because its use is necessary for the purpose of carrying out an activity not specified in the second column of this Schedule and who supplies only the excess to a network referred to in subregulation 6 above.	8. The supply of electricity to a network referred to in subregulation 6 above, but only if the electricity supplied in the period of 36 months ending at the relevant time as defined in regulation 11(19) of these Regulations has exceeded 30% of the total produced by the utility in that period.
CATEGORY 3 – GAS	
PART G	
A gas transporter	9. The provision or operation of a fixed network which provides, or will provide a service to the public in connection with the production, transport or distribution of gas.
CATEGORY 4 – TRANSPORT	
PART H	
An airport operator. Any other relevant person	10. The exploitation of a geographical area for the purpose of providing airport or other terminal facilities to carriers by air.

PART I	
A port operator	11. The exploitation of a geographical area for the purpose of providing maritime or inland port or other terminal facilities to carriers by sea.
Any other relevant person	
PART J	
A person who holds a vehicle licence under the Traffic Act which authorises him to provide a regular passenger service within the meaning of that licence.	12. The operation of a network providing a service to the public in the field of transport by bus.
Any other relevant person	
CATEGORY 5-HEAT	
PART K	
A relevant person	13. The provision or operation of a fixed network which provides or will provide a service to the public in connection with the production, transport or distribution of heat.
CATEGORY 6-EXPLORATION AND EXTRACTION OF OIL AND GAS	
PART L	
A person operating under a licence for that purpose	14. The exploitation of a geographical area for the purpose of exploring for or extracting oil or gas.
CATEGORY 7-POSTAL SERVICES	
PART M	
Director of Postal Services	15. The clearance, sorting, routing and delivery of postal items.

SCHEDULE 2

Regulations 2 and 40

ACTIVITIES CONSTITUTING WORKS

Section F			Construction		CPV Code
Division	Group	Class	Subject	Notes	
45			Construction	Construction of new buildings and works, restoring and common repairs.	45000000
	45.1		Site preparation		45100000

		45.11	Demolition and wrecking of buildings; earth moving	Demolition of buildings and other structures. Clearing of building sites. Earth moving; excavation, landfill, levelling and grading of construction sites, trench digging, rock removal, blasting, etc. Site preparation for mining: overburden removal and other development and preparation of mineral properties and sites. Building site drainage. Drainage of agricultural or forestry land.	45110000
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		45.12	Test drilling and boring	Test drilling, test boring and core sampling for construction, geophysical, geological or similar purposes.	45120000
	45.2		Building of complete constructions or parts thereof; civil engineering		45200000
		45.21	General construction of buildings and civil engineering works	<p>Construction of all types of buildings.</p> <p>Construction of civil engineering constructions.</p> <p>Bridges, including those for elevated highways, viaducts, tunnels and subways.</p> <p>Long-distance pipelines, communication and power lines.</p> <p>Urban pipelines, urban communication and power lines.</p> <p>Ancillary urban works.</p> <p>Assembly and erection of prefabricated constructions on the site.</p>	45210000
		45.22	Erection of	Erection of	45220000

			roof covering and frames	roofs. Roof covering. Waterproofing	
		45.23	Construction of highways, roads, airfields and sport facilities.	Construction of highways, streets, roads, other vehicular and pedestrian ways. Construction of railways. Construction of airfield runways. Construction work, other than buildings, for stadiums, swimming pools, gymnasiums, tennis courts, golf courses and other sports installations. Paintings of markings on road surfaces and car parks.	45230000
		45.24	Construction of water projects.	Construction of: waterways, port works, pleasure ports (marinas), locks, etc; dams and dykes dredging; subsurface work.	45240000
		45.25	Other construction work involving special trades.	Construction activities specialising in one aspect common to different kinds	45250000

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				<p>of structures, requiring specialised skill or equipment;</p> <p>construction of foundations, including pile driving;</p> <p>water well drilling and construction, shaft sinking;</p> <p>erection of non-self-manufactured steel elements;</p> <p>steel bending;</p> <p>bricklaying and stone setting;</p> <p>scaffolds and work platform erecting and dismantling, including renting of scaffolds and work platforms;</p> <p>erection of chimneys and industrial ovens.</p>	
	45.3		Building installation		45300000
		45.31	Installation of electrical wiring and fittings	<p>Installation in buildings or other construction projects of:</p> <p>electrical wiring and fittings;</p> <p>telecommunications systems;</p>	45310000

				<p>electrical heating systems;</p> <p>residential antennas and aerials;</p> <p>fire alarms; burglar alarm systems; lifts and escalators;</p> <p>lightning conductors, etc.</p>	
		45.32	Insulation work activities	Installation in buildings or other construction projects of thermal, sound or vibration insulation.	45320000
		45.33	Plumbing	<p>Installation in buildings or other construction projects of:</p> <p>plumbing and sanitary equipment;</p> <p>gas fittings;</p> <p>heating, ventilation, refrigeration or air conditioning equipment and ducts;</p> <p>sprinkler systems.</p>	45330000
		45.34	Other building installation	<p>Installation of illumination and signalling systems for roads, railways, airports and ports.</p> <p>Installation in buildings or other</p>	45340000

