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**PROCUREMENT (CONCESSION CONTRACTS) REGULATIONS  
2016**
**Subsidiary  
2016/086**

This version is out of date

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

**PROCUREMENT (CONCESSION CONTRACTS)  
REGULATIONS 2016**
**(LN. 2016/086)**

*Commencement*      **18.4.2016**

Amending enactments	Relevant current provisions	Commencement date
LN.2020/452	rr. 2(1), 4(2), (7)-(10), 8(1)-(2), (4), 9(2)-(3), (5)(a), (6)(a), 11(a)-(b), (g), 12, 13(d)(i), (aa), (bb), (ii)(bb), (13A), (15), 12(5)(a)-(b), 14, 16(1)(c), (2), (4)(c), 19(5), 20(1)-(2), (6)(a), (8), 21(6), 22(1), (5)(a), (7), 24(1), 29(2)(a), (5)(a), 30(1)-(4), 31(1)-(5), 32(1), 36(15)(a), 37(3), 41(3)-(4), 42(a)-(c), 43(5)(a), 46(1)(b), (2), 50(3), 56(2), (3)(a)-(c), (4), (c)	1.1.2021
2021/029	s. 47	1.1.2021
2021/228	rr. 5(2)(b)(i), (c), 9(4), (7)	1.1.2021

**Transposing:**

 Directive 2014/23/EU
 

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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 2014/23/EU of the European Parliament and of the Council of 26 February 2014, on the award of concession contracts, the Minister has made the following Regulations—*

**PART 1**

**PRELIMINARY AND GENERAL PRINCIPLES**

**Chapter 1**

**Scope, general principles and definitions**

**Subchapter 1**

**Subject-matter, scope, general principles, definitions and thresholds**

**Title and commencement.**

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

**Interpretation.**

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

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

“candidate” means an economic operator that has sought an invitation or has been invited to take part in a concession contract award procedure;

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

“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;

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

“concession award notice” means the notice referred to in regulation 30;

“concession contract” has the same meaning given by regulation 3;

“Concessions Directive” means Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts;

“concession granters” means contracting authorities or utilities;

“concession notice” has the meaning given by regulation 29;

“concessionaire” means an economic operator that has been awarded a concession contract;

“concession document” means any document produced or referred to by the concession granter to describe or determine elements of the concession contract or the procedure, including the concession notice, the technical and functional requirements, proposed conditions of concession contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents;

“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 of Procurement (Public Sector Contracts) Regulations 2016;

“dominant influence” on the part of the contracting authorities must be presumed where those authorities, directly or indirectly-

- (a) hold the majority of the undertaking’s subscribed capital;
- (b) control the majority of the votes attached to shares issued by the undertaking; or
- (c) can appoint more than half of the undertaking’s administrative, management or supervisory body.

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

“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;

“exclusive right” means a right granted by a competent authority by means of any law, regulation or published administrative provision which is compatible with the Retained Treaties, the effect of which is to limit the exercise of an activity to a single economic operator and which substantially affects the ability of other economic operators to carry out such an activity;

“execution of works” means-

- (a) the execution, or both the design and execution, of works related to one of the activities listed in Annex I to the Concessions 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 concession granter exercising a decisive influence on the type or design of the work;

“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, including with the purpose of helping to solve societal challenges or to support sustainable and inclusive growth;

“Minister”, means the Minister responsible for finance;

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

“official list” means an official list of approved contractors, suppliers or service providers established or maintained by Gibraltar or a Member State under Article 64 to the Public Sector Directive;

“prior information notice” means a notice sent to the Official Journal in accordance with regulation 29(3);

“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;

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

“special right” means a right granted by the Competent Authority by means of any law, regulation or published administrative provision which is compatible with the Treaties, the effect of which is to limit the exercise of an activity to two or more economic operators and which substantially affects the ability of other economic operators to carry out such an activity;

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

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

“UK e-notification service” has the meaning mentioned in regulation 31(5);

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

“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;

### **Concessions.**

3.(1) In these Regulations, “concession contract” means a works concession contract or a services concession contract within the meaning of this regulation.

(2) A “works concession contract” means a concession contract-

- (a) for pecuniary interest concluded in writing by means of which one or more concession granters entrust the execution of works to one or more economic operators, the consideration for which consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment; and
- (b) that meets the requirements of subregulation (4).

(3) A “services concession contract” means a concession contract-

- (a) for pecuniary interest concluded in writing by means of which one or more concession granters entrust the provision and the management of services, other than the execution of works, to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the concession contract or in that right together with payment; and
- (b) that meets the requirements of subregulation (4).

(4) The requirements referred to in subregulations (2) and (3) are-

- (a) the award of the concession contract involves the transfer to the concessionaire of an operating risk in exploiting the works or services encompassing demand or supply risk or both; and
- (b) the part of the risk transferred to the concessionaire involves real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire is not merely nominal or negligible.

(5) For the purposes of subregulation (4)(a), the concessionaire must be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession contract.

**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 concession granter must—

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

(4) The design of the concession contract award procedure, including the estimate of the value, must not be made with the intention of excluding it from the scope of these Regulations or of unduly favouring or disadvantaging certain economic operators or certain works, supplies or services.

(5) Concession granters must aim to ensure the transparency of the concession contract award procedure and of the performance of the concession contract, while complying with regulation 26.

(6) During the concession contract award procedure, a concession granter must not provide information in a discriminatory manner which may give some candidates or tenderers an advantage over others.

(7) These Regulations—

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

(8) The arms, munitions and war material to which subregulation 7(b) applies are, subject to subregulation (10), those included in the 1958 List.

(9) Subject to the effect of any regulations made under subregulation (10), 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 (7).

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

**Competent Authority.**

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

(2) The Competent Authority must be responsible for-

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

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

**Meaning of “utilities”**

6.(1) In these Regulations, “utilities” means entities which pursue one of the activities listed in Annex II to the Concession Contracts Directive and award a concession contract for the pursuit of one of those activities, and which are one of the following-

- (a) public bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law;

- (b) a public undertaking;
- (c) any other entities which operate on the basis of special rights or exclusive rights, granted for the exercise of one of the activities listed in Annex II to the Concession Contracts Directive.

(2) The entities referred to in this regulation are not utilities within the meaning of subregulation (1) if they have been granted special rights or exclusive rights by means of a procedure in which adequate publicity has been ensured and where the granting of those rights was based on objective criteria.

(3) The procedures referred to in subregulation (2) include-

- (a) procurement procedures with a prior call for competition in conformity with these Regulations, the Procurement (Public Sector Contracts) Regulations 2016, the Procurement (Utilities Contracts) Regulations 2016 or the Procurement (Defence and Security Public Contracts) Regulations 2012;
- (b) procedures pursuant to the legal acts of the European Union listed in Annex III to the Concessions Directive, as amended from time to time, ensuring adequate prior transparency for granting authorisations on the basis of objective criteria.

(4) In this regulation, “public undertaking” means a person over whom one or more contracting authorities are able to exercise directly or indirectly a dominant influence by virtue of-

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

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

- (a) possesses the majority of the issued share capital of that person or controls the majority of the voting power attached to the issued share capital of that person; or

- (b) may appoint—
  - (i) more than half of the individuals who are ultimately responsible for managing that person's affairs;
  - (ii) more than half of its members; or
  - (iii) in the case of a group of individuals, more than half of those individuals.

**Meaning of “concession notice”.**

7.(1) In these Regulations, subject to subregulation (2), “concession notice” means the notice referred to in regulation 29(1).

(2) In Part 4 of these Regulations, “concession notice”-

- (a) in relation to a concession contract awarded by a utility, includes a prior information notice; and
- (b) in relation to a concession contract awarded by a contracting authority, has the same meaning that “contract notice” has in relation to it in Council Directive 89/665/EEC, as may be amended from time to time.

**Threshold amounts.**

8.(1) These Regulations apply to concession contracts the value of which are equal to or greater than £4,733,252.

(2) *Deleted*

(3) For the purposes of subregulation (1), the value of a concession contract must be the total turnover of the concessionaire generated over the duration of the contract, net of value added tax, as estimated by the concession granter, in consideration for the works and services which are the object of the concession contract and the supplies incidental to such works and services.

