

REGULATIONS

entitled

**European Communities (Award of Contracts by Utility  
Undertakings) Regulations 2007**

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Made by the  
Minister for Finance

# TABLE OF CONTENTS

## PART 1

### PRELIMINARY PROVISIONS

#### *Regulation*

1. Citation and commencement
2. Object of these Regulations
3. Interpretation
4. Application of these Regulations

## PART 2

### ACTIVITIES TO WHICH THESE REGULATIONS APPLY

#### CHAPTER 1

##### *Procurement procedures relating to certain specified activities*

5. Procurement procedures for suppliers of gas, heat and electricity services
6. Procurement procedures for suppliers of water supply services
7. Procurement procedures for suppliers of transport services
8. Procurement procedures for suppliers of postal services
9. Procurement procedures for entities engaged in exploration for, or extraction of, oil, gas, coal or other solid fuels
10. Procurement procedures of port and airport operators

#### CHAPTER 2

##### *Multiple activities*

11. Contracts covering several activities

#### CHAPTER 3

*Contract thresholds*

12. Threshold amounts for contracts
13. Methods for calculating the estimated value of contracts, framework agreements and dynamic purchasing systems

PART 3

CONTRACTS TO WHICH THESE REGULATIONS DO NOT APPLY

CHAPTER 1

*Exclusions*

14. Regulations not to apply to certain works and service concessions
15. Contracts awarded for purposes of resale or lease to third parties
16. Contracts awarded for purpose other than carrying out a prescribed activity or for carrying out a prescribed activity in a third country
17. Contracts that are secret or require special security measures
18. Contracts awarded under international rules
19. Contracts awarded to an affiliated undertaking, to a joint venture or to a contracting entity forming part of a joint venture

CHAPTER 2

*Exclusions applicable to service supply contracts only*

20. Contracts relating to certain services excluded from the scope of these Regulations
21. Service supply contracts awarded on the basis of an exclusive right

CHAPTER 3

*Exclusions applicable to certain contracting entities*

22. Contracts awarded by certain contracting entities for the purchase of water and for the supply of energy or of fuels for the production of energy
23. Procurement procedures not to be subject to these Regulations when activity is exposed to competition

## PART 4

### GENERAL RULES APPLICABLE TO REGULATED CONTRACTS

24. Principles for awarding contracts
25. Economic operators
26. Conditions relating to agreements concluded within the World Trade Organisation
27. Contracting entities not to disclose confidential information
28. Framework agreements
29. Dynamic purchasing systems

## PART 5

### RESERVED CONTRACTS AND CENTRAL PURCHASING

30. Contracting entity may reserve award of contracts to persons employed in sheltered workshops
31. Contracts and framework agreements awarded by central purchasing bodies

## PART 6

### RULES APPLICABLE TO SERVICE SUPPLY CONTRACTS

32. Service supply contracts listed in Part A of Schedule 6
33. Service supply contracts listed in Part B of Schedule 6
34. Mixed service supply contracts for services listed in both Parts A and B of Schedule 6

## PART 7

### MATTERS TO BE SPECIFIED IN CONTRACT OR ASSOCIATED DOCUMENTS

35. Technical specifications
36. Formulation of technical specifications
37. Communication of technical specifications
38. Tenderers may submit variants

39. Contracting entity can ask tenderers to specify their intentions with respect to subcontracting
40. Conditions for performance of contracts
41. Obligations relating to taxes, environmental protection, employment protection provisions and working conditions

## CHAPTER 9

### *Procedures for awarding contracts*

42. Use of open, restricted and negotiated procedures

## PART 8

### RULES ON PUBLICATION AND TRANSPARENCY

## CHAPTER 1

### *Publication of notices*

43. Periodic indicative notices and notices on the existence of a system of qualification
44. How calls for competition can be made
45. Contract award notices
46. Form and manner in which notices are to be published

## CHAPTER 2

### *Time limits*

47. Deadline for the receipt of requests to participate and for the receipt of tenders
48. Open procedure: contract specifications and supporting documents to be provided on request
49. Invitations to submit a tender or to negotiate

## CHAPTER 3

### *Communication and information*

50. Rules applicable to communication
51. Information to be given to applicants for qualification, candidates and tenderers
52. Information to be stored concerning awards

## PART 9

### CONDUCT OF AWARD PROCEDURE WHEN CONTRACTING ENTITY USES RESTRICTED PROCEDURE OR NEGOTIATED PROCEDURE

#### CHAPTER 1

##### *General*

53. General provisions for conducting restricted procedure or negotiated procedure

#### CHAPTER 2

##### *Qualification and qualitative selection*

54. Mutual recognition of administrative, technical or financial conditions, and certificates, tests and evidence
55. Establishment and operation of qualification systems by contracting entities
56. Selection to be in accord with objective rules and criteria

#### CHAPTER 3

##### *Awarding a regulated contract*

57. Criteria for awarding regulated contract
58. Conduct of electronic auctions
59. Procedure for closing an electronic auction
60. Action to be taken by contracting entity when tenders are abnormally low

#### CHAPTER 4

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

61. Tenders comprising products originating in third countries
62. Responsibility of Minister to inform European Commission of difficulties with third countries as regards regulated contracts

## PART 10

### RULES GOVERNING DESIGN CONTESTS FOR SERVICE SUPPLY CONTRACTS

63. Design contests to which this Part applies
64. Design contests excluded from this Part
65. Responsibilities of contracting entity in organising a design contest
66. Rules on advertising and transparency of the European Commission
67. Means of communication applicable to design contests
68. Rules concerning organisation of design contests, selection of participants and the jury
69. Decisions of the jury

## PART 11

### MISCELLANEOUS PROVISIONS

70. Minister's responsibilities under these Regulations
71. Revision of the thresholds
72. Amendments
73. Compliance mechanisms
74. Revocation of existing Regulations
75. Transitional arrangement

## **SCHEDULES**

**SCHEDULE 1 - LIST OF ACTIVITIES FOR WORKS CONTRACTS**

**SCHEDULE 2 - INFORMATION TO BE INCLUDED IN CONTRACT NOTICE**

**SCHEDULE 3 – NOTICES ON THE EXISTENCE OF A QUALIFICATION SYSTEM**

**SCHEDULE 4 - PERIODIC INDICATIVE NOTICES**

**SCHEDULE 5 - INFORMATION TO BE INCLUDED IN THE CONTRACT AWARD  
NOTICE**

**SCHEDULE 6 - SERVICES**

**SCHEDULE 7 - INFORMATION TO BE INCLUDED IN DESIGN CONTEST  
NOTICE**

**SCHEDULE 8 - INFORMATION TO BE INCLUDED IN THE RESULTS OF  
DESIGN CONTEST NOTICES**

**SCHEDULE 9 - FEATURES CONCERNING PUBLICATION**

**SCHEDULE 10 -DEFINITION OF CERTAIN TECHNICAL SPECIFICATIONS**

**SCHEDULE 11 - SUMMARY TABLE OF THE TIME-LIMITS PRESCRIBED BY  
REGULATION 47**

**SCHEDULE 12 - INTERNATIONAL LABOUR LAW PROVISIONS REFERRED TO  
IN THE REGULATIONS**

**SCHEDULE 13 - REQUIREMENTS RELATING TO DEVICES FOR THE  
ELECTRONIC RECEIPT OF TENDERS, REQUESTS TO PARTICIPATE,  
APPLICATIONS FOR QUALIFICATION AS WELL AS PLANS AND  
PROJECTS IN CONTESTS**

**SCHEDULE 14 -REQUESTS CONCERNING EXEMPTIONS UNDER  
REGULATION 23**

I, Brian Cowen, Minister for Finance, in exercise of the powers conferred on me by section 3 of the European Communities Act 1972 (No. 27 of 1972) as amended by the European Communities (Amendment) Act 1973 (No. 25 of 1993), and for the purpose of giving effect to Directive 2004/17/EC of the European Parliament and the Council, dated 31 March 2004, (as amended by Directive 2005/51/EC, dated 7 September 2005) hereby make the following regulations:

## PART 1

### PRELIMINARY PROVISIONS

#### **Citation and commencement**

1. (1) These Regulations may be cited as the European Communities (Award of Contracts by Utility Undertakings) Regulations 2007.

(2) These Regulations come into operation on the day after the date on which their publication is notified in the *Iris Oifigiúil*.

#### **Object of these Regulations**

2. The object of these Regulations is to give effect to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 on the co-ordination of procurement procedures of entities operating in the water, energy, transport and postal services sectors (as amended by Directive 2005/51/EC of 7 September 2005).

#### **Interpretation**

3. (1) In these Regulations—

“the Advisory Committee” means the Advisory Committee for Public Contracts set up by Article 1 of Decision 71/306/EEC;

“the Government Procurement Agreement” means the Agreement on Government Procurement entered into in the framework of the Uruguay Round multilateral negotiations;

“assess” includes examine;

“associated document”, in relation to a regulated contract, includes a contract notice, contract document or additional document that is associated with the contract;

“bus” includes motor bus and trolley bus;

“buyer profile”, in relation to a contracting entity, means the entity’s buyer profile as described in Schedule 9;

“call for competition notice” means a notice, published in accordance with Schedule 9, that is used as a means of calling for competition;

“candidate” means an economic operator that has sought an invitation to participate in a restricted or negotiated procedure for the award of a contract;

“central purchasing body” means a contracting authority that—

- (a) acquires products or services, or products and services, for one or more contracting entities, or
- (b) awards contracts, or enters into framework agreements, to carry out works, or to supply products or a service, for one or more such entities;

“Common Procurement Vocabulary” means the reference nomenclature applicable to contracts as adopted by Regulation (EC) No. 2195/2002, while ensuring equivalence with the other existing nomenclatures;

“concessionaire”, in relation to a works concession contract, means the person to whom the contract is awarded;

“contracting authority” means the State, a local authority or a public authority, or an association comprising one or more local authorities or public authorities, or local authorities and public authorities;

“contracting entity” means—

- (a) a contracting authority, or
- (b) a public undertaking, or
- (c) a private sector entity engaged in a prescribed activity under a special or exclusive right granted by the relevant competent authority of a Member State;

“contractor” means a person, or a group of persons, that carries out or offers to carry out works or a particular kind of work on a commercial basis;

“corruption” has the meaning given by Article 3 of the Council Act of 26 May 1997 and Article 3(1) of Council Joint Action 98/742/JHA respectively;

“design contest” means such procedure as enables the contracting entity to acquire (mainly in the fields of town and country planning, architecture and engineering or data processing) a plan or design selected by a jury after being put out to competition with or without the award of a prize;

“dynamic purchasing system”, in relation to a contracting entity, means a completely electronic process for buying commonly used items that are generally available on the market, being a process the characteristics of which meet the requirements of the contracting entity and that—

- (a) is limited in duration, and
- (b) is open throughout its validity to any economic operator that satisfies the selection criteria and has submitted an indicative tender that complies with the relevant specifications;

“dominant influence” has the meaning given by paragraph (2);

“economic operator” means a person, or a group of persons, that is a contractor, product supplier or service supplier;

“electronic auction” means a repetitive process that involves the use of an electronic device, by means of which tenderers present new prices (revised downwards), or new values concerning certain elements of tenders, or both, occurs after an initial full evaluation of the tenders and so enabling them to be ranked by the use of automatic evaluation methods;

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

“excluded contract” means a contract excluded from the operation of these Regulations by a provision of Part 3;

“framework agreement” means an agreement between one or more contracting entities and one or more economic operators, the purpose of which is to establish the terms governing

contracts to be awarded during a specified period, including the terms relating to price and, where relevant, the quantity of items to be supplied;

“fraud” has the meaning given by Article 1 of the Convention relating to the protection of the financial interests of the European Communities;<sup>1</sup>

“Group Consolidated Accounts Directive” means Directive 83/349/EEC on the preparation of consolidated accounts for undertakings that are part of a group;

“land” includes all buildings and structures constructed on land;

“law” includes Act or statutory instrument;

“local authority” means a local authority for the purposes of the Local Government Act 2001;

“Minister” means the Minister for Finance;

“money laundering” has the same meaning as in Article 1 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering;

“negotiated procedure” means a procedure under which the relevant contracting party consults the economic operators of its choice and negotiate the terms of contract with one or more of those operators;

“open procedure” means a procedure under which any interested economic operator may submit a tender;

“periodic indicative notice” means a notice to which Regulation 43 applies;

“postal item” means an item addressed in the final form in which it is to be carried, irrespective of weight, and includes (but is not limited to) an item of correspondence, a book, catalogue, newspaper, or periodical and a postal package containing merchandise with or without commercial value, irrespective of weight;

“post-related service” means any of the following:

- (a) a mail service management service (which includes a service preceding or subsequent to despatch, such as a mailroom management services);

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<sup>1</sup> OJ C 316, 27/11/1995.

- (b) an added-value service linked to, and provided entirely by, electronic means (including the secure transmission of coded documents by electronic means, address management services, and transmission of registered electronic mail);
- (c) a service involving the transmission of postal items not included in point (a), such as direct mail bearing no address;
- (d) a financial service (as referred to in category 6 of Part A of Schedule 6 and in Regulation 20(1)(c) and (d), including the sale of postal money orders and making postal giro transfers;
- (e) a philatelic service;
- (f) a logistical service that combines physical delivery or warehousing (or both) with other non-postal functions;

“prescribed activity” means an activity to which these Regulations apply by virtue of a provision of Part 2;

“prescribed civil engineering activities” means civil engineering activities of a kind listed in Schedule 1;

“prescribed criminal organisation” has the same meaning as in Article 2(1) of Council Joint Action 98/733/JHA;

“prescribed postal service” means a service comprising the clearance, sorting, routing and delivery of postal items, and includes—

- (a) any reserved postal service that is or can be reserved on the basis of Article 7 of Directive 97/67/EC, and
- (b) any postal service that cannot not be reserved on the basis of that Article;

“prescribed service” means a service of a kind to which Schedule 6 applies;

“product” means movable personal property of any kind and, in particular, includes goods and any kind of material, and a document, a vessel and an aircraft;

“product supplier” means a person who supplies or offers to supply one or more kinds of products on a commercial basis;

“product supply contract” means a regulated contract (other than a works contract) the object of which is the purchase, lease, hire or hire purchase of one or more kinds of product, and includes such a contract that, incidentally, involves siting or installing works;

“public transport network” means one or more transport services provided to the public by a contracting entity;

“public undertaking” means an undertaking over which a contracting entity may exercise, directly or indirectly, a dominant influence because of—

- (a) its ownership of the undertaking, or
- (b) its financial participation in the undertaking, or
- (c) the rules that govern the undertaking;

“Public Authorities Contracts Directive” means Directive 2004/18/EC, dated 31 March 2004, of the European Parliament and of the Council;

“public authority” means any body that—

- (a) is established by or under a law of the State for a public purpose, and
- (b) does not have an industrial or commercial character, and
- (c) is—
  - (i) financed wholly or partly by the State, or by a local authority or another public authority, or
  - (ii) managed or supervised by the State, or by a local authority or another public authority, or
  - (iii) governed by a board, more than half of whose members are appointed by the State, or by a local authority or another public authority;

“Public Utilities Contracts Directive” means Directive 2004/17/EC, dated 31 March 2004, of the European Parliament and of the Council;

“quarter” means the period of 3 months ending on 31 March, 30 June, 30 September or 31 December;

“regulated contract” means a contract to which these Regulations apply;

“relevant competent authority”—

- (a) for a contracting entity engaged in carrying on any of the activities referred to in Chapter 1 of Part 2, means the Minister, or an authority that, in accordance with a law of the State, is responsible for performing supervisory or regulatory functions in relation to that entity,<sup>1</sup> and
- (b) for a contracting entity engaged in carrying on any of the activities referred to in that Chapter in another Member State, means the authority of that other State that, in accordance with a law of that other State, is responsible for performing supervisory or regulatory functions in relation to that entity;

“restricted procedure” means a procedure under which—

- (a) any economic operator may ask to participate, and
- (b) only those economic operators invited by the relevant contracting entity may submit a tender;

“Rome Treaty” means the Rome Treaty by which the European Community was established, as amended by subsequent European Treaties;

“sent to the European Commission for publication” means sent to the European Commission for publication in the Official Journal of the European Union;

“service supplier” means a person or group of persons who supplies or offers to supply one or more services on a commercial basis;

“service concession contract” means a regulated contract of the same kind as a service supply contract except that the consideration to be given for supplying the relevant service consists either solely in the right to exploit the service or in that right together with the payment of money;

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<sup>1</sup> Note: The relevant Irish competent authorities include the following:

- (a) for a contracting entity engaged in the electricity or gas industry in the State, the Commission for Energy Regulation;
- (b) for a contracting entity engaged in providing postal services in the State, the Commission for Communications Regulation;
- (c) for a contracting entity engaged in the aviation industry in the State, the Commission for Aviation Regulation;
- (d) for a contracting entity engaged in the State transport sector (other than aviation), the Minister for Transport;
- (e) for a contracting entity engaged in supplying water in the State, the Minister for the Environment, Heritage and Local Government.

“service supply contract” means a regulated contract (other than a works or product supply contract) the object of which is to supply a service, and includes—

- (a) a contract the object of which is to supply both a product and a prescribed service so long as the value of the service exceeds that of the product, and
- (b) a contract that relates to an activity of the kind listed in Schedule 6, and
- (c) a contract that relates to an activity of the kind listed in Schedule 1 so long as the activity is incidental to the main object of the contract;

“special or exclusive rights” mean rights granted by the relevant competent authority under a any legislative, regulatory or administrative provision that—

- (a) has the effect of restricting carrying out specified activities to one or more entities, and
- (b) substantially affects the ability of other entities to carry out such activity;

“technical specifications” has the meaning given by Schedule 10;

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

“third country” means a country or territory other than a Member State;

“transport” includes transport by railway, tramway, bus, cable or an automated system;

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

“works concession contract” means a regulated contract of the same kind as a works contract except that the consideration to be provided for carrying out the work under the contract consists only of—

- (a) the right to exploit the work, or
- (b) that right together with the payment of money;

“works contract” means a regulated contract the object of which is the construction, or the design and construction, of—

- (a) works related to one or more of the activities listed in Schedule 1, or

(b) a work, or the realisation, by whatever means, of a work corresponding to requirements specified by the contracting entity concerned.

(2) A contracting entity is presumed to have a dominating influence over an undertaking for the purposes of these Regulations if the entity, directly or indirectly—

- (a) holds more than half of the undertaking's subscribed share capital, or
- (b) controls more than half of the votes attaching to shares issued by the undertaking, or
- (c) can appoint more than half of the members of the undertaking's governing body.

(3) The NACE and CPC nomenclatures respectively take precedence if interpretations of the scope of these Regulations vary because of possible differences—

- (a) between the CPV and NACE nomenclatures listed in Schedule 1, or
- (b) between the CPV and CPC (provisional version) nomenclatures listed in Schedule 6.

(4) Unless the context otherwise requires or these Regulations otherwise provide, a word or expression that is used in these Regulations and in the Public Utility Contracts Directive has in these Regulations the same meaning as it has in that Directive.

(5) Notes appearing in the text are provided for information only and do not form part of these Regulations.

### **Application of these Regulations**

4. These Regulations apply to contracts in writing (other than excluded contracts) entered into or to be entered into between a contracting entity and an economic operator under which the operator undertakes to carry out works for, or to supply a kind of product or service to, the entity relating to an activity described in Chapter 1 of Part 2.

## **PART 2**

### **ACTIVITIES TO WHICH THESE REGULATIONS APPLY**

## CHAPTER 1

### *Procurement procedures relating to certain specified activities*

#### **Procurement procedures for suppliers of gas, heat and electricity services**

5. (1) These Regulations apply to the procurement procedures of a contracting entity that is engaged in—

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

(2) However, the supply of gas or heat by a contracting entity is not an activity to which these Regulations apply if—

- (a) the entity is not a contracting authority and supplies the gas or heat to a network that provides a service to the public, and
- (b) the production of gas or heat by the entity is the unavoidable consequence of carrying out an activity other than a prescribed activity, and
- (c) the supply to the network is aimed only at the economic exploitation of the entity's production and constitutes no more than 20 per cent of the entity's turnover, having regard to the average for the preceding 3 years (including the current year).

(3) Without limiting paragraph (1), these Regulations apply to—

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

(4) The supply of electricity by a contracting entity is not an activity to which these Regulations apply if—

- (a) the entity is not a contracting authority and supplies the electricity to a

network that provides a service to the public, and

- (b) the production of electricity by the entity is needed in order to enable the entity to carry out an activity other than a prescribed activity, and
- (c) the supply to the public network depends only on the entity's own consumption and has not exceeded 30 per cent of the entity's total production of energy, having regard to the average for the immediately preceding 3 years (including the current year).

### **Procurement procedures for suppliers of water supply services**

**6.** (1) These Regulations apply to the procurement procedures of a contracting entity that is engaged in—

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

(2) These Regulations also apply to a contract or design contest awarded or organised by an entity that carries on an activity referred to in paragraph (1) but only if the contract or contest is connected with—

- (a) a hydraulic engineering, irrigation or land drainage project and the volume of water to be used to supply drinking water represents more than 20 per cent of the total volume of water made available by the project, or
- (b) the disposal or treatment of sewage.

(3) The supply of drinking water by a contracting entity is not an activity to which these Regulations apply if—

- (a) the entity is not a contracting authority and supplies the water to a network that provides a service to the public, and
- (b) the production of drinking water by the entity arises because it is needed to enable the entity to carry out an activity other than an activity to which these Regulations apply, and

- (c) supply to the network depends only on the entity's own consumption and that supply has not exceeded 30 per cent of the entity's total production of drinking water, having regard to the average for the immediately preceding 3 years, including the current year.

### **Procurement procedures for suppliers of transport services**

7. (1) These Regulations apply to activities relating to the provision or operation of a network that provides a transport service to the public.