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				construction projects of fittings and fixtures n.e.c.	
	45.4		Building completion		45400000
		45.41	Plastering	Application in buildings or other construction projects of interior and exterior plaster or stucco, including related lathing materials.	45410000
		45.42	Joinery installation	Installation of non self-manufactured doors, windows, door and window frames, fitted kitchens, staircases, shop fittings and the like, of wood or other materials. Interior completion such as ceilings, wooden wall coverings, movable partitions, etc.	45420000
		45.43	Floor and wall covering	Laying, tiling, hanging or fitting in buildings or other construction projects of: ceramic, concrete or cut stone wall or floor tiles; parquet and other wood	45430000

				<p>floor coverings carpets and linoleum floor coverings carpets and linoleum floor coverings, including of rubber or plastic;</p> <p>terrazzo, marble, granite or slate floor or wall coverings;</p> <p>wallpaper.</p>	
		45.44	Painting and glazing	<p>Interior and exterior painting of buildings;</p> <p>Painting of civil engineering structures;</p> <p>Installation of glass, mirrors, etc.</p>	45440000
		45.45	Other building completion	<p>Installation of private swimming pools steam cleaning, sand blasting and similar activities for building exteriors.</p> <p>Other building completion and finishing work n.e.c.</p>	45450000
	45.5		Renting of construction or demolition equipment with operator		45500000
		45.50	Renting of construction or		45500000

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			demolition equipment with operator		
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SCHEDULE 3

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CATEGORIES OF SERVICES

Part A			
Category	Services	CPC Reference No	CPV Code
1	Maintenance and repair of vehicles and equipment	6112, 6122, 633, 886	from 50100000 to 50982000 (except for 50310000 to 50324200 and 50116510-9, 50190000-3, 50229000-6, 50243000-0)
2	Transport by land, including armoured car services and courier services but not including transport of mail and transport by rail	712 (except 71235), 7512, 87304	from 60112000-6 to 60129300-1 (except 60121000 to 60121600, 60122200-1, 60122230-0), and from 64120000-3 to 64121200-2
3	Transport by air but not transport of mail	73 (except 7321)	from 62100000-3 to 62300000-5 (except 62121000-6, 62221000-7)
4	Transport of mail by land, other than by rail, and by air	71235, 7321	60122200-1, 60122230-0 62121000-6, 62221000-7
5	Telecommunications services	752	from 64200000-8 to 64228200-2, 72318000-7, and from 72530000-9 to 72532000-3
6	Financial services: (a) Insurance services; (b) Banking and investment services other than financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments and central bank services.	Ex 81, 812, 814	from 66100000-1 to 66430000-3 and from 67110000-1 to 67262000-1
7	Computer and related services	84	from 50300000-8 to 50324200-4, from

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			72100000-6 to 72591000-4 (except 72318000-7 and from 72530000-9 to 72532000-3)
8	Research and development services where the benefits accrue exclusively to the utility for its use in the conduct of its own affairs and the services are to be wholly paid for by the utility	85	from 73000000-2 to 73300000-5 (except 73200000-4, 73210000-7, 7322000-0)
9	Accounting, auditing and book-keeping services	862	from 74121000-3 to 74121250-0
10	Market research and public opinion polling services	864	from 74130000-9 to 74133000-0, and 74423100-1, 74423110-4
11	Management consultancy services and related services, but not arbitration and conciliation services	865, 866	from 73200000-4 to 73220000-0, from 74140000-2 to 74150000-5 (except 74142200-8), and 74420000-9, 74421000-6, 74423000-0, 74423200-2, 74423210-5, 74871000-5, 93620000-0
12	Architectural services; engineering services and integrated engineering services; urban planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services	867	from 74200000-1 to 74200000-1 to 74276400-8, and from 74310000-5 to 74323100-0, and 74874000-6
13	Advertising services	871	from 74400000-3 to 74422000-3 (except 74420000-9 and 74421000-6)

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14	Building-cleaning services and property management services	874, 82201 to 82206	from 70300000-4 to 70340000-6, and 74710000-9 to 74760000-4
15	Publishing and printing services on a fee or contract basis	88442	from 78000000-7 to 78400000-1
16	Sewage and refuse disposal service: sanitation and similar services	94	FROM 90100000-8 TO 90320000-6, AND 50190000-3, 50229000-6, 50243000-0

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Part B			
Category	Services	CPC Reference No.	CPV Code
17	Hotel and restaurant services	64	from 55000000-0 to 55524000-9, and from 93400000-2 to 93411000-2
18	Transport by water	72	from 61000000-5 to 61530000-9, and from 63370000-3 to 63372000-7
19	Supporting and auxiliary transport services	74	62400000-6, 62440000-8, 62441000-5, 62450000-1, from 63000000-9 to 63600000-5 (except 63370000-3, 63371000-0, 63372000-7), and 74322000-2, 93610000-7
20	Legal services	861	from 74110000-3 to 74114000-1
21	Personnel placement and supply services	872	from 74500000-4 to 74540000-6 (except 74511000-4), and from 95000000-2 to 95140000-5
22	Investigation and security services, other than armoured car services	873 (except 87304)	from 74600000-5 to 74620000-1
23	Education and vocational health services	92	from 80100000-5 to 80430000-7
24	Health and social services	93	74511000-4, and from 85000000-9 to 85323000-9 (except 85321000-5 and 85322000-2)
25	Recreational, cultural and sporting services	96	from 74875000-3 to 74875200-5, and from 92000000-1 to 92622000-7 (except 92230000-2)
26	Other services		

SCHEDULE 4

Regulation 4(4)

EXTENSION TO NON MEMBER STATES

Relevant States:

1. Iceland
2. Liechtenstein
3. Norway