(4) That estimate must be calculated as at the moment at which the concession notice is submitted for publication in accordance with regulation 31 or, in cases where such notice is not provided for, at the moment at which the concession granter commences the concession contract award

procedure, for example by contacting economic operators in relation to the concession contract.

(5) If the value as estimated at the time of the award is more than 20% higher than the estimate calculated in accordance with subregulation (4), the former must be used for the purposes of this regulation.

(6) The estimated value of the concession contract must be calculated using an objective method specified in the concession documents.

(7) When calculating the estimated value of the concession contract, concession granters must, where applicable, take into account in particular-

- (a) the value of any form of option and any extension of the duration of the concession contract;
- (b) revenue from the payment of fees and fines by the users of the works or services other than those collected on behalf of the concession granter;
- (c) payments or any other financial advantages, in any form, from the concession granter or any other public authority to the concessionaire, including compensation for compliance with a public service obligation and public investment subsidies;
- (d) the value of grants or any other financial advantages, in any form, from third parties for the performance of the concession contract;
- (e) revenue from sales of any assets which are part of the concession contract;
- (f) the value of all the supplies and services that are made available to the concessionaire by the concession granters, provided that they are necessary for executing the works or providing the services;
- (g) any prizes or payments to candidates or tenderers.

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

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

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

(11) Where the aggregate value of the lots is equal to or greater than the threshold in subregulation (1), these Regulations must apply to the awarding of each lot.

## Subchapter 2

### Exclusions

#### General exclusions.

9.(1) These Regulations do not apply to services concession contracts awarded to a concession granter referred to in regulation 6(1)(a), or to an association of such contracting authorities or utilities, on the basis of an exclusive right.

(2) These Regulations do not apply to services concession contracts awarded to an economic operator on the basis of an exclusive right that has been granted for the exercise of an activity listed in Annex II to the Concessions Directive.

(3) Where the exclusive right was not granted following the application of sector-specific transparency obligations, regulation 30 must apply.

(4) *Omitted.*

(5) These Regulations do not apply to concession contracts for-

- (a) air transport services based on the economic operator's status as a qualifying air carrier within the meaning of Regulation (EC) No 1008/2008 of the European Parliament and of the Council, as may be amended from time to time; or
- (b) public passenger transport services within the meaning of Regulation (EC) No 1370/2007 of the European Parliament and of the Council, as may be amended from time to time.

(6) These Regulations do not apply to concession contracts which the concession granter is obliged to award in accordance with 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.

(7) *Omitted.*

(8) These Regulations do not apply to concession contracts which the concession granter awards in accordance with procurement rules provided by an international organisation or international financing institution where the concession contracts concerned are fully financed by that organisation or institution.

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

(10) Subregulations (7) to (9) do not apply to concession contracts in the fields of defence and security as referred to in Directive 2009/81/EC of the European Parliament and of the Council, as may be amended from time to time.

(11) These Regulations do not apply to concession contracts in the fields of defence and security as referred to in Directive 2009/81/EC-

- (a) which are governed by specific procedural rules pursuant to an international agreement or arrangement concluded between Gibraltar or the United Kingdom and one or more other countries;
- (b) which are governed by specific procedural rules pursuant to a concluded international agreement or arrangement relating to the stationing of troops and concerning the undertakings of Gibraltar or another country;

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- (c) which are governed by specific procedural rules of an international organisation purchasing for its purposes or which must be awarded by Gibraltar in accordance with those rules;
- (d) in relation to which 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 or the procurement and performance of which is classified as secret or must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in Gibraltar, provided that Gibraltar has determined that the essential interests concerned cannot be guaranteed by less intrusive measures, such as those referred to in subregulation (12);
- (e) awarded in the framework of a cooperative programme referred to in regulation 7(c) of the Procurement (Defence and Security Public Contracts) Regulations 2012;
- (f) awarded by a government to another government relating to works and services directly linked to military equipment or sensitive equipment, or works and services specifically for military purposes, or sensitive works and sensitive);
- (g) awarded in a country other than the United Kingdom or Gibraltar, to be carried out when forces are deployed outside the United Kingdom and Gibraltar where operational needs require those concession contracts to be concluded with economic operators located in the area of operations.

(12) These Regulations do not apply to concession contracts not otherwise exempted under subregulation (11)(d) to (g) to the extent that 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 concession granter makes available in a concession contract award procedure as provided for in these Regulations.

(13) These Regulations do not apply to services concession contracts-

- (a) f or the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or which concern interests in or rights over any of them;

- (b) for 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 providers, or concession 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 or another country, or before international courts, tribunals or institutions;
  - (ii) legal advice given-
    - (aa) in preparation of any of the proceedings referred to in subparagraph (i); or
    - (bb) where there is a tangible indication and high probability that the matter to which the advice relates will become the subject of such proceedings,  
  
provided that the advice is given by a lawyer;
  - (iii) document certification and authentication services which must be provided by notaries;
  - (iv) legal services provided by trustees or appointed guardians or other legal services the providers of which are designated by a court or tribunal in Gibraltar or are designated by law to carry out specific tasks under the supervision of such tribunals or courts;
  - (v) other legal services which in Gibraltar are connected, even occasionally, with the exercise of official authority;

- (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) 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; or
- (h) for political campaign services which are covered by CPV codes 79341400-0, 92111230-3 and 92111240-6, when awarded by a political party in the context of an election campaign.

(13A) In this regulation, “lawyer” means a person practising as an advocate, barrister or solicitor in any part of the United Kingdom or Gibraltar.

(14) These Regulations do not apply to services concession contracts for lottery services which are covered by CPV code 92351100-7 and awarded to an economic operator on the basis of an exclusive right granted otherwise than as described in regulation 6(2).

(15) These Regulations do not apply to concession contracts awarded by utilities for the pursuit of their activities in another country, in conditions not involving the physical use of a network or geographical area within Gibraltar.

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

10.(1) These Regulations do not apply to concession contracts 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 communication services.

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

**Specific exclusions in the field of water.**

11. These Regulations do not apply to-

- (a) concession contracts awarded to provide or operate fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water;
- (b) concession contracts awarded to supply drinking water to such networks;
- (c) concession contracts for either or both of the following subject matters-
  - (i) hydraulic engineering projects, irrigation or land drainage, provided that the volume of water to be used for the supply of drinking water represents more than 20% of the total volume of water made available by such projects or irrigation or drainage installations; or
  - (ii) the disposal or treatment of sewage,

when the contracts are connected with an activity referred to in paragraphs (a) or (b).

**Concession contracts awarded to an affiliated undertaking.**

12.(1) Notwithstanding regulation 16 and provided that the conditions in subregulation (2) are met these Regulations do not apply to concession contracts awarded by-

- (a) a utility to an affiliated undertaking; or

- (b) a joint venture, formed exclusively by a number of utilities for the purpose of carrying out activities listed in Annex II to the Concessions Directive, to an affiliated undertaking of one its members.

(2) The conditions are that-

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

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

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

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

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

- (ii) may exercise a dominant influence over the utility; or
- (iii) in common with the utility, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it.

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

13. Notwithstanding regulation 16, these Regulations do not apply to concession contracts awarded-

- (a) by a joint venture, formed exclusively by a number of utilities for the purpose of carrying out activities listed in Annex II to the Concessions Directive, to one of those utilities; or
- (b) by a utility to such a joint venture of which it forms part,

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

14. *Deleted*

**Exclusion of activities which are directly exposed to competition.**

15. These Regulations do not apply to concession contracts awarded by utilities where it has been established that the activity is directly exposed to competition in accordance with regulation 33 of the Procurement (Utilities Contracts) Regulations 2016.

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

16.(1) A concession contract awarded by a concession granter to a legal person falls outside the scope of these Regulations where all of the following conditions are fulfilled-

- (a) the concession granter 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

concession granter or by other legal persons controlled by that concession granter; and

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

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

- (a) its controlling concession granter, or
- (b) another legal person controlled by the same concession granter,

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

(3) A concession granter 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) that control is exercised by another legal person which is itself controlled in the same way by the concession granter,

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

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

- (a) the concession granter exercises jointly with other contracting authorities or utilities 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 utilities or by other legal persons controlled by the same contracting authorities or utilities; 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.

