

Subsidiary Legislation made under s.75.

## Procurement (Public Sector Contracts) Regulations 2016

### LN.2016/084

		<i>Commencement</i>	<b>18.4.2016</b>
Amending enactments	Relevant current provisions		Commencement date
LN. 2016/184	r. 99(4)(b)		15.9.2016
2017/130	rr. 2, 23(16)(c), (i)(cc), (ii)		29.6.2017
2019/024	rr. 57(3), 63(4)(a)		7.2.2019
2020/453	rr. 2(1), 4(2), 5(2)(b)-(c), A6, 6(3), 7(1)(a)-(d), (2)-(3), 8(7), (14)(a)-(b), 11(1)-(2), 12(1)(d)(i), (aa), (bb), (ii), (2)(aa), 13, 14(1)(c), (3)(b), (4)(c), 15(1)(a)-(b), (2), 17(2)(a), 18(1), (5)(a), (8), 19(1)(a)-(b), (2), 20(4), 21(1), 23(15)(a)(i), (16)(c), (17), (20)(a)-(b), 28(2), (4)(a)-(b), (5), 29(2)(a), (6)(a)-(b), (9)(a), 30(4)(a), (6)(a)-(b), (9)(a), 31(2), 32(5), 34(8)(a), (22), (25), (25A), 39, 42(5), (7), 48-49, 50(1), (2), (4), (5)(a)-(b), 51(2)-(7), 52, 53(1), 56(2), 58(4), 59(1)-(6), (10)(a), (11)-(13), 60(4)(a)-(b), (5), (10)-(11), 61, 62(2), (4)(a)-(c), (6), 64, 68(4)(c), (5)-(6), 69(2)(f), (6)-(8), 71(5), 72(3), 73(a)-(c), 75(3)-(4), 78(2)(a)-(b), (3)-(4), 82(1)(a)-(b), (2), 83(4), (10)-(11), 84-85, 89(1)(b), (2), 93(3), 99(3)(b)-(c), (4)(b)		1.1.2021
2021/029	rr. 26, 90		1.1.2021
2022/240	r. 7(1)(a)-(c)		11.8.2022
2024/007	r. 7(1)(a)-(c)		25.1.2024

#### Transposing:

Directive 2014/24/EU

Directive 2004/18/EC

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**Public Finance (Control and Audit)**

**2016/084 Procurement (Public Sector Contracts) Regulations 2016**

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*In exercise of the powers conferred on him by section 75 of the Public Finance (Control and Audit) Act and section 23(g)(i) of the Interpretation and General Clauses Act, and of all other enabling powers, and for the purpose of transposing into the law of Gibraltar Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014, on public procurement and repealing Directive 2004/18/EC, the Minister has made the following Regulations—*

## **PART 1**

### **PRELIMINARY AND GENERAL**

#### **Title and commencement.**

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

#### **Interpretation.**

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

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

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

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

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

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

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

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

“central purchasing body” means a contracting authority providing centralised purchasing activities and, possibly, ancillary purchasing activities;

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

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

“certification body” means a certification body complying with European standards of certification and “certificate issued by a certification body” means a certificate issued by such a body in accordance with certification arrangements for which Gibraltar or a Member State has provided for the purposes of Article 64 to the Public Contracts Directive;

“Common Procurement Vocabulary” or “CPV” means the reference nomenclature applicable to public 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;

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



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“Competent Authority” means the person or body appointed by the Minister under regulation 5 to undertake the responsibilities of these Regulations;

“competitive dialogue procedure” means a procedure—

- (a) in which any economic operator may make a request to participate; and
- (b) whereby a contracting authority conducts a dialogue with the economic operators admitted to that procedure with the aim of developing one or more suitable alternative solutions capable of meeting its requirements, and on the basis of which the economic operators chosen by the contracting authority are invited to tender;

“contract notice” means a notice sent to the Official Journal in accordance with these Regulations;

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

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

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

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

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

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

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

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

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

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

“electronic document” has the meaning given in Article 3(35) of Regulation (EU) No 910/2014 of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market, as amended from time to time;

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

“electronic signature” has the meaning given in Article 3(35) of Regulation (EU) No 910/2014 of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market, as amended from time to time;

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

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

“European Technical Assessment” means the documented assessment of the performance of a construction product, in relation to its essential characteristics, in accordance with the respective European Assessment Document, as defined in point 12 of Article 2 of Regulation (EU) No 305/2011 of the European Parliament and of the Council, as may be amended from time to time;

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

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

“innovation” means the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations inter alia with the purpose of helping to solve societal challenges or to support sustainable and inclusive growth;

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

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

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

“life cycle” means all consecutive and/or interlinked stages, including research and development to be carried out, production, trading and its conditions, transport, use and maintenance, throughout the existence of the product or the works or the provision of the service, from raw material acquisition or generation of resources to disposal, clearance and end of service or utilisation;

“Minister” means the Minister responsible for finance;

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

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

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

“procurement document” means any document produced or referred to by the contracting authority to describe or determine elements of the procurement or the procedure, including the contract notice, the prior information notice where it is used as a means of calling for competition, the technical specifications, the descriptive document,

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proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents;

“procurement” means the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose;

“prior information notice” means a notice submitted to the UK e-notification service in accordance with regulation 48;

“public contract” means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services;

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

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

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

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

- (a) the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex II to the Public Sector Directive;
- (b) the execution, or both the design and execution, of a work;
- (c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work;

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

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

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

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

“SME” must have the same meaning as provided in Commission Recommendation 2003/361/EC, as may be amended from time to time;

“SPD” means the Single Procurement Document referred to in regulation 59(1);

“standard” means a technical specification, adopted by a recognised standardisation body, for repeated or continuous application, with which compliance is not compulsory, and which is one of the following-

- (a) an international standard;
- (b) a European standard; or
- (c) a national standard;

“sub-central contracting authority” means all contracting authorities which are not government contracting authorities;

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

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

“technical specification” means one of the following-

- (a) in the case of public works contracts, the totality of the technical prescriptions contained in particular in the procurement documents, defining the characteristics required of a material, product or supply, so that it fulfils the use for which it is intended by the contracting authority; those characteristics include levels of environmental and climate performance, design for all requirements including accessibility for persons with disabilities, 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 at any stage of the life cycle of the works; those characteristics also include rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve; or
- (b) in the case of public supply or service contracts, a specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental and climate performance levels, design for all requirements, including accessibility for persons with disabilities, and conformity assessment, performance, use of the 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 at any stage of the life cycle of the supply or service and conformity assessment procedures;

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

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

“the UK e-notification service” has the meaning given by regulation 51(6) and references (in whatever terms) to the submission of notices to that service are to be construed in accordance with that regulation;

“Utilities Directive” means Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water,

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energy, transport and postal services sector and repealing Directive 2004/17/EC, as may be amended from time to time;

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

“working day” means a day other than a Saturday, Sunday or 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;

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

“year” means a calendar year.

(2) In these Regulations a reference to a Member State includes a reference to a State which is a party to the European Economic Area Agreement.

### **Contracting authorities.**

3.(1) For the purposes of these Regulations each of the following is a contracting authority—

- (a) a Government department;
- (b) the Gibraltar Parliament;
- (c) a body governed by public law as defined in Article 2(4) of the Public Sector Directive and any other body in Gibraltar which the Government may from time to time specify by notice in the Gazette; and
- (d) a corporation established, or a group of individuals appointed to act together, for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and—
  - (i) financed wholly or mainly by another contracting authority,
  - (ii) subject to management supervision by another contracting authority, or
  - (iii) more than half of the board of directors or members of which, or, in the case of a group of individuals, more than half of those individuals, are appointed by another contracting authority.

(2) Where an entity specified in subregulation (1) does not have the capacity to enter into a contract, the contracting authority in relation to that entity is a person whose function it is to enter into contracts for that entity.

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

4.(1) In these Regulations, an “economic operator” means any natural or legal person, public entity, group of such persons, entities or both, including any temporary association of undertakings, which offers the execution of works or a work, a combination of works and work, the supply of products or the provision of services on the market.

(2) *Deleted*

(3) A contracting authority must—

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

**Competent Authority.**

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

(2) The Competent Authority is responsible for-

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

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



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**PART 2**

**RULES IMPLEMENTING THE PUBLIC CONTRACTS DIRECTIVE**

**CHAPTER 1**

**SCOPE AND GENERAL PRINCIPLES**

**Subchapter 1**

**Subject matter and mixed procurement**

A6.(1) This Part –

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

(2) The arms, munitions and war material to which subregulation (1)(b) applies are, subject to subregulation (5), those included in the 1958 List.

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

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

**Mixed procurement.**

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

- (a) contracts which have as their subject-matter two or more types of procurement (works, services or supplies) must be awarded in accordance with the provisions

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applicable to the type of procurement that characterises the main subject-matter of the contract in question; and

- (b) in the case of-
- (i) mixed contracts consisting partly of services to which regulation 9 applies and partly of other services; or
  - (ii) mixed contracts consisting partly of services and partly of supplies,

the main subject-matter must be determined in accordance with which of the estimated values of the respective services, or of the respective services and supplies, is the highest.

(2) In the case of contracts which have as their subject-matter procurement covered by this Part as well as procurement not covered by this Part, the contracting authority may-

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

- (b) where the different parts of a given contract are objectively not separable, the applicable legal regime must be determined on the basis of the main subject-matter of that contract.

(3) For the purposes of these Regulations, where part of a given contract is covered by regulation A6(1) or the Procurement (Defence and Security Public Contracts) Regulations 2012, regulation 18 applies instead of subregulations (1) or (2).

**Threshold amounts.**

7.(1) This Part applies to procurements with a value estimated to be equal to or greater than the following thresholds-

- (a) for public works contracts, £5,372,609;
- (b) for public supply contracts and public service contracts awarded by central government authorities, and design contests organised by such authorities, £139,688, subject to subregulation (2);
- (c) for public supply contracts and public service contracts awarded by sub-central contracting authorities, and design contests organised by such authorities, £214,904;
- (d) for public service contracts for social and other specific services listed in Annex XIV to the Public Sector Directive, £663,540.

(2) Where public supply contracts are-

- (a) awarded by central government authorities operating in the field of defence; and
- (b) concern products not covered by Annex III to the Public Sector Directive,

the applicable threshold for the purposes of subregulation (1) is the sum specified in subregulation (1)(c).

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

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

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

(3) Without prejudice to subregulation (4), where a contracting authority is comprised of separate operational units, account must be taken of the total estimated value for all those units.

(4) Where a separate operational unit is independently responsible for its procurement, or certain categories of its procurement, the values may be estimated at the level of the unit in question.

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

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

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

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

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

(10) In the case of public works contracts, the calculation of the estimated value must take account of both the cost of the works and the total estimated value of the supplies and services that are made available to the contractor by the contracting authority provided that they are necessary for executing the works.

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

(12) Where a proposal for the acquisition of similar supplies may result in contracts being awarded in the form of separate lots, account must be taken of the total estimated value of all such lots when applying regulation 7(1)(b) and (c).

(13) For the purposes of subregulations (11) and (12), where the aggregate value of the lots is equal to or greater than the relevant threshold mentioned in regulation 7, this Part applies to the awarding of each lot.

(14) Notwithstanding subregulations (11) to (13), contracting authorities may, subject to subregulation (15), award contracts for individual lots without applying the procedures provided for by this Part, but only if the estimated value of the lot concerned is less than-

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

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

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

- (a) the total actual value of the successive contracts of the same type awarded during the preceding 12 months or financial year adjusted, where possible, to take account of the changes in quantity or value which would occur in the course of the 12 months following the initial contract;
- (b) the total estimated value of the successive contracts awarded during the 12 months following the first delivery, or during the financial year where that is longer than 12 months.

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

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

(18) In the case of public service contracts, the basis for calculating the estimated contract value must, where appropriate, be the following-

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

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- (c) in the case of design contracts, the fees, commissions payable and other forms of remuneration.

(19) In the case of public service contracts which do not indicate a total price, the basis for calculating the estimated contract value must be the following-

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

#### **Utilities.**

9. These Regulations do not apply to the seeking of offers in relation to a proposed public contract, framework agreement or dynamic purchasing system where the contracting authority is a utility within the meaning of regulation 3 of the Procurement (Utilities Contracts) Regulations 2016 and-

- (a) that contract is for the purposes of carrying out an activity listed in Annex I to the Utilities Directive, in which the utility is specified;
- (b) that contract is for the provision of bus services to the public where other entities are free to provide those services, either in general or in a particular geographical area, under the same conditions as the utility;
- (c) that contract is for the purpose of acquiring goods, work, 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, work, works or services or other persons are not free to sell, hire or provide them under the same conditions;
- (d) that contract is for the purchase of water, where that utility is engaged in the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transportation or distribution of drinking water or the supply of drinking water to such networks;
- (e) that contract is for the supply of energy or of fuels for the production of energy, where that utility is engaged in-
  - (i) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas or heat or the supply of gas or heat to such networks;

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- (ii) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity or the supply of electricity to such networks;
  - (iii) exploring for or extracting oil, gas, coal or other solid fuels; or
- (f) where that utility is engaged in an activity excluded from the Procurement (Utilities Contracts) Regulations 2016 by virtue of regulation 9 of those Regulations.