(2) A network is taken to exist in relation to a transport service referred to in paragraph (1) if the service is provided under operating conditions prescribed by the relevant competent authority, such as—

- (a) the conditions on the routes to be served, or
- (b) the capacity to be provided, or
- (c) the frequency of the service.

(3) These Regulations do not apply to a contracting entity that provides a bus service to the public if other contracting entities are free to provide such a service to the public within a general or particular geographic area under the same conditions as the entity.

### **Procurement procedures for suppliers of postal services**

8. These Regulations apply to the procurement procedures of a contracting entity that is engaged in an activity relating to the provision of—

- (a) a prescribed postal service, or
- (b) a post-related service, but only if the entity that provides the service also provides a prescribed postal service and the conditions specified in Regulation 23 are not satisfied in respect of that postal service.

### **Procurement procedures for entities engaged in exploration for, or extraction of, oil, gas, coal or other solid fuels**

**9.** These Regulations apply to the procurement procedures of a contracting entity that is engaged in an activity relating to the exploitation of a geographical area for the purposes of exploring for or extracting oil, gas or coal or any other kind of solid fuel.

### **Procurement procedures of port and airport operators**

**10.** These Regulations apply to the procurement procedures of a contracting entity that is engaged in an activity relating to the exploitation of a geographical area for the purposes of the provision of an airport, a maritime or inland port or any other kind of terminal facility to carriers by air, sea or inland waterway.

## CHAPTER 2

### *Multiple activities*

#### **Contracts covering several activities**

**11.** (1) A regulated contract that involves several activities is subject to the rules applicable to the activity for which it is principally intended. However, a decision whether to award a single contract or a number of separate contracts may not be made with the objective of excluding the contract from the scope of these Regulations or, if applicable, the European Communities (Award of Public Authorities Contracts) Regulations 2006 (S.I. No. 329 of 2006).

(2) If—

- (a) one of the activities for which a regulated contract is intended is subject to these Regulations and another is within the scope of the European Communities (Award of Public Authorities Contracts) Regulations 2006, and
- (b) it is not objectively possible to determine for which activity the contract is principally intended,

the contract must be awarded in accordance with the European Communities (Award of Public Authorities Contracts) Regulations 2006.

(3) If—

- (a) one of the activities for which a regulated contract is intended within the scope of these Regulations and another is not within the scope of either these Regulations or the European Communities (Award of Public Authorities Contracts) Regulations 2006, and
- (b) it is not objectively possible to determine for which activity the contract is principally intended,

the contract must be awarded in accordance with these Regulations.

## CHAPTER 3

### *Contract thresholds*

#### **Threshold amounts for contracts**

**12.** (1) These Regulations apply to contracts that are not excluded in accordance with the exceptions provided for in Part 3 and that have a value (exclusive of value-added tax) estimated to be equal to or greater than the following thresholds:

- (a) €278,000 for a works contract;
- (b) €22,000 for a product supply contract or service supply contract.

#### **Methods for calculating the estimated value of contracts, framework agreements and dynamic purchasing systems**

**13.** (1) The calculation of the estimated value of a regulated contract is to be based on the total amount payable (net of value added tax) as estimated by the contracting entity and must take account of the estimated total amount, including any form of option and any renewal of the contract.

- (2) The estimate must be valid—
  - (a) when the contract notice is sent, as provided for in Regulations 43 and 44, or
  - (b) if such a notice is not required, when the contracting entity begins the

contract award procedure.

(3) A contracting entity shall take into account any prizes or payments that it gives to candidates or tenderers when calculating the estimated value of a contract.

(4) A contracting entity shall not subdivide a works project, or a proposed purchase of a specified quantity of a product or a specified service, in order to prevent the project or purchase from coming within the scope of these Regulations.

(5) In calculating the estimated value of the works contract, a contracting entity shall take account of both the cost of the works and the total estimated value of the products necessary to carry out the works.

(6) The value of products or services that are not necessary for carrying out a particular works contract may not be added to the value of the works contract if to do so would result in removing the procurement of those products and services from the scope of these Regulations.

(7) If a proposed work or purchase of services may result in contracts being awarded at the same time in the form of separate lots, the contracting entity shall take account of the total estimated value of all the lots.

(8) Subject to paragraph (9), these Regulations apply to the awarding of each lot if the aggregate value of all of the lots is equal to or exceeds the threshold specified in Regulation 12.

(9) The contracting entity concerned may decide that these Regulations should not apply in respect of lots if the estimated value of which (net of value added tax) is less than €80,000 for supplying a service, or €1,000,000 for carrying out works, so long as the aggregate value of those lots does not exceed 20 per cent of the aggregate value of all of the lots.

(10) If a contracting entity proposes to acquire products of a similar kind and the acquisition could result in contracts being awarded at the same time in the form of separate lots, the entity shall take account of the total estimated value of all the lots when applying Regulation 12. Subject to paragraph (11), these Regulations apply to the awarding of each lot if the aggregate value of all of the lots is equal to or exceeds the threshold specified in Regulation 12.

(11) The contracting entity concerned may decide that these Regulations should not apply in respect of lots if the estimated value of which (net of value added tax) is less than

€80,000 for supplying products, so long as the aggregate value of those lots does not exceed 20 per cent of the aggregate value of all of the lots.

(12) If a product supply contract relates to the leasing, hire, rental or hire purchase of a product for a fixed term, the value to be taken as a basis for calculating the estimated contract value is—

- (a) if the term of the contract is 12 months or less, the total estimated value for that term, or
- (b) if the term of the contract is longer than 12 months, the total value including the estimated residual value.

(13) If a product supply contract relates to the leasing, hire, rental or hire purchase of a product that is for a term that is not fixed or that cannot be ascertained, the value to be taken as a basis for calculating the estimated contract value is the monthly value multiplied by 48.

(14) If a product supply contract, or a service supply contract, that is regular in nature or the supplies or services concerned are procured on a continuing basis, the contracting entity shall base the estimated contract value on the following:

- (a) either the total actual value of the successive contracts of the same kind awarded during the preceding 12 months, or the preceding financial year, adjusted (as far as possible) to take account of changes that can be anticipated in the quantity or value of products or services to be supplied as compared with those delivered under the initial contract during the preceding 12 months, or preceding financial year, or
- (b) the total estimated value of the successive contracts awarded during the 12 months following the first supply of a product or service under the contract, or if the financial year of the entity is longer than 12 months, during that financial year.

(15) A contracting entity may not choose the method to be used to calculate the estimated value of a regulated contract with the intention of excluding the contract from the scope of these Regulations.

(16) In calculating the estimated contract value of a service supply contract, a contracting entity shall, so far as relevant, take the following into account:

- (a) if the contract is for supply of insurance, the premium and other forms of remuneration payable for the insurance;

- (b) if the contract is for a financial service (such as banking), all fees, commissions, interest and other kinds of remuneration payable for the service;
- (c) if the contract involves undertaking design tasks, all fees, commissions and other forms of remuneration payable for those tasks.

(17) A contracting entity shall use the following as a basis for calculating the estimated value of a service supply contract that is for a fixed term but does not specify or provide for a total price:

- (a) if the contract is for a fixed term of 48 months or less, the total value for the full term;
- (b) if the contract is for a fixed term of longer than 48 months or no term is fixed, the monthly value multiplied by 48.

(18) A contracting entity shall, in relation to a framework agreement or dynamic purchasing system, take into account the maximum estimated value, net of value added tax, of all the contracts envisaged for the total period that the agreement or system will remain in operation.

## PART 3

### CONTRACTS TO WHICH THESE REGULATIONS DO NOT APPLY

#### CHAPTER 1

##### *Exclusions*

#### **Regulations not to apply to certain works and service concessions**

**14.** These Regulations do not apply to a works concession contract or a service concession contract if the contract is awarded by a contracting entity that carries out a prescribed activity and the concession is awarded for carrying out the activity.

### **Contracts awarded for purposes of resale or lease to third parties**

**15.** (1) These Regulations do not apply to a contract awarded by a contracting entity for purposes of reselling or leasing the subject of the contract to a third party if—

- (a) the entity enjoys no special or exclusive right to sell or lease that subject, and
- (b) economic operators are free to sell or lease that subject-matter under the same conditions as the entity.

(2) If requested to do so by the European Commission, a contracting entity shall notify the Commission of all the categories of products or activities that the entity regards as being excluded under paragraph (1).

### **Contracts awarded for purpose other than carrying out a prescribed activity or for carrying out a prescribed activity in a third country**

**16.** (1) These Regulations do not apply to a contract that a contracting entity awards for a purpose other than carrying out a prescribed activity or in carrying out such an activity in a third country in conditions not involving the physical use of a network or geographical area within the European Community.

(2) If requested to do so by the European Commission, a contracting entity shall notify the Commission of any activity that the entity regards as being excluded under paragraph (1).

### **Contracts that are secret or require special security measures**

**17.** These Regulations do not apply to a contract if the performance of the contract is required to be accompanied by special security measures in accordance with a law or an administrative provision of the State.

### **Contracts awarded under international rules**

**18.** (1) These Regulations do not apply to a contract awarded—

- (a) under a relevant international agreement, or

- (b) under an agreement relating to the stationing of armed forces, or
- (c) in accordance with the particular procedure of an international organisation,

if the contract is governed by procedural rules different from those prescribed by these Regulations.

(2) The Minister shall ensure that all relevant international agreements are notified to the European Commission.

(3) For the purposes of this paragraph, an agreement is a relevant international agreement if it—

- (a) is entered into between the State and the governments of one or more third countries, and
- (b) covers—
  - (i) carrying out works, or supplying a product or service, or conduct of design contests intended for the joint implementation or exploitation of a work by the State and those governments, or
  - (ii) supplying a service intended for the joint implementation or exploitation of a project by the State and those governments, and
- (c) accords with the Rome Treaty.

### **Contracts awarded to an affiliated undertaking, to a joint venture or to a contracting entity forming part of a joint venture**

**19.** (1) For the purposes of this Regulation, “affiliated undertaking”, in relation to a contracting entity, means—

- (a) any undertaking the annual accounts of which are consolidated with those of the entity in accordance with the requirements of the Group Consolidated Accounts Directive, or
- (b) if the entity is not subject to that Directive—
  - (i) any undertaking over which the entity may exercise, directly or indirectly, a dominant influence, or

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

(2) These Regulations do not apply to a works contract if the contract is awarded or to be awarded—

- (a) by a contracting entity to an affiliated undertaking, or
- (b) by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out prescribed activities, to an undertaking that is affiliated with one of these contracting entities,

and at least 80 per cent of the average turnover of the affiliated undertaking with respect to works for the preceding 3 years is derived from carrying out works for undertakings with which it is affiliated.

(3) These Regulations do not apply to a product supply contract to supply a product if the contract is awarded or to be awarded—

- (a) by a contracting entity to an affiliated undertaking, or
- (b) by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out prescribed activities, to an undertaking that is affiliated with one of those contracting entities,

and at least 80 per cent of the average turnover of the affiliated undertaking with respect to the supply of the product for the preceding 3 years is derived from supply to undertakings with which it is affiliated.

(4) These Regulations do not apply to a service supply contract if the contract is awarded or to be awarded—

- (a) by a contracting entity to an affiliated undertaking, or
- (b) by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out prescribed activities, to an undertaking that is affiliated with one of those contracting entities,

and at least 80 per cent of the average turnover of the affiliated undertaking with respect to that kind of service for the preceding 3 years is derived from supply to undertakings with which it is affiliated.

(5) When, because of the date on which an affiliated undertaking was created or commenced activities, the turnover is not available for the preceding 3 years, it is sufficient for the undertaking to show that the turnover referred to in paragraph (3), (4) or (5) is credible, for example, by means of business projections. If 2 or more undertakings affiliated with the contracting entity carry out the same or similar kinds of works, or supplies the same or similar kind of product or service, the percentage is to be calculated after taking into account the total turnover respectively derived by the undertaking from carrying out that kind of works, or supplying that kind of product or service.

(6) These Regulations do not apply to a contract that is awarded—

- (a) by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out prescribed activities, to one of those contracting entities, or
- (b) by a contracting entity to such a joint venture of which it forms part, but only if—
  - (i) the joint venture has been established to carry out the activity concerned over a period of at least 3 years, and
  - (ii) the document establishing the joint venture requires the contracting entities comprising the joint venture to participate in it for at least the same period.

(7) On being requested to do so by the European Commission, a contracting entity shall provide the Commission with the following information regarding the application of paragraphs (2), (3) and (4):

- (a) the names of the undertakings or joint ventures concerned;
- (b) the nature and value of the contracts involved;
- (c) such proof as that Commission requires that the relationship between the undertaking or joint venture to which the contracts are awarded and the contracting entity complies with the requirements of this Regulation.

## CHAPTER 2

### *Exclusions applicable to service supply contracts only*

#### **Contracts relating to certain services excluded from the scope of these Regulations**

**20.** (1) These Regulations do not apply to any of the following:

- (a) a contract for the acquisition of land, or a right or interest in or over land;
- (b) a contract for the provision of arbitration and conciliation services;
- (c) a contract to supply a financial service in connection with the issue, sale, purchase or transfer of securities or other financial instruments;
- (d) a contract involving raising capital or other money by a contracting entity;
- (e) the supply of a service by the Central Bank and Financial Services Authority of Ireland;
- (f) a contract of employment;
- (g) a contract to supply a service involving research and development, other than such a service in relation to which the benefits accrue exclusively to a contracting entity for its use in the conduct of its own affairs, on condition that the service supplied is wholly paid for by the entity.

(2) However, a service supply contract involving the supply of a financial service that is collateral to a contract of a kind referred to in paragraph (1)(a) is subject to these Regulations.

#### **Service supply contracts awarded on the basis of an exclusive right**

**21.** These Regulations do not apply to a service supply contract if—

- (a) the contract is awarded to a contracting entity that is itself a contracting entity, and
- (b) the award made on the basis of an exclusive right that the entity enjoys to provide that service under a law or administrative provision that is compatible with the Rome Treaty.

## CHAPTER 3

### *Exclusions applicable to certain contracting entities*

#### **Contracts awarded by certain contracting entities for the purchase of water and for the supply of energy or of fuels for the production of energy**

**22.** (1) These Regulations do not apply to a contract to supply water if the contract is awarded by a contracting entity engaged in one or both of the activities referred to in Regulation 6(1).

(2) These Regulations do not apply to a contract to supply energy, or fuel for the production of energy, if the contract is awarded by a contracting entity that is engaged in an activity referred to in Regulation 5(1) or (3) or Regulation 9.

#### **Procurement procedures not to be subject to these Regulations when activity is exposed to competition**

**23.** (1) The procurement procedures of a contracting entity that is engaged in a prescribed activity in the State are not subject to these Regulations if the activity is directly exposed to competition on markets to which access is unrestricted.

(2) For the purpose of applying paragraph (1), the following provisions apply:

- (a) the question of whether an activity is directly exposed to competition is to be decided on the basis of criteria that are in conformity with the provisions of the Rome Treaty on competition, such as—
  - (i) the characteristics of the goods or services concerned, and
  - (ii) the existence of alternative goods or services, and
  - (iii) the prices, and
  - (iv) the actual or potential presence of more than one supplier of those goods or services;
- (b) access to a market is taken not to be restricted if the European Community legislation specified in Annex XI to the Public Utility Contracts Directive has been implemented and applied in or in relation to the State.

(3) If free access to a particular market cannot be presumed on the basis of paragraph (2)(b), it must be shown that access to that market in question is free both in fact and in law.

(4) On being satisfied that paragraph (1) applies to a prescribed activity, a contracting entity engaged in that activity may apply in writing to the European Commission to be exempted from these Regulations with respect to that activity. The application must include—

- (a) all the relevant information as specified in Schedule 14, and
- (b) the position (if any) adopted by the relevant competent authority of the State.

(5) The procurement procedures of a contracting entity that is engaged in a prescribed activity cease to be subject to these Regulations if the European Commission—

- (a) has, in accordance with sub-article 6 of Article 30 of the Public Utility Contracts Directive, decided that sub-article 1 of that Article applies to the activity, or
- (b) has not so decided within the period allowed under sub-article 6 of that Article.

(6) The procurement procedures of a contracting entity that is engaged in a prescribed activity cease to be subject to these Regulations also if—

- (a) free access to a given market is to be presumed on the basis of paragraph (2)(b), and
- (b) the relevant competent authority has determined that paragraph (1) applies to the activity, and
- (c) the European Commission has not, within the period allowed under sub-article 6 of Article 30 of the Public Utility Contracts Directive, made a decision in accordance with that sub-article to the effect that sub-article 1 of that Article applies to the activity.

#### PART 4

#### GENERAL RULES APPLICABLE TO REGULATED CONTRACTS

## **Principles for awarding contracts**

**24.** In awarding a regulated contract, a contracting entity shall—

- (a) treat all economic operators equally and without discrimination, and
- (b) act in a transparent way.

## **Economic operators**

**25.** (1) If a tenderer or candidate for a service supply contract is, under the law of the Member State in which the tenderer or candidate is established, entitled to supply a particular service, the contracting entity may not reject the tenderer or candidate only on the ground that, under the law of the Member State in which the contract is awarded, the tenderer or candidate would be required to be either a natural person or a body corporate.

(2) If a body corporate tenders, or requests to participate in the procedure, for—

- (a) a works contract or a product supply contract, or
- (b) a product supply contract that also provides for the supply of a service or for undertaking siting and installation operations (or both),

the contracting entity may require the body corporate to indicate in its tender, or in its request to participate, the names and relevant professional qualifications of the staff who would be responsible for performing the contract if it were awarded to the body corporate.

(3) A group of economic operators may submit a tender or present itself as a candidate.

(4) If a group of economic operators submits a tender or a request to participate, the contracting entity may not require the group to assume a specific legal form. However, if the entity selects the group, it may, as a condition of awarding the contract to the group, require it to assume such a form, but only if it is of the opinion that the imposition of the requirement is necessary to ensure that the contract is carried out to its satisfaction.

## **Conditions relating to agreements concluded within the World Trade Organisation**

**26.** In awarding a contract, a contracting entity shall, in accordance with the Government Procurement Agreement, treat economic operators established in third countries no less favourably than economic operators established in Member States.

### **Contracting entities not to disclose confidential information**

**27.** (1) When providing technical specifications to interested economic operators, providing for qualification and selection of economic operators and award of a contract, a contracting entity may impose requirements with a view to protecting the confidential nature of information that it will make available.

(2) When providing information to a contracting entity, an economic operator may designate as confidential information that relates to matters affecting the operator or the operator's business, such as technical or trade secrets or the confidential aspects of tenders.

(3) Except as expressly provided by these Regulations or some other law of the State, a contracting entity shall not disclose information given to it by an economic operator if the operator has designated the information as being confidential.

### **Framework agreements**

**28.** (1) A contracting entity may treat a framework agreement as a regulated contract. If it does so, the provisions of these Regulations relating to regulated contracts apply to it accordingly.

(2) A contracting entity that has entered into a framework agreement in accordance with these Regulations may rely on Regulation 42(3) when awarding a regulated contract based on the agreement. A contracting entity may not rely on Regulation 42(3) if a framework agreement has not been awarded in accordance with these Regulations.

(3) A contracting entity may not misuse a framework agreement in order to hinder, limit or distort competition.

### **Dynamic purchasing systems**

**29.** (1) A contracting entity may award a regulated contract by means of a dynamic purchasing system, but only as provided by this Regulation.

(2) In operating a dynamic purchasing system for awarding a regulated contract, a contracting entity shall comply with the rules prescribed for the use of an open procedure on all phases of the system up to the time when the contract is awarded. The entity shall use

electronic means in accordance with Regulation 50 to operate the system and the procedure for awarding the contract.

(3) A contracting entity that operates a dynamic purchasing system shall admit to the system all tenderers who—

- (a) satisfy the relevant selection criteria, and
- (b) have submitted an indicative tender that complies with the requisite specification, together with any additional documents that the entity has required.

(4) A tenderer may improve an indicative tender at any time, but only if it continues to comply with the requisite specification.

(5) When operating a dynamic purchasing system, a contracting entity shall—

- (a) publish a contract notice that makes it clear that a dynamic purchasing system is involved in the contract award process and specifies the internet address at which the persons may inspect the documents referred to in subparagraph (c), and
- (b) indicate in the specification (among other matters) the nature of the purchases envisaged under the system, as well as all the necessary information concerning the purchasing system, the electronic equipment used and the technical connection arrangements and specifications, and
- (c) on publication of the notice and up to the expiry of the system, offer by electronic means unrestricted, direct and full access to the relevant specification and to any relevant additional documents.

(6) A contracting entity that operates a dynamic purchasing system shall, throughout the entire period of the dynamic purchasing system, give all economic operators the opportunity of submitting an indicative tender and of being admitted to the system under the conditions referred to in paragraphs (2) and (3).

(7) A contracting entity shall evaluate each indicative tender within such period, not exceeding 15 days from the date of submission of the indicative tender, as specified in the relevant contract notice. However, the entity may extend the evaluation period, but only if no invitation to tender is issued in the meantime.

(8) As soon as is practicable after completing the evaluation of the indicative tenders, the contracting entity shall inform each of the tenderers concerned whether the tenderer has been admitted to the dynamic purchasing system or has had its indicative tender refused.

(9) A contracting entity shall invite tenders for each specific contract that is to be awarded by the entity. Before issuing an invitation to tender, the entity shall publish a simplified contract notice inviting all interested economic operators to submit indicative tenders, in accordance with paragraphs (6) to (8), within such period as is specified in the notice. The period may not be less than 15 days from the date of publication.

(10) A contracting entity may not proceed with the tendering process until it has completed the evaluation of the indicative tenders received by the deadline.

(11) A contracting entity shall invite all tenderers admitted to the system to submit a tender for each specific contract to be awarded under the system. The invitation must specify a deadline for the submission of tenders.

(12) A contracting entity shall award the contract to the tenderer who submits the best tender on the basis of the award criteria specified in the contract notice for the establishment of the dynamic purchasing system. However, the entity may, if relevant, formulate those criteria more precisely in the invitation to submit tenders.