(5) For the purposes of subregulation (4)(a), concession granters 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 or utilities;
- (b) those contracting authorities or utilities 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 or utilities.

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

(7) A concession contract concluded exclusively between two or more concession granters 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 concession granters with the aim of ensuring

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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 concession granters 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 concession granter with respect to services, supplies and works for the 3 years preceding the concession contract award must be taken into consideration.

(9) Where, because of-

- (a) the date on which the relevant legal person, concession granter was created or commenced activities; or
- (b) 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.

### Subchapter 3

#### General Provisions

##### Duration of the concession contract.

17.(1) The duration of concession contracts must be limited, and the concession granter must estimate the duration on the basis of the works or services requested.

(2) For concession contracts lasting more than 5 years, the maximum duration of the concession contract must not exceed the time that a concessionaire could reasonably be expected to take to recoup the investments made in operating the works or services together with a return on invested capital taking into account the investments required to achieve the specific contractual objectives.

(3) The investments taken into account for the purposes of the calculation of the time period referred to in subregulation (2) must include both initial investments and investments during the life of the concession contract.

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

18. Concession contracts for social and other specific services listed in Annex IV to the Concessions Directive falling within the scope of these Regulations must be subject only to the obligations arising from regulations 29(3) to (5), 30 and 43 to 60.

#### **Mixed contracts.**

19.(1) Concession contracts which have as their subject-matter both works and services must be awarded in accordance with the provisions applicable to the type of concession contract that characterises the main subject-matter of the contract in question.

(2) In the case of mixed concession contracts consisting partly of social and other specific services listed in Annex IV to the Concessions Directive and partly of other services, the main subject-matter must be determined in accordance with which of the estimated values of the respective services is the highest.

(3) Where the different parts of a given contract are objectively separable-

- (a) in the case of contracts which have as their subject-matter elements covered by these Regulations as well as other elements, concession granters may choose to award separate contracts for the separate parts or to award a single contract;
- (b) where concession granters 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;
- (c) where concession granters choose to award a single contract, these Regulations, unless otherwise provided in paragraph (d), apply to the ensuing mixed contract, irrespective of-
  - (i) the value of the parts that would otherwise fall under a different legal regime;

- (ii) which legal regime those parts would otherwise have been subject to;
  - (d) in the case of a mixed contract containing elements of concession contracts as well as elements of public contracts covered by the Procurement (Public Sector Contracts) Regulations 2016 or contracts covered by the Procurement (Utilities Contracts) Regulations 2016, the mixed contract must be awarded in accordance with the Procurement (Public Sector Contracts) Regulations 2016 or the Procurement (Utilities Contracts) Regulations 2016, respectively.
- (4) Where the different parts of a given contract are objectively not separable-
- (a) the applicable legal regime must be determined on the basis of the main subject-matter of that contract; and
  - (b) where that contract involves both elements of a services concession contract and of a supply contract, the main subject-matter must be determined according to which of the estimated values of the respective services or supplies is the highest.
- (5) Where part of a given contract is covered by regulation 4(7) or the Procurement (Defence and Security Public Contracts) Regulations 2012, regulation 20 applies instead of subregulations (1) to (4).
- (6) In the case of contracts intended to cover several activities, one of them being an activity listed in Annex II to the Concessions Directive or subject to the Procurement (Utilities Contracts) Regulations 2016, the applicable provisions must be established in accordance with regulation 21 of these Regulations and regulation 7 of the Procurement (Utilities Contracts) Regulations 2016, respectively.
- (7) This regulation is subject to regulation 21.

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

20.(1) This regulation applies in the case of mixed contracts which have as their subject matter elements of a concession contract covered by these Regulations and procurement or other elements covered by regulation 4(7) or the Procurement (Defence and Security Public Contracts) Regulations 2012.

(2) In the case of contracts intended to cover several activities, one of them being listed in Annex II to the Concessions Directive or covered by the Procurement (Utilities Contracts) Regulations 2016, and another being covered by regulation 4(7) or the Procurement (Defence and Security Public Contracts) Regulations 2012, the applicable provisions must be established in accordance with regulation 22 of these Regulations and regulation 26 of the Procurement (Utilities Contracts) Regulations 2016, respectively.

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

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

(5) Where a concession granter chooses 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.

(6) Where concession granters 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 4(7), or different parts are covered by regulation 4(7) and the Procurement (Defence and Security Public Contracts) Regulations 2012 respectively, the contract may be awarded without applying these Regulations, provided that the award of a single contract is justified by objective reasons;
- (b) where part of a given contract is covered by the Procurement (Defence and Security Public Contracts) Regulations 2012, the contract may be awarded in accordance with these Regulations or in accordance with the Procurement (Defence and Security Public Contracts) Regulations 2012, provided that the award of a single contract is justified by objective reasons.

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

(8) Where the different parts of a given contract are objectively not separable, the contract may be awarded without applying these Regulations

where it includes elements to which regulation 4(7) applies; otherwise it may be awarded in accordance with these Regulations or in accordance with the Procurement (Defence and Security Public Contracts) Regulations 2012.

(9) This regulation is subject to regulation 22.

**Contracts covering both activities listed in Annex II to the Concessions Directive and other activities.**

21.(1) This regulation applies in the case of contracts intended to cover several activities where one of those activities is listed in Annex II to the Concessions Directive.

(2) Utilities may choose to award separate contracts for the purposes of the separate activities or to award a single contract for the purposes of all the activities.

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

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

(5) Where utilities choose to award a single contract-

- (a) a contract which is intended to cover several activities must be subject to the rules applicable to the activity for which it is principally intended;
- (b) in the case of a contract where it is objectively impossible to determine for which activity the contract is principally intended, the applicable rules must be determined in accordance with the following-
  - (i) the contract must be awarded in accordance with the provisions of these Regulations applicable to concession contracts awarded by contracting authorities, if one of the activities for which the contract is intended is subject to the provisions of these Regulations applicable to concession contracts awarded by contracting authorities and the other is subject to the provisions of these

Regulations applicable to concession contracts awarded by utilities,

- (ii) the contract must be awarded in accordance with the Procurement (Public Sector Contracts) Regulations 2016, if one of the activities for which the contract is intended is subject to these Regulations and the other to the Procurement (Public Sector Contracts) Regulations 2016,
- (iii) the contract must be awarded in accordance with these Regulations, if one of the activities for which the contract is intended is subject to these Regulations and the other is not subject to these Regulations, the Procurement (Public Sector Contracts) Regulations 2016 or the Procurement (Utilities Contracts) Regulations 2016.

(6) Where one of the activities concerned is covered by regulation 4(7) or the Procurement (Defence and Security Public Contracts) Regulations 2012, regulation 22 applies instead of subregulation (5).

**Contracts covering both activities listed in Annex II to the Concessions Directive and activities involving defence or security aspects.**

22.(1) This regulation applies in the case of contracts intended to cover several activities, one of them being listed in Annex II to the Concessions Directive and another being covered by regulation 4(7) or the Procurement (Defence and Security Public Contracts) Regulations 2012.

(2) Utilities may choose to award separate contracts for the purposes of the separate activities or to award a single contract for the purposes of all the activities.

(3) The choice between awarding a single contract or awarding separate contracts must not, however, be made with the objective of excluding the contract or contracts from the scope of these Regulations or the Procurement (Defence and Security Public Contracts) Regulations 2012 and a decision to award a single contract must be justified by objective reasons.

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

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

- (a) in the case of a contract intended to cover an activity which is covered by these Regulations and another which is covered by regulation 4(7), the utility may award the contract without applying these Regulations;
- (b) in the case of a contract intended to cover an activity which is covered by these Regulations and another which is covered by the Procurement (Defence and Security Public Contracts) Regulations 2012, the utility may award the contract either in accordance with these Regulations or in accordance with the Procurement (Defence and Security Public Contracts) Regulations 2012.

(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) Contracts referred to in subregulation (5)(b) which also include procurement or other elements which are covered by Article 346 of TFEU may be awarded without applying these Regulations.