**Specific exclusions in the field of electronic communications.**

10.(1) These Regulations do not apply to public contracts, or design contests, for the principal purpose of permitting contracting authorities to provide or exploit public communications networks or to provide to the public one or more electronic communications services.

(2) In this regulation, “public communications network” and “electronic communications service” have the same meanings as in Directive 2002/21/EC of the European Parliament and of the Council, as may be amended from time to time.

**Public contracts awarded, and design contests organised, pursuant to international rules.**

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

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

(2) *Deleted*

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

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

(5) In the case of contracts and design contests involving defence or security aspects which are awarded or organised pursuant to international rules, regulation 19 applies instead of subregulations (1) to (4) of this regulation.

**Specific exclusions for service contracts.**

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

- (a) for the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property, or which concern interests in or rights over any of them;
- (b) the acquisition, development, production or co-production of programme material intended for audiovisual media services or radio media services, that are awarded by audiovisual or radio media service providers, or contracts for broadcasting time or programme provision that are awarded to audiovisual or radio media service providers;
- (c) for arbitration or conciliation services;
- (d) for any of the following legal services-
  - (i) legal representation of a client by a lawyer in-
    - (aa) an arbitration or conciliation held in Gibraltar, or another country or before an international arbitration or conciliation instance; or
    - (bb) judicial proceedings before the courts, tribunals or public authorities of Gibraltar, a or another country or before international courts, tribunals or institutions;
  - (ii) legal advice given in preparation of any of the proceedings referred to in subparagraph (i), or where there is a tangible indication and high probability that the matter to which the advice relates will become the subject of such proceedings, provided that the advice is given by a lawyer;



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- (iii) document certification and authentication services which must be provided by notaries;
  - (iv) legal services provided by trustees or appointed guardians or other legal services the providers of which are designated by a court or tribunal in Gibraltar, or are designated by law to carry out specific tasks under the supervision of such tribunals or courts;
  - (v) other legal services which in Gibraltar are connected, even occasionally, with the exercise of official authority;
- (e) for-
- (i) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council, as may be amended from time to time;
  - (ii) central bank services; or
  - (iii) operations conducted with the European Financial Stability Facility and the European Stability Mechanism;
- (f) for loans, whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments;
- (g) which are employment contracts;
- (h) for civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations, and which are covered by CPV codes 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8, 98113100-9 and 85143000-3 except patient transport ambulance services;
- (i) for public passenger transport services by rail or metro; or
- (j) for political campaign services covered by CPV codes 79341400-0, 92111230-3 and 92111240-6, when awarded by a political party in the context of an election campaign.
- (2) In this regulation-

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- (a) “audiovisual media services” and “media service providers” have, respectively, the meanings given by Articles 1(1)(a) and 1(1)(d) of Directive 2010/13/EU of the European Parliament and of the Council, as may be amended from time to time;
- (aa) “lawyer” means a person practising as an advocate, barrister or solicitor in any part of Gibraltar or the United Kingdom;
- (b) “programme” has the meaning given by Article 1(1)(b) of that Directive 2010/13/EU of the European Parliament and of the Council, as may be amended from time to time, but also includes radio programmes and radio programme materials; and
- (c) “programme material” has the same meaning as “programme”.

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

13. These Regulations do not apply to public service contracts awarded by a contracting authority to another contracting authority on the basis of an exclusive right which the latter enjoys pursuant to a law, regulation or published administrative provision which is compatible with anything which is retained EU law by virtue of section 7 of the European Union (Withdrawal) Act 2019 because of the effect which TFEU had immediately before 1 January 2021 in giving rise to any of the rights, powers, liabilities, obligations, restrictions, remedies and procedures mentioned in that section.

**Public contracts between entities within the public sector.**

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

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

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

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

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

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

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

(4) A contracting authority which does not exercise over a legal person control within the meaning of subregulation (2) may nevertheless award a public contract to that legal person without applying these Regulations where all of the following conditions are fulfilled-

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

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

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

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

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

- (a) the contract establishes or implements a co-operation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;
- (b) the implementation of that co-operation is governed solely by considerations relating to the public interest; and
- (c) the participating contracting authorities perform on the open market less than 20% of the activities concerned by the co-operation.

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

(9) Where, because of the date on which the relevant legal person or contracting authority was created or commenced activities, or a reorganisation of its activities, the turnover, or alternative activity-based measure such as costs, are either not available for the preceding 3 years or no longer relevant, it must be sufficient to show that the measurement of activity is credible, particularly by means of business projections.

**Contracts subsidised by contracting authorities.**

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15.(1) These Regulations apply to the awarding of the following contracts-

- (a) works contracts which are subsidised directly by contracting authorities by more than 50% and the estimated value of which, net of VAT, is equal to or greater than the sum specified in regulation 7(1)(a), where those contracts involve any of the following activities-
  - (i) civil engineering activities as listed in Annex II to the Public Sector Directive;
  - (ii) building work for hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes;
- (b) service contracts which are subsidised directly by contracting authorities by more than 50% and the estimated value of which, net of VAT, is equal to or greater than the sum specified in regulation 7(1)(c) and which are connected to a works contract as referred to in paragraph (a).

**Research and development services.**

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

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

**Defence and security.**

17.(1) These Regulations apply to the awarding of public contracts and to design contests organised in the fields of defence and security, with the exception of the following contracts-

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

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

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

(3) Where the procurement and performance of the public contract or design contest are classified as secret or must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in Gibraltar, these Regulations do not apply provided that Gibraltar has determined that the essential interests concerned cannot be guaranteed by less intrusive means, such as those referred to in subregulation (2)(a).

**Mixed procurement involving defence or security aspects.**

18.(1) This regulation applies in the case of mixed contracts which have as their subject matter procurement covered by these Regulations and procurement covered by regulation A6(1) or the Procurement (Defence and Security Public Contracts) Regulations 2012.

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

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

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

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

- (a) where part of a given contract is covered by regulation A6(1), the contract may be awarded without applying these Regulations, provided that the award of a single contract is justified by objective reasons;

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- (b) where part of a given contract is covered by the Procurement (Defence and Security Public Contracts) Regulations 2012, the contract may be awarded in accordance with those Regulations, provided that the award of a single contract is justified by objective reasons.

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

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

(8) Where the different parts of a given contract are objectively not separable, the contract may be awarded without applying these Regulations, where it includes elements covered by regulation A6(1); otherwise it may be awarded in accordance with the Procurement (Defence and Security Public Contracts) Regulations 2012.

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

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

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

(2) *Deleted*

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

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

## Subchapter 2

### General Rules

#### Principles of procurement.

20.(1) Contracting authorities must treat economic operators equally and without discrimination and must act in a transparent and proportionate manner.

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

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

(4) The Competent Authority must ensure that economic operators, performing public contracts, comply with all the applicable obligations in the fields of environmental, social and labour law established by Gibraltar law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X to the Public Sector Directive.

#### Economic operators.

21.(1) *Deleted*

(2) In the case of-

- (a) public service contracts;
- (b) public works contracts; and
- (c) public supply contracts which cover in addition services or siting and installation operations,



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legal persons may be required to indicate, in the tender or the request to participate, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract in question.

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

(4) Where necessary, contracting authorities may clarify in the procurement documents how groups of economic operators are to meet the requirements as to economic and financial standing or technical and professional ability referred to in regulation 58 provided that this is justified by objective reasons and is proportionate.

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

(6) Without prejudice to this regulation, contracting authorities may require groups of economic operators to assume a specific legal form once they have been awarded the contract, to the extent that such a change is necessary for the satisfactory performance of the contract.

### **Confidentiality.**

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

(2) Subregulation (1) is without prejudice to-

- (a) any other provision of these Regulations, including the obligations relating to the advertising of awarded contracts and the provision of information to candidates and tenderers set out in regulations 50 and 55 respectively;
- (b) any enactments relating to access to information;
- (c) any other requirement, or permission, for the disclosure of information that is applicable under Gibraltar law.

(3) Contracting authorities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure.

**Rules applicable to communication.**

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

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

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

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

(4) Where, in accordance with subregulation (3), electronic means of communication are not used, communication must be carried out-

- (a) by post or by other suitable carrier; or
- (b) by a combination of post or other suitable carrier and electronic means.

(5) Contracting authorities are not obliged to require electronic means of communication in the submission process to the extent that the use of means of communication other than electronic means is necessary either-

- (a) because of a breach of security of the electronic means of communication; or

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(b) for the protection of information of a particularly sensitive nature requiring such a high level of protection that it cannot be properly ensured by using electronic tools and devices that are either generally available to economic operators or can be made available to them by alternative means of access within the meaning of subregulation (14).

(6) Where contracting authorities require, in accordance with subregulation (3), means of communication other than electronic means in the submission process, they must indicate in the report referred to in regulation 83(1) the reasons for that requirement.

(7) Where applicable, contracting authorities must indicate in the report the reasons why use of means of communication other than electronic means has been considered necessary in accordance with subregulation (5).

(8) Subject to subregulations (9), (10) and (11), oral communication may be used in respect of communications other than those concerning the essential elements of a procurement procedure, provided that the content of the oral communication is documented to a sufficient degree.

(9) For the purpose of subregulation (8), the essential elements of a procurement procedure include the procurement documents, requests to participate, confirmations of interest and tenders.

(10) Oral communications with tenderers which could have a substantial impact on the content and assessment of the tenders must be documented to a sufficient extent and by appropriate means, such as written or audio records or summaries of the main elements of the communication.

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

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

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

(14) Contracting authorities must be deemed to offer suitable alternative means of access where they-

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

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

- (a) “publication of the call for competition” means whichever of the following is relevant, and where both are relevant, the earliest of them-
  - (i) its publication on the UK e-notification service after being submitted in accordance with regulation 51;
  - (ii) its publication on a buyer profile in accordance with regulation 52; and
- (b) the text of the call for competition notice or the invitation to confirm interest must specify the internet address at which the tools and devices are accessible.

(16) In addition to the requirements set out in Annex IV of the Public Sector Directive, the following rules apply to tools and devices for the electronic transmission and receipt of tenders and for the electronic receipt of requests to participate-

- (a) information on specifications for the electronic submission of tenders and requests to participate, including encryption and time-stamping, must be available to interested parties;
- (b) the Competent Authority, or a contracting authority acting within an overall framework established by the Competent Authority must, acting in accordance with subregulations (17) and (18), specify the level of security required for the electronic means of communication in the various stages of the specific procurement procedure, and that level must be proportionate to the risks attached;
- (c) where the Competent Authority, or a contracting authority acting within an overall framework established by the Competent Authority must, conclude that the level of risk, assessed in accordance with subregulations (18) and (19), is such that

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advanced electronic signatures as defined by Regulation (EU) No 910/2014 of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market, as may be amended from time to time, must act in accordance with Article 27 of that Regulation (and for this purpose the submission of the tender or request is to be treated as the use of an online service to which that Article applies).

(17) *Deleted*

(18) In deciding the level of security required at each stage of a procurement procedure, and in concluding whether the level of risk is such that advanced electronic signatures are required, the Competent Authority or contracting authority referred to in subregulation (16), must assess the risks having regard to both the likelihood that particular risks will materialise and the potential adverse consequences if those risks materialise.

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

- (a) the risk to the proper functioning and integrity of the specific procurement process, including risks of breach of these Regulations;
- (b) risks to the security of Gibraltar;
- (c) the risk of inadvertent or unauthorised disclosure of, or access to, any economic operator's confidential information;
- (d) the risk of inadvertent or unauthorised disclosure of, or access to, information held by the contracting authority including information relating to the specific procurement;
- (e) the risk that use of electronic communications could provide opportunity for malicious attacks on the electronic systems of, or data held by, the authority, any economic operator or any other person, including introduction of malware or denial of service attacks;
- (f) other material risks relating to the procurement procedure in question;
- (g) the need for consistency as between similar procurements performed by the same contracting authority;
- (h) the need for proportionality between, on the one hand the expected benefits of any particular security requirements, in terms of eliminating or reducing any of the

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risks referred to in paragraphs (a) to (g), and on the other hand the costs, burdens and obligations which those requirements may impose on economic operators.

(20) The Competent Authority or contracting authority may establish the required advanced signature format in a format other than those referred to in Article 1 of Commission Implementing Decision (EU) 2015/1506 laying down specifications relating to formats of advanced electronic signatures and advanced seals to be recognised by public sector bodies, as may be amended from time to time, and, where it does so-

- (a) it must put in place the necessary measures to be able to process that format technically by including the information required for the purpose of processing the signature in the document concerned; and
- (b) the document must contain in the electronic signature or in the electronic document carrier information on existing validation possibilities that comply with the requirements of Article 2(1)(b) of that Decision (or would comply with those requirements if the person seeking to validate the signature were a public sector body within the meaning of that Article).