(13) The period during which a dynamic purchasing system may remain in operation may not exceed 4 years, except if determined by the contracting entity as exceptional. If that entity determines that there are exceptional circumstances justifying an extension of the period beyond 4 years, it must record the reasons for its determination.

(14) A contracting entity shall not use a dynamic purchasing system to prevent, restrict or distort competition.

(15) A contracting entity shall not charge interested economic operators or parties for access to a dynamic purchasing system operated by the entity.

## PART 5

### RESERVED CONTRACTS AND CENTRAL PURCHASING

**Contracting entity may reserve award of contracts to persons employed in sheltered workshops**

- 30.** (1) In awarding a contract, a contracting entity is entitled—
- (a) to reserve to sheltered workshops the right to participate in the contract award procedure, or
  - (b) to provide for the contract to be performed in the context of a sheltered employment program,

if a majority of the employees concerned are disabled persons who, because of the nature or seriousness of their disabilities, cannot carry on occupations under normal conditions.

(2) If a contracting entity decides to exercise the right conferred by paragraph (1), it shall specify in the notice calling for competition that it is relying on this Regulation.

**Contracts and framework agreements awarded by central purchasing bodies**

**31.** (1) A contracting entity may enter into a regulated contract with or through a central purchasing body.

(2) A contracting entity that enters into a regulated contract with or through a central purchasing body is taken to have complied with these Regulations to the extent that the body has complied with these Regulations or, where relevant, the European Communities (Award of Public Authorities Contracts) Regulations 2006.

PART 6

RULES APPLICABLE TO SERVICE SUPPLY CONTRACTS

**Service supply contracts listed in Part A of Schedule 6**

**32.** A contracting entity that wishes to award a service supply contract having as its object the supply of a service listed in Part A of Schedule 6 shall ensure that Parts 7 to 9 are complied with in relation to the award of the contract.

### **Service supply contracts listed in Part B of Schedule 6**

**33.** The award of a service supply contract that provides for the supply of a service listed in Part B of Schedule 6 is subject only to Regulations 35 and 45.

### **Mixed service supply contracts for services listed in both Parts A and B of Schedule 6**

**34.** (1) A contracting entity shall ensure that Parts 7 to 9 are complied with in relation to the award of a service supply contract that comprises the supply of a service listed in both Parts A and B of Schedule 6 if the value of the service listed in Part A of that Schedule is greater than the value of the service listed in Part B of that Schedule.

(2) In awarding any other kind of service supply contract, a contracting entity shall ensure that Regulations 35 and 45 are complied with.

## **PART 7**

### **MATTERS TO BE SPECIFIED IN CONTRACT OR ASSOCIATED DOCUMENTS**

#### **Technical specifications**

**35.** (1) When entering into a contract, a contracting entity shall ensure that the relevant technical specifications are specified in the contract or in an associated document.

(2) A contracting entity shall, as far as practicable, ensure that the technical specifications for a works contract take account of the need to prescribe accessibility criteria for all persons who are likely to use the works on completion, especially those who have disabilities.

(3) A contracting entity shall ensure that technical specifications for a regulated contract provide tenderers with equal access to the award process and do not hinder competition among potential tenderers.

(4) A contracting entity may specify that a product bearing an eco-label is presumed to comply with the technical specifications prescribed by the contract or an associated document in accordance with Regulation 36(9). However, the entity shall accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognised body.

(5) A contracting entity shall accept a certificate issued by a recognised body established in another Member State.

(6) Unless it considers that the subject-matter of the contract justifies otherwise, a contracting entity shall ensure that technical specifications do not refer to—

- (a) a specific make or source, or
- (b) a particular process, or
- (c) a specific trade mark, patent or type, or a specific origin or production,

if to do so would have the effect of favouring or eliminating a particular undertaking or product. However, a contracting entity may include such a reference in an exceptional case, but only if a sufficiently precise and intelligible description of the subject-matter of the contract is not possible. Each reference under this paragraph must be accompanied by the words “or equivalent”.

(7) In this Regulation, “recognised body” means a test and calibration laboratory, or a certification and inspection body, that complies with the relevant European standards.

### **Formulation of technical specifications**

**36.** (1) Subject to this Regulation, the contracting entity shall ensure that the technical specifications for a regulated contract are formulated—

- (a) by reference to technical specifications and, in order of preference—
  - (i) to national standards transposing European standards, or
  - (ii) to European technical approvals,
  - (iii) to common technical specifications, or
  - (iv) to international standards, or
  - (v) to other technical reference systems established by the European standardisation bodies, or
- (b) in terms of performance or functional requirements, which may include environmental characteristics, or

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

(2) If there are no standards, approvals, specifications or systems of the kind referred to in subparagraph (1)(a), the technical specifications may be formulated by reference to national standards, national technical approvals or national technical specifications relating to the design, calculation and construction of the relevant works, or the use of the relevant product.

(3) Each reference under paragraph (1)(a) must be accompanied by the words “or equivalent”.

(4) If environmental characteristics are required, the contracting entity shall ensure that those characteristics are specified with sufficient precision to allow tenderers to determine the subject-matter of the contract and to allow the contract to be awarded. However, that entity may formulate the technical specifications for a regulated contract by reference to the specifications referred to in paragraph (1).

(5) This Regulation does not affect the operation of mandatory national technical rules to the extent that they are compatible with European Community law.

(6) A contracting entity that chooses the option referred to in paragraph (1)(a) may not reject a tender on the ground that the product or service for which tenders have been invited do not comply with the technical specifications to which the entity has referred to if the tenderer, by appropriate means, proves to the satisfaction of the entity that the solutions that the tenderer proposes in the tender satisfy in an equivalent manner the requirements of those technical specifications.

(7) A contracting entity that chooses the option referred to in paragraph (1)(b) may not reject a tender that complies with—

- (a) a national standard transposing a European standard, or
- (b) a European technical approval, or
- (c) a common technical specification, or

- (d) an international standard, or a technical reference system, established by a European standardisation body,

if those specifications address the performance or functional requirements that the entity has prescribed.

(8) In submitting a tender for a regulated contract for which the contracting entity has chosen the option referred to in paragraph (1)(b), the tenderer shall, by appropriate means, satisfy the contracting entity that the works, product or service complies with the requisite standard, system, approval or specification and so meets the performance or functional requirements of that entity.

(9) A contracting entity that prescribes environmental characteristics in terms of performance or functional requirements as referred to in paragraph (1)(b) may use the detailed specifications, or (if necessary) a part of those specifications, as defined by European or multi-national eco-labels, or by any other eco-label, but only if—

- (a) those specifications are appropriate to define the characteristics of the product or service to which the contract relates and are accessible to all interested parties, and
- (b) the requirements for the label are drawn up on the basis of scientific information, and
- (c) the eco-labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate.

(10) In this Regulation, “by appropriate means” includes (but is not limited to) by means of a technical dossier of the manufacturer (if any) or a test report from a recognised body.

### **Communication of technical specifications**

**37.** (1) A contracting entity that has put out a regulated contract for tender shall, on request, make available to those economic operators that are interested in tendering for the contract—

- (a) the technical specifications that are regularly referred to in its works, supply or service supply contracts, or

- (b) the technical specifications that it intends to apply to contracts covered by periodic indicative notices.

(2) If the technical specifications for a regulated contract are based on documents available to interested economic operators, the inclusion of a reference to those documents suffices.

### **Tenderers may submit variants**

**38.** (1) If a regulated contract is to be awarded on the basis of the most economically advantageous tender, the contracting entity may authorise tenderers for the contract to submit variants.

(2) The contracting entity shall specify in the tender documentation whether or not variants are authorised. A tenderer may submit a variant only if the tender documentation specifically authorises variants.

(3) A contracting entity that authorises variants shall state in the contract documents the minimum requirements to be met by the variants and any specific requirements for their presentation.

(4) In awarding a contract, a contracting entity may take into consideration only variants that satisfy the minimum requirements specified in the relevant contract documents.

(5) A contracting entity that has authorised variants in relation to the award of a product supply contract or a service supply contract may not reject a variant submitted by a tenderer only because the variant would, if successful, result in the award of a service supply contract instead of a product supply contract or a product supply contract instead of a service supply contract.

### **Contracting entity can ask tenderers to specify their intentions with respect to subcontracting**

**39.** In the contract documents given to tenderers for a regulated contract, the contracting entity is entitled to ask each tenderer to specify in its tender whether it intends to subcontract any share of the contract to subcontractors should the contract be awarded to it. The specification of such an intention does not affect the successful tenderer's primary liability under the contract.

## **Conditions for performance of contracts**

**40.** A contracting entity may prescribe special conditions for the performance of a regulated contract that is to be awarded by the entity, so long as the conditions are compatible with European Community law and are specified in the relevant contract notice or contract specifications. Those conditions or specifications may deal with social and environmental matters as well as with other matters.

## **Obligations relating to taxes, environmental protection, employment protection provisions and working conditions**

**41.** (1) A contracting entity that proposes to award a works contract or a service supply contract shall specify in the contract documents the persons from whom a candidate or tenderer can obtain information about the obligations that are to apply during the performance of the contract as regards taxation, environmental protection, employment protection and working conditions. This paragraph does not affect the operation of Regulation 60 regarding the examination of abnormally low tenders.

(2) The contracting entity—

- (a) shall require the candidates or tenderers concerned to state that, in preparing their tenders for the contract, they have taken account of the obligations relating to employment protection and working conditions that are in force in the place where the works are to be carried out or the service is to be supplied, and
- (b) shall disregard the tender of any tenderer that fails to comply with that requirement.

## **CHAPTER 9**

### *Procedures for awarding contracts*

#### **Use of open, restricted and negotiated procedures**

**42.** (1) When awarding a contract, a contracting entity shall apply the procedures provided for by this Chapter.

(2) A contracting entity may choose to award a regulated contract by means of an open, restricted or negotiated procedure, provided that, subject to paragraph (3), a call for competition has been made in accordance with Regulation 44.

(3) A contracting entity may use a procedure for awarding a regulated contract without prior call for competition in the following circumstances:

- (a) if no tenders or no suitable tenders or no applications have been submitted in response to a procedure with a prior call for competition, but only if the initial conditions for the contract are not substantially altered;
- (b) if the contract is purely for the purpose of research, experiment, study or development, and not for the purpose of securing a profit or of recovering research and development costs, and to the extent that the award of the contract will not prejudice the competitive award of subsequent contracts that have the purpose of securing a profit or of recovering research and development costs;
- (c) if, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract can be carried out only by a particular economic operator;
- (d) if the deadlines laid down for open procedures, restricted procedures and negotiated procedures with a prior call for competition cannot be complied with, but only if strictly necessary for reasons of extreme urgency brought about by events that the contracting entity could not have foreseen;
- (e) if, in the case of a product supply contract that provides for the original supplier to make additional deliveries of a product that are intended either as a partial replacement for the normal supply, or as an extension of the existing supply, of the product, a change of supplier would oblige the contracting entity to acquire a product that has different technical characteristics from the original product and those characteristics would be incompatible with, or result in disproportionate technical difficulties in, the effective operation and maintenance of the product;
- (f) if, in the case of a works contract or service supply contract, additional works or an additional service becomes necessary to enable the contract to be carried out because the work or service was, through unforeseen circumstances, not included in the project when the contract was initially awarded or first entered into, but only if the award is made to the economic

operator that undertook to perform the original contract and—

- (i) the additional works or service cannot be technically or economically separated from the main contract without great inconvenience to the contracting entity, or
  - (ii) the additional works or service, although separable from the performance of the original contract, is strictly necessary to enable its later stages to be completed;
- (g) if, in the case of a works contract, the contract has been awarded to a contractor and new works consisting of the repetition of similar works are assigned to the contractor, but only if the contract was awarded after a call for competition and the new works conform to a basic project for which the contract was awarded;
- (h) if, in the case of a product supply contract, the product is quoted and purchased on a commodity market;
- (i) if the contract is to be awarded on the basis of a framework agreement, but only if the condition referred to in Regulation 28(2) is complied with;
- (j) if, in the case of a product supply contract, it is possible to obtain the product by taking advantage of a particularly advantageous situation available for a very short time at a price considerably lower than the normal market price for the product;
- (k) if, in the case of a product supply contract, the product can be purchased under particularly advantageous conditions—
- (i) from a supplier whose business is being wound up, or
  - (ii) from the receiver or liquidator of a supplier that has been adjudicated bankrupt, or has entered into an arrangement with creditors or is subject to some other insolvency similar procedure established under a law of the State;
- (l) if, in the case of a service supply contract, the contract is a part of the follow-up to a design contest organised in accordance with these Regulations.

(4) The contracting entity shall, when first putting out for tender the project referred to in paragraph (3)(g), give notice that it may assign new works consisting of a repetition of similar works to the successful contract without making prior call for competition. When applying Regulations 12 and 13, the entity shall take into consideration the total estimated cost of subsequent works.

(5) In awarding a service supply contract of the kind referred to in paragraph (3)(l), a contracting entity shall, in accordance with the relevant rules, award the contract either to the winner or to one of the winners of the contest.

## PART 8

### RULES ON PUBLICATION AND TRANSPARENCY

#### CHAPTER 1

##### *Publication of notices*

#### **Periodic indicative notices and notices on the existence of a system of qualification**

**43.** (1) A contracting entity that intends to award works contracts, or enter into framework agreements relating to carrying out works, within the next 12 months may make known, by means of a periodic indicative notice published either by the European Commission or by the entity on its buyer profile, the essential characteristics of those contracts or agreements, if the estimated value of the contracts or agreements is equal to or greater than the threshold specified in Regulation 12 (after taking into account Regulation 13).

(2) A contracting entity that intends to award product supply contracts, or enter into framework agreements relating to the supply of products, within the next 12 months may make known, by means of a periodic indicative notice published either by the European Commission or by the entity on its buyer profile, the estimated total value of the contracts or the agreements by product area if the total estimated value is equal to or greater than €750,000, taking into account Regulations 12 and 13. The product area is to be established by reference to the relevant CPV nomenclature.

(3) A contracting entity that intends to award service supply contracts, or enter into framework agreements relating to the supply of services, within the next 12 months may make known, either by means of a periodic indicative notice published either by the European Commission or by the entity on its buyer profile, the estimated total value of the contracts or the framework agreements in each of the categories of services listed in Part A of Schedule 6, if the estimated total value of the contracts or agreements is equal to or greater than €750,000, taking into account Regulations 12 and 13.

(4) In the case of a periodic indicative notice relating to works contracts or framework agreements for carrying out works, the contracting entity shall ensure that the notice is sent to the European Commission for publication or published on its buyer profile as soon as possible after the planning of the relevant contracts or agreements has been approved.

(5) In the case of a periodic information notice relating to product supply contracts or service supply contracts, the contracting entity shall ensure that the notice is sent to the European Commission for publication, or published on its buyer profile, as soon as possible after the beginning of the entity's financial year.

(6) Before publishing a periodic information notice on its buyer profile, a contracting entity shall, by electronic means, notify the European Commission of its intention to publish such a notice. The notification must comply with the format and procedures for sending notices as specified at the Internet address <http://simap.eu.int>.

(7) A contracting entity which publishes a periodic indicative notice in accordance with paragraphs (1), (2) and (3) is entitled to reduce the time limits for receiving tenders as prescribed by Regulation 47 (4) and (5).

(8) A contracting entity may publish, or arrange for the European Commission to publish, a periodic indicative notice relating to a major project without repeating information included in an earlier periodic indicative notice, provided that it is clearly pointed out that the notice is an additional one.

(9) A contracting entity that decides to establish a qualification system in accordance with Regulation 55 shall publish a notice giving details of the system as referred to in Schedule 3, indicating the purpose of the qualification system and how access to the rules concerning its operation can be obtained. If the system is for longer than 3 years, the entity shall publish the notice annually. If the system is for a shorter period, the initial notice suffices.

## **How calls for competition can be made**

**44.** (1) A call for competition for the award of a regulated contract may be made—

- (a) by means of a periodic indicative notice that complies with Schedule 4, or
- (b) by means of a notice on the existence of a qualification system as referred to in Schedule 3, or
- (c) by means of a contract notice as referred to in Part A, B or C of Schedule 2.

(2) A call for admission to a dynamic purchasing system must be made by a contract notice as referred to in paragraph (1)(c), but a call for competition for a regulated contract based on such a system must be by simplified contract notice as referred to in Part D of Schedule 2.

(3) When a call for competition for a regulated contract is made by means of a periodic indicative notice, the notice must—

- (a) refer specifically to the works, product or service to which the contract relates, and
- (b) indicate that the contract will be awarded by restricted or negotiated procedure without further publication of a notice of a call for competition and invite interested economic operators to express their interest in writing, and
- (c) have been published in accordance with Schedule 9 not more than 12 months before the date on which the invitation referred to in Regulation 49 (6) is sent. The contracting entity shall also comply with the deadlines prescribed by Regulation 47.

## **Contract award notices**

**45.** (1) A contracting entity that has awarded a regulated contract or entered into a framework agreement shall, within 2 months after awarding the contract or entering into the agreement, publish a contract award notice in accordance with Schedule 5 under conditions to be laid down by the European Commission in accordance with the procedure referred to in Article 68(2) of the Public Utility Contracts Directive.

(2) A contracting entity that has entered into a framework agreement is not required to publish a notice of the results of the award procedure for a regulated contract based on that agreement.

(3) A contracting entity that awards a regulated contract that is based on a dynamic purchasing system shall send the relevant contract award notice within 2 months after the date on which it awards the contract. However, if the entity enters into a number of such contracts, it may group the contract award notices on a quarterly basis, in which case, it shall send the grouped notices within 2 months after the end of each quarter.

(4) A contracting entity that awards a research and development service contract by means of a procedure that does not call for competition may limit to the reference “research and development services” the information to be provided in accordance with Schedule 5 concerning the nature and quantity of the services to be provided under the contract.

(5) A contracting entity that awards a research and development service contract that cannot be awarded by means of a procedure that does not call for competition may limit, on grounds of commercial confidentiality, the information to be provided in accordance with Schedule 5 concerning the nature and quantity of the service to be supplied.

(6) When paragraph (4) or (5) applies, the contracting entity shall ensure that any information published under this Regulation is no less detailed than that contained in the notice of the call for competition.

(7) In the case of a service supply contract relating to a service listed in Part B of Schedule 6, the contracting entity shall indicate in the contract notice whether it agrees to its publication.

(8) Information provided in accordance with Schedule 5 and marked as being not intended for publication may be published only in a simplified form and in accordance with Schedule 9 for statistical purposes.

### **Form and manner in which notices are to be published**

**46.** (1) A contracting entity shall ensure that every contract award notice<sup>1</sup> that it sends to the European Commission for publication—

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<sup>1</sup> Note: If such a notice is sent by electronic means in accordance with the format and procedures for transmission specified in paragraph 3 of Schedule 9, it will be published in the Official Publications of the European Communities no later than 5 days after the notice was sent.

- (a) includes the information set out in Schedules 2 to 5 and, when appropriate, any other information that the entity considers useful, and
- (b) accords with the format of standard forms adopted by the European Commission in accordance with the procedure referred to in Article 68(2) of the Public Utility Contracts Directive.

(2) If these Regulations require a contracting entity to send a notice to the European Commission and the entity sends the notice by electronic means, the entity shall ensure that the notice complies with the format and procedures for transmission specified in Schedule 9.

(3) In sending a notice required by these Regulations, a contracting entity shall comply with the technical requirements for publication specified in Schedule 9.

(4) A contracting entity shall not send a notice unless the full text of the notice is in an official language of the European Community chosen by the entity<sup>1</sup>.

(5) A contracting entity shall not publish within the State a contract notice or its contents before it has sent a copy of the notice for publication by the European Commission.

(6) When issuing or publishing a notice within the State, a contracting entity shall ensure that the notice specifies only—

- (a) information that is contained in the copy of the notice sent to the European Commission for publication or published on a buyer profile in accordance with Regulation 46(1), and
- (b) the date on which that copy was sent to the European Commission for publication or was published on the entity's buyer profile.

(7) A contracting entity shall ensure that the content of a notice not sent by electronic means in the format and procedures for transmission specified in Schedule 9 does not exceed 650 words.

(8) A contracting entity shall ensure that it is able to provide proof of the dates on which copies of notices were sent to the European Commission for publication.<sup>2</sup>

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<sup>1</sup> Note: The European Commission will publish a summary of the important elements of the notice in the other official languages of the European Community. The version of the notice published in the chosen language is the sole authentic text.

<sup>2</sup> Note: The European Commission will give a confirmation to the contracting entity confirming the publication of the information sent. The confirmation must mention the date of that publication and proof of publication.

(9) A contracting entity may send for publication in the Official Journal of the European Union a copy of a notice of a regulated contract even if its publication under these Regulations is not mandatory.

## CHAPTER 2

### *Time limits*

#### **Deadline for the receipt of requests to participate and for the receipt of tenders**

**47.** (1) When fixing the deadline for the receipt of tenders or requests to participate in an award of a regulated contract, a contracting entity shall take particular account of the complexity of the contract and the time needed for drawing up tenders, but without affecting the deadlines prescribed by this Regulation.

(2) In awarding a regulated contract by means of an open procedure, a contracting entity shall fix a deadline for the receipt of tenders that is no less than 52 days from the date on which it sent the contract notice for publication by the European Commission.

(3) In awarding a regulated contract by means of a restricted procedure or in a negotiated procedure with a prior call for awarding such a contract through a competition, the following provisions apply:

- (a) the contracting entity shall fix a deadline for the receipt of requests to participate in response to a notice referred to in Regulation 44 (1)(c), or an invitation by the entity under Regulation 49(6), that—
  - (i) is in any case no less than 37 days from the date on which the notice or invitation was sent, and
  - (ii) is in no case less than 22 days if the notice is sent for publication otherwise than by fax or other electronic means, and
  - (iii) is no less than 15 days if the notice is sent for publication by fax or other electronic means;
- (b) the deadline for the receipt of tenders may be set by mutual agreement between the contracting entity and the selected candidates, provided that all candidates have the same time to prepare and submit their tenders;
- (c) if it is not possible to reach agreement on the deadline for the receipt of

tenders, the contracting entity shall fix a deadline that is, as a general rule, at least 24 days, and is in no case less than 10 days, from the date of the invitation to tender.