#### **Subchapter 4**

#### **Specific Situations**

#### **Research and development services.**

23. These Regulations apply to services concession contracts for research and development services which are covered by CPV codes 73000000-2 to 73120000-9, 73300000-5, 73420000-2 and 73430000-5 only if-

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

#### **CHAPTER 2**

#### **Principles**

#### **Economic operators.**

24.(1) *Deleted*

(2) Legal persons may be required to indicate, in the tender or in the application, 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 concession contract award procedures and must not be required by concession granters to have a specific legal form in order to submit a tender or an application.

(4) Where necessary, concession granters may clarify in the concession 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 36 provided that this is justified by objective reasons and is proportionate.

(5) Any conditions for the performance of a concession 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) Concession granters 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.

**Nomenclatures.**

25. Any references to nomenclatures in the context of the award of concession contracts must be made using the CPV.

**Confidentiality.**

26.(1) A concession granter 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 provisions of these Regulations, including the obligations relating to the advertising of awarded concession

contracts and the provision of information to candidates and tenderers set out in regulations 30 and 38 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) Concession granters may impose on economic operators requirements aimed at protecting the confidential nature of information which they make available throughout the concession contract award procedure.

**Rules applicable to communication.**

27.(1) Concession granters may choose one or more of the following means of communication for all communication and information exchange-

- (a) electronic means;
- (b) post or fax;
- (c) oral communication, including telephone, in respect of communications other than the essential elements of a concession contract award procedure, and provided that the content of the oral communication is documented to a sufficient degree on a durable medium;
- (d) hand delivery certified by an acknowledgement of receipt,

except where the use of electronic means is mandatory in accordance with regulations 31(1) and 32.

(2) The means of communication chosen must be generally available and non-discriminatory, and must not restrict economic operators' access to the concession contract award procedure.

(3) The tools and devices to be used for communicating by electronic means, and their technical characteristics, must be interoperable with information and communication technology products in general use.

(4) In all communication, exchange and storage of information, concession granters must ensure that the integrity of data and the confidentiality of applications and tenders are preserved.

(5) Concession granters must examine the content of applications and tenders only after the time limit set for submitting them has expired.

## PART 2

### RULES ON THE AWARD OF CONCESSION CONTRACTS

#### CHAPTER 1

##### General principles

###### General principles.

28.(1) The concession granter has the freedom to organise the procedure leading to the choice of concessionaire, subject to compliance with this Directive.

(2) The design of the concession award procedure must respect the principles laid down in regulation 4.

(3) The concession granters must ensure that economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Gibraltar law, European Union law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X to the Concessions Directive.

###### Concession notices.

29.(1) Concession granters wishing to award a concession contract, other than a concession contract for social and other specific services listed in Annex IV to the Concessions Directive, must make known their intention through the publication of a concession notice.

(2) For the purposes of subregulation (1), a concession notice must contain-

- (a) the information set out in Annex V to the Concessions Directive, but as if-
  - (i) in paragraph 3, Article 32(2) were a reference to regulation 32(3) of these Regulations;
  - (ii) in paragraph 10, “date of dispatch” were a reference to the date on which the notice is submitted to the UK e-

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notification service for the purposes of these Regulations; and

(iii) paragraph 15 were deleted,; and

(b) any other information that the concession granter considers useful,

and must be in the format of the standard forms set out in.

(3) Concession granters wishing to award a concession contract for social and other specific services listed in Annex IV to the Concessions Directive must make known their intention of a planned concession award through the publication of a prior information notice.

(4) Such a prior information notice must contain the information set out in Annex VI to the Concessions Directive and must be in the format of the standard forms, including standard forms of corrigenda.

(5) This regulation does not apply in any of the following cases-

- (a) where no applications, no suitable applications, no tenders or no suitable tenders have been submitted in response to a prior concession contract procedure, provided that the initial conditions of the concession contract are not substantially altered and that a report is sent to the Chief Minister if the Chief Minister so requests;
- (b) where the works or services can be supplied only by a particular economic operator for any of the following reasons-
  - (i) the aim of the concession contract is the creation or acquisition of a unique work of art or artistic performance;
  - (ii) competition is absent for technical reasons;
  - (iii) the existence of an exclusive right;
  - (iv) the protection of intellectual property rights and exclusive rights other than exclusive rights as defined in regulation 2,

but only, in the case of subparagraphs (ii) to (iv), where no reasonable alternative or substitute exists and the absence of

competition is not the result of an artificial narrowing down of the parameters of the concession contract award.

(6) For the purposes of subregulation (5)(a)-

- (a) a tender must be considered not to be suitable where it is irrelevant to the concession contract, being manifestly incapable, without substantial changes, of meeting the concession granter's needs and requirements as specified in the concession documents;
- (b) an application must be considered not to be suitable where-
  - (i) the applicant concerned is to be or may be excluded under regulation 36(8) to (25) or does not meet the selection criteria set out by the concession granter in accordance with regulation 36(1) to (3);
  - (ii) the application includes tenders which are considered not to be suitable as described in paragraph (a).

#### **Concession award notices.**

30.(1) Not later than 48 days after the award of a concession contract, the concession granter must submit a concession award notice on the results of the concession award procedure for publication in accordance with regulation 31.

(2) Concession contract award notices for social and other specific services listed in Annex IV to the Concessions Directive may be grouped for publication on a quarterly basis, in which case the concession granter must submit the grouped notices for publication within 48 days of the end of each quarter.

(3) Subject to subregulation (4), a concession award notice must contain the information set out in Annex VII to the Concessions Directive, or in the case of a concession contract for social and other specific services listed in Annex IV to the Concessions Directive, the information set out in Annex VIII to that Directive.

(4) In subregulation (3), the reference to Annex VII is a reference to that Annex, but as if-

- (i) in paragraph 7, "Article 41" were a reference to regulation 39 of these Regulations;

- (ii) in paragraph 11(c), “Article 8(3)” were a reference to regulation 8(6) and (7) of these Regulations;
- (iii) paragraph 12 were deleted;
- (iv) in paragraph 14, “in the Official Journal of the European Union” read “on the UK e-notification service (within the meaning of the Procurement (Concession Contracts) Regulations 2016”); and
- (v) in paragraph 15, “date of dispatch” were a reference to the date on which the notice is submitted to the UK e-notification service for the purposes of these Regulations.

**Form and manner of publication of notices.**

31.(1) The notices required by regulations 29, 30 and 41(3) to be submitted for publication and any corrigenda to the notices must be submitted to the UK e-notification service for publication.

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

(3) The notices referred to in regulations 29, 30 and 41(3) must not be published otherwise than on the UK e-notification service before they are published on that service unless publication on that service does not take place 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 but must indicate the date of submission of the notice to that service, not later than 5 days after they are sent.

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

**Electronic availability of concession documents.**

32.(1) Concession granters must, by means of a website, offer unrestricted and full direct access free of charge to the concession documents from the date of the publication on the UK e-notification service of a concession

notice or, where the concession notice does not include the invitation to submit tenders, from the date on which the invitation to submit tenders was sent.

(2) The text of the concession notice or of the invitation to submit tenders must specify the internet address at which the concession documents are accessible.

(3) Subregulation (4) applies where, in duly justified circumstances due to-

- (a) exceptional security reasons;
- (b) technical reasons; or
- (c) the particularly sensitive nature of commercial information requiring a very high level of protection,

unrestricted and full direct access free of charge to certain concession documents cannot be offered by means of a website.

(4) In the circumstances referred to in subregulation concession granters must indicate in the notice or the invitation to submit a tender that the concession documents concerned will be transmitted by means other than the internet and the time limit for the receipt of tenders must be prolonged.

(5) Provided that it has been requested in good time, concession granters must supply to all applicants or tenderers taking part in the concession contract award procedure additional information relating to the concession documents not later than 6 days before the deadline fixed for the receipt of tenders.

#### **Combating corruption and preventing conflicts of interest.**

33.(1) Concession granters must take appropriate measures to combat fraud, favouritism and corruption and to effectively prevent, identify and remedy conflicts of interest arising in the conduct of concession contract award procedures, so as to avoid any distortion of competition and to ensure the transparency of the award procedure and the equal treatment of all candidates and tenderers.