#### **Nomenclatures.**

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

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

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

(2) For the purposes of subregulation (1), the concept of conflicts of interest must at least cover any situation where relevant staff members have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

(3) In this regulation-

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

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

### **PART 3**

## **RULES ON PUBLIC CONTRACTS**

### **CHAPTER 1**

#### **Procedures**

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

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

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

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

27.(1) When awarding public contracts, contracting authorities must apply procedures that conform to these Regulations, provided that a call for competition has been published in accordance with these Regulations.

(2) Contracting authorities may apply-

- (a) an open or restricted procedures as regulated by these Regulations;
- (b) an innovation partnership as regulated by these Regulations; or
- (c) a competitive procedure with negotiation or a competitive dialogue in the following situations-
  - (i) with regard to works, supplies or services fulfilling one or more of the following criteria-

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- (aa) the needs of the contracting authority cannot be met without adaptation of readily available solutions;
  - (bb) they include design or innovative solutions;
  - (cc) the contract cannot be awarded without prior negotiation because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of risks attaching to them;
  - (dd) the technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, European Technical Assessment, common technical specification or technical reference, within the meaning of points 2 to 5 of Annex VII to the Public Sector Directive;
- (ii) with regard to works, supplies or services where, in response to an open or a restricted procedure, only irregular or unacceptable tenders are submitted.

(3) Where subregulation (2)(b) applies, contracting authorities are not required to publish a contract notice where they include in the procedure all of, and only, the tenderers which satisfy the criteria set out in regulations 57 to 64 and which, during the prior open or restricted procedure, submitted tenders in accordance with the formal requirements of the procurement procedure.

(4) For the purpose of subregulation (2)(a) a tender must-

- (a) be considered irregular if-
  - (i) it does not comply with the procurement documents;
  - (ii) it is received late;
  - (iii) there is evidence of collusion or corruption; or
  - (iv) it is found by the contracting authority to be abnormally low;
- (b) be considered unacceptable if-
  - (i) the tender submitted by tenderers does not have the required qualifications; and



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- (ii) the tender has a price that exceeds the contracting authority's budget as determined and documented prior to the launching of the procurement procedure.

(5) The call for competition must be made by means of a contract notice in accordance with regulation 49.

(6) Where the call for competition is made by means of such a prior information notice, pursuant to regulation 50(2), economic operators which have expressed their interest following the publication of the prior information notice must subsequently be invited to confirm their interest in writing by means of an invitation to confirm interest in accordance with regulation 54.

#### **Open procedure.**

28.(1) In open procedures, any interested economic operator may submit a tender in response to a contract notice.

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

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

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

- (a) the prior information notice included all the information required by regulation 48(2) insofar as that information was available at the time the prior information notice was published;
- (b) the prior information notice was submitted for publication between 35 days and 12 months before the date on which the contract notice was submitted.

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

(6) The contracting authority may reduce by 5 days the time limit for receipt of tenders set out in subregulation (2) where it accepts that tenders may be submitted by electronic means in accordance with regulation 23.

**Restricted procedure.**

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

(2) The minimum time limit for receipt of requests to participate must, subject to subregulation (10), be 30 days from the date on which-

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

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

(4) Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 65.

(5) Subject to subregulations (6) to (9), the minimum time limit for the receipt of tenders must be 30 days from the date on which the invitation to tender is sent.

(6) Where contracting authorities have published a prior information notice which was not itself used as a means of calling for competition, the minimum time limit for the receipt of tenders as laid down in subregulation (5) may be shortened to 10 days, provided that both of the following conditions are fulfilled-

- (a) the prior information notice included all the information required by regulation 48, insofar as that information was available at the time the prior information notice was published;
- (b) the prior information notice was submitted for publication between 35 days and 12 months before the date on which the contract notice was submitted.

(7) The time limit for the receipt of tenders must be at least 10 days from the date on which the invitation to tender is sent.

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(8) The time limit for receipt of tenders provided for by subregulation (5) may be reduced by 5 days where the contracting authority accepts that tenders may be submitted by electronic means in accordance with regulation 23.

(9) Where a state of urgency duly substantiated by the contracting authorities renders impracticable the time limits laid down in this regulation, they may fix-

- (a) a time limit for the receipt of requests to participate which must not be less than 15 days from the date on which the contract notice is submitted; and
- (b) a time limit for the receipt of tenders which must not be less than 10 days from the date on which the invitation to tender is sent.

**Competitive procedure with negotiation.**

30.(1) In competitive procedures with negotiation, any economic operator may submit a request to participate in response to a call for competition by providing the information set out in Parts B and C of Annex V to the Public Sector Directive for qualitative selection that is requested by the contracting authority.

(2) In the procurement documents, contracting authorities must-

- (a) identify the subject-matter of the procurement by providing a description of their needs and the characteristics required of the supplies, works or services to be procured;
- (b) indicate which elements of the description define the minimum requirements to be met by all tenders; and
- (c) specify the contract award criteria.

(3) The information provided under subregulation (2) must be sufficiently precise to enable economic operators to identify the nature and scope of the procurement and decide whether to request to participate in the procedure.

(4) Subject to subregulation (6), the minimum time limit for receipt of requests to participate must be 30 days from-

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

(5) Subject to subregulations (6) to (9), the minimum time limit for the receipt of initial tenders must be 30 days from the date on which the invitation is sent.

(6) Where contracting authorities have published a prior information notice which was not itself used as a means of calling for competition, the minimum time limit for the receipt of initial tenders as laid down in subregulation (5) may be shortened to 10 days, provided that both of the following conditions are fulfilled-

- (a) the prior information notice included all the information required by regulation 48, insofar as that information was available at the time the prior information notice was published;
- (b) the prior information notice was submitted for publication between 35 days and 12 months before the date on which the contract notice was submitted.

(7) The time limit for the receipt of initial tenders must be at least 10 days from the date on which the invitation to tender is sent.

(8) The time limit for receipt of initial tenders provided for by subregulation (5) may be reduced by 5 days where the contracting authority accepts that tenders may be submitted by electronic means in accordance with regulation 22.

(9) Where a state of urgency duly substantiated by the contracting authorities renders impracticable the time limits laid down in this regulation, they may fix-

- (a) a time limit for the receipt of requests to participate which must not be less than 15 days from the date on which the contract notice is submitted; and
- (b) a time limit for the receipt of initial tenders which must not be less than 10 days from the date on which the invitation to tender is sent.

(10) Only those economic operators invited by the contracting authority following its assessment of the information provided may submit an initial tender which must be the basis for the subsequent negotiations.

(11) Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 65.

(12) Subject to subregulations (14) and (18), contracting authorities must negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve their content.

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(13) The minimum requirements and the award criteria must not be subject to negotiation.

(14) Contracting authorities may award contracts on the basis of the initial tenders without negotiation where they have indicated, in the contract notice or in the invitation to confirm interest, that they reserve the possibility of doing so.

(15) During the negotiations, contracting authorities must ensure equal treatment of all tenderers and they must-

- (a) not provide information in a discriminatory manner which may give some tenderers an advantage over others;
- (b) inform all tenderers whose tenders have not been eliminated under subregulation (18), in writing, of any changes to the technical specifications or other procurement documents, other than those setting out the minimum requirements; and
- (c) following any such changes, provide sufficient time for tenderers to modify and re-submit amended tenders, as appropriate.

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

(17) For the purposes of subregulation (16), such agreement must not take the form of a general waiver but must be given with reference to the intended communication of specific information.

(18) Competitive procedures with negotiation may take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria specified in the contract notice, in the invitation to confirm interest or in another procurement document.

(19) In the contract notice, the invitation to confirm interest or in another procurement document, the contracting authority must indicate whether it will use the option described in subregulation (18).

(20) Where the contracting authority intends to conclude the negotiations, it must-

- (a) inform the remaining tenderers and set a common deadline to submit any new or revised tenders;

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- (b) verify that the final tenders are in conformity with the minimum requirements and comply with regulation 56(1);
- (c) assess the final tenders on the basis of the award criteria; and
- (d) award the contract in accordance with regulations 66 to 69.

**Competitive dialogue.**

31.(1) In competitive dialogues, any economic operator may submit a request to participate in response to a contract notice by providing the information for qualitative selection that is requested by the contracting authority.

(2) The minimum time limit for receipt of requests to participate must be 30 days from the date on which the contract notice is submitted.

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

(4) Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 65.

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

(6) Contracting authorities must set out their needs and requirements in the contract notice and they must define those needs and requirements in-

- (a) that notice;
- (b) a descriptive document,

or both paragraphs (a) and (b).

(7) At the same time and in the same documents, contracting authorities must also set out and define the chosen award criteria and set out an indicative timeframe.

(8) Contracting authorities-

- (a) must open, with the participants selected in accordance with the relevant provisions of regulations 56 to 66, a dialogue the aim of which must be to identify and define the means best suited to satisfying their needs; and

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(b) may discuss all aspects of the procurement with the chosen participants during this dialogue.

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

(10) In accordance with regulation 22, contracting authorities must not reveal to the other participants solutions proposed or other confidential information communicated by a candidate or tenderer participating in the dialogue without its agreement.

(11) Such agreement must not take the form of a general waiver but must be given with reference to the intended communication of specific information.

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

(13) In the contract notice or the descriptive document, the contracting authority must indicate whether it will use the option in subregulation (12).

(14) The contracting authority must continue the dialogue until it can identify the solution or solutions, which are capable of meeting its needs.

(15) Subject to subregulations (16) and (17), having declared that the dialogue is concluded and having so informed the remaining participants, contracting authorities must ask each of them to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue.

(16) The tenders referred to in subregulation (15)-

(a) must contain all the elements required and necessary for the performance of the project;

(b) may be clarified, specified and optimised at the request of the contracting authority.

(17) For the purposes of subregulation (16), such clarifications, specification or optimisation, or any additional information, may not involve changes to the essential aspects of the tender or of the public procurement, including the needs and requirements set out in the contract

notice or in the descriptive document, where variations to those aspects, needs and requirements are likely to distort competition or have a discriminatory effect.

(18) Contracting authorities must assess the tenders received on the basis of the award criteria laid down in the contract notice or in the descriptive document.

(19) At the request of the contracting authority, negotiations with the tenderer identified as having submitted the tender presenting the best price-quality ratio in accordance with regulation 67 may be carried out to confirm financial commitments or other terms contained in the tender by finalising the terms of the contract, provided this does not-

- (a) have the effect of materially modifying essential aspects of the tender or of the public procurement, including the needs and requirements set out in the contract notice or in the descriptive document; and
- (b) risk distorting competition or causing discrimination.

(20) Contracting authorities may specify prizes or payments to the participants in the dialogue.

### **Innovation partnership.**

32.(1) In innovation partnerships, any economic operator may submit a request to participate in response to a contract notice by providing the information for qualitative selection that is requested by the contracting authority.

(2) In the procurement documents, the contracting authority must-

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

(3) The information provided under subregulation (2) must be sufficiently precise to enable economic operators to identify the nature and scope of the required solution and decide whether to request to participate in the procedure.

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



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(5) The minimum time limit for receipt of requests to participate must be 30 days from the date on which the contract notice is submitted.

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

(7) Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 65, and the contracts must be awarded on the sole basis of the award criterion of the best price quality ratio in accordance with regulation 67.

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

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

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

(11) Based on the targets in subregulation (10), the contracting authority may decide after each phase to-

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

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

(12) Without prejudice to any provision in this regulation, contracting authorities must negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve their content.

(13) The minimum requirements and the award criteria must not be subject to negotiation.

(14) During the negotiations, contracting authorities must ensure equal treatment of all tenderers and they must-

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- (a) not provide information in a discriminatory manner which may give some tenderers an advantage over others;
- (b) inform all tenderers whose tenders have not been eliminated under subregulation (17), in writing, of any changes to the technical specifications or other procurement documents, other than those setting out the minimum requirements; and
- (c) following any such changes, provide sufficient time for tenderers to modify and re-submit amended tenders, as appropriate.

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

(16) For the purposes of subregulation (15), such agreement must not take the form of a general waiver but must be given with reference to the intended communication of specific information.

(17) Negotiations during innovation partnership procedures may take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria specified in the contract notice, in the invitation to confirm interest or in another procurement document.

(18) In the contract notice, the invitation to confirm interest or in another procurement document, the contracting authority must indicate whether it will use the option described in subregulation (17).

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

(20) Only those economic operators invited by the contracting authority, following its assessment of the requested information, may submit research and innovation projects aimed at meeting the needs identified by the contracting authority that cannot be met by existing solutions.

(21) In the procurement documents, the contracting authority must define the arrangements applicable to intellectual property rights.

(22) Subject to subregulation (23), in the case of an innovation partnership with several partners, the contracting authority must not, in accordance with regulation 22, reveal to the

other partners solutions proposed or other confidential information communicated by a partner in the framework of the partnership without that partner's agreement.

