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Rights of Tenderers and Contractors under Saudi Public Procurement Contract Regulations: A Comparative Study with England and Wales

By
Ibrahim Mohammad Alhudaithy

B.A (Law) King Saud University, Riyadh
LL.M. Case Western Reserve University, Cleveland Ohio, USA

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A Thesis Submitted in Fulfilment of the Requirements for the Degree
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1 1 OCT 2006

Table of Contents

The Purchasing Law	2
Implementing Regulations to the Purchasing Law	9
The public Works Contracts Regulations	16
The public Services Contracts Regulations	57
The public Services Contracts Regulations	100



The Purchasing Law

Royal Decree No M/14 of 7.4.1397 AH (1979)

The Purchasing Law

Procurement of Government Purchases Law

Enacted by Royal decree No M/14 of 7.4.1397 AH; and the council of ministers' resolution No 423, dated 25.3.1397 AH.

Royal Decree No M/14 of 7.4.1397 AH

In the name of his majesty the king:

We, Fahd ben abdil Aziz Al Saud,

Vice regent of the Saudi Arabian Kingdom,

Having perused Royal order No A/53 dated 22.2.1397 AH, articles 19 and 20 of the council of ministers' law, enacted by Royal decree No 38 of 22.10.1377 AH; and the Auctions and Tenders law enacted by Royal Decree No 7/6 of 24.2.1386 AH; and the council of ministers' resolution NO423 of 25.3.1397 AH,

Have decreed the following:

First. The law for procurement of government purchases and execution of its projects and work in accordance with the text hereto attached is hereby approved and shall operate as of the date of promulgation in the official Gazette.

Second. The deputy premier and the minister of finance and national economy shall implement this decree of ours.

Order No 423, dated 25.3.1397 AH

The council of ministers:

Having perused the bill of the law of procurement of government purchases and execution of its projects and works;

Order the following:

- 1- the approval of the procurement of government purchases and execution of its projects and works law according to the hereto attached form;
- 2- A draft resolution of a Royal Decree has been prepared, copy of which is attached hereto.

Council of ministers
Deputy Chairman

Article 1

The following basic rules shall be observed when procuring government purchases and executing its projects works:

- (a) All persons and establishments who wish to deal with the government shall, if they satisfy the conditions qualifying them for such dealings, have equality of opportunity and be treated equally.
- (b) Full and consolidated information about the required petitioners; a specific date shall be fixed for tendering.
- (c) In order to secure its purchases and execute its projects and works, the government shall deal with individual and establishments who are licensed to carry on the work within the scope of which fall the required works or purchases in conformity with the laws and established rules.
- (d) Saudi individuals and establishments who are licensed to carry on work according to the law and established rules shall have priority in dealing with the government; after them establishments formed by Saudi nationals, and non-Saudi nationals when the capital holding of Saudis constitute 50 per cent of more, shall have priority.
- (e) Products of Saudi origin shall have preference over their foreign counterparts if they satisfy the purpose for which they are required, even though their specifications be inferior to the foreign counterparts. When such products are available, they may be purchased direct if produced by the one factory; but if such products are produced by

a number of factories, the factories shall compete for the order, provided the Government shall in both cases establish a suitable purchase price.

No products shall be deemed of Saudi origin unless they have been produced by an industrial establishment which is licensed to operate in the Kingdom and provided such establishment is able to produce a certificate from the Ministry of industry and Electricity that local raw materials or local labour have contributed in a reasonable percentage in the production of such products.

- (f) The purchase or execution of the works shall be for a fair price which is not higher than the prevailing price; in practice, the method of obtaining this fair price shall be arrived at through a competition to be carried out according to the law among those engaged in the relevant field of activity.
- (g) The acceptance of tenders and the conclusion of contracts pursuant thereto shall be only according to the conditions and specification laid down.