(2) The measures adopted in relation to conflicts of interest must not go beyond what is strictly necessary to prevent a potential conflict of interest or eliminate a conflict of interest that has been identified.

(3) For the purposes this regulation, 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 concession contract award procedure.

(4) In subregulation (3), “relevant staff members” means staff members of the concession granter who are involved in the conduct of the concession contract award procedure or may influence the outcome of that procedure.

## CHAPTER 2

### Procedural guarantees

#### Technical and functional requirements.

34.(1) Technical and functional requirements must be set out in the concession documents and must lay down the characteristics required of the works or services that are the subject-matter of the concession contract.

(2) Those characteristics may also refer to the specific process of production or provision of the requested works or services provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.

(3) The characteristics may, for example, include quality levels, environmental and climate performance levels, design for all requirements, including accessibility for persons with disabilities, and conformity assessment, performance, safety or dimensions, terminology, symbols, testing and test methods, marking and labelling, or user instructions.

(4) Unless justified by the subject-matter of the concession contract, technical and functional requirements 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 production with the effect of favouring or eliminating certain undertakings or certain products.

(5) For the purposes of subregulation (4), such a reference is permitted, on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract is not possible, in which case the reference must be accompanied by the words “or equivalent”.

(6) A concession granter must not reject a tender on the grounds that the works and services tendered for do not comply with the technical and

functional requirements to which it has referred, once the tenderer proves in its tender, by any appropriate means, that the solutions it has proposed satisfy in an equivalent manner the technical and functional requirements.

**Procedural guarantees.**

35.(1) Concession contracts must be awarded on the basis of the award criteria, provided that all of the following conditions are fulfilled-

- (a) the tender complies with any minimum requirements set by the concession granter;
- (b) the tenderer complies with the conditions for participation set out in regulation 36(1) to (3); and
- (c) the tenderer is not excluded from participating in the concession contract award procedure in accordance with regulation 36(8) to (15), as read with regulation 36(20) to (25).

(2) The concession granter must provide-

- (a) in the concession notice, a description of the concession and of the conditions of participation; and
- (b) in the concession notice, in the invitation to submit a tender or in other concession documents, a description of the award criteria and, where applicable, the minimum requirements to be met.

(3) The concession granter may limit the number of candidates or tenderers to an appropriate level, on condition that this is done in a transparent manner and on the basis of objective criteria.

(4) The number of candidates or tenderers invited must be sufficient to ensure genuine competition.

(5) The concession granter must communicate the following to all participants-

- (a) the description of the envisaged organisation of the procedure and an indicative completion deadline; and
- (b) any modification to that procedure or completion deadline.

(6) To the extent that any modification referred to in subregulation (5)(b) concerns elements disclosed in the concession notice, the concession granter must advertise it to all economic operators.

(7) The concession granter must provide for appropriate recording of the stages of the procedure using the means it considers appropriate, subject to regulation 26(1) and (2).

(8) The concession granter may hold negotiations with candidates and tenderers but the subject-matter of the concession contract, the award criteria and the minimum requirements must not be changed during the course of any negotiations.

(9) In this regulation-

“the award criteria” means the award criteria set out by the concession granter in accordance with regulation 39;

“minimum requirements” mean the conditions and characteristics, in particular any technical, physical, functional and legal conditions and characteristics, that any tender must meet or possess.

#### **Selection of and qualitative assessment of candidates.**

36.(1) Concession granters must verify the conditions for participation relating to the professional and technical ability and the financial and economic standing of candidates or tenderers on the basis of self-declarations or references submitted as proof in accordance with the requirements specified in the concession notice.

(2) Those requirements must be non-discriminatory and proportionate to the subject-matter of the concession contract.

(3) The conditions for participation must be related and proportionate to the need to ensure the ability of the concessionaire to perform the concession contract, taking into account the subject matter of the concession contract and the purpose of ensuring genuine competition.

(4) For the purpose of meeting the conditions for participation, an economic operator may, where appropriate and for a particular concession contract, rely on the capacities of other entities, regardless of the legal nature of its links with them, subject to the following provisions of this regulation.

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

(6) With regard to financial standing, the concession granter may require that the economic operator and those entities on which it relies are jointly liable for the execution of the contract.

(7) A group of economic operators within the meaning of regulation 24 may rely on the capacities of participants in the group or of other entities, and subregulations (4) to (6) apply in relation to such as group in the same way that they apply in relation to an economic operator.

(8) Contracting authorities and utilities referred to in regulation 6(1)(a) must exclude an economic operator from participation in a concession contract award procedure where they have established 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;
- (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;

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- (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.

(9) 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.

(10) Concession granters, other than those referred to in subregulation (8)(a) may exclude an economic operator from participation in a concession award procedure where they are aware that the economic operator has been the subject of a conviction by a final judgment for any of the reasons listed in subregulation (9).

(11) A concession granter referred to in regulation 6(1)(a) may exclude an economic operator from participation in a concession contract award procedure where-

- (a) it 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 the economic operator is established or with those applicable in Gibraltar.

(12) A concession granter referred to in regulation 6(1)(a) may exclude an economic operator from participation in a concession contract award procedure where it 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.

(13) Subregulations (11) and (12) 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.

(14) A utility other than one referred to in regulation 6(1)(a) may exclude an economic operator from participation in a concession contract award procedure where it is aware that that economic operator has been convicted of any offence in subregulation (8).

(15) A concession granter may exclude from participation in a concession contract award procedure any economic operator if one of the following conditions is fulfilled-

- (a) where it can demonstrate by any appropriate means a violation of applicable obligations in the fields of environmental, social and labour law established by national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X to the Concessions Directive, as amended from time to time;
- (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 the laws and regulations of Gibraltar or a Member State;
- (c) where the concession granter can demonstrate by any appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;
- (d) where a conflict of interest within the meaning of regulation 33 cannot be effectively remedied by any other, less intrusive, measures;
- (e) where the concession granter has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;
- (f) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior concession contract or a prior contract with a concession granter as defined under these Regulations or under the Procurement (Public Sector Contracts) Regulations 2016 or the Procurement (Utilities

Contracts) Regulations 2016 which led to early termination of that prior contract, damages or other comparable sanctions;

- (g) 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 fulfilment of the selection criteria set out by the concession granter in accordance with subregulations (1) to (3); or
  - (ii) has withheld such information or is unable to submit the required documents supporting such information;
- (h) where the economic operator has-
  - (i) undertaken to-
    - (aa) unduly influence the decision-making process of the concession granter; or
    - (bb) obtain confidential information that may confer upon it undue advantages in the concession contract award procedure; or
  - (ii) negligently provided misleading information that may have a material influence on decisions concerning exclusion, selection or award;
- (i) in the case of a concession contract in the fields of defence and security as referred to in Directive 2009/81/EC, where the economic operator has been found, on the basis of any means of evidence, including protected data sources, not to possess the reliability necessary to exclude risks to the security of Gibraltar.

(16) Contracting authorities and utilities referred to in regulation 6(1)(a) may exclude an economic operator where they become aware, at any time during a concession contract procedure, that 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 (8) to (10).

(17) Concession granters may exclude an economic operator where they become aware, at any time during a concession contract procedure, that 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 (12), (14) or (15).

(18) In the cases referred to in subregulations (1) and (2) the period during which the economic operator must, subject to subregulation (21), be excluded is 5 years from the date of the conviction.

(19) In the cases referred to in subregulations (14) and (15), the period during which the economic operator may, subject to subregulation (21), be excluded is 3 years from the date of the relevant event.

(20) Subject to subregulation (21), any economic operator that is in one of the situations referred to in subregulations (8), (14) or (15) may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of the relevant ground for exclusion.

(21) If the concession granter considers such evidence to be sufficient, the economic operator concerned must not be excluded from the procedure.

(22) 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 (20) during the period of exclusion resulting from the judgment.

(23) For that purpose, 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.

(24) The measures taken by the economic operator must be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct.

(25) Where the concession granter considers such measures to be insufficient, it must give the economic operator a statement of the reasons for that decision.

**Time limits for receipt of applications and tenders for the concession contract.**

37.(1) When fixing the time limits for the receipt of applications or of tenders, concession granters must take account, in particular, of the complexity of the concession contract and the time required for drawing up tenders or applications, without prejudice to the minimum time limits set out in this regulation.