(23) For the purposes of subregulation (22), such agreement must not take the form of a general waiver but must be given with reference to the intended communication of specific information.

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

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

## CHAPTER 2

### Techniques and Instruments for Electronic and Aggregated Procurement

#### Framework agreements.

33.(1) Contracting authorities may conclude framework agreements, provided that they apply the procedures provided for in these Regulations.

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

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

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

(5) Contracts based on a framework agreement may under no circumstances entail substantial modifications to the terms laid down in that framework agreement, in particular in the case referred to in subregulation (6).

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

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

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

- (a) following the terms and conditions of the framework agreement, without reopening competition, where it sets out-
  - (i) all the terms governing the provision of the works, services and supplies concerned; and
  - (ii) the objective conditions for determining which of the economic operators that are party to the framework agreement must perform them, which conditions must be indicated in the procurement documents for the framework agreement;
- (b) where the framework agreement sets out all the terms governing the provision of the works, services and supplies concerned-
  - (i) partly without reopening competition in accordance with paragraph (a); and
  - (ii) partly through reopening competition amongst the economic operators which are party to the framework agreement in accordance with paragraph (c),

where this possibility has been stipulated by the contracting authorities in the procurement documents for the framework agreement;

- (c) where not all the terms governing the provision of the works, services and supplies concerned are laid down in the framework agreement, through reopening competition amongst the economic operators which are party to the framework agreement.

(8) For the purposes of subregulation (7)(b)-

- (a) the choice of whether specific works, supplies or services must be acquired following a reopening of competition or directly on the terms set out in the

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framework agreement must be made pursuant to objective criteria, which must be set out in the procurement documents for the framework agreement;

- (b) those procurement documents must also specify which terms may be subject to reopening of competition.

(9) The possibilities provided for in subregulation (7)(b) must also apply to any lot of a framework agreement for which all the terms governing the provision of the works, services and supplies concerned are set out in the framework agreement, regardless of whether all the terms governing the provision of the works, services and supplies concerned under other lots have been set out.

(10) The competitions referred to in subregulation (7)(b) and (c) must be based on the same terms as applied for the award of the framework agreement and, where necessary, more precisely formulated terms and, where appropriate, other terms referred to in the procurement documents for the framework agreement, in accordance with the following procedure-

- (a) for every contract to be awarded, contracting authorities must consult in writing the economic operators capable of performing the contract;
- (b) contracting authorities must fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject-matter of the contract and the time needed to send in tenders;
- (c) tenders must be submitted in writing, and their content must not be opened until the stipulated time limit for reply has expired;
- (d) contracting authorities must award each contract to the tenderer that has submitted the best tender on the basis of the award criteria set out in the procurement documents for the framework agreement.

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

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

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

(3) The dynamic purchasing system may be divided into categories of products, works or services that are objectively defined on the basis of characteristics of the procurement to be undertaken under the category concerned.

(4) The characteristics referred to in subregulation (3), may include reference to the maximum allowable size of the subsequent specific contracts or to a specific geographic area in which subsequent specific contracts will be performed.

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

(6) All the candidates satisfying the selection criteria must be admitted to the system, and the number of candidates to be admitted to the system must not be limited in accordance with regulations 29(4) and 65.

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

(8) Notwithstanding regulation 29, the following time limits must apply for the purpose of the regulation-

- (a) the minimum time limit for receipt of requests to participate must be 30 days from the date on which-
  - (i) the contract notice is submitted; or
  - (ii) where a prior information notice is used as a means of calling for competition, the invitation to confirm interest is submitted;
- (b) the minimum time limit for receipt of tenders must, subject to subregulation (10), be at least 10 days from the date on which the invitation to tender is sent.

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

(10) All communications in the context of a dynamic purchasing system must only be made by electronic means in accordance with regulation 23(1) to (7) and (11) to (19).

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(11) For the purposes of awarding contracts under a dynamic purchasing system, contracting authorities must-

- (a) publish a call for competition making it clear that a dynamic purchasing system is involved;
- (b) indicate in the procurement documents at least the nature and estimated quantity of the purchases envisaged, as well as all the necessary information concerning the dynamic purchasing system, including how the dynamic purchasing system operates, the electronic equipment used and the technical connection arrangements and specifications;
- (c) indicate in the procurement documents any division into categories of products, works or services and the characteristics defining them;
- (d) offer unrestricted and full direct access, as long as the system is valid, to the procurement documents in accordance with regulation 53.

(12) Contracting authorities must give any economic operator, throughout the entire period of validity of the dynamic purchasing system, the possibility of requesting to participate in the system under the conditions referred to in subregulations (5) to (9).

(13) Contracting authorities must finalise their evaluation of such requests in accordance with the selection criteria within 10 working days following their receipt.

(14) The period referred to in subregulation (13), may be prolonged to 15 working days in individual cases where justified, in particular because of the need to examine additional documentation or to otherwise verify whether the selection criteria are met.

(15) Notwithstanding subregulations (13) and (14), as long as the invitation to tender for the first specific procurement under the dynamic purchasing system has not been sent, contracting authorities may extend the evaluation period provided that no invitation to tender is issued during the extended evaluation period.

(16) Where contracting authorities intend to extend the evaluation period in accordance with subregulation (15), they must indicate in the procurement documents the length of the extended period that they intend to apply.

(17) Contracting authorities must inform the economic operator concerned at the earliest possible opportunity of whether or not it has been admitted to the dynamic purchasing system.

(18) Contracting authorities must invite all admitted participants to submit a tender for each specific procurement under the dynamic purchasing system, in accordance with regulation 54.

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

(20) Subject to subregulation (21), contracting authorities must award the contract to the tenderer that submitted the best tender on the basis of the award criteria set out in the contract notice for the dynamic purchasing system or in the invitation to confirm interest.

(21) The award criteria referred to in subregulation (20) may, where appropriate, be formulated more precisely in the invitation to tender.

(22) Contracting authorities may, at any time during the period of validity of the dynamic purchasing system, require admitted participants to submit a renewed SPD within 5 working days from the date on which that request is transmitted.

(23) Regulation 59(7) to (10) must apply throughout the entire period of validity of the dynamic purchasing system.

(24) Contracting authorities must indicate the period of validity of the dynamic purchasing system in the call for competition.

(25) Where the period of validity is changed without terminating the dynamic purchasing system, the contracting authority shall submit for publication on the UK e-notification service a notice of the kind used initially for the call for competition for the dynamic purchasing system.

(25A) Where a dynamic purchasing system is terminated before the end of the period of validity that had most recently been indicated under subregulation (24) or (25), the contracting authority shall submit for publication on the UK e-notification service a contract award notice under regulation 50.

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

### **Electronic auctions.**

35.(1) Contracting authorities may use electronic auctions, in which the following are presented-



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

or both are presented.

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

(3) Public service contracts, and public works contracts, which have as their subject-matter intellectual performances, such as the design of works, which cannot be ranked using automatic evaluation methods, must not be the subject of electronic auctions.

(4) In open or restricted procedures or competitive procedures with negotiation, contracting authorities may decide that the award of a public contract must be preceded by an electronic auction when the content of the procurement documents, in particular the technical specifications, can be established with precision.

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

- (a) on the reopening of competition among the parties to a framework agreement as provided for in regulation 33(7)(b) or (c); and
- (b) on the opening for competition of contracts to be awarded under a dynamic purchasing system referred to in regulation 34.

(6) The electronic auction must be based on one of the following elements of the tenders-

- (a) solely on prices where the contract is awarded on the basis of price only;
- (b) on prices or on the new values of the features of the tenders indicated in the procurement documents, or on both, where the contract is awarded-
  - (i) on the basis of the best price-quality ratio; or
  - (ii) to the tender with the lowest cost using a cost-effectiveness approach.

(7) Contracting authorities which decide to hold an electronic auction must state that fact in the contract notice or in the invitation to confirm interest, and the procurement documents must indicate at least the information set out in Annex VI of the Public Sector Directive.

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

(9) Subject to subregulations (10) and (11) a tender must be considered admissible where-

- (a) it has been submitted by a tenderer which has not been excluded under regulation 57 and which meets the selection criteria; and
- (b) it is in conformity with the technical specifications without being irregular, unacceptable or unsuitable.

(10) For the purposes of subregulation (9)(b) a tender must be considered-

- (a) irregular if-
  - (i) it does not comply with the procurement documents;
  - (ii) it was received late;
  - (iii) there is evidence of collusion or corruption; or
  - (iv) it has been found by the contracting authority to be abnormally low;
- (b) unacceptable if-
  - (i) the tender submitted by the tenderer does not have the required qualifications; and
  - (ii) the tender has a price that exceeds the contracting authority's budget as determined and documented prior to the launching of the procurement procedure.

(11) For the purposes of subregulation (9)(b)-

- (a) a tender must be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the

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contracting authority's needs and requirements as specified in the procurement documents; and

- (b) a request to participate must be considered not to be suitable where the economic operator concerned-
  - (i) is to be or may be excluded under regulation 57; or
  - (ii) does not meet the selection criteria set out by the contracting authority pursuant to regulation 58.

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

(13) The electronic auction referred to in subregulation (12), may take place in a number of successive phases, and must not start sooner than 2 working days after the date on which invitations are sent out.

(14) The invitation referred to in subregulations (12) and (13), must be accompanied by the outcome of a full evaluation of the relevant tender, carried out in accordance with the weighting provided for in regulation 67(9).

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

(16) Subject to subregulation (17), except where the most economically advantageous offer is identified on the basis of price alone, that formula must incorporate the weighting of all the criteria established to determine the most economically advantageous tender, as indicated in the notice used as a means of calling for competition or in other procurement documents.

(17) For the purposes of subregulation (16), any ranges of weightings must be reduced beforehand to a specified value.

(18) Where variants are authorised in accordance with regulation 45, a separate formula must be provided for each variant.

(19) Throughout each phase of an electronic auction the contracting authorities-

- (a) must instantaneously communicate to all tenderers at least sufficient information to enable them to ascertain their relative rankings at any moment;

(b) may-

- (i) where this has been previously indicated, communicate other information concerning other prices or values submitted;
- (ii) at any time announce the number of participants in the current phase of the auction,

but must in no case disclose the identities of the tenderers during any phase of an electronic auction.

(20) Contracting authorities must close an electronic auction in one or more of the following manners-

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

(21) Where contracting authorities intend to close an electronic auction in accordance with subregulation (20)(c), whether or not in combination with subregulation (20)(b), the invitation to take part in the auction must indicate the timetable for each phase of the auction.

(22) After closing an electronic auction, contracting authorities must award the contract in accordance with regulation 67 on the basis of the results of the electronic auction.

### **Electronic catalogues.**

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

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

(3) Electronic catalogues must-

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- (a) be established by the candidates or tenderers with a view to participating in a given procurement procedure in accordance with the technical specifications and format established by the contracting authority;
  - (b) comply with the requirements for electronic communication tools set out in regulation 23 as well as with any additional requirements set by the contracting authority in accordance with that regulation.
- (4) Where the presentation of tenders in the form of electronic catalogues is accepted or required, contracting authorities must-
- (a) state so in the contract notice or in the invitation to confirm interest where a prior information notice is used as a means of calling competition; and
  - (b) indicate in the procurement documents all the necessary information relating to the matters covered by regulation 23(16) to (19) as far as they concern the format, the electronic equipment used and the technical connection arrangements and specifications for the catalogue.
- (5) Where a framework agreement has been concluded with more than one economic operator, following the submission of tenders in the form of electronic catalogues, contracting authorities may provide that the reopening of competition for specific contracts is to take place on the basis of updated catalogues, and in such a case, contracting authorities must use one of the following methods-
- (a) invite tenderers to resubmit their electronic catalogues, adapted to the requirements of the contract in question; or
  - (b) notify tenderers that they intend to collect from the electronic catalogues which have already been submitted the information needed to constitute tenders adapted to the requirements of the contract in question, provided that the use of that method has been indicated in the procurement documents for the framework agreement.
- (6) Where contracting authorities reopen competition for specific contracts in accordance with subregulation (5)(b), they must-
- (a) notify tenderers of the date and time at which they intend to collect the information needed to constitute tenders adapted to the requirements of the specific contract in question; and
  - (b) give tenderers the possibility to refuse such collection of information.

(7) Contracting authorities must allow for an adequate period between the notification and the actual collection of information, and before awarding the contract, contracting authorities must present the collected information to the tenderer concerned so as to give it the opportunity to contest or confirm that the tender thus constituted does not contain any material errors.

(8) Contracting authorities may award contracts based on a dynamic purchasing system by requiring that offers for a specific contract are to be presented in the format of an electronic catalogue.

(9) Contracting authorities may also award contracts based on a dynamic purchasing system in accordance with subregulations (5)(b), (6) and (7) provided that the request to participate in the dynamic purchasing system is accompanied by an electronic catalogue in accordance with the technical specifications and format established by the contracting authority.