(4) If a contracting entity has published a periodic indicative notice as referred to in Regulation 43, the minimum time limit for the receipt of tenders in an open procedure may not be less than 22 days from the date on which the relevant contract notice was sent to the European Commission for publication.

(5) The reduced deadlines are permitted only if—

- (a) the relevant periodic indicative notice has included, in addition to the information required by Part 1 of Schedule 4, all the information required by Part 2 of that Schedule, insofar as that information is available at the time when the notice is published, and
- (b) the notice was sent for publication at least 52 days (but not more than 12 months) before the date on which the relevant contract notice was sent for publication.

(6) If a notice is transmitted by electronic means in accordance with the format and procedures for transmission specified at the Internet address <http://simap.eu.int>, the deadlines for the receipt of requests to participate in restricted and negotiated procedures, and for receipt of tenders in open procedures, can be reduced by not more than 7 days.

(7) Except in the case of a deadline set by mutual agreement in accordance with paragraph (3)(b), deadlines for the receipt of tenders when an open, restricted or negotiated procedure is used can be further reduced by up to 5 days if the contracting entity offers unrestricted and full direct access, by electronic means, to the contract documents and any supplementary documents from the date on which the relevant call of competition notice is published. The notice must specify an internet website at which that documentation is accessible.

(8) When an open procedure is used, the cumulative effect of the reductions provided for in paragraphs (4) to (7) must not result in a deadline for the receipt of tenders that is less than 15 days from the date on which the contracting entity sent the contract notice for publication by the European Commission. However, if the contract notice is not transmitted by fax or other electronic means, the cumulative effect of the reductions provided for in paragraphs (4) to (7) must not result a deadline for receipt of tenders in an open procedure that is less than 22 days from the date on which the contract notice was sent for publication.

(9) The cumulative effect of the reductions provided for in paragraphs (4) to (7) must not result in a deadline for receipt of requests to participate, in response to the publication of—

- (a) a notice referred to in Regulation 44 (1)(c), or
- (b) an invitation by the contracting entity under Regulation 49(6),

that is less than 15 days from the date on which the contract notice or invitation is sent.

(10) When a restricted or negotiated procedure is used, the cumulative effect of the reductions provided for in paragraphs (4) to (7) must not, except for a deadline set by mutual agreement in accordance with paragraph (3)(b), result in a deadline for the receipt of tenders that is less than 10 days from the date of the invitation to tender.

(11) If, for any reason—

- (a) the contract documents and the supporting documents or additional information, although requested in good time, have not been supplied before the deadlines specified in Regulations 48 and 49, or
- (b) where tenders can be made only after a visit to the site, or after on-the-spot inspection of the documents supporting the contract documents,

the contracting entity shall, except in the case of a time-limit set by mutual agreement in accordance with paragraph (3)(b), extend the deadline for the receipt of tenders so that all of the economic operators involved can be aware of all the information needed in order to prepare a tender.

(12) Schedule 11 contains a table summarising the time limits referred to in this Regulation.

### **Open procedure: contract specifications and supporting documents to be provided on request**

**48.** (1) If, in awarding a regulated contract by means of an open procedure, a contracting entity—

- (a) receives a request to participate from an economic operator within a reasonable time before the deadline for the submission of tenders, and

- (b) does not offer unrestricted and full direct access by electronic means to the contract specifications and any supporting documents in accordance with Regulation 47(7),

it shall send those specifications and supplementary documents to the operator within 6 days after receiving the request

(2) If an economic operator requests additional information about the contract specifications and any supporting documents a reasonable time before the deadline for the submission of tenders, the contracting entity shall provide the requested information to the operator without delay but, in any case, no later than 6 days before that deadline.

### **Invitations to submit a tender or to negotiate**

**49.** (1) In awarding a regulated contract by means of a restricted procedure or a negotiated procedure with publication of a contract notice, a contracting entity shall simultaneously and in writing invite the selected candidates—

- (a) to submit their tenders, or
- (b) to negotiate,

as provided by this Regulation.

(2) The invitation must—

- (a) include a copy of the relevant contract specifications or descriptive document and of each of the supporting documents (if any), or
- (b) if the contract specifications and other documents are made directly available by electronic means in accordance with Regulation 47(7), specify how access to those specifications and the other documents can be obtained.

(3) If a person other than the contracting entity responsible for the award procedure is in possession of the document containing the contract specifications, or the descriptive document or any supporting document, the invitation must specify—

- (a) the address from which the document may be obtained, and
- (b) if relevant—
  - (i) the deadline for requesting the document, and

- (ii) the fee (if any) payable for obtaining the document from the person and any payment procedure.

Immediately after receiving a request for such a document from an economic operator, the person having possession of the document shall send it to the economic operator.

(4) On receiving, within a reasonable time before the deadline for the receipt of tenders, a request from an economic operator to provide additional information about the document containing the contract specifications, or the descriptive document or any supporting document, the person in possession of the document shall provide the additional information to that operator not less than 6 days before the deadline.

(5) The invitation to candidates must also include the following information, but may also include other information:

- (a) a reference to the publication of the contract notice;
- (b) the deadline for the receipt of the tenders, the address to which the tenders must be sent and the language or languages in which the tenders must be prepared;
- (c) a reference to any possible accompanying documents to be submitted, either in support of verifiable declarations by the tenderer in accordance with Regulation 56, or to supplement the information referred to in that Regulation, and under the conditions prescribed by that Regulation;
- (d) the criteria for the award of the contract, where they are not indicated in the notice on the existence of a qualification system used as a means of calling for competition;
- (e) if not specified in the contract notice, the contract specifications or the descriptive document, the relative weighting of criteria for the award of the contract or, if appropriate, the descending order of importance for those criteria.

(6) A contracting entity that has made a call for competition by means of a periodic indicative notice shall invite all candidates to confirm their interest on the basis of detailed information about the relevant contract before it begins to select tenderers or participants in negotiations. The invitation must include the following information but may include other information:

- (a) information about the nature and quantity of works, supplies or services

(including all options concerning complementary contracts and, if possible, the estimated time available for exercising those options for renewable contracts), the nature and quantity and, if possible, the estimated publication dates of future notices of competition for the works, product or service to be put out to tender;

- (b) whether the procedure for awarding regulated contracts is to be restricted or negotiated;
- (c) if relevant, the date on which the works are to be started or completed, or the supply of a product or service is to be started or completed;
- (d) the address and closing date for the submission of requests for tender documents and the language or languages in which they are to be prepared;
- (e) the address of the entity and the information necessary for obtaining the relevant contract specifications and other documents;
- (f) economic and technical conditions, financial guarantees and information required from economic operators;
- (g) the amount of, and the payment procedures for, any sum payable for obtaining tender documents;
- (h) whether the contract to which the invitation to tender relates is for purchase, lease, hire or hire-purchase, or any combination of them;
- (i) the criteria for awarding the contract and their weighting or, if appropriate, the order of importance of those criteria, if details of those criteria are not given in the relevant periodic indicative notice, the contract specifications or the invitation to tender or negotiate.

## CHAPTER 3

### *Communication and information*

## **Rules applicable to communication**

**50.** (1) A contracting entity may give or send any information, notice or other communication for a purpose connected with awarding a contract, or require candidates or tenderers to submit information or tenders, by such of the following means as it chooses:

- (a) by post or personal delivery;
- (b) subject to paragraphs (5) and (6), by electronic means;
- (c) subject to paragraph (7), by telephone or fax;
- (d) by a combination of any 2 or more of those means.

(2) A contracting entity shall choose a means of communication that is generally available to economic operators so as to enable them to gain access to the entity's tendering procedure.

(3) A contracting entity shall communicate and store information in connection with awarding regulated contracts in a way that maintains the integrity of data and the confidentiality of tenders and preserves requests to participate.

(4) A contracting entity shall ensure that the content of tenders remain unopened and confidential until the deadline set for submitting tenders or requests to participate has expired.

(5) The equipment used for communicating by electronic means must be—

- (a) non-discriminatory, and
- (b) generally available, and
- (c) interoperable with information and communication equipment that is currently in general use.

(6) The following provisions apply to equipment used for sending and receiving tenders, and for receiving requests to participate, by electronic means:

- (a) information regarding the specifications necessary for the electronic submission of tenders and requests to participate (including encryption) must be made available to candidates and tenderers;
- (b) equipment used for electronically receiving tenders and requests to participate must comply with Schedule 13;

- (c) tenderers or candidates must undertake to submit, before the deadline for submission of tenders or requests to participate, the documents, certificates and declarations referred to in Chapter 2 of Part 9 if they do not exist in electronic form.

(7) The following provisions apply to the sending of requests to participate in a procedure for the award of a regulated contract by a contracting entity:

- (a) requests to participate may be made in writing or by telephone;
- (b) a person who makes such a request by telephone shall confirm the request in writing before the deadline set for receiving requests;
- (c) a person who sends such a request by fax shall confirm the request by post or by electronic means before the deadline set for receiving requests, but only if required to do so by the entity for the purpose of authenticating the request.

The entity shall specify those provisions in the contract notice, together with the deadline for sending confirmation by post or electronic means.

### **Information to be given to applicants for qualification, candidates and tenderers**

**51.** (1) As soon as possible after reaching a decision about—

- (a) entering into a framework agreement or awarding a regulated contract, or
- (b) admission to a dynamic purchase system,

a contracting entity shall notify candidates and tenderers of the decision by the most rapid available means of communication, such as electronic mail or fax.

(2) A contracting entity that notifies its decision by electronic mail or fax shall confirm the decision by letter if a candidate or tenderer asks it to do so.

(3) If the decision of a contracting entity—

- (a) is not to enter into a framework agreement, or award a regulated contract, for which there has been a call for competition, or
- (b) is to restart the procedure, or

(c) is not to implement a dynamic purchasing system,

the entity shall include in the decision the reasons on which it was based.

(4) A contracting entity that has rejected a candidate's application shall, as soon as practicable and in any case within 15 days after receiving a request to do so, inform the candidate of the reasons for the rejection.

(5) A contracting entity that has rejected a tenderer's tender shall —

(a) when notifying the tenderer in accordance with paragraph (1), indicate the principal reason, or reasons, why the tender is not the selected tender;

(b) as soon as practicable, and in any case within 15 days after receiving a request from a tenderer that has made an admissible tender, inform that tenderer of—

(i) the characteristics and relative advantages of the selected tender, and

(ii) the name of the successful tenderer or parties to the framework agreement.

(6) In a case referred to in Regulation 35(4), reasons for rejection referred to in paragraph (5)(a) include—

(a) the reasons for the entity's decision of non-equivalence, or

(b) that the works, product or service does not meet the relevant performance or functional requirements).

(7) However, a contracting entity may decide not to disclose information referred to in paragraph (1) relating to entry into a regulated contract or a framework agreement, or to admission to a dynamic purchasing system, on the ground that release of the information—

(a) would impede law enforcement, or otherwise be contrary to the interest, or

(b) would prejudice the legitimate commercial interests of economic operators (whether public or private), or

(c) might prejudice fair competition among those operators.

(8) A contracting entity may not enter into a regulated contract with a successful tenderer unless at least 14 days have elapsed since the date on which tenderers were informed, in accordance with paragraph (1), of the decision to award the contract to that tenderer.

(9) A contracting entity may reduce the period referred to in paragraph (8) to not less than 7 days but only if the entity considers that it must, for reasons of urgency that it can demonstrate, enter into a regulated contract before the end of the 14-day period. However, if within the 7-day period, an unsuccessful tenderer notifies the entity in writing that the tenderer intends to seek a review of the entity's decision to award the contract, the entity may not enter into a regulated contract until at least 10 days have elapsed since tenderers were notified of the entity's decision to award the contract.

(10) A contracting entity that operates a qualification system for tenderers shall determine an application received from an economic operator for recognition as soon as practicable after receiving the application. If the entity is not able to determine the application within 4 months after the date of receipt, it shall, without delay, inform the operator of the reasons for the delay and the date by which the entity expects to determine the application.

(11) As soon as practicable after determining an application for recognition of a qualification (and in any case not later than 15 days after making the determination), the entity shall, by notice in writing, notify the applicant of the determination. If the application is refused, the entity shall include in the determination a statement setting out the reasons for the refusal. Those reasons must be based on the criteria for qualification referred in Regulation 55(4).

(12) A contracting entity that operates a qualification system may terminate the recognition of an economic operator's qualification only for reasons based on the criteria for qualification referred to in Regulation 55(4).

(13) A contracting entity shall not cancel recognition of an economic operator's qualification unless, at least 15 days previously, it—

- (a) has informed the operator of its intention to do so and of its reasons for the proposed cancellation, and
- (b) has given the operator an opportunity to make representations to it showing why the qualification should not be cancelled.

### **Information to be stored concerning awards**

**52.** (1) A contracting entity shall keep appropriate information on each contract that is sufficient to permit it at a later date to justify decisions taken in connection with—

- (a) the qualification and selection of economic operators and the award of contracts, and
- (b) the use of procedures without a prior call for competition, and
- (c) the non-application of Parts 6, 7 and 8 because of the derogations provided for in Parts 3.

(2) A contracting entity shall take appropriate steps to record the progress of award procedures conducted by electronic means.

(3) The contracting entity shall keep the information for at least 4 years from the date of award of the contract so that the entity will be able, during that period, to provide the necessary information to the European Commission if it so requests.

## PART 9

### CONDUCT OF AWARD PROCEDURE WHEN CONTRACTING ENTITY USES RESTRICTED PROCEDURE OR NEGOTIATED PROCEDURE

#### CHAPTER 1

##### *General*

#### **General provisions for conducting restricted procedure or negotiated procedure**

**53.** (1) The following provisions apply when a contracting entity is selecting participants in an award procedure:

- (a) if the entity has prescribed rules and criteria for the exclusion of tenderers or candidates in accordance with Regulation 56, it shall exclude economic operators in accordance with those rules and those criteria;
- (b) the entity shall select tenderers and candidates in accordance with the objective rules and criteria prescribed under that Regulation;
- (c) if the entity uses a restricted procedure or a negotiated procedure with a call

for competition, it shall, whenever appropriate, reduce in accordance with that Regulation the number of candidates selected in accordance with subparagraphs (a) and (b).

(2) When making a call for competition that involves notification and use of a qualification system, a contracting entity shall select tenderers in a restricted procedure, or participants in a negotiated procedure, from candidates that qualify in accordance with the rules of the system as established under Regulation 55.

(3) A contracting entity shall verify that the tenders submitted by selected tenderers comply with the rules and requirements applicable to tenders and award the contract on the basis of the criteria prescribed by Regulations 57 and 60.

## CHAPTER 2

### *Qualification and qualitative selection*

#### **Mutual recognition of administrative, technical or financial conditions, and certificates, tests and evidence**

**54.** (1) If, in the course of selecting economic operators to participate in a restricted or negotiated procedure, a contracting entity assesses the qualifications of economic operators, or reviews the criteria and rules on which those qualifications are based, the entity may not—

- (a) impose on those operators administrative, technical or financial conditions that would not be imposed on others, or
- (b) require those operators to undergo tests, or produce evidence, that would duplicate objective evidence that is already available.

(2) In requesting an economic operator to produce a certificate prepared by an independent body attesting the compliance of the operator with specified quality assurance standards, a contracting entity shall refer to quality assurance systems based on the relevant European standards series certified by bodies conforming to the European standards series concerning certification.

(3) For the purposes of this Regulation, a contracting entity shall—

- (a) recognise certificates given by a competent body established in another

Member State if satisfied that those certificates are equivalent to certificates given by recognised competent bodies established in the State, and

- (b) accept other evidence from economic operators of equivalent quality assurance measures.

(4) For a works contract or service supply contract (but only when appropriate), a contracting entity may, in order to verify an economic operator's technical abilities, require an indication of the environmental management measures that the operator will be able to take when carrying out the contract. If, in such a case, a contracting entity requires the production of a certificate prepared by an independent body certifying that the operator has complied with specified environmental management standards, the entity shall refer to the EMAS or to environmental management standards based on the relevant European or international standards certified by bodies conforming to European Community law or the relevant European or international standards concerning certification.

(4) A contracting entity shall—

- (a) recognise equivalent certificates from bodies established in other Member States, and
- (b) accept other evidence of equivalent environmental management measures from an economic operator.

### **Establishment and operation of qualification systems by contracting entities**

**55.** (1) A contracting entity may, if it so chooses, establish and operate a qualification system for economic operators.

(2) A contracting entity that operates such qualification system shall ensure that economic operators are at all times able to apply to be included in the system and to have their applications properly considered.

(3) A system established under this Regulation may involve different qualification stages.

(4) A contracting entity shall operate such a system on the basis of objective criteria and rules for qualification established by the entity. If those criteria and rules include technical specifications, Regulation 35 applies. The entity may review and update the criteria and rules as required.

(5) The criteria and rules for a qualification system may include the exclusion criteria listed in Regulation 53 of the European Communities (Award of Public Authorities Contracts) Regulations 2006 on the terms and conditions specified in those Regulations. If the contracting entity is a contracting authority, those criteria and rules must include the exclusion criteria listed in paragraphs (1) to (3) of that Regulation.

(6) If the criteria and rules for qualification referred to in paragraph (4) include requirements relating to the economic and financial capacity of an economic operator, the operator may, when necessary and for a particular contract, rely on the capacity of other persons, whatever the legal nature of the link between the operator and those other persons. In such a case, the operator must prove to the contracting entity that the necessary resources will be available to it throughout the period of the validity of the qualification system.<sup>1</sup> Under the same conditions, a group of economic operators may rely on the capacity of participants in the group or of other persons.

(7) If the criteria and rules for qualification referred to in paragraph (4) include requirements relating to the technical or professional abilities of an economic operator, the operator may, when necessary and for a particular contract, rely on the capacity of other persons, whatever the legal nature of the link between the operator and those other persons. In such a case, the operator must prove to the contracting entity that the necessary resources will be available to it throughout the period of the validity of the qualification system.<sup>2</sup> Under the same conditions, a group of economic operators may rely on the abilities of participants in the group or of other persons.

(8) A contracting entity that operates a qualification system shall, on request, make available to an economic operator the criteria and rules for qualification referred to in paragraph (4) and, if those criteria or rules are updated, the entity shall provide interested economic operators with details of the updated criteria or rules.

(9) A contracting entity shall, on being satisfied that the qualification system of another body meets its requirements, notify interested economic operators of the name of the other body.

(10) A contracting entity shall keep a written record of qualified economic operators. The record can be divided into categories according to the type of contract for which the qualification is valid.

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<sup>1</sup> By way of example, this may be achieved by producing an undertaking by those other persons that they will make the necessary resources available to the operator throughout the relevant period.

<sup>2</sup> By way of example, this may be achieved by producing an undertaking by those other persons that they will make the necessary resources available to the operator throughout the relevant period.

(11) When establishing or operating a qualification system, a contracting entity shall comply with—

- (a) Regulation 43(9) relating to notices on the existence of a system of qualification, and
- (b) Regulation 51(10), (11) and (12) relating to the information to be delivered to economic operators that have applied for qualification, and
- (c) Regulation 53(2) relating to the selection of participants when a call for competition is made by means of a notice on the existence of a qualification system, and
- (d) Regulation 54 relating to mutual recognition of administrative, technical or financial conditions, certificates, tests and evidence.

(12) When making a call for competition by means of a notice on the existence of a qualification system, a contracting entity shall select tenderers in a restricted procedure or participants in a negotiated procedure from the qualified candidates in accordance with the system.

### **Selection to be in accord with objective rules and criteria**

**56.** (1) A contracting entity that has established selection criteria for an open procedure shall do so in accordance with objective rules and criteria that are available to all interested economic operators.

(2) A contracting entity that selects candidates for a restricted procedure or a negotiated procedure shall do so in accordance with the objective rules and criteria that it has made available to interested economic operators.

(3) A contracting entity shall base its selection criteria for a restricted procedure or a negotiated procedure on the objective need of the entity to reduce the number of candidates to a level that is justified by the need to balance the particular characteristics of the procurement procedure with the resources required to conduct it. However, in deciding the number of candidates to be selected, the entity shall take account of the need to ensure adequate competition.

(4) The criteria specified in paragraphs (1) and (2) may include the exclusion criteria listed in Regulation 53 of the European Communities (Award of Public Authorities Contracts) Regulations 2006 on the terms and conditions specified in that Regulation. If the

contracting entity is a contracting authority, those criteria and rules must include the exclusion criteria listed in paragraph (1) of that Regulation.

(5) If the criteria referred to in paragraphs (1) and (2) include requirements relating to the economic and financial capacity of an economic operator, the operator may, when necessary and for a particular contract, rely on the capacity of other persons, whatever the legal nature of the link between the operator and those other persons. If it does so, the economic operator must prove to the contracting entity that the necessary resources will be available to it throughout the period necessary to carry out the contract.<sup>1</sup> Under the same conditions, a group of economic operators may rely on the capacities of participants in the group or of other persons.

(6) The criteria referred to in paragraphs (1) and (2) include requirements relating to the technical or professional abilities of an economic operator.

(7) If the criteria referred to in paragraphs (1) and (2) include requirements relating to the technical or professional abilities of an economic operator, the operator may, when necessary and for a particular regulated contract, rely on the abilities of other persons, whatever the legal nature of the link (if any) between the operator and those persons. If it does so, the operator must prove to the contracting entity that the necessary resources will be available to it throughout the period necessary to perform the contract.<sup>2</sup> Under the same conditions, a group of economic operators may rely on the abilities of participants in the group or of other persons.