(2) Where applications or tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the concession documents, the time limits for the receipt of applications for the concession contract or for the receipt of tenders must be fixed so that all economic operators concerned may be aware of all the information needed to produce applications or tenders and in any event must be longer than the minimum time limits set out in subregulations (3) and (4).

(3) The minimum time limit for the receipt of applications (whether or not including tenders for the concession contract) must be 30 days from the date on which the concession notice was submitted for publication in accordance with regulation 31.

(4) Where the procedure takes place in successive stages the minimum time limit for the receipt of initial tenders must be 22 days from the date on which the invitation to tender is sent.

(5) The time limits for receipt of tenders may be reduced by 5 days where the concession granter allows the submission of tenders by electronic means in accordance with regulation 27.

**Informing candidates and tenderers.**

38.(1) The concession granter must as soon as possible inform each candidate and tenderer of decisions reached concerning the award of a concession contract, including-

- (a) the name of the successful tenderer; and
- (b) the grounds for any decision-
  - (i) to reject its application or tender;
  - (ii) not to award a contract for which there has been publication of a concession notice; or

(iii) to recommence the procedure.

(2) On request from the party concerned, the concession granter must as quickly as possible, and in any event within 15 days from receipt of a request in writing, inform any tenderers that have submitted an admissible tender of the characteristics and relative advantages of the tender selected.

(3) The concession granter may decide to withhold certain information referred to in this regulation 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.

**Award criteria.**

39.(1) Concession contracts must be awarded on the basis of objective criteria which comply with the principles set out in regulation 4 and which ensure that tenders are assessed in conditions of effective competition so as to identify an overall economic advantage for the concession granter (“the award criteria”).

(2) The award criteria-

- (a) must be linked to the subject-matter of the concession contract;
- (b) must not confer an unrestricted freedom of choice on the concession granter; and
- (c) may include one or more of the following-
  - (i) environmental criteria;
  - (ii) social criteria; or
  - (iii) criteria related to innovation.

(3) The award criteria must be accompanied by requirements which allow the information provided by the tenderers to be effectively verified.

(4) The concession granter must verify whether tenders properly meet the award criteria.

(5) The concession granter must list the award criteria in descending order of importance.

(6) Notwithstanding subregulation (5), where the concession granter receives a tender which proposes an innovative solution with an exceptional level of functional performance which could not have been foreseen by a diligent concession granter, the concession granter may, exceptionally, modify the ranking order of the award criteria to take into account that innovative solution.

(7) Where subregulation (6) applies the concession granter must-

- (a) inform all tenderers about the modification of the order of importance and issue a new invitation to submit tenders in compliance with the minimum time limit referred to in regulation 37(4) for the receipt of tenders;
- (b) where the award criteria have been published in or at the same time as the concession notice, publish a new concession notice in compliance with the minimum time limit referred to in regulation 37(3) for the receipt of applications.

(8) The concession granter must ensure that a modification of the ranking order referred to in subregulation (6) does not result in discrimination.

### PART 3

#### Rules on the performance of concession contracts

##### Subcontracting.

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

(2) Subregulation (1) is without prejudice to the question of the concessionaire's liability.

(3) Subject to subregulation (5), in the case of a works concession contract and in respect of services to be provided at a facility under the oversight of the concession granter, after the award of the concession contract and at the latest when the performance of the concession contract commences, the

concession granter must require the concessionaire to notify to the concession granter the name, contact details and legal representatives of its subcontractors involved in such works or services, in so far as known at the time.

- (4) The concession granter must require the concessionaire to notify it of-
- (a) any changes to the information notified under subregulation (3) during the course of the concession contract; and
  - (b) the name, contact details and legal representatives of any new subcontractors which it subsequently involves in such works or services.
- (5) Subregulations (3) and (4) do not apply to suppliers.
- (6) Concession granters may extend the obligations provided for in subregulations (3) and (4) to, for example-
- (a) services concession contracts, other than those concerning services to be provided at the facilities under the oversight of the concession granter, or suppliers involved in works concession contracts or services concession contracts;
  - (b) subcontractors of the concessionaire's subcontractors or subcontractors further down the subcontracting chain.
- (7) Concession granters may verify whether there are grounds for exclusion of subcontractors under regulation 36(8) to (25).
- (8) In such cases referred to in subregulation (7), the concession granter-
- (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 concession contracts during their term.**

41.(1) Concession contracts may be modified without a new concession contract award procedure in accordance with these Regulations in any of the following cases-

- (a) where the modifications, irrespective of their monetary value, have been provided for in the initial concession documents in clear, precise and unequivocal review clauses, which may include value 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 concession contract;
- (b) for additional works or services by the original concessionaire that have become necessary and were not included in the initial concession contract where a change of concessionaire-
  - (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 concession contract; and
  - (ii) would cause significant inconvenience or substantial duplication of costs for the concession granter,

provided, in the case of a concession contract awarded by a contracting authority, that any increase in value does not exceed 50% of the value of the original concession contract;

- (c) where all of the following conditions are fulfilled-
  - (i) the need for modification has been brought about by circumstances which a diligent concession granter could not have foreseen;
  - (ii) the modification does not alter the overall nature of the concession contract;
  - (iii) in the case of a concession contract awarded by a contracting authority, any increase in value does not

exceed 50% of the value of the original concession contract;

- (d) where a new concessionaire replaces the one to which the concession granter had initially awarded the concession 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 concessionaire, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of these Regulations;
- (e) where the modifications, irrespective of their value, are not substantial within the meaning of subregulation (8);
- (f) where subregulation (5) 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) Concession granters which have modified a concession contract in either of the cases described in subregulation (1)(b) and (c) must submit a notice to that effect for publication in accordance with regulation 31.

(4) Such a notice must contain the information set out in Annex XI to the Concessions 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

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meaning of the Procurement (Concession 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.

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

- (a) the threshold mentioned in regulation 8, and
- (b) 10% of the value of the initial concession contract,

provided that the modification does not alter the overall nature of the concession contract.

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

(7) For the purpose of the calculation of the values mentioned in subregulations (1)(b) and (c) and (5)(b), the updated value must be the reference value when the concession contract includes an indexation clause but if the concession contract does not contain an indexation clause, the updated value must be calculated taking into account the average inflation in Gibraltar of the concession granter.

(8) A modification of a concession contract during its term must be considered substantial for the purposes of subregulation (1)(e), where one or more of the following conditions are met-

- (a) the modification renders the concession contract materially different in character from the one initially concluded;
- (b) the modification introduces conditions which, had they been part of the initial concession contract award procedure, would have-
  - (i) allowed for the admission of other applicants than those originally selected;
  - (ii) allowed for the acceptance of a tender other than that originally accepted; or

- (iii) attracted additional participants in the concession contract award procedure;
- (c) the modification changes the economic balance of the concession contract in favour of the concessionaire in a manner which was not provided for in the initial concession contract;
- (d) the modification extends the scope of the concession contract considerably;
- (e) a new concessionaire replaces the one to which the concession granter had initially awarded the concession contract in cases other than those provided for in subregulation (1)(d).

(9) A new concession contract award procedure in accordance with these Regulations must be required for modifications of the provisions of a concession contract during its term other than those provided for in this regulation.

**Termination of concession contracts.**

42. Concession granters must ensure that every concession contract which they award contains provisions enabling them to terminate the concession contract where-

- (a) a modification of the concession contract has taken place, which would have required a new concession contract award procedure in accordance with regulation 41(9); or
- (b) in the case of a concession contract awarded by a concession granter referred to in regulation 6(1)(a), the concessionaire has, at the time of the concession contract award, been in one of the situations referred to in regulation 36(8), including as a result of the application of regulation 36(9), and should therefore have been excluded from the concession contract award procedure;

**PART 4**

**Remedies**

**Chapter 1**

**Facilitation of remedies**

**Information about contract award procedures.**

43.(1) A concession granter must, as soon as possible after the decision has been made, inform the tenderers and candidates of its decision to award the concession contract, and must do so by notice in writing by the most rapid means of communication practicable.