(10) For the purposes of subregulation (9), the electronic catalogue must be completed subsequently by the candidates, when they are informed of the contracting authority's intention to constitute tenders by means of the procedure set out in subregulation (5)(b).

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

37.(1) A contracting authority fulfills its obligations under these Regulations when it-

- (a) acquires supplies or services from a central purchasing body offering the centralised purchasing activity referred to in paragraphs (a), (b) or (c) of the definition of "centralised purchasing activity" at regulation 2;
- (b) acquires works, supplies or services by-
  - (i) using contracts awarded by the central purchasing body;
  - (ii) using dynamic purchasing systems operated by the central purchasing body; or
  - (iii) to the extent set out in regulation 33(4), by using a framework agreement concluded by the central purchasing body offering the centralised purchasing activity referred to in paragraph (b) of the definition of "centralised purchasing activity" at regulation 2.

(2) Without prejudice to subregulation (4), the contracting authority concerned is responsible for fulfilling the obligations imposed by this Part in respect of any parts of the procedure that it conducts itself, such as-

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- (a) awarding a contract under a dynamic purchasing system which is operated by a central purchasing body;
- (b) conducting a reopening of competition under a framework agreement that has been concluded by a central purchasing body;
- (c) determining, under regulation 33(7)(a) or (b), which of the economic operators, party to the framework agreement, must perform a given task under a framework agreement that has been concluded by a central purchasing body.

(3) All procurement procedures conducted by a central purchasing body must be performed using electronic means of communication, in accordance with the requirements set out in regulation 23.

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

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

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

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

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

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

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

39. *Deleted*

**CHAPTER 3****Conduct of the Procedure****Preliminary market consultations.**

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

(2) For the purpose of this regulation, contracting authorities may, for example, seek or accept advice from independent experts or authorities or from market participants.

(3) Such advice referred to in subregulation (2), may be used in the planning and conduct of the procurement procedure, provided that it does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.

**Prior involvement of candidates or tenderers.**

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

- (a) has advised the contracting authority, whether in the context of regulation 40 or not; or
- (b) has otherwise been involved in the preparation of the procurement procedure,

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

(2) Such measures referred to in subregulation (1) must include-

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

(3) The candidate or tenderer concerned must only be excluded from the procedure where there are no other means to ensure compliance with the duty to treat economic operators equally in accordance with regulation 20(1).



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(4) Prior to any such exclusion referred to in subregulation (3), candidates or tenderers must be given the opportunity to prove that their involvement in preparing the procurement procedure is not capable of distorting competition.

(5) The measures taken under this regulation must be documented in the report referred to in regulation 83(1).

**Technical specifications.**

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

(2) In the case of any public contract, the required characteristics may also refer to-

- (a) the specific process or method of production or provision of the requested works, supplies or services; or
- (b) a specific process for another stage of its life cycle,

even where such factors do not form part of the characteristics' material substance provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.

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

(4) For all procurement which is intended for use by natural persons, whether the general public or staff of the contracting authority, the technical specifications must, except in duly justified cases, be drawn up so as to take into account accessibility criteria for persons with disabilities or design for all users.

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

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

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

- (a) in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract;
- (b) by reference to technical specifications and, in order of preference, to-
  - (i) national standards transposing European standards;
  - (ii) European Technical Assessments;
  - (iii) common technical specifications;
  - (iv) international standards;
  - (v) other technical reference systems established by the European standardisation bodies; or
  - (vi) when none of the above exist, national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies,

but each reference must be accompanied by the words 'or equivalent';

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

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

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

(10) Where a contracting authority uses the option of referring to the technical specifications referred to in subregulation (7)(b), it must not reject a tender on the grounds that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred, once the tenderer proves in its tender by any appropriate means, including the means of proof referred to in regulation 44, that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications.

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

(12) In its tender, the tenderer must prove by any appropriate means, including those referred to in regulation 44, that the work, supply or service in compliance with the standard meets the performance or functional requirements of the contracting authority.

**Labels.**

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

- (a) the label requirements only concern criteria which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract;
- (b) the label requirements are based on objectively verifiable and non-discriminatory criteria;
- (c) the labels are established in an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate;

- (d) the labels are accessible to all interested parties;
- (e) the label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.

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

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

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

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

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

44.(1) Contracting authorities may require that economic operators provide a test report from a conformity assessment body or a certificate issued by such a body as means of proof of conformity with requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

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

(3) For the purposes of this regulation, “conformity assessment body” means a body that performs conformity assessment activities including calibration, testing, certification and inspection accredited in accordance with Regulation (EC) No 765/2008 of the European Parliament and of the Council, as may be amended from time to time.

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

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

(5) If a Member State requests information related to the evidence and documents submitted in accordance with regulations 42(6), 42(12) and this regulation, the Competent Authority must ensure that this information is provided in accordance with regulation 88.

#### **Variants.**

45.(1) Contracting authorities may authorise or require tenderers to submit variants, and must indicate, in the contract notice or in the invitation to confirm interest, whether or not they authorise or require variants.

(2) Variants referred to in subregulation (1), must not be authorised or required without such an indication and must be linked to the subject-matter of the contract.

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

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

(5) Only variants meeting the minimum requirements laid down by the contracting authorities must be taken into consideration.

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

**Division of contracts into lots.**

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

(2) Contracting authorities must, provide an indication of the main reasons for their decision not to subdivide into lots, which must be included in the procurement documents or the report referred to in regulation 83(1).

(3) Contracting authorities must indicate, in the contract notice or in the invitation to confirm interest, whether tenders may be submitted for one, for several or for all of the lots.

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

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

**Setting time limits.**

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

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

(3) Contracting authorities must extend the time limits for the receipt of tenders so that all economic operators concerned may be aware of all the information needed to produce tenders in the following cases-

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

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

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

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

## CHAPTER 4

### Publication and transparency

#### Prior information notices.

48. Contracting authorities may make known their intentions of planned procurements through the publication of a prior information notice, and such notices must contain the information set out in section I of part B of Annex V to the Public Sector Directive but as if-

- (a) in paragraph 2, “the second and third subparagraph of Article 53(1)” were a reference to regulation 53(3) and (4) of these Regulations; and
- (b) in paragraph 9, “date of dispatch” were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations.

#### Contract notices.

49. Contract notices-

- (a) shall contain the information set out in part C of Annex 5 to the Public Contracts Directive, but as if-
  - (i) in paragraph 2, “the second and third subparagraphs of Article 53(1)” were a reference to regulation 53(3) and 54(2) of these Regulations;

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- (ii) paragraph 24 (financing by EU funds) were deleted;
  - (iii) in paragraph 26, “in the Official Journal of the European Union” read “on the UK e-notification service (within the meaning of the Procurement (Public Sector Contracts) Regulations 2016; and
  - (iv) in paragraph 28, “date of dispatch” were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations; and
- (b) shall be submitted for publication in accordance with regulation 51.

#### **Contract award notices.**

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

(2) Such notices-

- (a) shall contain the information sent out in part D of Annex to the Public Contracts Directive, but as if-
  - (i) in paragraph 9, “Article 67” were a reference to regulation 67 of these Regulations;
  - (ii) in paragraph 11 (b), the words “Member State or from a third” were deleted;
  - (iii) paragraph 15 (financing by EU funds) were deleted;
  - (iv) in paragraph 17, “in the Official Journal of the European Union” read “on the UK e-notification service (within the meaning of the Procurement (Public Sector Contracts) Regulations 2016)”; and
  - (v) in paragraph 18, “date of dispatch” were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations; and
- (b) shall be submitted for publication in accordance with regulation 51.



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

(4) In the case of framework agreements, concluded in accordance with regulation 33, contracting authorities must not be bound to submit a notice of the results of the procurement procedure for each contract based on such an agreement.

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

- (a) submit a contract award notice within 30 days after the award of each contract based on a dynamic purchasing system; or
- (b) group such notices on a quarterly basis, in which case they must submit the grouped notices within 30 days of the end of each quarter.

(6) Certain information on the award of the contract or the conclusion of the framework agreement may be withheld from publication where its release-

- (a) would impede law enforcement or would otherwise be contrary to the public interest;
- (b) would prejudice the legitimate commercial interests of a particular economic operator, whether public or private; or
- (c) might prejudice fair competition between economic operators.

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

51.(1) Notices referred to in subregulations 48, 49 and 50 must include the information set out in Annex V to the Public Sector Directive, in the format of standard forms, including standard forms of corrigenda.

(2) The notices required by regulations 34, 48, 49, 50, 72, 75 and 78 must be submitted to the UK e-notification service for publication.

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

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

(5) Contracting authorities may submit notices in respect of public contracts to the UK e-notification service for publication even where they are not required by these Regulations to do so.

(6) In these Regulations, “the UK e-notification service” means a single web-based portal which is provided, for purposes which include the purposes of this Part, by or on behalf of the Cabinet Office, and to which access by Gibraltar has been extended.

(7) For the purposes of these Regulations, a notice of any description is submitted to the UK e-notification service if the information comprising the notice is entered in the portal in such form or manner as the portal may elicit it and in compliance with any specific instructions that are given within the portal about how the information, or any particular element of it, is to be entered.

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

52.(1) In addition to the publication of the notices referred to in regulations 34, 48, 49, 50, 75 and 78 on the UK e-notification service, contracting authorities may publish information contained in them on the internet on a buyer profile.

(2) The notices referred to in regulations 34, 48, 49, 50, 72 and 78, and the information contained in them, must not be published otherwise than on the UK e-notification service before they are published on that service.

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

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

(5) Where a prior information notice is to be published on a buyer profile-

- (a) the prior information notice may not be so published before the notice is submitted to the UK e-notification service; and

- (b) the prior information notice must indicate the date of that submission.

**Electronic availability of procurement documents.**

53.(1) Contracting authorities must, by means of a website, offer unrestricted and full direct access free of charge to the procurement documents from the date of the publication on the UK e-notification service of a notice submitted in accordance with regulation 51 or the date on which an invitation to confirm interest is sent.

(2) The text of the notice or the invitation to confirm interest referred to in subregulation (1), must specify the internet address at which the procurement documents are accessible.

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

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

(5) In the cases referred to in subregulations (3) and (4), the time limit for the submission of tenders must be prolonged by 5 days, except in the cases of duly substantiated urgency referred to in regulations 28(5), 29(9) and 30(9).

(6) Provided that it has been requested in good time, contracting authorities must supply to all tenderers taking part in the procurement procedure additional information relating to the specifications and any supporting documents not later than 6 days before the time limit fixed for the receipt of tenders.

(7) In the case of an accelerated procedure, the period mentioned in subregulation (6) must be 4 days.

**Invitations to candidates.**

54.(1) In restricted procedures, competitive dialogue procedures and innovation partnerships, contracting authorities must simultaneously and in writing invite the selected candidates to submit their tenders or, in the case of a competitive dialogue, to take part in the dialogue.

- (2) The invitations required by subregulations (1) must-
- (a) include a reference to the electronic address at which the procurement documents have been made directly available by electronic means;
  - (b) be accompanied by the procurement documents, where those documents have not been the subject of unrestricted and full direct access, free of charge, for the reasons referred to in regulation 53(3) or (4) and have not already been made otherwise available; and
  - (c) contain at least the information set out in Annex IX to the Public Sector Directive.

**Informing candidates and tenderers.**

55.(1) Contracting authorities must as soon as possible inform each candidate and tenderer of decisions reached concerning the conclusion of a framework agreement, the award of a contract or admittance to a dynamic purchasing system, including the grounds for any decision-

- (a) not to conclude a framework agreement;
  - (b) not to award a contract for which there has been a call for competition;
  - (c) to recommence the procedure; or
  - (d) not to implement a dynamic purchasing system.
- (2) On request from the candidate or tenderer concerned, the contracting authority must as quickly as possible, and in any event within 15 days from receipt of a written request, inform-
- (a) any unsuccessful candidate of the reasons for the rejection of its request to participate;
  - (b) any unsuccessful tenderer of the reasons for the rejection of its tender, including, for the cases referred to in regulation 42(10) and (11), the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements;
  - (c) any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement;

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- (d) any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.

(3) Contracting authorities may decide to withhold certain information referred to in subregulations (1) and (2) where the release of such information-

- (a) would impede law enforcement or would otherwise be contrary to the public interest;
- (b) would prejudice the legitimate commercial interests of a particular economic operator, whether public or private; or
- (c) might prejudice fair competition between economic operators.

## CHAPTER 5

### Choice of participants and award of contracts

#### General principles in awarding contracts etc.

56.(1) Contracts must be awarded on the basis of criteria laid down in accordance with regulations 67 to 69, provided that the contracting authority has verified in accordance with regulations 59 to 61 that all of the following conditions are fulfilled-

- (a) the tender complies with the requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents, taking into account, where applicable, regulation 45;
- (b) the tender comes from a tenderer that-
  - (i) is not excluded in accordance with regulation 57; and
  - (ii) meets the selection criteria set out by the contracting authority in accordance with regulation 58, and where applicable, the non-discriminatory rules and criteria referred to in regulation 65.