Article 2

- (a) Competitors shall be notified either by advertisement inserted at least twice in the official Gazette or by official letter sent to those who are invited to the tender, if the tender is limited to a number of them.
- (b) The administrative authority may invite tenders in two stages:
The first stage: notice shall be sent to persons engaged in the relevant activity who wish to tender for the purchases or the execution of the works required so that eligible bidders may be selected from their number.
The second stage: said authority may require such persons to submit their tenders and shall select those who will be called to bid pursuant to whatever information is available to the authority, if the work falls within its jurisdiction; but when the work is outside its jurisdiction, the invitation shall be made in conformity with the nomination of the government authority concerned; if such information is not available to a government department, assistance may be sought from a specialist establishment or from an international body.
- (c) The notice for tender shall contain a date and place for submission of sealed tenders; tenders shall be submitted in sealed envelopes which may not be opened except on the date fixed for that purpose, save when this law provides that an unsealed tender may be submitted.
- (d) A preliminary deposit shall be produced with the tender which shall be between 1 and 2 per cent of the value of the tenders; no such deposit need be produced in the case of a direct purchase nor in the case of unsealed tenders of a direct purchase nor in the case of unsealed tenders which are referred to hereinafter.
- (e) Sealed tenders shall be opened by a committee which is convened on the date fixed for the opening of the envelopes; the prices quoted in the tenders shall be read out to the tenderers present or their representatives; the least three members shall be presided over by an official whose classification shall not be below the tenth grade.
- (f) After submission of the tenders, tenderers may not increase or decrease the quoted price other than in cases in which negotiation are permissible hereunder.

Method of procurement of purchases and execution of works

Article 3

purchases shall be made and works executed as follow:

- (a) construction works
not less than five contractors, who have been officially classified as of the category for which the work is required or who are duly authorised to work in the kingdom according to the established rules, shall be invited to tender within not less than one month; the invitation to tender shall contain the date and time for opening the tenders.
- (b) the various equipment, such as the various types of automobiles including those which carry passengers, trucks, dumpers and motorcars designed for specific purposes i.e. fire-engines and dust-carts, heavy mobile and fixed plant, such as

agricultural and road equipment and cranes; electrical equipment, such as generators, transformers, water-pumps, wires and cables: by selecting three acceptable kinds which satisfy the required need; Saudi agents who hold agencies for such equipment shall, after being notified of the required specification, be invited to submit, within three days at least and twenty days at most, unsealed tenders as specified by the administrative authority. If there is no appointed agent in the kingdom for such equipment, the purchase may be made direct from the manufacturer.

- (c) Office equipment comprising photographic material, type writers, calculators, filing cabinets, office furniture curtains, carpets, guillotines (punches), staplers, printed and other papers, and internal decoration work shall be purchased direct from dealers engaged in such business, if the value thereof does not exceed 1,000,000 (one million) Riyals; if the value exceeds that figure, at least three of the dealers who are engaged in such business shall be invited to submit unsealed tenders.
- (d) Operation and maintenance work, whether for electrical or mechanical equipment or for buildings; at least three specialist contractors licensed to carry out such works shall be invited to submit their sealed tenders within a time limit to be fixed by the administrative authority.
- (e) Supply of food, including cooked food and foodstuffs irrespective of whether the service is confined only to the supply of the rations or covers service also: by inviting at least three Saudi specialised contractors to submit sealed tenders within time fixed by the administrative authority.
- (f) Drilling wells: by inviting at least three specialised and licensed contractors to submit sealed tenders within the time fixed by the administrative authority.
- (g) Spare parts: by purchase direct from the appointed agent or from others who deal in spare parts, irrespective of the value thereof.
- (h) Any type of purchase and execution of works referred to in the preceding paragraphs, as well as others: by direct negotiation, if the value of procuring the same does not exceed 1,000,000 (one million) Riyals; the minister himself or the head of the autonomous department shall have authority to negotiate, which authority may not be delegated to another save when the amount does not exceed 500,000 (five hundred thousand) Riyals.
- (i) Consultancy work, studies, preparation of specifications and supervision of the execution thereof: by direct negotiation where the value does not exceed 1,000,000 (one million) Riyals; for a sum in excess of this value, three consultancy firms at least shall be invited to submit tenders within the time limit fixed by the administrative authority; the minister concerned shall select the best of them; the agreement for preparing studies and designs shall be made against payment of a lump sum, but the supervisory work may be made against payment of a lump sum, periodic payments of a certain specified percentage of the work value.
- (j) Materials which have the price fixed officially shall be procured by direct negotiation provided the value thereof does not exceed the official price.
- (k) Procuring medicaments: by inviting at least three Saudi agents who represent international companies specialising in the production of pharmaceuticals; such international companies shall be nominated by a technical committee appointed by the minister; the committee shall select the companies from a list prepared every year by the minister of health; said committee shall seek assistance from an international body to obtain technical practical data about such companies.
- (l) Weapons shall be procured by direct agreement with the companies producing them; selection of the companies shall be subject to the prior approval of the chairman of the council of ministers.
- (m) Big projects comprising the execution of civil, mechanical and electrical works, which call for a high standard of execution, the use of patents of inventions or

scientific processes: at least three specialist international companies shall be invited to tender in two stages as provided for in article 2(b) hereof.