## CHAPTER 3

### *Awarding a regulated contract*

#### **Criteria for awarding a regulated contract**

**57.** (1) A contracting entity shall, in awarding a regulated contract on the basis of the tender that is most economically advantageous to it, adopt criteria linked to the subject-matter of the contract.

(2) Except as provided by paragraph (1), a contracting entity shall award a regulated contract on the basis of the lowest price tendered.

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<sup>1</sup> By way of example, this may be achieved by delivering an undertaking by those other persons to make the necessary resources available to the operator throughout the relevant period.

<sup>2</sup> By way of example, this may be achieved by delivering an undertaking by those other persons to make the necessary resources available to the operator throughout the relevant period.

(3) For the purpose of paragraph (1), the criteria may include (but are not limited to) quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, and delivery date and delivery period or period of completion.

(4) The contracting entity shall specify in the relevant contract notice or contract documents the relative weighting that it gives to each of the criteria chosen to determine the most economically advantageous tender. That weighting can be expressed by providing for a range within an appropriate maximum spread.

(5) On concluding that, for demonstrable reasons, publication of weighting is not feasible, the contracting entity shall, in the relevant notice calling for competition or contract documents, set out the criteria in descending order of importance.

### **Conduct of electronic auctions**

**58.** (1) A contracting entity may award a regulated contract by means of an electronic auction, but only in accordance with this Regulation and Regulations 59 and 60.

(2) A contracting entity shall not—

- (a) have improper recourse to electronic auctions, or
- (b) use an electronic auction in such a way as to prevent, restrict or distort competition or to change the subject-matter of the contract, as put up for tender in the published contract notice and defined in the specification.

(3) In awarding a regulated contract by means of an open, restricted or negotiated procedure, a contracting entity may decide that the award should be preceded by an electronic auction, but only if the award criteria can be quantified numerically or mathematically with sufficient precision

(4) A contracting entity may similarly hold an electronic auction on the opening for competition of a regulated contract to be awarded under the dynamic purchasing system.

(5) When a regulated contract is to be awarded by electronic auction, the following provisions apply:

- (a) if the contract is to be awarded to the tenderer of the lowest price, the electronic auction must be based solely on the prices tendered;

- (b) if the contract is to be awarded to the tenderer who submits the most economically advantageous tender, the electronic auction must be based either on the prices tendered or on the new values of the features of the tenders indicated in the relevant specification, or on both

(6) On deciding to hold an electronic auction, a contracting entity shall state that fact in the relevant contract notice. The details of the auction that must be specified in that notice include (but are not limited to) the following:

- (a) the criteria which will form the basis for bidding in the electronic auction;
- (b) any limits imposed on the values that can be submitted (in so far as they result from the contract specifications);
- (c) the information that the entity will make available to tenderers in the course of the auction and, if relevant, when the information will be made available to them;
- (d) all information relevant to the conduct holding of the auction;
- (e) the conditions under which tenderers will be able to bid and, in particular, the minimum amount by which tenderers may reduce their tenders as part of the bidding process;
- (f) all relevant information concerning the electronic equipment to be used and the arrangements and technical specifications for communicating while the auction is in progress.

The criteria referred to in sub-paragraph (a) must be capable of being expressed in numeric or mathematical values for the conduct of the auction.

(7) Before proceeding with an electronic auction, a contracting entity shall make a full initial evaluation of the tenders in accordance with the specified award criteria and the weighting (if any) fixed for those criteria.

(8) In holding an electronic auction, a contracting entity—

- (a) shall, simultaneously by electronic means, invite all tenderers who have submitted admissible tenders to the entity to submit new prices or new values, or both new prices and new values, and
- (b) shall include in the invitation all relevant information concerning individual

connection to the electronic equipment being used, and

(c) shall state the date and time of the start of the auction.

(9) A contracting entity may hold an electronic auction in a number of successive phases, but may not begin the auction earlier than 2 business days after the date on which invitations were sent.

(10) In awarding a regulated contract on the basis of the most economically advantageous tender, a contracting entity shall ensure—

- (a) that the invitation is accompanied by the outcome of a full evaluation of the relevant tender, carried out in accordance with the weighting provided for in Regulation 57(4), and
- (b) that the invitation specifies the mathematical formula to be used in the electronic auction to determine automatic re-rankings of tenderers on the basis of the new prices or new values (or both) submitted by them, and
- (c) that that formula incorporates the weighting of all the criteria that have been fixed to determine the most economically advantageous tender (as specified for that purpose in the relevant contract notice or contract specifications).

Before the auction commences, the contracting entity shall ensure that any weightings expressed as being within a range are specified as precise figures.

(11) When holding an electronic auction a contracting entity shall, throughout each phase of the auction, instantaneously communicate to each tenderer sufficient information to enable the tenderer to discover what its relative ranking is at any particular time. The entity may also—

- (a) communicate other information concerning other prices or values submitted, so long as that is stated in the contract specifications, and
- (b) at any time announce the number of tenderers who are participating in that phase of the auction.

However, the entity shall not disclose the identities of the tenderers at any time during the holding of the auction.

## **Procedure for closing an electronic auction**

**59.** (1) A contracting entity shall close an electronic auction in one or more of the following ways:

- (a) by specifying in the invitation to participate in the auction the date and time of the closure;
- (b) when it is no longer receiving any further new offers or prices that comply with the entity's conditions with respect to the minimum amount by which tenderers may reduce their tenders as part of the bidding process;
- (c) when the number of phases in the auction (as fixed in the invitation to participate in the auction) has been completed.

(2) A contracting entity shall not close an electronic auction in accordance with paragraph (1)(b) unless it has specified in the invitation to participate in the auction the period that it will allow to elapse (after the last submission is received) before it closes the auction.

(3) A contracting entity shall not close an electronic auction in accordance with paragraph (1)(c), unless it has specified to participants in the auction the timetable for each phase of the auction.

(4) After closing an electronic auction for the award of a contract, a contracting entity shall award the contract on the basis of the results of the auction.

## **Action to be taken by contracting entity when tenders are abnormally low**

**60.** If it appears to a contracting entity that a tender for the award of a contract, to be abnormally low, the entity shall not immediately reject the tender, but shall, by notice in writing, request the tenderer to provide written details of such elements of the tender as are specified in the notice. Those details may relate to (but are not limited to) the following:

- (a) if the contract is a works contract, the economics of the construction method to be used to carry out the work;
- (b) if the contract is a product supply contract, the economics of the manufacturing process to be used to produce the product;
- (c) if the contract is a service supply contract, the economics of the means to be

used to supply the service;

- (d) the technical solutions chosen, or any exceptionally favourable conditions available to the tenderer, for carrying out the works, or for supplying the product or service, or both;
- (e) the originality of the work to be carried out, or the product or service to be supplied, by the tenderer;
- (f) compliance with the relevant requirements relating to employment protection and working conditions in force at the place where the work is to be carried out, or the product or service is to be supplied;
- (g) whether there is a possibility that the tenderer may receive aid from the State.

(2) The contracting entity shall, as far as practicable, verify the constituent elements—

- (a) by consulting the tenderer, and
- (b) by taking account of the evidence that the tenderer provides about those elements.

(3) The contracting entity can reject a tender on being satisfied that the only reason for the tender being abnormally low is that the tenderer has received aid from the State, but only after—

- (a) that entity has consulted the tenderer about the matter, and
- (b) the tenderer has failed, by a deadline specified by that entity, to satisfy it that the aid was granted lawfully.

(4) As soon as practicable after rejecting a tender under paragraph (3), the contracting entity shall, by notice in writing, inform the European Commission of the rejection and the reason for it.

## CHAPTER 4

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

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

**61.** (1) This Regulation—

- (a) applies to tenders covering a product that originates in a third country with which the European Community has not entered into (whether multilaterally or bilaterally) an agreement designed to ensure comparable and effective access for undertakings established in the European Community to the markets of that country, and
- (b) does not affect the obligations of the European Community or its Member States in respect of third countries.

(2) A contracting entity may reject any tender submitted to it for the award of a product supply contract if the proportion of the product originating in third countries exceeds 50 per cent of the total value of the product constituting the tender. For the purposes of this paragraph, the proportion of the product originating in third countries is as determined in accordance with Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code.

(3) Software used in telecommunications network equipment is a product for the purposes of this Regulation

(4) If, having regard to the contract award criteria referred to in Regulation 57, two or more tenders are equivalent, a contracting entity shall give preference to tenders other than those that can be rejected under paragraph (2). For that purpose, prices of tenders are to be considered equivalent if the price difference does not exceed 3 per cent.

(5) A contracting entity may not prefer a tender over another under paragraph (4) if—

- (a) its acceptance would oblige the entity to acquire equipment that has technical characteristics different from those of existing equipment, and
- (b) the acquisition would be incompatible with the existing equipment, or would—
  - (i) give rise to technical difficulties in operating and maintaining that equipment, or
  - (ii) result in disproportionate costs.

(6) For the purposes of this Regulation, those third countries to which the benefit of the provisions of the Public Utility Contracts Directive has been extended by a Council Decision as referred to in paragraph (2) are not to be taken into account in determining the proportion of the product originating in third countries.

### **Responsibility of Minister to inform European Commission of difficulties with third countries as regards regulated contracts**

**62.** (1) As soon as practicable after becoming aware of any general difficulty, in law or in fact, encountered and reported by an economic operator established in the State in securing the award of service supply contracts in a third country, the Minister shall notify the European Commission of the difficulty.

(2) The Minister shall inform the European Commission as soon as practicable after becoming aware of any difficulty, in law or in fact—

- (a) encountered and reported to the Minister by an economic operator established in the State, and
- (b) attributable to the non-observance of the international labour law provisions listed in Schedule 12 when those undertakings have tried to secure the award of contracts in third countries.

## PART 10

### RULES GOVERNING DESIGN CONTESTS FOR SERVICE SUPPLY CONTRACTS

#### **Design contests to which this Part applies**

**63.** (1) This Part applies to a design contest organised as part of a procurement procedure for a service supply contract where the estimated value of the service (net of value added tax) is equal to or greater than the relevant threshold. For the purposes of this paragraph, “relevant threshold” means the estimated value of the contract (net of value added tax), and includes any possible prizes or payments to participants.

(2) This Part applies to every design contest for the award of a service supply contract for which the total amount of contest prizes and payments to participants is equal to or greater than the relevant threshold. In determining whether or not that threshold has been exceeded, the estimated value of the contract (net of valued added tax) that the relevant contracting entity might subsequently award under Regulation 42(3)(1) (assuming that the entity does not exclude the award of such a contract award from the contest notice) must be taken into account, as well as the total amount of contest prizes and payments.

(3) For the purposes of this Regulation, the relevant threshold is €422,000.

### **Design contests excluded from this Part**

**64.** This Part does not apply to—

- (a) a design contest organised for a service supply contract in a case referred to in Regulation 16, 17 or 18, or
- (b) a design contest organised in the Member State concerned for the conduct of an activity in respect of which an exemption has been granted in accordance with Regulation 23 if—
  - (i) a European Commission decision has established that paragraph 1 of Article 30 of the Public Utility Contracts Directive applies, or
  - (ii) that paragraph is taken to apply because of paragraph 4 (second or third subparagraph) or because of paragraph 5 (fourth subparagraph) of that Article.

### **Responsibilities of contracting entity in organising a design contest**

**65.** (1) In organising a design contest for the award of a contract, a contracting entity shall ensure—

- (a) that the contest conforms to the rules prescribed by this Part, and
- (b) that those rules are communicated to those interested in participating in the contest.

(2) A contracting entity shall not limit the admission of participants to such a contest—

- (a) by reference to the territory or part of the territory of a Member State, or
- (b) on the grounds that, under the law of the Member State in which the contest is organised, the participants would be required to be either natural or legal persons.

### **Rules on advertising and transparency**

**66.** (1) A contracting entity that wishes to organise a design contest shall make a call for competition by means of a design contest notice.

(2) A contracting entity that has held a design contest shall make the results known by means of a notice.

(3) The contracting entity shall ensure that the call for competition contains information referred to in Schedule 7 and that the notice of the results of a design contest shall contain the information referred to in Schedule 8 in accordance with the format of standard forms adopted by the Commission in accordance with the procedure in Article 68(2) of the Public Utility Contracts Directive.

(4) A contracting entity that conducts a design contest shall forward the notice of the results of the contest to the Public Utility Contracts Directive to the Commission within 2 months after the closure of the contest and under conditions to be laid down by the European Commission in accordance with the procedure referred to in Article 68(2) of that Directive.

(5) Paragraphs (2) to (10) of Regulation 46 also apply to notices relating to a design contest.

### **Means of communication applicable to design contests**

**67.** (1) Paragraphs (1), (2) and (4) of Regulation 50 apply to all communications relating to a design contest.

(2) A contracting entity that holds a design contest shall—

- (a) communicate and store information in connection with the contest in a way that maintains the integrity of data and the confidentiality of information provided by participants in the contest, and
- (b) take all reasonably practicable steps to ensure that the jury established to

judge the contest ascertains the contents of plans and projects only after the deadline for their submission to the entity.

- (3) If, in holding a design contest, a contracting entity makes use of devices for the electronic receipt of plans and projects, it shall—
- (a) make available to the parties concerned information relating to the contract specifications that is necessary for the presentation of plans and projects by electronic means, including encryption, and
  - (b) ensure that all such devices comply with the requirements of Schedule 13.

### **Rules concerning organisation of design contests, selection of participants and the jury**

**68.** (1) A contracting entity that organises a design contest shall apply procedures that reflect the requirements set out in these Regulations relating to the award of a contract.

(2) A contracting entity that restricts a design contest to a limited number of participants shall ensure that the selection criteria for the contest are clear and non-discriminatory.

(3) The entity shall also ensure that the number of candidates invited to participate in the contest is sufficient to ensure genuine competition.

(4) The entity shall ensure that each member of the jury selected for the contest is a natural person who is independent of those participating in the contest.

(5) If the participants in a design contest are required to hold a particular professional qualification, at least one-third of the members of the jury must have that qualification or an equivalent qualification.

### **Decisions of the jury**

**69.** (1) This Regulation applies whenever a jury has been appointed to judge a design contest.

(2) Before judging a design contest, the jury shall appoint one of its members to be chairperson of the jury.

(3) A person shall not interfere with the jury's deliberations or decision unless the person is a member of the jury.

(4) The contracting entity concerned shall ensure that the plans and projects of the candidates are submitted anonymously to the jury.

(5) The jury shall examine the plans and projects solely on the basis of the criteria indicated in the design contest notice.

(6) Each member of the jury shall maintain the anonymity of the candidates until the jury has reached its decision.

(7) The chairperson of the jury shall record the jury's ranking of projects in a report, signed by its members, made according to the merits of each project, together with its remarks and any matters that require clarification.

(8) Until the jury has reached its decision, a person shall not disclose to any other person (other than another member of the jury) the name of any member of the jury.

(9) A jury may, if it thinks necessary, invite candidates to answer questions concerning matters in respect of which the jury requires clarification, but only if those matters are recorded in the minutes of its deliberations.

(10) The chairperson of the jury shall ensure that complete and accurate minutes are kept recording the dialogue between jury members and the candidates.

## PART 11

### MISCELLANEOUS PROVISIONS

#### **Minister's responsibilities under these Regulations**

**70.** (1) The Minister shall ensure that for each year, in accordance with the arrangements to be laid down under the procedure provided for in Article 68(2) of the Public Utility Contracts Directive, the European Commission is provided with a statistical report concerning the total value (according to category of activity to which Annexes I to X to that Directive refer) of the contracts—

- (a) that were awarded below the thresholds set out in Regulation 12, and
- (b) that would, but for those thresholds, be subject to these Regulations.

(2) In relation to the categories of activity to which Annexes II, III, V, IX and X to the Public Utility Contracts Directive relate, the Minister shall ensure that the European Commission is provided, no later than 31 October of each year, with a statistical report on contracts awarded for the previous year, in accordance with arrangements to be laid down under the procedure provided for in Article 68(2) to that Directive. The statistical report shall contain the information required to verify the proper application of the Agreement.

(3) The information required under paragraph (2) need not include information concerning a contract—

- (a) for research and development services listed in category 8 of Part A of Schedule 6, or
- (b) for a telecommunications service listed in category 5 of that Part whose CPV positions are equivalent to the CPC reference numbers 7524, 7525 and 7526, or
- (c) for a service listed in Part B of that Schedule.

(4) The arrangement under paragraphs (1) and (2) must be made in such a way as to ensure that—

- (a) in the interests of administrative simplification, contracts of lesser value may be excluded, provided that the usefulness of the statistics is not jeopardised, and
- (b) the confidential nature of the information provided is respected.

### **Revision of the thresholds**

**71.** (1) As soon as practicable after the European Commission has published revised thresholds and their corresponding values in the national currencies in the Official Journal of the European Union in accordance with Article 68 of the Public Utility Contracts Directive, the Minister shall notify all contracting entities of the revised thresholds and values set out in the provisions of these Regulations that correspond to the relevant provisions of that Directive.

(2) On publication of a notice in the Official Journal of the European Union in accordance with paragraph (1), the thresholds and values set out in the provisions of these Regulations are adjusted accordingly.

## **Amendments**

**72.** (1) As soon as practicable after the European Commission, in accordance with the procedure referred to in Article 68 of the Public Utility Contracts Directive, amends—

- (a) the list of contracting entities in Annexes I to X so that they reflect the criteria set out in Parts 1 and 2;
- (b) the technical procedures for the calculation methods specified in the second subparagraph of Article 69 (1) and (2)) of that Directive, or
- (c) the procedures for the drawing-up, sending, receipt, translation, collection and distribution of the notices referred to in Articles 41, 42, 43 and 63 of that Directive and the statistical reports provided for in Article 67 of that Directive, or
- (d) the procedures for specific reference to specific positions in the CPV nomenclature in the notices, or
- (e) the reference numbers in the nomenclature set out in Annex XII to that Directive (so far as the amendment does not change the material scope of that Directive), and the procedures for reference to particular positions of this nomenclature in the notices, or
- (f) the reference numbers in the nomenclature set out in Annex XVII to that Directive (so far as the amendment does not change the material scope of that Directive), and the procedures for reference in the notices to particular positions in this nomenclature within the categories of services listed in that Annex, or
- (g) the procedure for sending and publishing data referred to in Annex XX to that Directive, on grounds of technical progress or for administrative reasons, or
- (h) the technical details and characteristics of the devices for electronic receipt referred to in points (a), (f) and (g) of Annex XXIV to that Directive, or

- (i) Annex XI to that Directive,

the Minister shall, by a further Regulation, make appropriate amendments to the corresponding provisions of these Regulations.

### **Compliance mechanisms**

**73.** In conformity with Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, the Minister shall ensure implementation of the Public Utility Contracts Directive and these Regulations.

### **Revocation of existing Regulations**

**74.** The European Communities (Award of Contracts by Entities operating in the Water, Energy, Transport and Telecommunications Sectors) Regulations 1999 (S.I. No. 31 of 1999) are revoked.

### **Transitional arrangement**

**75.** (1) Despite the revocation of the Regulations referred to in Regulation 74, those Regulations, so far as relevant, continue to apply to and in relation to regulated contracts for which a contracting entity has invited tenders or expressions of interest before the commencement of these Regulations.

(2) Expressions used in paragraph (1) have the same meanings as they have in the revoked Regulations.