(2) Contracting authorities may decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with applicable obligations referred to in in the fields of environmental, social and labour law established by national law, collective agreements subject to subregulations (2A) and (2B) or by the international environmental, social and labour law provisions listed in Annex X to the Public Sector Directive.

(3) In open procedures-

- (a) contracting authorities may decide to examine tenders before verifying the absence of grounds for exclusion and the fulfillment of the selection criteria in accordance with regulations 57 to 64; and
- (b) where contracting authorities make use of that possibility, they must ensure that the verification of absence of grounds for exclusion and of fulfilment of the selection criteria is carried out in an impartial and transparent manner so that no contract is awarded to a tenderer that-
  - (i) should have been excluded under regulation 57; or
  - (ii) does not meet the selection criteria set out by the contracting authority.

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

#### **Exclusion grounds.**

57.(1) Contracting authorities must exclude an economic operator from participation in a procurement procedure where they have established, by verifying in accordance with regulations 59, 60 and 61, or are otherwise aware, that that economic operator has been convicted of any of the following offences-

- (a) participation in a criminal organisation, as defined in Article 2 of Council Framework Decision 2008/841/JHA, as may be amended from time to time;
- (b) corruption, as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and Article 2(1) of Council Framework Decision 2003/568/JHA, as may amended from time to time, as well as corruption as defined in Gibraltar law;
- (c) fraud within the meaning of Article 1 of the Convention on the protection of the European Communities' financial interests, as may be amended from time to time;

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- (d) terrorist offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Council Framework Decision 2002/475/JHA respectively, or inciting or aiding or abetting or attempting to commit an offence, as referred to in Article 4 of that Framework Decision, as may be amended from time to time;
- (e) money laundering or terrorist financing, as defined in Article 1 of Directive 2005/60/EC of the European Parliament and of the Council, as may be amended from time to time;
- (f) child labour and other forms of trafficking in human beings as defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council, as may be amended from time to time.

(2) The obligation to exclude an economic operator also applies where the person convicted is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control in the economic operator.

(3) An economic operator must be excluded from participation in a procurement procedure where-

- (a) the contracting authority is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions; and
- (b) the breach has been established by a judicial or administrative decision having final and binding effect in accordance with the legal provisions of the country in which it is established or with those of Gibraltar law.

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

(5) Subregulations (3) and (4) cease to apply when the economic operator has fulfilled its obligations by paying, or entering into a binding arrangement with a view to paying, the taxes or social security contributions due, including, where applicable, any interest accrued or fines.

(6) Contracting authorities may exclude from participation in a procurement procedure any economic operator in any of the following situations-

- (a) where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in regulation 56(2);

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- (b) where the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it is in an arrangement with creditors, where its business activities are suspended or it is in any analogous situation arising from a similar procedure under Gibraltar law;
- (c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;
- (d) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;
- (e) where a conflict of interest within the meaning of regulation 25 cannot be effectively remedied by other, less intrusive, measures;
- (f) where a distortion of competition from the prior involvement of the economic operator in the preparation of the procurement procedure, as referred to in regulation 41, cannot be remedied by other, less intrusive, measures;
- (g) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a utility, or a prior concession contract, which led to early termination of that prior contract, damages or other comparable sanctions;
- (h) where the economic operator-
  - (i) has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfillment of the selection criteria; or
  - (ii) has withheld such information or is not able to submit supporting documents required under regulation 59; or
- (i) where the economic operator has-
  - (i) undertaken to unduly influence the decision-making process of the contracting authority, or obtain confidential information that may confer upon it undue advantages in the procurement procedure; or



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- (ii) negligently provided misleading information that may have a material influence on decisions concerning exclusion, selection or award.

(7) Contracting authorities must exclude an economic operator where they become aware, at any time during a procurement procedure, which the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in subregulations (1) to (3).

(8) Contracting authorities may exclude an economic operator where they become aware, at any time during a procurement procedure, which the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in subregulations (4) or (8).

(9) In the cases referred to in subregulations (1) to (3), the period during which the economic operator must, subject to subregulation (12), be excluded is 5 years from the date of the conviction.

(10) In the cases referred to in subregulations (4) and (6), the period during which the economic operator may, subject to subregulation (12), be excluded is 3 years from the date of the relevant event.

(11) Subject to subregulation (12), any economic operator that is in one of the situations referred to in subregulations (1) or (6) may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion.

(12) If the contracting authority considers such evidence to be sufficient, the economic operator concerned must not be excluded from the procurement procedure.

(13) For the purpose of subregulations (11) and (12), the economic operator must prove that it has-

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

(14) The measures taken by the economic operator must be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct, and where the contracting authority considers such measures to be insufficient, the contracting authority must give the economic operator a statement of the reasons for that decision.

(15) An economic operator which has been excluded by final judgment from participating in procurement or concession award procedures must not be entitled to make use of the process provided for under subregulation (11) during the period of exclusion resulting from the judgment.

**Selection criteria.**

58.(1) Selection criteria may relate to-

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

(2) Contracting authorities may only impose on economic operators the criteria referred to in subregulations (4) to (15) as requirements for participation, and must limit any requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded.

(3) All requirements referred to in subregulation (2), must be related and proportionate to the subject-matter of the contract.

(4) *Deleted*

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

(6) With regard to economic and financial standing, contracting authorities may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract, and may require that economic operators-

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

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- (b) provide information on their annual accounts showing the ratios, for example, between assets and liabilities; and
- (c) have an appropriate level of professional risk indemnity insurance.

(7) The minimum yearly turnover that economic operators are required to have must not exceed twice the estimated contract value, except in duly justified cases, such as by reference to special risks attached to the nature of the works, services or supplies, in which case the contracting authority must indicate their main reasons in the procurement documents or in the report referred to in regulation 83(1).

(8) The ratio, for example between assets and liabilities, may be taken into consideration where the contracting authority specifies the methods and criteria for such consideration in the procurement documents, but such methods and criteria must be transparent, objective and non-discriminatory.

(9) Where a contract is divided into lots this regulation must apply in relation to each individual lot, however, the contracting authority may set the minimum yearly turnover that economic operators are required to have by reference to groups of lots in the event that the successful tenderer is awarded several lots to be executed at the same time.

(10) Where contracts based on a framework agreement are to be awarded following a reopening of competition, the maximum yearly turnover requirement referred to in subregulation (7) must be calculated on the basis of the expected maximum size of specific contracts that will be performed at the same time, or, where it is not known, on the basis of the estimated value of the framework agreement.

(11) In the case of a dynamic purchasing system, the maximum yearly turnover requirement referred to in subregulation (7) must be calculated on the basis of the expected maximum size of specific contracts to be awarded under that system.

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

(13) Contracting authorities may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past.

(14) A contracting authority may assume that an economic operator does not possess the required professional abilities where the contracting authority has established that the

economic operator has conflicting interests that may negatively affect the performance of the contract.

(15) In procurement procedures for supplies requiring siting or installation work, or for services or works, the professional ability of economic operators to provide the service or to execute the installation or the work may be evaluated with regard to their skills, efficiency, experience and reliability.

(16) Contracting authorities must indicate the requirements for participation, which may be expressed as minimum levels of ability, together with the appropriate means of proof, in the contract notice or in the invitation to confirm interest.

#### **Single Procurement Document.**

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

- (a) it is not in one of the situations referred to in regulation 57 in which economic operators must or may be excluded;
- (b) it meets the relevant selection criteria that have been set out under regulation 58;
- (c) where applicable, it fulfills the objective rules and criteria that have been set out under regulation 65.

(2) Where the economic operator relies on the capacities of other entities under regulation 63, the SPD must also contain the information referred to in subregulation (1) in respect of such entities.

(3) The SPD must-

- (a) consist of a formal statement by the economic operator that the relevant ground for exclusion does not apply and, or alternatively, that the relevant selection criterion is fulfilled and must provide the relevant information as required by the contracting authority; and
- (b) identify the public authority or third party responsible for establishing the supporting documents and contain a formal statement to the effect that the economic operator will be able, upon request and without delay, to provide those supporting documents.

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(4) Where the contracting authority can obtain the supporting documents directly by accessing a database as mentioned in subregulation (10), the SPD must also contain the information required for this purpose, such as the internet address of the database, any identification data and, where applicable, the necessary declaration of consent.

(5) Economic operators may reuse an SPD, which has already been used in a previous procurement procedure, provided that they confirm that the information contained in it continues to be correct.

(6) The SPD must be provided exclusively in electronic form.

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

(8) Before awarding the contract, the contracting authority must, except in respect of contracts based on framework agreements where such contracts are concluded in accordance with regulation 33(6) or (7)(a), require the tenderer to which it has decided to award the contract to submit up-to-date supporting documents in accordance with regulation 60 and, where appropriate, regulation 62.

(9) The contracting authority may invite economic operators to supplement or clarify the certificates received under regulations 60 and 62.

(10) Notwithstanding subregulations (7) and (8), economic operators must not be required to submit-

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

### **Means of proof.**

60.(1) Contracting authorities may require the certificates, statements and other means of proof referred to in this regulation as evidence for the absence of grounds for exclusion under regulation 57 and for the fulfillment of the selection criteria.

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(2) Contracting authorities must not require from economic operators means of proof other than those referred to in this regulation and in regulations 58(13) and 62.

(3) In respect of regulation 63, economic operators may rely on any appropriate means to prove to the contracting authority that they will have the necessary resources at their disposal.

(4) Contracting authorities must accept the following as sufficient evidence that none of the cases specified in regulation 57 apply to the economic operator-

- (a) as regards regulation 57(1) and (2), the production of an extract from the relevant register, such as judicial records or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the country of origin or the country where the economic operator is established showing that those requirements have been met;
- (b) as regards regulation 57(3) to (5) and (6)(b), a certificate issued by the competent authority in the country concerned.

(5) Where the country in question does not issue such documents or certificates, or to the extent that these do not cover all the cases specified in regulation 57(1) to (5) and (6)(b), they may be replaced by a declaration on oath or, in a country where there is no provision for declarations on oath, by a solemn declaration made by the person concerned before a competent judicial or administrative authority, a notary or a competent professional or trade body, in the country of origin or in the country where the economic operator is established.

(6) Proof of the economic operator's economic and financial standing may be provided by one or more of the references listed in Part 1 of Annex XII to the Public Sector Directive.

(7) Where the references mentioned in subregulation (6) are not appropriate in a particular case, the contracting authority may require the economic operator to provide other information to prove its economic and financial standing.

(8) Where, for any valid reason, the economic operator is unable to provide the references or other information required by the contracting authority, it may prove its economic and financial standing by any other document which the contracting authority considers appropriate.

(9) Proof of the economic operator's technical and professional ability may, subject to regulation 58(13), be provided by one or more of the following means, listed in Part II of Annex XII to the Public Sector Directive, in accordance with the nature, quantity or importance, and the use, of the works, supplies or services.

61. *Deleted*

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

62.(1) Contracting authorities must, where they require the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain quality assurance standards, including on accessibility for persons with disabilities, refer to quality assurance systems based on the relevant European standards series certified by accredited bodies.

(2) *Deleted*

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

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

(a) *Deleted*

(b) *Deleted*

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

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

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

63.(1) With regard to-

(a) criteria relating to economic and financial standing as set out under regulation 58(6) to (11); and

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- (b) criteria relating to technical and professional ability as set out under regulation 58(12) to (15),

an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them, subject to the following provisions of this regulation.

(2) With regard to criteria relating to the educational and professional qualifications mentioned in point (f) Part II of Annex XII to the Public Sector Directive, or to relevant professional experience, economic operators may however only rely on the capacities of other entities where those entities will perform the works or services for which these capacities are required.

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

(4) The contracting authority must, in accordance with regulations 59 to 61, verify whether the entities on whose capacity the economic operator intends to rely fulfill the relevant selection criteria and whether there are grounds for exclusion under regulation 57, and-

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

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

(6) A group of economic operators within the meaning of regulation 21(3) may rely on the capacities of participants in the group or of other entities, and subregulations (1) to (5) apply in relation to such a group in the same way that they apply in relation to an economic operator.

(7) In the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators within the meaning of regulation 21(3), by a participant in that group.

64. *Deleted*



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

65.(1) In restricted procedures, competitive procedures with negotiation, competitive dialogue procedures and innovation partnerships, contracting authorities may limit the number of candidates meeting the selection criteria that they will invite to tender or to conduct a dialogue, provided that the minimum number of qualified candidates is available, in accordance with the following subregulations of this regulation.

(2) Contracting authorities must indicate, in the contract notice or in the invitation to confirm interest, the objective and non-discriminatory criteria or rules they intend to apply, the minimum number of candidates they intend to invite and, where applicable the maximum number.

(3) In the restricted procedure, the minimum number of candidates must be 5.

(4) In the competitive procedure with negotiation, the competitive dialogue procedure and the innovation partnership procedure, the minimum number of candidates must be 3.