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

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

and anything required by subregulation (8);

- (c) the name of the economic operator to be awarded the concession contract; and
- (d) a precise statement of either—
  - (i) when, in accordance with regulation 44, 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 concession granter will not, in conformity with regulation 44, enter into the concession contract.

(3) The reasons referred to in subregulation (2)(b) must include the reason for any decision by the concession granter that the economic operator did not meet the technical and functional requirements in an equivalent manner as mentioned in regulation 34(6).

(4) 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 subregulation (2)(b).

(5) A concession granter need not comply with subregulation (1) in any of the following cases-

- (a) where the concession contract is permitted by these Regulations to be awarded without prior publication of a concession notice on the UK e-notification service;
- (b) where the only tenderer is the one who is to be awarded the concession contract, and there are no candidates.

(6) A concession granter may withhold any information to be provided in accordance with the preceding provisions of this regulation, 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.

(7) In this regulation-

“candidate” means a candidate, as defined in regulation 2(1), which-

- (a) is not a tenderer; and
- (b) has not been informed of the rejection of its application and the reasons for it;

“tenderer” means a tenderer, as defined in regulation 2(1), which has not been definitively excluded.

(8) For the purposes of subregulation (7)(b), an exclusion is definitive if, and only if, the tenderer has been notified of the exclusion and either-

- (a) the exclusion has been held to be lawful in proceedings under Chapter 2 of this Part; or
- (b) the time limit for starting such proceedings has expired even on the assumption that the Court would have granted the maximum extension permitted by regulation 49(4) and (5).

**Standstill period.**

44.(1) Where regulation 43(1) applies, the concession granter must not enter into the concession contract before the end of the standstill period.

(2) Subject to subregulation (6), where the concession granter sends a regulation 43(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 concession granter sends a regulation 43(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 43(1) notices are sent to the relevant economic operators, and if the notices are sent to different relevant economic operators on different dates, the relevant sending date is the date on which the last of the notices is sent.

(5) Subject to subregulation (6), where the concession granter sends a regulation 43(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.

## CHAPTER 2

### APPLICATION TO THE COURT

#### Interpretation of Chapter 2.

45.(1) In this Chapter, except where the context otherwise requires—

“Court” means the Supreme Court;

“declaration of ineffectiveness” means a declaration made under regulation 55(2)(a);

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

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

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

“standstill period”, and references to its end, has the same meaning as in regulation 44.

(2) In this Chapter, 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 46 and 47, “economic operator” has its usual meaning, but in the other provisions of this Chapter “economic operator” has the narrower meaning of an economic operator to which a duty is owed in accordance with regulations 46 or 47.

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

46.(1) This regulation applies to the obligation on a concession granter to comply with—

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

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

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

47. (1) The duty owed in accordance with regulation 46 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.**

48.(1) A breach of the duty owed in accordance with regulations 46 or 47 is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage.

(2) Proceedings for that purpose must be started in the Court, and regulations 49 to 60 apply to such proceedings.

**General time limits for starting proceedings.**

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

(2) Subject to subregulations (3) to (5), such proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.

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

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

(4) Subject to subregulation (5), the Court may extend the time limit imposed by subregulation (2) (but not any of the limits imposed by regulation 50) where the Court considers that there is a good reason for doing so.

(5) The Court must not exercise its power under subregulation (4) so as to permit proceedings to be started more than 3 months after the date when the

economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.

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

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

50.(1) This regulation limits the time within which proceedings may be started where the proceedings seek a declaration of ineffectiveness.

(2) Such proceedings must be started—

- (a) where subregulation (3) or (5) applies, within 30 days beginning with the relevant date mentioned in that subregulation;
- (b) in any event, within 6 months beginning with the day after the date on which the contract was entered into.

(3) This subregulation applies where a relevant contract award notice has been published on the UK e-notification service, in which case the relevant date is the day after the date on which the notice was published.

(4) For the purposes of subregulation (3), a contract award notice is relevant if, and only if—

- (a) the contract was awarded without prior publication of a contract notice; and
- (b) the contract award notice includes justification of the decision of the concession granter to award the contract without prior publication of a contract notice.

(5) This subregulation applies where the concession granter has informed the economic operator of—

- (a) the conclusion of the contract; and
- (b) a summary of the relevant reasons,

in which case the relevant date is the day after the date on which the economic operator was informed of the conclusion or, if later, was informed of a summary of the relevant reasons.

(6) In subregulation (5), “the relevant reasons” means the reasons which the economic operator would have been entitled to receive in response to a request under regulation 38(2).

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

### **Starting proceedings.**

51.(1) Where proceedings are to be started, the economic operator must serve the claim form on the concession granter 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 44, 52 or 53(1)(b) where the contract has not been fully performed.

(3) In those circumstances, the economic operator must, as soon as practicable, send a copy of the claim form to each person, other than the concession granter, who is a party to the contract in question.

(4) The concession granter must, as soon as practicable, comply with any request from the economic operator for any information that the economic operator may reasonably require for the purpose of complying with subregulation (3).

(5) In this regulation, “serve” means serve in accordance with rules of court, and for the purposes of this regulation a claim form is deemed to be served on the day on which it is deemed by rules of court to be served.

### **Concession contract-making suspended by challenge to award decision.**

52.(1) Where—

- (a) a claim form is issued in respect of a concession granter's decision to award the concession contract;
- (b) the concession granter has become aware that the claim form has been issued and that it relates to that decision; and
- (c) the concession contract has not been entered into,

the concession granter is required to refrain from entering into the concession contract.

- (2) The requirement continues until any of the following occurs—
- (a) the Court brings the requirement to an end by interim order under regulation 53(1)(a);
  - (b) the proceedings at first instance are determined, discontinued or otherwise disposed of and no order has been made continuing the requirement (for example in connection with an appeal or the possibility of an appeal).
- (3) This regulation does not affect the obligations imposed by regulation 44.

**Interim orders.**

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

- (a) bringing to an end the requirement imposed by regulation 52(1);
  - (b) restoring or modifying that requirement;
  - (c) suspending the procedure leading to the award of the concession contract in relation to which the breach of the duty owed in accordance with regulations 46 or 47 is alleged;
  - (d) suspending the implementation of any decision or action taken by the concession granter 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 47(1) were not applicable, it would be appropriate to make an interim order requiring the concession granter to refrain from entering into the concession contract; and
  - (b) only if the Court considers that it would not be appropriate to make such an interim order may it make an order under subregulation (1)(a).

(3) If the Court considers that it would not be appropriate to make an interim order of the kind mentioned in subregulation (2)(a) in the absence of undertakings or conditions, it may require or impose such undertakings or conditions in relation to the requirement in regulation 52(1).

(4) The Court may not make an order under subregulation (1)(a) or (b) or (3) before the end of the standstill period.

(5) This regulation does not prejudice any other powers of the Court.

**Remedies where the contract has not been entered into.**

54.(1) Subregulation (2) applies where—

- (a) the Court is satisfied that a decision or action taken by a concession granter was in breach of the duty owed in accordance with regulations 46 or 47; and
- (b) the concession 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 concession granter to amend any document;
- (c) award damages to an economic operator which has suffered loss or damage as a consequence of the breach.

(3) Where the Court is satisfied that an economic operator would have had a real chance of being awarded the contract if that chance had not been affected by the breach mentioned in subregulation (1)(a), the economic operator is entitled to damages amounting to its costs in preparing its tender and in participating in the procedure leading to the award of the concession contract.

(4) Subregulation (3)—

- (a) only applies in the case of a breach mentioned in subregulation (1)(a) by a utility;
- (b) does not affect a claim by an economic operator that it has suffered other loss or damage or that it is entitled to relief other than damages; and

- (c) is without prejudice to the matters on which an economic operator may be required to satisfy the Court in respect of any such other claim.

(5) This regulation does not prejudice any other powers of the Court.

**Remedies where the contract has been entered into.**

55.(1) Subregulation (2) applies if—

- (a) the Court is satisfied that a decision or action taken by a concession granter was in breach of the duty owed in accordance with regulations 46 or 47; and
- (b) the concession contract has already been entered into.