## SCHEDULE 1

Regulation 3

### LIST OF ACTIVITIES FOR WORKS CONTRACTS

NACE <sup>1</sup>					
Section F			Construction		CPV Code
Division	Group	Class	Subject	Notes	
45			Construction	This division includes construction of new buildings and works, restoring and common repairs.	45000000
	45.1		Site preparation		45100000
		45.11	Demolition and wrecking of buildings; earth moving	<p>This class includes—</p> <ul style="list-style-type: none"> <li>• demolition of buildings and other structures;</li> <li>• clearing of building sites;</li> <li>• earth moving, including excavation, landfill, levelling and grading of construction sites, trench digging, rock removal, blasting;</li> <li>• site preparation for mining, including overburden removal and other development and preparation of mineral properties and sites.</li> </ul> <p>This class also includes—</p> <ul style="list-style-type: none"> <li>• building site drainage;</li> <li>• drainage of agricultural or</li> </ul>	45110000

<sup>1</sup> Note: If the interpretation of the CPV and the NACE differs, the NACE nomenclature will apply.

				forestry land.	
		45.12	Test drilling and boring	<p>This class includes test drilling, test boring and core sampling for construction, geophysical, geological or similar purposes.</p> <p>This class excludes—</p> <ul style="list-style-type: none"> <li>• drilling of production oil or gas wells; (See 11.20)</li> <li>• water well drilling; (See 45.25)</li> <li>• oil and gas field exploration, geophysical, geological and seismic surveying. (See 74.20)</li> </ul>	
	45.2		Building of complete constructions or parts thereof: civil engineering		45200000
		45.21	General construction of buildings and civil engineering works	<p>This class includes—</p> <ul style="list-style-type: none"> <li>• construction of all types of buildings</li> <li>• construction of civil engineering constructions</li> <li>• bridges, including those for elevated high-ways, viaducts, tunnels and subways</li> <li>• long-distance pipelines, communication and power lines</li> <li>• urban pipelines, urban communication and power lines;</li> <li>• ancillary urban works;</li> <li>• assembly and erection of prefabricated constructions on the site.</li> </ul> <p>This class excludes—</p> <ul style="list-style-type: none"> <li>• service activities incidental to oil and gas extraction; (See 11.20)</li> <li>• erection of complete prefabricated constructions</li> </ul>	

				<p>from self-manufactured parts not of concrete; (See divisions 20, 26 and 28)</p> <ul style="list-style-type: none"> <li>• construction work, other than buildings, for stadiums, swimming pools, gymnasiums, tennis courts, golf courses and other sports installations; (See 45.23)</li> <li>• building installation (See 45.3)</li> <li>• building completion; (See 45.4)</li> <li>• architectural and engineering activities; (See 74.20)</li> <li>• project management for construction. (See 74.20)</li> </ul>	
		45.22	Erection of roof covering and frames	<p>This class includes—</p> <ul style="list-style-type: none"> <li>• erection of roofs;</li> <li>• roof covering;</li> <li>• waterproofing.</li> </ul>	45220000
		45.23	construction of high-ways, roads, airfields and sport facilities	<p>This class includes—</p> <ul style="list-style-type: none"> <li>• construction of highways, streets, roads, other vehicular and pedestrian ways;</li> <li>• construction of railways;</li> <li>• construction work, other than buildings, for stadiums, swimming pools, gymnasiums, tennis courts, golf courses and other sports installations;</li> <li>• painting of markings on road surfaces and car parks.</li> </ul> <p>This class excludes preliminary earth moving (See 45.11)</p>	45230000
		45.24	Construction of water projects	<p>This class includes construction of waterways, harbour and river works, pleasure ports (marinas), locks, dams and dykes dredging subsurface work.</p>	45240000
		45.25	Other construction	<p>This class includes—</p> <ul style="list-style-type: none"> <li>• construction activities</li> </ul>	45250000

				<p>specialising in one aspect common to different kinds of structures, requiring specialised skill or equipment;</p> <ul style="list-style-type: none"> <li>• construction of foundations, including pile driving;</li> <li>• water well drilling and construction, shaft sinking;</li> <li>• erection of non-self-manufactured steel elements</li> <li>• steel bending;</li> <li>• bricklaying and stone setting;</li> <li>• scaffolds and work platform erecting and dismantling, including renting of scaffolds and work platforms;</li> <li>• erection of chimneys and industrial ovens.</li> </ul> <p>This class excludes renting of scaffolds without erection and dismantling (See 71.32)</p>	
	45.3		Building installation		45300000
		45.31	Installation of electrical wiring and fittings	<p>This class includes the installation in buildings or other construction projects of the following—</p> <ul style="list-style-type: none"> <li>• electrical wiring and fittings;</li> <li>• telecommunications systems;</li> <li>• electrical heating systems;</li> <li>• residential antennas and aerials;</li> <li>• fire alarms;</li> <li>• burglar alarm systems;</li> <li>• lifts and escalators;</li> <li>• lightning conductors;</li> <li>• other fittings and appliances normally found in buildings or construction projects.</li> </ul>	45310000
		45.32	Insulation work activities	<p>This class includes installation in buildings or other construction projects of thermal, sound or vibration insulation.</p> <p>This class excludes waterproofing</p>	45320000

				(See 45.22)	
		45.33	Plumbing	<p>This class includes installation in buildings or other construction projects of the following—</p> <ul style="list-style-type: none"> <li>• plumbing and sanitary equipment;</li> <li>• gas fittings;</li> <li>• heating, ventilation, refrigeration or air-conditioning equipment and ducts;</li> <li>• sprinkler systems.</li> </ul> <p>This class excludes installation of electrical heating systems (See 5.31)</p>	45330000
		45.34	Other building installation	<p>This class includes—</p> <ul style="list-style-type: none"> <li>• installation of illumination and signalling systems for roads, railways, airports and harbours;</li> <li>• installation in buildings or other construction projects of fittings and fixtures n.e.c.</li> </ul>	45340000
	45.4		Building completion		45400000
		45.41	Plastering	<p>This class includes application in buildings or other construction projects of interior and exterior plaster or stucco (including related lathing materials).</p>	45410000
		45.42	Joinery installation	<p>This class includes installation of the following—</p> <ul style="list-style-type: none"> <li>• not self-manufactured doors, windows, door and window frames;</li> <li>• fitted kitchens, staircases, shop fittings and the like;</li> <li>• wood or other materials;</li> <li>• interior completion such as</li> </ul>	45420000

				<p>ceilings, wooden wall coverings, movable partitions, and the like.</p> <p>This class excludes laying parquet and other wood floor coverings. (See 45.43)</p>	
		45.43	Floor and wall covering	<p>This class includes laying, tiling, hanging or fitting in buildings or other construction projects of—</p> <ul style="list-style-type: none"> <li>• ceramic, concrete or cut stone wall or floor tiles;</li> <li>• parquet and other wood floor coverings;</li> <li>• carpets and linoleum floor coverings, including of rubber or plastic;</li> <li>• terrazzo, marble, granite or slate floor or wall coverings;</li> <li>• wallpaper.</li> </ul>	45430000
		45.44	Painting and glazing	<p>This class includes—</p> <ul style="list-style-type: none"> <li>• interior and exterior painting of buildings;</li> <li>• painting of civil engineering structures;</li> <li>• installation of glass, mirrors, and the like.</li> </ul> <p>This class excludes installation of windows. (See 45.42)</p>	45440000
		45.45	Other building completion	<p>This class includes—</p> <ul style="list-style-type: none"> <li>• installation of private swimming pools, steam cleaning, sand blasting and similar activities for building exteriors;</li> <li>• other building completion and finishing work n.e.c.</li> </ul> <p>This class excludes interior cleaning of buildings and other structures. (See 74.70)</p>	45450000

	45.5		Renting of construction or demolition equipment with operator		45500000
		45.50	Renting of construction or demolition equipment with operator	This class excludes renting of construction or demolition machinery and equipment without operators. (See 71.32)	45500000

## SCHEDULE 2

Regulation 44

### INFORMATION TO BE INCLUDED IN CONTRACT NOTICE

#### PART A—OPEN PROCEDURE

The following information specified in this Part is the formation that a contracting entity must include in a contract notice when using the open procedure:

- (a) the name and address of the contracting entity, together with its telegraphic address, electronic address, telephone number, telex and fax number (if any);
- (b) the nature of the contract, including whether the contract is for carrying out works, or supplying a product or service, and, if relevant, whether a framework agreement or a dynamic purchasing system is involved;
- (c) if relevant, an indication as to whether tenders are being requested for purchase, lease, rental or hire purchase or any combination of them;
- (d) the place where the works are to be carried out, the product is to be delivered, or the service is to be performed;
- (e) if, in the case of a works contract, the work or the contract is subdivided into several lots, the order of size of the different lots and an indication to whether it will be possible to tender for one, for several or for all the lots;
- (f) in the case of a works contract that involves drawing-up projects, an indication of the purpose of the works or the contract;
- (g) in the case of a product supply contract—
  - (i) the nature and quantity of the product to be supplied (with the relevant nomenclature reference), including any option for further supply and an estimate (as far as ascertainable) of the time available for exercising any such option as well as the number (if any) of renewals, and
  - (ii) an indication as to whether suppliers may tender for all the products required or only some of them;

- (h) in the case of a service supply contract—
  - (i) the category of service (within the meaning of Part A or B of Schedule 6 and the description (with the relevant nomenclature reference number);
  - (ii) an indication as to whether the supply of the service is reserved by a law or administrative provision to a particular profession trade or business and, if it is so reserved, a reference to the relevant law or administrative provision, and
  - (iii) if the service is to be supplied by a body corporate, the names and professional qualifications of the staff of the body who are to be responsible for supplying the service, and
  - (iv) an indication as to whether suppliers may tender for only a part of the service to be supplied, and
  - (v) the deadline for delivering or completing the service, the period for which the contract is to have effect and, as far as possible, the date on which the supply of the service is to start;
- (i) in the case of—
  - (i) recurring works contracts, the general nature of the work concerned (with the relevant nomenclature reference number), or
  - (ii) recurring product supply contracts, an estimate (as far as ascertainable) of the timing of the subsequent calls for competition for supplying the product, or
  - (iii) recurring service supply contracts, an estimate (as far as ascertainable) of the timing of subsequent calls for competition for supplying the service and the extent of the service to be provided;
- (j) if known by the contracting entity, an indication as to whether variants may be submitted or not;
- (k) if a dynamic system is used—
  - (i) the final date for receiving tenders or indicative tenders, and
  - (ii) the address to which those tenders are to be sent, and

- (iii) the language or languages in which those tenders are to be prepared;
- (l) if applicable—
  - (i) the persons authorised to be present at the opening of tenders, and
  - (ii) the date and time at which, and the place where, the tenders are to be opened, and
  - (iii) any deposits and guarantees that will be required to provided;
- (m) the main terms concerning financing and payment or references to the documents in those terms are contained;
- (n) if relevant, the legal form to be taken by the grouping of economic operators to whom the contract is to be awarded;
- (o) details of the economic operator's position and the minimum economic and technical conditions required of that operator;
- (p) the period during which the tenderer is bound to keep open the tender;
- (q) the criteria (as referred to in Regulation 57) that are to be used for award of the contract (for example, "lowest price" or "most economically advantageous tender");
- (r) if they do not appear in the contract specifications, the criteria representing the most economically advantageous tender as well as their weighting or, if relevant, the order of importance of these criteria;
- (s) if the performance of the contract is to be subject to special conditions, details of those conditions;
- (t) if the periodic information notice, or a notice of publication of that notice, has been published in the Official Journal of the European Union, or the periodic information notice has been published on the contracting entity's buyer profile, details of that publication;
- (u) the name and address of the person to whom appeals can be made and, if relevant, the person who is responsible for mediating disputes arising from the award or performance of the contract, and precise information concerning deadlines for lodging appeals, or, if necessary, the name, address, telephone number, fax number and e-mail address of the person

from which the information may be obtained;

- (v) the address from which the contract documents and any additional documents may be obtained and, if applicable, the amount and terms of payment to be made for those documents;
- (w) the date on which the contracting entity dispatched the notice and the date on which the Office for Official Publications of the European Communities received the notice;
- (x) any other relevant information.

## PART B—RESTRICTED PROCEDURE

The following information specified in this Part is the formation that a contracting entity must include in a contract notice when using the restricted procedure:

- (a) the name and address of the contracting entity, together with its telegraphic address, electronic address, telephone number, telex and fax number (if any);
- (b) if relevant, an indication as to whether the contract is reserved for sheltered workshops or whether its performance is reserved in the context of sheltered employment programs;
- (c) the nature of the contract, including whether the contract is for carrying out works, or supplying a product or service, and, if relevant, whether a framework agreement or a dynamic purchasing system is involved;
- (d) if relevant, an indication as to whether tenders are being requested for purchase, lease, rental or hire purchase or any combination of them;
- (e) the place where the works are to be carried out, the product is to be delivered, or the service is to be performed;
- (f) if, in the case of a works contract, the work or the contract is subdivided into several lots, the order of size of the different lots and an indication to whether it will be possible to tender for one, for several or for all the lots;
- (g) in the case of a works contract that involves drawing-up projects, an indication of the purpose of the works or the contract;

- (h) in the case of a product supply contract—
  - (i) the nature and quantity of the product to be supplied (with the relevant nomenclature reference), including any option for further supply and an estimate (as far as ascertainable) of the time available for exercising any such option as well as the number (if any) of renewals;
  - (ii) an indication as to whether suppliers may tender for all the products required or only some of them;
- (i) in the case of a service supply contract—
  - (i) the category of service (within the meaning of Part A or B of Schedule 6) and the description (with the relevant nomenclature reference number), and
  - (ii) an indication as to whether the supply of the service is reserved by a law or administrative provision to a particular profession or trade and, if it is so reserved, a reference to the relevant law or administrative provision, and
  - (iii) if the service is to be supplied by a body corporate, the names and professional qualifications of the staff of the body who are to be responsible for supplying the service, and
  - (iv) an indication as to whether suppliers may tender for only a part of the service to be supplied, and
  - (v) the deadline for delivering or completing the service, the period for which the contract is to have effect and, as far as possible, the date on which the supply of the service is to start;
- (j) in the case of—
  - (i) recurring works contracts, the general nature of the work concerned (with the relevant nomenclature reference number), or
  - (ii) recurring product supply contracts, an estimate (as far as ascertainable) of the timing of the subsequent calls for competition for supplying the product, or

- (iii) recurring service supply contracts, an estimate (as far as ascertainable) of the timing of subsequent calls for competition for supplying the service and the extent of the service to be provided;
- (k) if known by the contracting entity, an indication as to whether variants may be submitted or not;
- (l) if relevant, the legal form to be taken by the grouping of economic operators to whom the contract is to be awarded;
- (m) the final date for receiving requests to participate, the address to which the requests are to be sent, and the language or languages in which the requests are to be prepared;
- (n) the final date for dispatching invitations to tender;
- (o) if applicable, details of any deposits and guarantees required;
- (p) the main terms concerning financing and payment or references to the documents in those terms are contained;
- (q) details of the economic operator's position and the minimum economic and technical conditions required of that operator;
- (r) the criteria (referred to in Regulation 57) to be used for award of the contract;<sup>1</sup>
- (s) criteria representing the most economically advantageous tender as well as their weighting or, if relevant, the order of importance of those criteria if they do not appear in the contract specifications or will not be set out in the invitation to tender;
- (t) if the performance of the contract is to be subject to special conditions, details of those conditions;
- (u) if the periodic information notice, or a notice of publication of that notice, has been published in the Official Journal of the European Union, or the periodic information notice has been published on the contracting entity's buyer profile, details of that publication;
- (v) the name and address of the person to whom appeals can be made and, if

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<sup>1</sup> For example, "lowest price" or "most economically advantageous tender".

relevant, the person who is responsible for mediating disputes arising from the award or performance of the contract, and precise information concerning deadlines for lodging appeals, or, if necessary, the name, address, telephone number, fax number and e-mail address of the person from which the information may be obtained;

- (w) the date on which the contracting entity sent the notice for publication by the European Commission;
- (x) the date of receipt of the notice by the Office for Official Publications of the European Communities (as supplied by that Office);
- (y) any other relevant information.

#### PART C—NEGOTIATED PROCEDURE

The following information is the formation that a contracting entity must include in a contract notice when using the negotiated procedure:

- (a) the name and address of the contracting entity, together with its telegraphic address, electronic address, telephone number, telex and fax number (if any);
- (b) if relevant, an indication as to whether the contract is reserved for sheltered workshops or whether its performance is reserved in the context of sheltered employment programs;
- (c) the nature of the contract, including whether the contract is for carrying out works, or supplying a product or service, and, if relevant, whether a framework agreement or a dynamic purchasing system is involved;
- (d) if relevant, an indication as to whether tenders are being requested for purchase, lease, rental or hire purchase or any combination of them;
- (e) the place where the works are to be carried out, the products are to be delivered, or the service is to be performed;
- (f) if, in the case of a works contract, the work or the contract is subdivided into several lots, the order of size of the different lots and an indication to whether it will be possible to tender for one, for several or for all the lots;
- (g) in the case of a works contract that involves drawing-up projects, an

indication of the purpose of the works or the contract;

- (h) in the case of a product supply contract—
  - (i) the nature and quantity of the product to be supplied (with the relevant nomenclature reference), including any option for further supply and an estimate (as far as ascertainable) of the time available for exercising any such option as well as the number (if any) of renewals, and
  - (ii) an indication as to whether suppliers may tender for all the products required or only some of them;
- (i) in the case of a service supply contract—
  - (i) the category of service (within the meaning of Part A or B of Schedule 6) and the description (with the relevant nomenclature reference number);
  - (ii) an indication as to whether the supply of the service is reserved by a law or administrative provision to a particular profession, trade or business and, if it is so reserved, a reference to the relevant law or administrative provision, and
  - (iii) if the service is to be supplied by a body corporate, the names and professional qualifications of the staff of the body who are to be responsible for supplying the service, and
  - (iv) an indication as to whether suppliers may tender for only a part of the service to be supplied, and
  - (v) the deadline for delivering or completing the service, the period for which the contract is to have effect and, as far as possible, the date on which the supply of the service is to start;
- (j) in the case of—
  - (i) recurring works contracts, the general nature of the work concerned (with the relevant nomenclature reference number), or
  - (ii) recurring product supply contracts, an estimate (as far as ascertainable) of the timing of the subsequent calls for competition for supplying the product, or

- (iii) recurring service supply contracts, an estimate (as far as ascertainable) of the timing of subsequent calls for competition for supplying the service and the extent of the service to be provided;
- (k) if known by the contracting entity, an indication as to whether variants may be submitted or not;
- (l) if relevant, the legal form to be taken by the grouping of economic operators to whom the contract is to be awarded;
- (m) the final date for receiving requests to participate, the address to which the requests should be sent, and the language or languages in which requests are to be prepared;
- (n) if relevant, any deposits and guarantees required;
- (o) the main terms concerning financing and payment or references to the documents in those terms are contained;
- (p) details of the economic operator's position and the minimum economic and technical conditions required of that operator;
- (q) the criteria (as referred to in Regulation 57) to be used for awarding the contract;<sup>1</sup>
- (r) if they do not appear in the contract specifications or will not be set out in the invitation to negotiate, the criteria representing the most economically advantageous tender as well as their weighting and, if relevant, the order of importance of those criteria;
- (s) if the performance of the contract is to be subject to special conditions, details of those conditions;
- (t) if relevant, the names and addresses of the economic operators already selected by the contracting entity;
- (u) if applicable, the dates of previous publications in the Official Journal of the European Union;
- (v) if the periodic information notice, or a notice of publication of that notice,

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<sup>1</sup> Lowest priced or most economically advantageous tender.

has been published in the Official Journal of the European Union, or the periodic information notice has been published on the contracting entity's buyer profile, details of that publication;

- (w) the name and address of the person to whom appeals can be made and, if relevant, the person who is responsible for mediating disputes arising from the award or performance of the contract, and precise information concerning deadlines for lodging appeals, or, if necessary, the name and address of the person from which the information may be obtained, together with the person's telephone number, fax number and e-mail address (if any);
- (x) the date on which the contracting entity dispatched the notice and the date on which the Office for Official Publications of the European Communities received the notice;
- (y) any other relevant information.

#### PART D—DYNAMIC PURCHASING SYSTEMS

The following information specified in this Part is the formation that a contracting entity must include in a contract notice when using a dynamic purchasing system (1):

- (a) the country in which the entity is established;
- (b) the name and e-mail address of contracting entity;
- (c) details of the publication reference of the contract notice on the system;
- (d) the e-mail address at which the contract documents and additional documents relating to the system are available;
- (e) a description of the subject-matter of the contract by reference number(s) of CPV nomenclature and the quantity or extent of the contract to be awarded;
- (f) the timeframe for submitting indicative tenders.

### SCHEDULE 3

Regulations 43, 44 and 55

#### NOTICES ON THE EXISTENCE OF A QUALIFICATION SYSTEM

The following is the information that must be included in a notice relating to the existence of a qualification system:

- (a) the name and address of the contracting entity, together with its telegraphic address, electronic address, telephone number, telex and fax number (if any);
- (b) if relevant, an indication as to whether the contract is reserved for sheltered workshops or whether its performance is reserved in the context of sheltered employment programs;
- (c) the purpose of the qualification system (including a description of the works, product or service, or the category of works, product or service, to be procured through the system, together with the relevant nomenclature reference numbers);
- (d) the conditions to be fulfilled by the economic operators having regard to their qualifications as to their expertise and capability in accordance with the system and the methods according to which each of those conditions will be verified;
- (e) the period during which the qualification system is valid and the formalities required in order to renew the system;
- (f) a statement to the effect that the notice is a call for competition;
- (g) if known by the contracting entity, the criteria (as referred to in Regulation 57) to be used to award the contract;<sup>1</sup>
- (h) if they do not appear in the contract specifications or will not be set out in the invitation to tender or negotiate, the criteria representing the most economically advantageous tender as well as their weighting and, if relevant, the order of importance of those criteria;

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<sup>1</sup> Lowest priced or most economically advantageous tender

- (i) the address from which further information and documentation concerning the qualification system can be obtained (if different from the addresses mentioned in paragraph (a));
- (j) the name and address of the person to whom appeals can be made and, if relevant, the person who is responsible for mediating disputes arising from the award or performance of the contract, and precise information concerning deadlines for lodging appeals, or, if necessary, the name and address of the person from which the information may be obtained, together with the person's telephone number, fax number and e-mail address (if any);
- (k) any other relevant information.

(2) If the description of the conditions and verification methods referred to in paragraph (1)(d) is voluminous and based on documents available to interested economic operators, a summary of the main conditions and methods and a reference to those documents is sufficient.

## SCHEDULE 4

Regulations 43, 44 and 47

### PERIODIC INDICATIVE NOTICES

#### **PART 1: Information to be included in all cases**

1. The following is the information that must be included in a periodic indicative notice:
  - (a) the name, address, telegraphic address, electronic address, telephone number, telex and fax number of the contracting entity or the person from which additional information may be obtained;
  - (b) the date on which the contracting entity dispatched the notice to the Office for Official Publications of the European Communities or published the notice on its buyer profile, and the date on which the Office for Official Publications of the European Communities received the notice;
  - (c) any other relevant information.
2. If the notice is for a works contract, it must specify the nature, extent and general characteristics of the work or of the lots by reference to the work (including the relevant nomenclature reference number).
3. If the notice is for a public contract, it must specify the nature and quantity or value of the product that is to be supplied (including the relevant nomenclature reference number).
4. If the notice is for a public contract, it must specify the intended total procurement for each of the service categories listed in Part A of Schedule 6 (including the relevant nomenclature reference number).