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

(6) Subject to subregulation (7), contracting authorities must invite a number of candidates at least equal to the minimum number indicated in accordance with subregulation (2).

(7) Where the number of candidates meeting the selection criteria and the minimum levels of ability as referred to in regulation 58(16) is below that minimum number, the contracting authority may continue the procedure by inviting the candidates with the required capabilities.

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

**Reduction of the number of tenders and solutions.**

66.(1) Where contracting authorities exercise the option of reducing the number of tenders to be negotiated in accordance with regulation 32(19) and (20) or of solutions to be discussed in accordance with regulation 31(12) and (13), they must do so by applying the award criteria stated in the procurement documents.

(2) In the final stage, the number arrived at must make for genuine competition in so far as there are enough tenders, solutions or qualified candidates.

**Contract award criteria.**

67.(1) Contracting authorities must base the award of public contracts on the most economically advantageous tender assessed from the point of view of the contracting authority.

(2) That tender must be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with regulation 68, and may include the best price-quality ratio, which must be assessed on the basis of criteria, such as qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question.

(3) Such criteria may comprise, for example-

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

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

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

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

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

(6) Award criteria must not have the effect of conferring an unrestricted freedom of choice on the contracting authority.

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(7) Award criteria must-

- (a) ensure the possibility of effective competition; and
- (b) be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria.

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

(9) The contracting authority must specify, in the procurement documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender, except where this is identified on the basis of price alone.

(10) Those weightings may be expressed by providing for a range with an appropriate maximum spread.

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

**Life-cycle costing.**

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

- (a) costs, borne by the contracting authority or other users, such as-
  - (i) costs relating to acquisition;
  - (ii) costs of use, such as consumption of energy and other resources;
  - (iii) maintenance costs;
  - (iv) end of life costs, such as collection and recycling costs;
- (b) costs imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified.

(2) The costs mentioned in subregulation (1)(b) may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

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

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

(4) The method used for the assessment of costs imputed to environmental externalities must fulfil all of the following conditions-

- (a) it is based on objectively verifiable and non-discriminatory criteria and, in particular, where it has not been established for repeated or continuous application, it must not unduly favour or disadvantage certain economic operators;
- (b) it is accessible to all interested parties;
- (c) the data required can be provided with reasonable effort by normally diligent economic operators, including economic operators from countries party to the GPA or other international agreements by which the European Union was, immediately before 1 January 2021, bound.

**Abnormally low tenders.**

69.(1) Contracting authorities must require tenderers to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.

(2) The explanations given in accordance with subregulation (1) may in particular relate to-

- (a) the economics of the manufacturing process, of the services provided or of the construction method;
- (b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work;
- (c) the originality of the work, supplies or services proposed by the tenderer;
- (d) compliance with applicable obligations referred to in regulation 56(2);
- (e) compliance with obligations referred to in regulation 71;

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(3) The contracting authority must assess the information provided by consulting the tenderer.

(4) The contracting authority may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in subregulation (2).

(5) The contracting authority must reject the tender where it has established that the tender is abnormally low because it does not comply with applicable obligations referred to in regulation 56(2).

## PART 4

### Contract Performance

#### Conditions for performance of contracts.

70.(1) Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are-

- (a) linked to the subject-matter of the contract; and
- (b) indicated in the call for competition or in the procurement documents.

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

#### Subcontracting.

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

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

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

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

- (a) any changes to the information notified under subregulation (3) during the course of the contract; and
- (b) the name, contact details and legal representatives of any new subcontractors which the main contractor subsequently involves in such works or services.

(5) Where necessary for the purposes of subregulation (8), the required information must be accompanied by SPDs in respect of the subcontractors.

(6) Subregulations (3) and (4) do not apply to suppliers.

(7) Contracting authorities may extend the obligations provided for in subregulations (3) and (4) to, for example-

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

(8) Contracting authorities may, in accordance with regulations 59, 60 and 61, verify whether there are grounds for exclusion of subcontractors under regulation 57.

(9) In such cases, the contracting authority-

- (a) must require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion; and
- (b) may require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.

#### **Modification of contracts during their term.**

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

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

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or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of these Regulations; or

- (iii) in the event that the contracting authority itself assumes the main contractor's obligation towards its subcontractors where this possibility is provided for under regulation 71;
- (e) where the modifications, irrespective of their value, are not substantial within the meaning of subregulation (7); or
- (f) where subregulation (4) applies.

(2) Where several successive modifications are made-

- (a) the limitations imposed by the proviso at the end of subregulation (1)(b) and by subregulation (c)(iii) must apply to the value of each modification; and
- (b) such successive modifications must not be aimed at circumventing these Regulations.

(3) Contracting authorities which have modified a contract in either of the cases described in subregulations (1)(b) and (c) must submit a notice to that effect, in accordance with regulation 51, for publication, and such a notice must contain the information set out in Part G of Annex 5 to the Public Sector Directive, but as if-

- (a) paragraph 9 (financing by EU funds) were deleted;
- (b) in paragraph 11, "in the Official Journal of the European Union" read "on the UK e-notification service (within the meaning of the Procurement (Public Sector Contracts) Regulations 2016)"; and
- (c) in paragraph 12, "date of dispatch" were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations.

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

- (a) the relevant threshold mentioned in regulation 7; and



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

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

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

(6) For the purpose of the calculation of-

- (a) the price mentioned in subregulations (1)(b) and (c); and
- (b) the values mentioned in subregulation (4)(b),

the updated figure must be the reference figure when the contract includes an indexation clause.

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

- (a) the modification renders the contract or the framework agreement materially different in character from the one initially concluded;
- (b) the modification introduces conditions which, had they been part of the initial procurement procedure, would have-
  - (i) allowed for the admission of other candidates than those initially selected;
  - (ii) allowed for the acceptance of a tender other than that originally accepted; or
  - (iii) attracted additional participants in the procurement procedure;
- (c) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;
- (d) the modification extends the scope of the contract or framework agreement considerably;

- (e) a new contractor replaces the one to which the contracting authority had initially awarded the contract in cases other than those provided for in subregulation (1)(d).

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

### **Termination of contracts.**

73. Contracting authorities must ensure that every public contract which they award contains provisions enabling the contracting authority to terminate the contract where-

- (a) the contract has been subject to a substantial modification which would have required a new procurement procedure in accordance with regulation 72(9); or
- (b) the contractor has, at the time of contract award, been in one of the situations referred to in regulation 57(1), including as a result of the application of regulation 57(2), and should therefore have been excluded from the procurement procedure;

## **PART 5**

### **PARTICULAR PROCUREMENT REGIMES**

#### **CHAPTER 1**

#### **Social and Other Specific Services**

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

74. Public contracts for social and other specific services listed in Annex XIV to the Public Sector Directive must be awarded in accordance with this Part, where the value of the contracts is equal to or greater than the threshold indicated in regulation 7.

#### **Publication of notices.**

75.(1) Contracting authorities intending to award a public contract for the services referred to in regulation 74 must make known their intention by any of the following means-

- (a) by means of a contract notice, which must contain the information referred to in Part H of Annex V to the Public Sector Directive; or

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- (b) by means of a prior information notice, which must-
- (i) be published continuously;
  - (ii) contain the information set out in Part I of Annex V to the Public Sector Directive;
  - (iii) refer specifically to the types of services that will be the subject-matter of the contracts to be awarded, and
  - (iv) indicate that the contracts will be awarded without further publication and invite interested economic operators to express their interest in writing.

(2) Contracting authorities that have awarded a public contract for the services referred to in regulation 76 must make known the results of the procurement procedure by means of a contract award notice, which must contain the information referred to in Part J of Annex V to the Public Sector Directive.

(3) Contracting authorities may group contract award notices on a quarterly basis, in which case they must comply with subregulation (5) by submitting the grouped notices within 30 days of the end of each quarter.

(4) Contracting authorities must submit the notices referred to in this regulation for publication in accordance with regulation 51.

### **Principles of awarding contracts.**

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

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

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

- (a) the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services;
- (b) the specific needs of different categories of users, including disadvantaged and vulnerable groups;

- (c) the involvement and empowerment of users; and
- (d) innovation.

## CHAPTER 2

### Rules Governing Design Contests

#### **Scope.**

77.(1) This Chapter applies to-

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

(2) In the cases referred to in subregulation (1)(a), the threshold mentioned in regulation 7 must be calculated on the basis of the estimated value of the public service contract, including any possible prizes or payments to participants.

(3) In the cases referred to in subregulation (1)(b), the threshold mentioned in regulation 7 must be calculated on the basis of the total amount of the prizes and payments.

#### **Notices.**

78.(1) Contracting authorities that intend to carry out a design contest must make known their intention by means of a contest notice.

(2) Contest notices must-

- (a) include the information set out in Part E of Annex V to the Public Sector Directive, but as if-
  - (i) in paragraph 2, “the second and third subparagraphs of Article 53(1)” were a reference to regulation 53(3) and (4) of these Regulations;
  - (ii) in paragraph 16, “date of dispatch” were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations; and

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(b) be submitted for publication in accordance with regulation 51.

(3) Contracting authorities that have held a design contest must submit for publication in accordance with regulation 51 a notice of the results of the contest, and must be able to prove the date on which the notice was submitted to the UK e-notification service.

(4) A notice of the results of the contest must include the information set out in Part F of Annex V to the Public Sector Directive, but as if-

- (a) paragraph 12 (financing by EU funds) were deleted;
- (b) in paragraph 13, “in the Official Journal of the European Union” read “on the UK e-notification service (within the meaning of the Procurement (Public Sector Contracts) Regulations 2016”; and
- (c) in paragraph 14, “date of dispatch” were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations.

(5) For the purpose of this regulation, where the release of information on the outcome of the contest-

- (a) would impede law enforcement or would otherwise be contrary to the public interest;
- (b) would prejudice the legitimate commercial interests of a particular enterprise, whether public or private; or
- (c) might prejudice fair competition between service providers,

such information may be withheld from publication.

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

79.(1) When organising design contests, contracting authorities must apply procedures which are adapted to the provisions of Part 1 and this Chapter.

(2) The admission of participants to design contests must not be limited-

- (a) by reference to a specific part of Gibraltar; or
- (b) on the grounds that, under Gibraltar law, they would be required to be either natural or legal persons.

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(3) Where design contests are restricted to a limited number of participants, the contracting authorities must lay down clear and non-discriminatory selection criteria.

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

**Composition of the jury.**

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

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

**Decisions of the jury.**

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

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

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

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

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

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

**PART 6**

**RECORDS, REPORTS AND CO-OPERATION**

**Retention of contract copies.**

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

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

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

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

83.(1) For every contract or framework agreement covered by these Regulations, and every time a dynamic purchasing system is established, contracting authorities must draw up a written report which must include at least the following-

- (a) the name and address of the contracting authority, the subject-matter and value of the contract, framework agreement or dynamic purchasing system;
- (b) where applicable, the results of the qualitative selection and reduction of numbers pursuant to regulations 65 and 66, namely-
  - (i) the names of the selected candidates or tenderers and the reasons for their selection;
  - (ii) the names of the rejected candidates or tenderers and the reasons for their rejection;
- (c) the reasons for the rejection of tenders found to be abnormally low;
- (d) the name of the successful tenderer and the reasons why it's tender was selected and, where known-
  - (i) the share, if any, of the contract or framework agreement which the successful tenderer intends to subcontract to third parties; and
  - (ii) the names of the main contractor's subcontractors, if any;
- (e) for competitive procedures with negotiation and competitive dialogues, the circumstances as laid down in regulation 27 which justify the use of those procedures;

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- (f) where applicable, the reasons why the contracting authority has decided not to award a contract or framework agreement or to establish a dynamic purchasing system;
- (g) where applicable, the reasons why means of communication other than electronic means have been used for the submission of tenders;
- (h) where applicable, conflicts of interests detected and subsequent measures taken.

(2) The report referred to in subregulation (1) is not required in respect of contracts based on framework agreements where these are concluded in accordance with regulation 33(6) or (7)(a).

(3) To the extent that the contract award notice drawn up in accordance with regulation 50 or 75(3) contains the information required in this subregulation, contracting authorities may refer to that notice.

(4) A contracting authority shall communicate the report, or its main elements to the Chief Minister if he so requests.

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

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

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

(7) The documentation referred to in subregulation (6), must be kept for a period of at least 3 years from the date of award of the contract.

(8) The Competent Authority may request that contracting authorities provide any information that it requests with regards to procurement-



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- (a) within the scope of these Regulations; or
- (b) which would have been within the scope of these Regulations if their value had exceeded the relevant thresholds mentioned in regulation 7,

for the purpose of meeting its obligations under these Regulations.

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

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

84. *Deleted*

85. *Deleted*

## **PART 7**

### **Remedies**

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

86.(1) Subject to subregulation (13), a contracting authority must, as soon as possible after the decision has been made, inform the tenderers and candidates of its decision to—

- (a) award of the contract; or
- (b) the conclusion of the framework agreement,

and must do so by notice in writing by the most rapid means of communication practicable.