(2) In those circumstances, the Court—

- (a) must, if it is satisfied that any of the grounds for ineffectiveness applies, make a declaration of ineffectiveness in respect of the contract unless regulation 57 requires the Court not to do so;
- (b) must, where required by regulation 59, impose penalties in accordance with that regulation;
- (c) may award damages to an economic operator which has suffered loss or damage as a consequence of the breach, regardless of whether the Court also acts as described in paragraphs (a) and (b);
- (d) must not order any other remedies.

(3) Subregulation (2)(d) does not prejudice any power of the Court under regulations 58(3) or 59(9).

(4) Regulation 54(3) and (4)(b) and (c) apply for the purposes of this regulation in the case of a breach mentioned in subregulation (1)(a) by a utility.

**Grounds for ineffectiveness.**

56.(1) There are two grounds for ineffectiveness.

*The first ground*

(2) Subject to subregulation (3), the first ground applies where the contract has been awarded without prior publication of a notice on the UK e-notification service in any case in which these Regulations required the prior publication of such a notice.

(3) The first ground does not apply if all the following apply-

- (a) the concession granter considered the award of the concession contract without prior publication of a concession notice on the UK e-notification service to be permitted by these Regulations;
- (b) the concession granter has had published on the UK e-notification service a voluntary transparency notice expressing its intention to enter into the concession contract; and
- (c) the concession 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 which contains the following information-

- (a) the name and contact details of the concession granter;
- (b) a description of the object of the concession contract;
- (c) a justification of the decision of the concession granter to award the concession contract without prior publication of a concession notice on the UK e-notification service;
- (d) the name and contact details of the economic operator to be awarded the concession contract; and
- (e) where appropriate, any other information which the concession granter considers it useful to include.

*The second ground*

(5) The second ground applies where all the following apply-

- (a) the concession contract has been entered into in breach of any requirement imposed by-

- (i) regulation 44,
  - (ii) regulation 52, or
  - (iii) regulation 53(1)(b);
- (b) there has also been a breach of the duty owed to the economic operator in accordance with regulation 46 or 47 in respect of obligations other than those imposed by regulation 44 and this Chapter;
- (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 concession contract was entered into; and
- (d) the breach mentioned in paragraph (b) has affected the chances of the economic operator obtaining the concession contract.

**General interest grounds for not making a declaration of ineffectiveness.**

57.(1) Where the Court is satisfied that any of the grounds for ineffectiveness applies, the Court must not make a declaration of ineffectiveness if—

- (a) the concession granter or another party to the proceedings raises an issue under this regulation; and
- (b) the Court is satisfied that overriding reasons relating to a general interest require that the effects of the contract should be maintained.

(2) For that purpose, economic interests in the effectiveness of the concession 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 concession contract include—

- (a) the costs resulting from the delay in the execution of the concession 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 concession contract; and
- (d) the costs of legal obligations resulting from the ineffectiveness.

(5) For the purposes of subregulation (1)(b), overriding reasons may be taken to require that the effects of the contract should be maintained even if they do not require the Court to refrain from shortening the duration of the contract by an order under regulation 59(3)(a).

#### **The consequences of ineffectiveness.**

58.(1) Where a declaration of ineffectiveness is made, the contract is to be considered to be prospectively, but not retrospectively, ineffective as from the time when the declaration is made and, accordingly, those obligations under the concession contract which at that time have yet to be performed are not to be performed.

(2) Subregulation (1) does not prevent the exercise of any power under which the orders or decisions of the Court may be stayed, but at the end of any period during which a declaration of ineffectiveness is stayed, the contract is then to be considered to have been ineffective as from the time when the declaration had been made.

(3) When making a declaration of ineffectiveness, or at any time after doing so, the Court may make any order that it thinks appropriate for addressing—

- (a) the implications of subregulation (1) or (2) for the particular circumstances of the case;
- (b) any consequential matters arising from the ineffectiveness.

(4) Such an order may, for example, address issues of restitution and compensation as between those parties to the contract who are parties to the proceedings so as to achieve an outcome which the Court considers to be just in all the circumstances.

(5) Subregulation (6) applies where the parties to the contract have, at any time before the declaration of ineffectiveness is made, agreed by contract any provisions for the purpose of regulating their mutual rights and obligations in the event of such a declaration being made.

(6) In those circumstances, the Court must not exercise its power to make an order under subregulation (3) in any way which is inconsistent with those provisions, unless and to the extent that the Court considers that those provisions are incompatible with the requirement in subregulation (1) or (2).

**Penalties in addition to, or instead of, ineffectiveness.**

59.(1) Where the Court makes a declaration of ineffectiveness, it must also order that the concession granter pay a civil financial penalty of the amount specified in the order.

(2) Subregulation (3) applies where—

- (a) in proceedings for a declaration of ineffectiveness, the Court is satisfied that any of the grounds for ineffectiveness applies but does not make a declaration of ineffectiveness because regulation 57 requires it not to do so; or
- (b) in any proceedings, the Court is satisfied that the contract has been entered into in breach of any requirement imposed by regulation 44, 52 or 53(1)(b), and does not make a declaration of ineffectiveness (whether because none was sought or because the Court is not satisfied that any of the grounds for ineffectiveness applies).

(3) In those circumstances, the Court must order at least one, and may order both, of the following penalties—

- (a) that the duration of the concession contract be shortened to the extent specified in the order;
- (b) that the concession granter 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.

(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 46 or 47;
- (b) the behaviour of the concession granter;
- (c) where the order is to be made under subregulation (3), the extent to which the contract remains in force.

(6) Where more than one economic operator starts proceedings in relation to the same contract, subregulation (4) applies to the totality of penalties imposed in respect of the contract.

*Civil financial penalties*

(7) Where a concession granter is ordered by the Supreme Court to pay a civil financial penalty under this regulation—

- (a) the Court's order must state that the penalty is payable to the Minister;
- (b) the Court must send a copy of the order to the Minister;
- (c) the concession granter must pay the penalty to the Minister; and
- (d) the Minister must, on receipt of the penalty, pay it into the Consolidated Fund.

(8) Where a concession granter is not a Government body any payment due under subregulation (7) may be enforced by the Minister as a judgment debt due to the Minister;

*Contract shortening*

(9) When making an order under subregulation (3)(a), or at any time after doing so, the Court may make any order that it thinks appropriate for addressing the consequences of the shortening of the duration of the contract.

(10) Such an order may, for example, address issues of restitution and compensation as between those parties to the contract who are parties to the proceedings so as to achieve an outcome which the Court considers to be just in all the circumstances.

(11) Subregulation (12) applies where the parties to the contract have, at any time before the order under subregulation (3)(a) is made, agreed by contract any provisions for the purpose of regulating their mutual rights and obligations in the event of such an order being made.

(12) In those circumstances, the Court must not exercise its power to make an order under subregulation (9) in any way which is inconsistent with those provisions, unless and to the extent that the Court considers that those provisions are incompatible with the primary order that is being made, or has been made, under subregulation (3)(a).

(13) In subregulation (3)(a), “duration of the contract” refers only to its prospective duration as from the time when the Court makes the order.

### **Injunctions against the Crown.**

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

## **PART 5**

### **TRANSITIONAL PROVISIONS**

#### **General transitional provisions.**

61.(1) Nothing in these Regulations affects any concession contract award procedure commenced before 18th April 2016.

(2) For that purpose, a concession contract award procedure has been commenced before 18th April 2016 if, before that date-

- (a) a public works concession contract notice has been sent to the Official Journal in accordance with the Public Contracts Regulations 2006;
- (b) a contract notice has been sent to the Official Journal in accordance with the Procurement (Defence and Security Public Contracts) Regulations 2012 in order to invite offers or requests to be selected for tender or to negotiate in respect of a proposed concession contract;
- (c) the concession granter has had published any form of advertisement seeking offers or expressions of interest in a proposed concession contract; or

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- (d) the concession granter has contacted any economic operator in order to-
  - (i) seek expressions of interest or offers in respect of a proposed concession contract; or
  - (ii) respond to an unsolicited expression of interest or offer received from that economic operator in relation to a proposed concession contract.
- (3) Nothing in these Regulations affects a concession contract awarded-
  - (a) before 18th April 2016; or
  - (b) after that date but where the award was not, by virtue of subregulations (1) and (2), affected by these Regulations.