#### **PART 2: Notices Used as a means of Calling for Competition or Permits Reduction of Time Limits for Receipt of Tenders**

If the notice is used as a means of calling for competition or permits a reduction of time limits for receiving tenders, it must also include the following information:

- (a) a reference to the fact that interested suppliers should advise the entity of their interest in the contract or contracts;

- (b) if relevant, whether the contract is reserved for sheltered workshops or whether its performance is reserved in the context of sheltered employment programs;
- (c) the deadline for receiving applications for an invitation to tender or to negotiate;
- (d) the nature and quantity of the product to be supplied or general nature of the work or category of service (within the meaning of Part A of Schedule 6) and description, stating if a framework agreement is contemplated, including any options for further procurement and the estimated time available for exercising the options as well as the number of renewals (if any);
- (e) in the case of recurring contracts, an estimate of the timing of subsequent calls for competition;
- (f) whether purchase, lease, rental or hire-purchase, or any combination of them, is involved;
- (g) if the contract is to supply a service, the deadline for delivery or completion of the service, the duration of the contract and, as far as possible, the date for starting the service;
- (h) the address to which interested economic operators should send their expressions of interest in writing;
- (i) the deadline for receipt of expressions of interest;
- (j) the language or languages authorised for the presentation of candidatures or tenders;
- (k) the economic and technical conditions, and financial and technical guarantees that suppliers are required to provide;
- (l) if known by the contracting entity, the estimated date for initiating the award procedures in respect of the contract or contracts;
- (m) whether the restricted procedure or the negotiated procedure is to be used;
- (n) the amount of and payment details for any sum to be paid to obtain documents concerning the consultation;
- (o) if the performance of the contract is to be subject to special conditions,

details of those conditions;

- (p) if known by the contracting entity, the criteria (as referred to in Regulation 57) to be used to award the contract;<sup>1</sup>
- (q) if they do not appear in the contract specifications, or will not be specified in the invitation to confirm interest referred to in Regulation 49(6) or in the invitation to tender or to negotiate, the criteria representing the most economically advantageous tender as well as their weighting and, if relevant, the order of importance of those criteria;
- (r) the name and address of the person to whom appeals can be made and, if relevant, the person who is responsible for mediating disputes arising from the award or performance of the contract, and precise information concerning deadlines for lodging appeals, or, if necessary, the name and address of the person from which the information may be obtained, together with the person's telephone number, fax number and e-mail address (if any).

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<sup>1</sup> Lowest priced or most economically advantageous tender.

## SCHEDULE 5

Regulation 45

### INFORMATION TO BE INCLUDED IN THE CONTRACT AWARD NOTICE

#### PART A—INFORMATION FOR PUBLICATION IN THE OFFICIAL JOURNAL OF THE EUROPEAN UNION <sup>(1)</sup>

1. The following is the information that is required to be included in a contract award notice that is required to be published in the Official Journal of the European Union:

- (a) the name and address of the contracting entity;
- (b) the nature of the contract<sup>1</sup> and the relevant nomenclature reference number;
- (c) if the contract is a framework agreement, a statement to that effect;
- (d) a summary indication of the nature and quantity of the works to be carried out, or the product or service to be supplied;
- (e) the form of the call for competition;<sup>2</sup>
- (f) details of publication of the notice in the Official Journal of the European Union;
- (g) if the contract was awarded without a prior call for competition, an indication of the circumstances, as specified in Regulation 42(3), justifying this type of award procedure
- (h) details of the award procedure used;<sup>3</sup>
- (i) the number of tenders that were received;
- (j) the date on which the contract was awarded;
- (k) the price (if any) paid for bargain purchases in accordance with Regulation

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<sup>1</sup> For example, whether to contract is to carry out works, or to supply a product or service.

<sup>2</sup> For example, notice on the existence of a system of qualification, periodic notice, or call for tenders.

<sup>3</sup> I.e. whether “open”, “restricted” or “negotiated”.

42(3)(j);

- (l) the name and address of the economic operator to whom the contract was awarded;
- (m) if relevant, whether the contract has been, or may be, subcontracted;
- (n) the price paid or the prices of the highest and lowest tenders taken into account in awarding the contract;
- (o) the name and address of the person to whom appeals can be made and, if relevant, the person who is responsible for mediating disputes arising from the award or performance of the contract, and precise information concerning deadlines for lodging appeals, or, if necessary, the name and address of the person from which the information may be obtained, together with the person's telephone number, fax number and e-mail address (if any).

2. The following is optional information that may be included in a contract award notice:

- (a) the value and share of the contract which has been or may be subcontracted to third parties;
- (b) the award criteria.

#### PART B—INFORMATION THAT IS NOT INTENDED FOR PUBLICATION IN THE OFFICIAL JOURNAL OF THE EUROPEAN UNION

1 The following information does not need to be published in the Official Journal of the European Union:

- (a) the number of contracts awarded (where an award has been split between several suppliers);
- (b) the value of each contract awarded;
- (c) in the case of a product supply contract or service supply contract, the country of origin of the product or service;<sup>1</sup>

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<sup>1</sup> i.e. whether it is of European Community origin or non-Community origin. If the latter, the country is to be specified.

- (d) details of which award criteria were used;<sup>1</sup>
- (e) whether the contract was awarded to a tenderer who has submitted a variant as provided by Regulation 38(1);
- (f) whether any tenders were excluded on the grounds that they were abnormally low;
- (g) the date on which the contracting entity sent the notice for publication by the European Commission;
- (h) if the contract is to supply a service listed in Schedule 6 Part B, the agreement of the contracting entity to publication of the notice (Regulation 45).

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<sup>1</sup> Most economically advantageous or lowest price.

## SCHEDULE 6

Regulations 3, 32, 33, 34, 43,  
45 and 70; Schedules 2, 4 and 5

### SERVICES

#### PART A<sup>1</sup>: Services within the meaning of Regulation 32

CATEGORY NO.	SUBJECT	CPC REFERENCE NO.	CPV REFERENCE NO.
1.	Maintenance and repair services	6112, 6122, 633, 886	From 50100000 to 50982000 (except for 50310000 to 50324200 and 50116510-9, 50190000-3, 50229000-6, 50243000-0)
2.	Land transport services, <sup>2</sup> including armoured car services, and courier services, except transport of mail	712 (except 71235), 7512, 87304	From 60112000-6 to 60129300-1 (except 60121000 to 60121600, 60122200-1, 60122230-0), and from 64120000-3 to 64121200-2
3.	Air transport services of passengers and freight, except transport of mail	73 (except 7321)	From 62100000-3 to 62300000-5 (except 62121000-6, 62221000-7)
4.	Transport of mail by land and by air <sup>3</sup>	71235, 7321	60122200-1, 60122230-0 62121000-6, 62221000-7
5.	Telecommunications services	752	From 64200000-8 to 64228200-2, 72318000-7, and from 72530000-9 to 72532000-3
6.	Financial services: (a) Insurance services (b) Banking and investment services <sup>4</sup>	Ex 81, 812, 814	From 66100000-1 to 66430000-3 and From 67110000-1 to 67262000-1 (3)

<sup>1</sup> CPC Nomenclature (provisional version), used to define the scope of Directive 93/38/EEC.

<sup>2</sup> Except for rail transport services covered by category 18.

<sup>3</sup> Except for rail transport services covered by category 18.

<sup>4</sup> Except financial services relating to the issue, sale, purchase or transfer of securities or other financial instruments, and central bank services. Also excluded: services involving the acquisition or rental, by whatever financial procedures, of land, existing buildings, or other immovable property or concerning rights in respect of the land or buildings. Nevertheless, financial services supplied at the same time as, before or after the contract of acquisition or rental, in whatever form, are subject to these Regulations.

7.	Computer and related services	84	From 50300000-8 to 50324200-4, From 72100000-6 to 72591000-4 (except 72318000-7 and from 2530000 to 72532000-3)
8.	Research and development services <sup>1</sup>	85	From 73000000-2 to 73300000-5 (except 73200000-4, 73210000-7, 7322000-0)
9	Accounting, auditing and bookkeeping services	862	From 74121000-3 to 74121250-0
10	Market research and public opinion polling services	864	From 74130000-9 to 74133000-0, and 74423100-1, 74423110-4
11	Management consulting services and related services <sup>2</sup>	865, 866	From 73200000-4 to 73220000-0, From 74140000-2 to 74150000-5 (except 74142200-8), and 74420000-9, 74421000-6, 74423000-0, 74423200-2, 74423210-5, 74871000-5, 93620000-0
12	Architectural services; engineering services and integrated engineering services; urban planning and landscape engineering services; related scientific and technical consulting services; technical testing and analysis services	867	From 74200000-1 to 74276400-8, and From 74310000-5 to 74323100-0, and 74874000-6
13	Advertising services	871	From 74400000-3 to 74422000-3 (except 74420000-9 and 74421000-6)
14	Building-cleaning services and property management services	874, 82201 to 82206	From 70300000-4 to 70340000-6, and From 74710000-9 to 74760000-4

<sup>1</sup> Except research and development services other than those where the benefits accrue exclusively to the contracting entity for its use in the conduct of its own affairs on condition that the service supplied is wholly paid for by that entity.

<sup>2</sup> Except arbitration and conciliation services.

15	Publishing and printing services on a fee or contract basis	88442	From 78000000-7 to 78400000-1
16	Sewage and refuse disposal services; sanitation and similar services	94	From 90100000-8 to 90320000-6, and 50190000-3, 50229000-6, 50243000-0

### **PART B: Services within the meaning of Regulation 33**

Category No	Subject	CPC Reference No	CPV Reference No
17	Hotel and restaurant services	64	From 55000000-0 to 55524000-9, and From 93400000-2 to 93411000-2
18	Rail transport services	711	60111000-9, and from 60121000-2 to 60121600-8
19	Water transport services	72	From 61000000-5 to 61530000-9, and From 63370000-3 to 63372000-7
20	Supporting and auxiliary transport services	74	62400000-6, 62440000-8, 62441000-5, 62450000-1, From 63000000-9 to 63600000-5 (except 63370000-3, 63371000-0, 63372000-7), and 74322000-2, 93610000-7
21	Legal services	861	From 74110000-3 to 74114000-1
22	Personnel placement and supply services <sup>1</sup>	872	From 74500000-4 to 74540000-6 (except 74511000-4), and from 95000000-2 to 95140000-5
23	Investigation and security services, except armoured car services	873 (except 87304)	From 74600000-5 to 74620000-1
24	Education and vocational education services	92	From 80100000-5 to 80430000-7
25	Health and social services	93	74511000-4, and from 85000000-9 to 85323000-9 (except 85321000-5 and 85322000-2)

<sup>1</sup> Except employment contracts.

26	Recreational, cultural and sporting services	96	From 74875000-3 to 74875200-5, and From 92000000-1 to 92622000-7 (except 92230000-2)
27	Other services		

## SCHEDULE 7

Regulation 66

### INFORMATION TO BE INCLUDED IN DESIGN CONTEST NOTICE

The following is the information required to be included in a design contest notice:

- (a) the name, address, electronic address, telephone, telex and fax numbers of the contracting entity and of the service from which additional documents may be obtained;
- (b) the description of the project (including nomenclature reference numbers);
- (c) the nature of the contest (i.e. whether it is open or restricted);
- (d) in the case of an open contest, the final date for receiving projects;
- (e) in the case of a restricted contest—
  - (i) the number or range of participants expected;
  - (ii) if applicable, the names of participants already selected;
  - (iii) the criteria for selecting participants;
  - (iv) the final date for receiving requests to participate;
- (f) if applicable, whether participation is reserved to a particular profession;
- (g) the criteria to be applied in the evaluation of projects;
- (h) if applicable, names of the selected members of the jury;
- (i) an indication as to whether the decision of the jury is binding on the entity;
- (j) if applicable, the number and value of prizes to be awarded;
- (k) if applicable, details of all payments made to participants;
- (l) an indication as to whether the prize-winners are to be permitted any follow-up contracts;
- (m) the name and address of the person to whom appeals can be made and, if

relevant, the person who is responsible for mediating disputes arising from the award or performance of the contract, and precise information concerning deadlines for lodging appeals, or, if necessary, the name and address of the person from which the information may be obtained, together with the person's telephone number, fax number and e-mail address (if any);

- (n) the date on which the contracting entity dispatched the notice to the Office for Official Publications of the European Communities and the date on which that Office received the notice;
- (o) any other relevant information.

## **SCHEDULE 8**

Regulation 66

### **INFORMATION TO BE INCLUDED IN THE RESULTS OF DESIGN CONTEST NOTICES**

The following is the information that must be included in a notice notifying the result of a design contest:

- (a) the name and address of the contracting entity, together with its telegraphic address, electronic address, telephone number, telex and fax number (if any);
- (b) the project description (including nomenclature reference numbers);
- (c) the total number of participants;
- (d) the number of participants from outside the State;
- (e) details of the winner of the contest;
- (f) if applicable, the prize or prizes;
- (g) a reference to the design contest notice;
- (h) the name and address of the person to whom appeals can be made and, if relevant, the person who is responsible for mediating disputes arising from the award or performance of the contract, and precise information concerning deadlines for lodging appeals, or, if necessary, the name and address of the person from which the information may be obtained, together with the person's telephone number, fax number and e-mail address (if any);
- (i) the date on which the notice was dispatched to the Office for Official Publications of the European Union and the date on which that Office received the notice;
- (j) any other relevant information.

## SCHEDULE 9

Regulations 3, 43, 44, 45 and 46

### FEATURES CONCERNING PUBLICATION

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

- (1) A contracting entity shall ensure that a notice of the kind specified in Chapter 1 of Part 8 or Regulation 66 is sent to the Office for Official Publications of the European Communities in the format required by the implementing measures adopted by the European Commission in accordance with Article 68 (2) of the Public Utilities' Contracts Directive.<sup>1</sup>
- (2) A contracting entity shall also use the requisite format for publishing a periodic indicative notice on its buyer profile and for the notice relating to that publication.
- (3) A contracting entity may also include on its buyer profile information on ongoing invitations to tender, scheduled purchases, contracts entered into, procedures cancelled or any other related information useful to economic operators, such as a contact point, a telephone and a fax number, a postal address and an e-mail address.

#### 2. **Publication of complementary or additional information**

- (1) A contracting entity is encouraged to publish the contract specifications and the additional documents in their entirety on the Internet.
- (2) The entity's buyer profile may include the following:
  - (a) periodic indicative notices;
  - (b) information on continuing invitations to tender;
  - (c) scheduled purchases;

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<sup>1</sup> Note: The format and procedure for sending notices electronically can be found at the Internet address <http://simap.eu.int>

- (d) contracts entered into;
- (e) procedures cancelled;
- (f) any other useful general information, such as a contact point, a telephone and a fax number, a postal address and an e-mail address.

## SCHEDULE 10

### Regulation 3

#### DEFINITION OF CERTAIN TECHNICAL SPECIFICATIONS

For the purposes of these Regulations—

“common technical specifications” means a technical specification prescribed in accordance with a procedure that is recognised by each of the Member States and has been published in the Official Journal of the European Union;

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

“European technical approval”, in relation to a product, means a favourable technical assessment of the fitness for use of the product, based on the fulfilment of the essential requirements for building works, by means of the inherent characteristics of the product and the defined conditions of application and use;<sup>1</sup>

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

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

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

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

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<sup>1</sup> Note European technical approvals are issued by an approval body designated for this purpose by the relevant Member State.

“technical reference” means any product produced by a European standardisation body, other than official standards, according to procedures adapted to developments in market needs;

“technical specification”—

- (a) in relation to a works contract, means the totality of the technical prescriptions contained in the tender documents, defining the characteristics required of a material, product or supply, that permits a material, a product or a supply to be described in a manner such that it fulfils the use for which it is intended by the relevant contracting entity, and
- (b) in relation to a product supply contract, means a specification in a document defining the required characteristics of the relevant product (such as quality levels, environmental performance levels, design requirements (including accessibility for disabled persons) and conformity assessment standards, performance standards, product use standards, safety standards and dimensions), including requirements relevant to the product as regards—
  - the name under which the product is sold,
  - the use of terminology and symbols,
  - testing and test methods,
  - packaging,
  - marking and labelling,
  - user instructions,
  - production processes and methods,
  - conformity assessment procedures, and
- (c) in relation to a service supply contract, means a specification in a document defining the required characteristics of the relevant service (such as the required quality levels, environmental performance levels, conformity assessment standards, performance standards, safety standards and procedures for assessing conformity with relevant standards).

(2) For the purposes of paragraph (a) of the definition of “technical specifications” in paragraph (1), the characteristics must include—

- (a) levels of environmental performance, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions (including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, and production processes and

methods), and

- (b) rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions that the relevant contracting entity is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts to which they relate.

**SCHEDULE 11**

Regulation 47

**SUMMARY TABLE OF THE TIME-LIMITS PRESCRIBED BY REGULATION 47**

**Open Procedures**

<b>Time-limit for receipt of tenders—without a periodic indicative notice</b>					
<b>Time-limit</b>	<b>Electronic transmission of the notice</b>	<b>Contract documents available electronically</b>	<b>Electronic transmission plus “electronic” contract documents</b>	<b>Effect of paragraph 8 of Regulation 47</b>	<b>Effect of paragraph 8 of Regulation 47 (without electronic transmission)</b>
52 days	45 days	47 days	40 days	none	none

<b>Time-limit for receipt of tenders—with publication of a periodic indicative notice</b>					
<b>Time-limit reduced to</b>	<b>Electronic transmission of the notice</b>	<b>Contract documents available electronically</b>	<b>Electronic transmission plus “electronic” contract documents</b>	<b>Effect of paragraph 8 of Regulation 47</b>	<b>Effect of paragraph 8 of Regulation 47 (without electronic transmission)</b>
36 days	29 days	31 days	24 days	none	none
<b>Minimum time-limit</b>	<b>Electronic transmission of the notice</b>	<b>Contract documents available electronically</b>	<b>Electronic transmission plus “electronic” contract documents</b>	<b>Effect of paragraph 8 of Regulation 47</b>	<b>Effect of paragraph 8 of Regulation 47 (without electronic transmission)</b>
22 days	15 days	17 days	10 days	The period of 10 days is extended to 15 days	The period of 17 days is extended to 22 days

### Restricted and negotiated procedures

<b>Time-limit for the receipt of requests to participate</b>					
General time-limit	Electronic transmission of the notice	Contract documents available electronically	Electronic transmission plus “electronic” contract documents	Effect of paragraphs 9 of Regulation 47	Effect of paragraphs 10 of Regulation 47
37 days	30 days	Not applicable (n.a.)	n.a.	none	n.a.
Minimum time-limit	Electronic transmission of the notice	Contract documents available electronically	Electronic transmission plus “electronic” contract documents	Effect of paragraph 9 of Regulation 47	Effect of paragraph 10 of Regulation 47
22 days	15 days	n.a.	n.a.	none	n.a.
Minimum time-limit	Electronic transmission of the notice	Contract documents available electronically	Electronic transmission plus “electronic” contract documents	Effect of paragraph 9 of Regulation 47	Effect of paragraph 10 of Regulation 47
15 days	8 days	n.a.	n.a.	The period of 8 days is extended to 15 days	n.a.

<b>Time-limit for the receipt of tenders</b>					
A: Time-limit in general	Electronic transmission of the notice	Contract documents available electronically	Electronic transmission plus “electronic” contract documents	Effect of paragraph 9 of Regulation 47	Effect of paragraph 10 of Regulation 47
24 days	n.a.	19 days	n.a.	n.a.	none

<b>B: Minimum time-limit</b>	Electronic transmission of the notice	Contract documents available electronically	Electronic transmission plus “electronic” contract documents	Effect of paragraph 9 of Regulation 47	Effect of paragraph 10 of Regulation 47
10 days	n.a.	5 days	n.a.	n.a.	The period of 5 days is extended to 10 days
<b>C: Time-limit set by agreement</b>	Electronic transmission of the notice	Contract documents available electronically	Electronic transmission plus “electronic” contract documents	Effect of paragraph 9 of Regulation 47	Effect of paragraph 10 of Regulation 47
	n.a.	n.a.	n.a.	n.a.	n.a.

## SCHEDULE 12

Regulation 62

### INTERNATIONAL LABOUR LAW PROVISIONS REFERRED TO IN THE REGULATIONS

- (a) Convention 87 on *Freedom of Association and the Protection of the Right to Organise*.
- (b) Convention 98 on the *Right to Organise and Collective Bargaining*.
- (c) Convention 29 on *Forced Labour*.
- (d) Convention 105 on the *Abolition of Forced Labour*.
- (e) Convention 138 on *Minimum Age*.
- (f) Convention 111 on *Discrimination (Employment and Occupation)*.
- (g) Convention 100 on *Equal Remuneration*.
- (h) Convention 182 on the *Worst Forms of Child Labour*.

## SCHEDULE 13

Regulations 50 and 67

### **REQUIREMENTS RELATING TO DEVICES FOR THE ELECTRONIC RECEIPT OF TENDERS, REQUESTS TO PARTICIPATE, APPLICATIONS FOR QUALIFICATION AS WELL AS PLANS AND PROJECTS IN CONTESTS**

1. A contracting entity may use a device for the electronic receipt of tenders, requests to participate, applications for qualification or plans and projects in a contest only if the device, through technical means and appropriate procedures, complies with the following minimum standards:
  - (a) electronic signatures relating to tenders, requests to participate and applications for qualification and to the forwarding of plans and projects must accord with provisions adopted by the State under Directive 1999/93/EC;<sup>1</sup>
  - (b) the exact time and date of the receipt of tenders, requests to participate, applications for qualification and the submission of plans and projects must be capable of being determined precisely;
  - (c) measures must be in place to ensure that, as far as reasonably practicable, no-one can, before the prescribed time-limit, have access to data transmitted to the entity;
  - (d) if that access prohibition is infringed, measures must be in place to ensure that, as far as reasonably practicable, the infringement is detectable;
  - (e) only authorised persons may set or change the dates for opening data received;
  - (f) during the various stages of the qualification procedure, or the contract award procedure or contest, access to data submitted to the contracting entity must not be possible except through simultaneous action by authorised persons;

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<sup>1</sup> Directive 1999/93/EC of the European Parliament and of the Council on a Community framework for electronic signatures (OJ L 13, 19/1/2000, p. 12).

- (g) simultaneous action by authorised persons must give access to data transmitted only after the latest date for submitting a tender as prescribed by the contracting authority;
  - (h) data received and opened in accordance with these requirements must remain accessible only to authorised persons.
- (2) In this Schedule, “authorised persons” means persons authorised by the contracting entity concerned.