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

- (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

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- (ii) the economic operator-
  - (aa) to be awarded the contract; or
  - (bb) to become a party to the framework agreement,

and anything required by subregulation (8);

- (c) the name of the economic operator-
  - (i) to be awarded the contract; or
  - (ii) to become a party to the framework agreement; and
- (d) a precise statement of either-
  - (i) when, in accordance with regulation 87, 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 contracting authority will not, in conformity with regulation 87, enter into the contract or conclude the framework agreement.

(3) Where it is to be sent to a candidate, the notice referred to in subregulation (1) must include-

- (a) the reasons why the candidate was unsuccessful; and
- (b) the information mentioned in subregulation (2), but as if the words “and relative advantages” were omitted from paragraph (b).

(4) Where the contract or framework agreement is permitted by these Regulations to be awarded or concluded without prior publication of a contract notice, the contracting authority need not comply with subregulation (1).

(5) Where the only tenderer is the one who is to be awarded the contract or who is to become a party to the framework agreement, and there are no candidates, the contracting authority need not comply with subregulation (1).

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(6) Where a contracting authority awards a contract under a framework agreement, or a dynamic purchasing agreement, that contracting authority need not comply with subregulations (1) to (3).

(7) Except to the extent that the contracting authority has already informed the economic operator (whether by notice under subregulation (1) or otherwise), and subject to subregulation (11), a contracting authority must within 15 days of the date on which it receives a request in writing from any economic operator which was unsuccessful-

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

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

- (a) as specified in regulation 42(10) by an equivalent means; or
- (b) in terms of the performance or functional requirements in regulation 42(11) by an equivalent means.

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

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

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

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

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

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

**Standstill period.**

87.(1) Where regulation 86(1) applies, the contracting authority must not enter into the contract or conclude the framework agreement before the end of the standstill period.

(2) Subject to subregulation (6), where the contracting authority sends a regulation 86(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 contracting authority sends a regulation 86(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 86(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.

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(5) Subject to subregulation (6), where the contracting authority sends a regulation 86(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.

## PART 8

### APPLICATIONS TO THE COURT

#### Interpretation of Part 8.

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

“contract”, except in regulation 103, means a contract or a framework agreement;

“Court” means the Supreme Court;

“declaration of ineffectiveness” means a declaration made under regulation 98(2)(a) or 103(3);

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

“grounds for ineffectiveness” has the meaning given to it by regulation 99;

“proceedings” means court proceedings taken for the purposes of regulation 91; and

“standstill period”, and references to its end, has the same meaning as in regulation 87.

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

(3) In regulations 89 and 90, “economic operator” has its usual meaning, but in the other provisions of this Part “economic operator” has the narrower meaning of an economic operator to which a duty is owed in accordance with regulation 89 or 90.

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

89.(1) This regulation applies to the obligation on a contracting authority to comply with-

- (a) the provisions of Part 1; and
- (b) any retained EU obligation that is enforceable by virtue of section 7 of the European Union (Withdrawal) Act 2019 in the field of public procurement in respect of a contract or design contest falling within the scope of Part 1.

(2) The obligation referred to in subregulation (1) is a duty owed to an economic operator from Gibraltar or the United Kingdom.

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

90. (1) The duty owed in accordance with regulation 89 is a duty owed also to an economic operator from a State or other subject of international law in respect of which a relevant international agreement applies, but only where the agreement applies to the procurement concerned.

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

#### **Enforcement of duties through the Court.**

91.(1) A breach of the duty owed in accordance with regulations 89 and 90 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 92 to 104 apply to such proceedings.

**General time limits for starting proceedings.**

92.(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) and (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 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 date 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 limits imposed by this regulation (but not the limits imposed by regulation 93) 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 only when the claim form is served.

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

93.(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; and
- (b) in any event, within six months beginning with the day after the date on which the contract was entered into.

(3) This subregulation applies where a relevant contract award notice has been published on the UK e-notification service, in which case the relevant date is the day after the date on which the notice was published.

(4) For the purposes of subregulation (3), a contract award notice is relevant if, and only if—

- (a) the contract was awarded without the prior publication of a contract notice; and
- (b) the contract award notice includes justification of the decision of the contracting authority to award the contract without the prior publication of a contract notice.

(5) This subregulation applies where the contracting authority 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 or the relevant reasons.



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(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 86(7).

(7) In this regulation, “contract award notice” means a notice in accordance with regulation 50(1).

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

**Starting proceedings.**

94.(1) Where proceedings are to be started, the economic operator must serve the claim form on the contracting authority 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 87, 95 or 96(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 contracting authority, who is a party to the contract in question.

(4) The contracting authority 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, or they are, deemed by rules of court to be served.

**Contract-making suspended by challenge to award decision.**

95.(1) Where—

- (a) a claim form is issued in respect of a contracting authority’s decision to award the contract;
- (b) the contracting authority 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 contracting authority 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 96(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 87.

**Interim orders.**

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

- (a) bringing to an end the requirement imposed by regulation 95(1);
- (b) restoring or modifying that requirement;
- (c) suspending the procedure leading to—
- (i) the award of the contract; or
- (ii) the determination of the design contest,

in relation to which the breach of the duty owed in accordance with regulations 89 and 90 is alleged;

- (d) suspending the implementation of any decision or action taken by the contracting authority 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 95(1) were not applicable, it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract; and

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- (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 95(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.**

97.(1) Subregulation (2) applies where—

- (a) the Court is satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with regulations 89 and 90; 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 contracting authority to amend any document;
- (c) award damages to an economic operator which has suffered loss or damage as a consequence of the breach.

(3) This regulation does not prejudice any other powers of the Court.

**Remedies where the contract has been entered into.**

98.(1) Subregulation (2) applies if—

- (a) the Court is satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with regulations 89 and 90; and
- (b) the contract has already been entered into.

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(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 100 requires the Court not to do so;
- (b) must, where required by regulation 102, 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 paragraphs (a) and (b);
- (d) must not order any other remedies.

(3) Subregulation (2)(d) is subject to regulation 103(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 99(3) or 102(11) (orders which supplement a declaration of ineffectiveness or a contract-shortening order).

### **Grounds for ineffectiveness.**

99.(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 the prior publication of a contract notice in any case in which these Regulations required the prior publication of a contract notice.

(3) The first ground does not apply if all the following apply—

- (a) the contracting authority considered the award of the contract without the prior publication of a contract notice to be permitted by these Regulations;
- (b) the contracting authority has had published on the UK e-notification service a voluntary transparency notice expressing its intention to enter into the contract; and
- (c) the contract has not been entered into before the end of a period of at least 10 days beginning with the day after the date on which the voluntary transparency notice was published on the UK e-notification service.

- (4) In subregulation (3), “voluntary transparency notice” means a notice—
- (a) which contains the following information—
    - (i) the name and contact details of the contracting authority,
    - (ii) a description of the object of the contract,
    - (iii) a justification of the decision of the contracting authority to award the contract without the prior publication of a contract notice,
    - (iv) the name and contact details of the economic operator to be awarded the contract, and
    - (v) where appropriate, any other information which the contracting authority considers it useful to include; and
  - (b) *Deleted*

*The second ground*

- (5) The second ground applies where all the following apply—
- (a) the contract has been entered into in breach of any requirement imposed by—
    - (i) regulation 87 (the standstill period),
    - (ii) regulation 95 (contract-making suspended by challenge to award), or
    - (iii) regulation 96(1)(b) (interim order restoring or modifying a suspension originally imposed by regulation 95);
  - (b) there has also been a breach of the duty owed to the economic operator in accordance with regulations 89 and 90 in respect of obligations other than those imposed by regulation 87 (the standstill period) and this Part;
  - (c) the breach mentioned in paragraph (a) has deprived the economic operator of the possibility of starting proceedings in respect of the breach mentioned in paragraph (b), or pursuing them to a proper conclusion, before the contract was entered into; and

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- (d) the breach mentioned in paragraph (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 is based on a framework agreement or was awarded under a dynamic purchasing system;
- (b) the contract was awarded in breach of any requirement imposed by—
  - (i) regulation 33(10) (award of particular contracts under framework agreements through re-opening of competition); or
  - (ii) regulation 34(18) to (21) (award of contracts under the dynamic purchasing systems); and
- (c) the estimated value of the contract is equal to or exceeds the relevant threshold for the purposes of regulation 7.

(7) The third ground does not apply if all the following apply—

- (a) the contracting authority considered the award of the contract to be in accordance with the provisions mentioned in subregulation (6)(b);
- (b) the contracting authority has, despite regulation 86(6), voluntarily complied with the requirements set out in regulation 86(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.**

100.(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 contracting authority 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.

This version is out of date

(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 102(3)(a).

#### **The consequences of ineffectiveness.**

101.(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; and
- (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.**

102.(1) Where the Court makes a declaration of ineffectiveness, it must also order that the contracting authority 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 100 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 87, 95, or 96(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 contracting authority pays 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.



This version is out of date

(5) In determining the appropriate order, the Court must take account of all the relevant factors, including-

- (a) the seriousness of the relevant breach of the duty owed in accordance with regulations 89 and 90;
- (b) the behaviour of the contracting authority;
- (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) Subject to subregulation (8), where a contracting authority is ordered by the 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 contracting authority 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 the Minister is ordered to pay a civil financial penalty under this Part—

- (a) subregulation (7) does not apply; and
- (b) the Minister must pay the penalty into the Consolidated Fund.

(9) Where a contracting authority is a not a Government body any payment due under subregulation (7) may be enforced by the Minister as a judgment debt due to the Minister.

*Contract shortening*

(10) 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.

(11) 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.

(12) Subregulation (13) 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 purposes of regulating their mutual rights and obligations in the event of such an order being made.

(13) In those circumstances, the Court must not exercise its power to make an order under subregulation (10) 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).

(14) 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 based on a framework agreement.**

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

- (a) is based on the terms of a framework agreement; and
- (b) was entered into before a declaration of ineffectiveness (if any) was made in respect of the framework agreement.

(2) A specific contract is not to be considered to be ineffective merely because a declaration of ineffectiveness has been made in respect of the framework agreement.

(3) Where a declaration of ineffectiveness has been made in respect of the framework agreement, the Court must, subject to subregulation (5), make a separate declaration of ineffectiveness in respect of each relevant specific contract.

(4) For that purpose, a specific contract is relevant only if a claim for a declaration of ineffectiveness in respect of that specific contract has been made—

- (a) within the time limits mentioned in regulation 93 as applicable to the circumstances of the specific contract; and
- (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.

This version is out of date

(5) Regulation 100 (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—

- (a) the third ground of ineffectiveness set out in regulation 99(6) and (7); or
- (b) the second ground of ineffectiveness set out in regulation 99(5), where—
  - (i) the relevant breach of the kind mentioned in regulation 99(5)(a) is entering into the specific contract in breach of regulation 95 or 96(1)(b), and
  - (ii) the relevant breach of the kind mentioned in regulation 99(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 a 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 101 (the consequences of ineffectiveness) applies; and
- (b) regulation 102(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 contract be shortened to the extent specified in the order.

(10) The extent by which the duration of the 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 contract” refers only to its prospective duration as from the time when the Court makes the order.

**Injunctions against the Crown**

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

**PART 9****REVOCAION, SAVINGS AND TRANSITIONAL PROVISIONS****Revocation.**

105. Subject to regulation 106, the Procurement (Public Contracts) Regulations 2012 are revoked.

**Savings and transitional provisions.**

106.(1) Where a contracting authority has commenced a contract award procedure before the coming into operation of these Regulations, the Regulations specified in regulation 105 (the revoked Regulations) must continue to have effect on and after the coming into operation of these Regulations in relation to that contract award procedure, as if the revoked Regulations had not been revoked in accordance with regulation 105.

(2) A contracting authority 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 contracting authority 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 public 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 contracting authority has despatched any form of advertisement seeking offers or expressions of interest in a proposed public contract;
- (c) where there is no advertising as referred to in paragraph (a) or (b), that contracting authority has contacted any economic operator in order to seek expressions of interest or offers in respect of a proposed public contract; or
- (d) that contracting authority has sent a notice to the Official Journal in accordance with the revoked Regulations in order to hold a design contest.

This version is out of date

(3) Where a framework agreement has been concluded before the coming into operation of these Regulations, these Regulations must not apply to the award of any specific contract under that framework agreement.

## Part 10

### Consequential amendments

107. In the Procurement (Defence and Security Public Contracts) Regulations 2012 make the following amendments-

- (a) for every reference of “Procurement (Public Contracts) Regulations 2012” substitute “Procurement (Public Sector Contracts) Regulations 2016”;
- (b) for every reference of “Procurement (Utilities Contracts) Regulations 2012” substitute “Procurement (Utilities Contracts) Regulations 2016”;
- (c) in subregulation (3)(1)(a) for “regulation 3” substitute “regulation 2”.