## SCHEDULE 14

### REQUESTS CONCERNING THE APPLICABILITY OF REGULATION 23<sup>1</sup>

#### Definition

1. In this Schedule—

“affiliated undertaking” has the meaning given by Article 19(1) of the Public Utility Contracts Directive;

“applicant”, in relation to a request under Regulation 23 concerning the applicability of sub-article (1) of that Article, means the contracting entity that has made the request;

“independent supplier” means a supplier that is not affiliated to the applicant;

“relevant geographical market” has the meaning given by paragraph 6(3) and (4) of this Schedule;

“relevant product market” has the meaning given by paragraph 6(1) and (2);

“research and development intensity” means research and development expenditure as a proportion of turnover.

Note: Article 23.1 of the Directive provides that “affiliated undertaking” means any undertaking, the annual accounts of which are consolidated with those of the contracting entity in accordance with the requirements of the Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 44(2)(g) of the Treaty on consolidated accounts, or, in the case of entities not subject to that Directive, any undertaking over which the contracting entity may exercise, directly or indirectly, a dominant influence within the meaning of Article 2(1)(b) hereof or which may exercise a dominant influence over the contracting entity or which, in common with the contracting entity, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it.

#### Information requirements for request

2. A request made under Regulation 23 concerning the applicability of sub-article (1) of that Article by a Member State or by a contracting entity must contain the information stipulated in paragraphs 4 to 9.

#### How request is to be sent

3. (1) As far as possible, a request must be sent by electronic means to the following e-mail address: [Markt-C3@cec.eu.int](mailto:Markt-C3@cec.eu.int).

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<sup>1</sup> Reflects provisions of Commission Decision 2005/15/EC of 7 January 2005

- (2) If sending by electronic means is not possible, a request must be sent in triplicate to the following address:

European Commission

Directorate-General for Internal Market and Services

Directorate for Public Procurement Policy

B-1049 Brussels

### **Identity and status of applicant**

4. (1) A request must specify—
- (a) the full name and address of the applicant, and
  - (b) if the applicant is a contracting entity, whether the applicant is a public undertaking or a private undertaking, and
  - (c) if the applicant is a contracting authority, whether the request is made on behalf of the relevant Member State, and if it is, the information requested for each point in this paragraph and paragraphs 5 to 9.
- (2) In relation to each point in paragraphs 7 and 8, the request must provide the requisite information for each of contracting entities that is carrying out the activity covered by the request. However, if there are a large number of those entities, the information may be restricted to those entities holding 10 per cent or more of the relevant geographical market.
- (3) If the information is similar or identical for several contracting entities, the applicant can group them together, on condition that this is specified in the request.
- (4) If the applicant is a contracting entity that carries out one of the activities referred to in the Public Utility Contracts Directive, the provision of the relevant national law stating that contracting entities may make a request under Regulation 23 must be specified.

### **Description of the activity covered by request**

5. (1) The request must contain a description of the activity to which, in the applicant's view, Regulation 23(1) applies.
- (2) If the conditions of Regulation 23(1) regarding the activity concerned do not apply in the State as a whole, the area in which the activity covered by this request is carried out must be specified.

(3) It is only necessary for the applicant to mention the area in which the applicant considers that the conditions of Regulation 23(1) are satisfied.

### **What are relevant markets?**

6. (1) A relevant product market comprises all those products or services, or products and services, that are regarded as interchangeable or substitutable by the consumer, because of their characteristics, their prices and their intended use.
- (2) The following factors are considered to be relevant to the determination of the relevant product market and should be taken into account in the analysis:
- (a) the degree of physical similarity between the relevant products or services;
  - (b) any differences in the end use to which the products are put;
  - (c) differences in price between two products;
  - (d) the cost of switching from one product to another, in the case of two potentially competing products;
  - (e) established or entrenched consumer preferences for one type or category of product;
  - (f) product classifications (classifications maintained by trade associations and similar bodies).
- (3) The relevant geographical market comprises the area in which the relevant contracting entities are involved in the supply of products or services, or products and services, in which the conditions of competition are sufficiently homogeneous and that can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas.
- (4) Factors relevant to the assessment of the relevant geographical market include the following:
- (a) the nature and characteristics of the products or services concerned;
  - (b) the existence of barriers to entry;
  - (c) consumer preferences;
  - (d) appreciable differences in market shares or substantial price differences between neighbouring areas;

- (e) transport costs.
- (5) In the context of subparagraphs (1) to (4), the application must define the relevant product market that, in the applicant's opinion, should form the basis of the analysis (if any) prepared by the European Commission.
- (6) The applicant's reply must—
- (a) give reasons for assumptions or conclusions, and explain how the factors outlined in this paragraph have been taken into account, and
  - (b) in particular, state the specific product or service directly or indirectly affected by the request and identify the categories of products that the applicant considers substitutable in the market definition.
- (7) The request must contain an explanation of the relevant geographical market or markets that in the applicant's opinion should form the basis of the analysis (if any) prepared by the European Commission. The applicant's reply must give reasons for assumptions or conclusions, and explain how the factors outlined in this paragraph have been taken into account. In particular, the reply must specify the geographical area in which the relevant contracting entity is active in the relevant product market, and if the applicant believes the relevant geographical market to be wider than a single Member State, give the reasons for the belief.

#### **Applicability of the legislative acts referred to in Annex XI to Directive 2004/17/EC**

- 7 A request must specify—
- (a) whether the activity to which the request relates is subject to one of the legislative acts referred to in Annex XI to the Public Utility Contracts Directive, and
  - (b) if it does, the relevant law that transposes the European Community legislation concerned.

#### **Information concerning the relevant market and access to that market**

8. (1) This paragraph must be completed irrespective of the reply mentioned in paragraph 6(1).
- (2) The request must state the reasons why the applicant believes that access to the relevant market is not restricted.
- (3) For each relevant market, the request must include the requisite information for each of the previous 3 years, and for each of the following territories:

- (a) the relevant EEA territory (if any);
  - (b) the European Communities as a whole;
  - (c) the EFTA States as a whole;
  - (d) each Member State and each EFTA State where the applicant carries out a prescribed activity;
  - (e) the relevant geographical market if the applicant considers that this market is different.
- (4) The following is the requisite information for the purposes subparagraph (3):
- (a) an estimate of the total size of the market in terms of sales value (expressed in euro) and volume (units),<sup>1</sup> indicating the basis for the calculations and sources used and providing documents, where available, to confirm those calculations;
  - (b) the sales in value and volume, as well as an estimate of the market share held by the applicant;
  - (c) an estimate of the market share in value (and, where appropriate, volume) of all competitors (including importers) having at least 10 per cent of the relevant geographical market;
  - (d) an estimate of the total value, volume and source of imports from outside the EEA territory concerned;
  - (e) the share of those imports that is attributable to the applicant;
  - (f) an estimate of the extent to which any quotas, tariffs and non-tariff barriers to trade constitute barriers to those imports;
  - (g) an estimate of the extent to which transportation and other costs affect those imports;
  - (h) the extent to which trade between EEA States is hindered by—
    - (i) transportation and other costs, and
    - (ii) other non-tariff barriers to trade;

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<sup>1</sup> The value and volume of a market should reflect production, plus imports, less exports for the geographical areas in question.

- (i) the manner in which the applicant produces and sells the relevant products or services (such as, whether they are manufactured locally, or are sold through local distribution networks);
- (j) a comparison of the applicant's price levels in each Member State and each EFTA State and a similar comparison of price levels between the Member States, the EFTA States and other areas where those products are produced (for example, Eastern Europe, the United States of America, Japan, or any other relevant area);
- (k) the nature and extent of the vertical integration of the applicant compared with the largest competitors;
- (l) any assets or infrastructure used jointly with other contracting entities or used to carry out more than one activity covered by the Public Utility Contracts Directive and, if use of those assets or infrastructures is subject to special conditions (such as universal service obligations or special rights), details of that use;
- (m) whether, during the immediately preceding 5 years, there has been any significant entry to the geographical market concerned for the relevant products and if there has the name and address of the undertaking concerned and its telephone number and fax number (if available), as well as the appropriate contact person, and an estimate of its current market share;
- (n) whether, in the opinion of the applicant, there exist any undertakings (including those at present operating only in markets outside the European Communities or outside the EEA) that could enter the market, and if there are—
  - (i) the undertakings concerned by reference to their respective names, addresses, telephone numbers, fax numbers and appropriate contact persons, and
  - (ii) an explanation stating the basis for that opinion, and
  - (iii) give an estimate of the time within which the market entry is likely to occur;
- (o) the various factors influencing entry into the relevant markets, from both a geographical and product viewpoint, taking into account, if relevant—

- (i) the total costs of entry (including the costs of research and development, essential distribution systems, promotion, advertising, after-sales service) on an equivalent scale to that of a significant viable competitor, indicating the market share of such a competitor, and
  - (ii) any legal or regulatory barriers to entry, such as a requirement to obtain official authorisation or to comply with relevant standards, and
  - (iii) any restrictions created by the existence of patents, know-how and other intellectual property rights in the relevant markets and any restrictions created by the licensing of those rights, and
  - (iv) the extent to which the applicant is a licensee or licensor of patents, know-how and other rights in those markets, and
  - (v) the importance of economies of scale for the production of products in those markets, and
  - (vi) the extent to which sources of supply (such as raw materials) are available;
- (p) an account of the importance of research and development in the ability of an undertaking operating in the relevant market to compete in the long term and an explanation of the nature of the research and development carried out by the applicant in the relevant markets, taking into account, if relevant—
- (i) trends and intensity of research and development in the relevant markets and for the applicant, and
  - (ii) technological developments in those markets over an appropriate time period (including developments in particular products or services, production processes and distribution systems), and
  - (iii) the major innovations that have been made in those markets and the undertakings responsible for those innovations, and
  - (iv) the cycle of innovation in those markets and where the parties are placed in that cycle;
- (q) the extent to which co-operation agreements (horizontal or vertical) exist in the relevant markets;

- (r) details of the most important co-operation agreements that the applicant has entered into in the relevant markets (such as research and development, licensing, joint production, specialisation, distribution, long-term supply and exchange of information agreements).
- (5) The applicant shall, by producing available relevant documentation, confirm the calculation referred to in subparagraph (4)(c) and shall provide the names, addresses, telephone numbers, fax numbers and appropriate contact persons of the competitors so referred to.

### **Exposure to competition**

9. (1) According to Article 30(2) of the Public Utility Contracts Directive, the question of whether an activity is directly exposed to competition must be decided on the basis of criteria that are in conformity with the Rome Treaty provisions on competition (such as the characteristics of the relevant product or service, the existence of an alternative supply of that product or service, the prices, and the actual or potential presence of more than one supplier of that product or service).

(2) The request must—

- (a) include an explanation as to why the applicant considers that the activity to which the request relates is fully exposed to competition in the relevant product market on the geographical market concerned, and
- (b) in particular—
  - (i) identify the five largest independent suppliers<sup>1</sup> to the applicant and their individual shares of the applicant's purchases of raw materials or goods used to produce the relevant products, and
  - (ii) specify the names, addresses, telephone numbers, fax numbers and appropriate contact persons of those suppliers, and
  - (iii) identify the undertakings affiliated to the applicant and their individual shares of the applicant's purchases of raw materials or goods used to produce the relevant products;

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<sup>1</sup> Independent suppliers are suppliers who are not affiliated to the applicant. For the definition of affiliated undertakings, see note at paragraph 1 of this Schedule.

- (iv) the names, addresses, telephone numbers, fax numbers and appropriate contact persons of those undertakings, and
- (c) describe the distribution channels and after-sales service networks that exist in the relevant markets, taking into account, if relevant—
  - (i) the existing distribution systems and their importance in these markets, and
  - (ii) the extent to which distribution is performed by third parties or by undertakings affiliated to the applicant, and
  - (ii) the existence (or otherwise) of after-sales service networks (for example, maintenance and repair) and their importance in those markets, and
  - (iii) the extent to which those services are performed by third parties or by undertakings affiliated to the applicant, and
- (d) if relevant, provide an estimate of the total Community-wide and EFTA-wide capacity for the immediately preceding 3 years and, specifying during that period, the capacity of the applicant and the rate of the applicant's capacity utilisation, and
- (e) specify any other supply-side considerations that the applicant believes to be relevant, and
- (f) identify the five largest independent customers of the applicant in the relevant market and their individual shares of total sales of the relevant products by the applicant, and specify the names, addresses, telephone numbers, fax numbers and appropriate contact persons of each of those customers, and
- (g) an explanation of demand in terms of—
  - (i) the different phases of the markets, for example, take-off, expansion, maturity and decline, and a forecast of the growth rate of demand, and
  - (ii) the importance of customer preferences, in terms of brand loyalty, product differentiation and the provision of a full range of products, and

- (iii) the degree of concentration or dispersion of demand, and
  - (iv) segmentation of customers into different groups with a description of the “typical customer” of each group, and
  - (v) the importance of exclusive distribution contracts and other types of long-term contracts, and
  - (vi) the extent to which contracting authorities, State undertakings or similar bodies are important as a source of demand, and
- (h) provide estimates of the degree of consumer activity in terms of switching suppliers and renegotiating contracts during the immediately preceding 5 years, and the sources on which the estimates are based, and if available, the relevant documentation to confirm the estimates.

GIVEN under my Official Seal,

January 2007.

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Minister for Finance.

### ***Explanatory Note***

*(This note, and the Correlation Table following, are not part of the Instrument and do not purport to be a legal interpretation).*

*These Regulations implement (i) EU Directive 2004/17/EC which revises earlier Directives governing the procedures for awarding works, supplies and services contracts by contracting entities operating in the water, energy, transport and postal services sectors and (ii) EU Directive 2005/51/EC (in regard to contracting entities covered by Directive 2004/17/EC) which relates to standard notices to be used when publishing notices in the Official Journal of the EU.*

*National Public Procurement Policy Unit*

**Correlation Table - European Communities (Award of Contracts by Utility Undertakings)  
Regulations 2007 and Directive 2004/17/EC**

<b>Regulation</b>	<b>Title</b>	<b>Corresponding Directive Article</b>
1	<i>Citation and commencement</i>	<i>No Equivalent</i>
2	<i>Object of these Regulations</i>	<i>No Equivalent</i>
3	<i>Interpretation</i>	<i>Article 1 &amp; 2</i>
4	<i>Application of these Regulations</i>	<i>No Equivalent</i>
5	<i>Procurement procedures for suppliers of gas, heat and electricity services</i>	<i>Article 3</i>
6	<i>Procurement procedures for suppliers of water supply services</i>	<i>Article 4</i>
7	<i>Procurement procedures for suppliers of transport services</i>	<i>Article 5</i>
8	<i>Procurement procedures for suppliers of postal services</i>	<i>Article 6</i>
9	<i>Procurement procedures for entities engaged in exploration for, or extraction of, oil, gas, coal or other solid fuels</i>	<i>Article 7</i>
10	<i>Procurement procedures of port and airport operators</i>	<i>Article 7</i>
11	<i>Contracts covering several activities</i>	<i>Article 9</i>
12	<i>Threshold amounts for contracts</i>	<i>Article 16</i>
13	<i>Methods for calculating the estimated value of contracts, framework agreements and dynamic purchasing systems</i>	<i>Article 17</i>
14	<i>Regulations not to apply to certain works and service concessions</i>	<i>Article 18</i>
15	<i>Contracts awarded for purposes of resale or lease to third parties</i>	<i>Article 19</i>
16	<i>Contracts awarded for purpose other than carrying out a prescribed activity or for carrying out a prescribed activity in a third country</i>	<i>Article 20</i>
17	<i>Contracts that are secret or require special security measures</i>	<i>Article 21</i>
18	<i>Contracts awarded under international rules</i>	<i>Article 22</i>
19	<i>Contracts awarded to an affiliated undertaking, to a joint venture or to a contracting entity forming part of a joint venture</i>	<i>Article 23</i>
20	<i>Contracts relating to certain services excluded from the scope of these Regulations</i>	<i>Article 24</i>
21	<i>Service supply contracts awarded on the basis of an exclusive right</i>	<i>Article 25</i>
22	<i>Contracts awarded by certain contracting entities for the purchase of water and for the supply of energy or of fuels for the production of energy</i>	<i>Article 26</i>
23	<i>Procurement procedures not to be subject to these</i>	<i>Article 30</i>

	<i>Regulations when activity is exposed to competition</i>	
24	<i>Principles for awarding contracts</i>	<i>Article 10</i>
25	<i>Economic operators</i>	<i>Article 11</i>
26	<i>Conditions relating to agreements concluded within the World Trade Organisation</i>	<i>Article 12</i>
27	<i>Contracting entities not to disclose confidential information</i>	<i>Article 13</i>
28	<i>Framework agreements</i>	<i>Article 14</i>
29	<i>Dynamic purchasing systems</i>	<i>Article 15</i>
30	<i>Contracting entity may reserve award of contracts to persons employed in sheltered workshops</i>	<i>Article 28</i>
31	<i>Contracts and framework agreements awarded by central purchasing bodies</i>	<i>Article 29</i>
32	<i>Service supply contracts listed in Part A of Schedule 6</i>	<i>Article 31</i>
33	<i>Service supply contracts listed in Part B of Schedule 6</i>	<i>Article 32</i>
34	<i>Mixed service supply contracts for services listed in both Parts A and B of Schedule 6</i>	<i>Article 33</i>
35	<i>Technical specifications</i>	<i>Article 34</i>
36	<i>Formulation of technical specifications</i>	<i>Article 34</i>
37	<i>Communication of technical specifications</i>	<i>Article 35</i>
38	<i>Tenderers may submit variants</i>	<i>Article 36</i>
39	<i>Contracting entity can ask tenderers to specify their intentions with respect to subcontracting</i>	<i>Article 37</i>
40	<i>Conditions for performance of contracts</i>	<i>Article 38</i>
41	<i>Obligations relating to taxes, environmental protection, employment protection provisions and working conditions</i>	<i>Article 39</i>
42	<i>Use of open, restricted and negotiated procedures</i>	<i>Article 40</i>
43	<i>Periodic indicative notices and notices on the existence of a system of qualification</i>	<i>Article 41</i>
44	<i>How calls for competition can be made</i>	<i>Article 42</i>
45	<i>Contract award notices</i>	<i>Article 43</i>
46	<i>Form and manner in which notices are to be published</i>	<i>Article 44</i>
47	<i>Deadline for the receipt of requests to participate and for the receipt of tenders</i>	<i>Article 45</i>
48	<i>Open procedure: contract specifications and supporting documents to be provided on request</i>	<i>Article 46</i>
49	<i>Invitations to submit a tender or to negotiate</i>	<i>Article 47</i>
50	<i>Rules applicable to communication</i>	<i>Article 48</i>
51	<i>Information to be given to applicants for qualification, candidates and tenderers</i>	<i>Article 49</i>
52	<i>Information to be stored concerning awards</i>	<i>Article 50</i>
53	<i>General provisions for conducting restricted procedure or negotiated procedure</i>	<i>Article 51</i>
54	<i>Mutual recognition of administrative, technical or financial conditions, and certificates, tests and</i>	<i>Article 52</i>

	<i>evidence</i>	
55	<i>Establishment and operation of qualification systems by contracting entities</i>	<i>Article 53</i>
56	<i>Selection to be in accord with objective rules and criteria</i>	<i>Article 54</i>
57	<i>Criteria for awarding regulated contract</i>	<i>Article 55</i>
58	<i>Conduct of electronic auctions</i>	<i>Article 56</i>
59	<i>Procedure for closing an electronic auction</i>	<i>Article 56</i>
60	<i>Action to be taken by contracting entity when tenders are abnormally low</i>	<i>Article 57</i>
61	<i>Tenders comprising products originating in third countries</i>	<i>Article 58</i>
62	<i>Responsibility of Minister to inform European Commission of difficulties with third countries</i>	<i>Article 59</i>
63	<i>Design contest procedures</i>	<i>Article 61</i>
64	<i>Design contests excluded</i>	<i>Article 62</i>
65	<i>Responsibilities of contracting entity in organising a design contest</i>	<i>Article 60</i>
66	<i>Rules on advertising and transparency</i>	<i>Article 63</i>
67	<i>Means of communication applicable to design contests</i>	<i>Article 64</i>
68	<i>Rules concerning organisation of design contests, selection of participants and the jury</i>	<i>Article 65</i>
69	<i>Decisions of the jury</i>	<i>Article 66</i>
70	<i>Minister's responsibilities under these Regulations</i>	<i>Article 67</i>
71	<i>Revision of the thresholds</i>	<i>Article 69</i>
72	<i>Amendments</i>	<i>Article 70</i>
73	<i>Compliance mechanisms</i>	<i>Article 72</i>
74	<i>Revocation of existing Regulations</i>	<i>Article 73</i>
75	<i>Transitional arrangement</i>	<i>Article 73</i>

<b>Schedule</b>	<b>Title</b>	<b>Equivalent Directive Annex</b>
1	<i>List of activities for works contracts</i>	<i>Annex XII</i>
2	<i>Information to be included in contract notice</i>	<i>Annex XIII</i>
3	<i>Notices on the existence of a qualification system</i>	<i>Annex XIV</i>
4	<i>Periodic indicative notices</i>	<i>Annex XVA</i>
5	<i>Information to be included in the contract award notice</i>	<i>Annex XVI</i>
6	<i>Services</i>	<i>Annex XVII</i>
7	<i>Information to be included in design contest notice</i>	<i>Annex XVIII</i>
8	<i>Information to be included in the results of design contest notices</i>	<i>Annex XIX</i>
9	<i>Features concerning publication</i>	<i>Annex XX</i>
10	<i>Definition of certain technical specifications</i>	<i>Annex XXI</i>

11	<i>Summary table of the time-limits prescribed by Regulation 47</i>	<i>Annex XXII</i>
12	<i>International Labour Law provisions referred to in the Regulations</i>	<i>Annex XXIII</i>
13	<i>Requirements relating to devices for the electronic receipt of tenders, requests to participate, applications for qualification as well as plans and projects in contests</i>	<i>Annex XXIV</i>
14	<i>Requests concerning exemptions under Regulation 23</i>	<i>Procedure for establishing if activities are exempt on grounds of adequate competition or unrestricted market access. (Commission Decision 2005/15/EC of 7 January 2005).</i>