- (n) Any item not expressly mentioned in this article, which may be required by the administrative authority, may be procured by inviting at least three competitors to submit their tenders so that the most suitable may be selected.

Article 4

In its dealings the administrative authority shall offer the opportunity to tender to the highest possible number of qualified persons engaged in the relevant activities so that its dealings shall not be confined to specific persons or firms.

Rules for Deciding Tenders

Article 5

- (a) In each Ministry or Department one or more three-member committees shall be formed to examine the tenders and make their recommendation for the award of the most suitable tenderer; the Committee shall be chaired by an official whose grade shall not be under the twelfth grade; in making the recommendation the Committee shall seek the assistance of specialist technicians who shall submit their reports to the Committee.
- (b) If the Committee is formed in other than the Head Office of the Ministry of Department, the grade of the chairman may be below the twelfth grade.
- (c) The Committee shall adopt its recommendations in the presence of all the members; if any member is absent, the official who has been delegated to perform his duties shall substitute for him; if selection of the committee member was made on account of his personality, he shall be replaced by a member to be appointed by the Minister; the Committee's resolutions shall be passed by a majority vote of the members; the resolutions shall be passed by a majority vote of the members; the resolutions shall be written in the minutes of the meeting and the opinion of the dissenters (if any) shall be recorded, together with the reasons for the differing opinions so that these can be placed before the person vested with the power to decide in respect of the recommendation.
- (d) In the following cases, the Committee may negotiate with the lowest tenderer if confirming to the terms and specifications or with any other bidder:
 - (1) When the prices quoted in the tender are manifestly higher than those prevailing in the market, the Committee shall require the lowest tenderer to reduce his price; if he refuses to respond or if he does not reduce his price to reasonable level, the Committee may negotiate with the next lowest tenderer or it may inform all tenderers accordingly and require them to reduce their tenders.
 - (2) If the tender contains one or more qualifications, negotiations shall be conducted with such tenderer to require him to cancel all or some of the qualifications so as to reach an acceptable tender; if he refuses to do so or insists on keeping all or some of such qualifications, which makes the tender unacceptable, the Committee may negotiate with the next lowest tenderer and so on until the Committee is able to select the best tender.
- (e) Bids or tenders may be cancelled when the need ceases or when it is revealed to the Committee that the price, terms or specifications are not suitable and it is unlikely to achieve any results if negotiations are conducted in accordance with the formalities of the preceding paragraph.

Authority to make decisions on tenders and contracts

Article six

The authority to make decisions regarding purchases and the execution of works, the value of which exceed 3,000,000 (three million) Riyals, shall be vested in the Minister or the Head of the Autonomous Department, as the case may be; when the value is less, such authority shall be vested in the Under-Secretary of the Ministry or any one acting on his behalf; where the value is less said authority may be vested in a responsible person provided that the authority shall be commensurate with the responsibility of that person.

Conditions of the contract

Article 7

Guarantees

- (a) A person who enters into a contract with the government shall produce a final deposit (security) of five percent of the contract value.
- (b) No final deposit shall be required when the contracts relate to consultancy work, direct purchase or the purchase of spare parts.
- (c) The final deposit for operation and maintenance contracts may be reduced commensurately with the gradual execution of the works, provided that the sum shall not go below the deposit required for the remaining works of the contract.
- (d) The deposit shall conform to any of the forms provided for in article 2 (d); if the security is in the form of an under taking by an insurance company, the value thereof shall not be less than 25 per cent of the contract value.

Article 8

Payment of the consideration

- (a) The Government Authority may, on signature of the contract, make an advance payment to the contractor against a letter of credit equal to such payment, which advance shall be deducted by instalments commensurate with the work as it is completed.
- (b) The contractor's remaining entitlement is payable to him in instalments commensurate with the progress of the work, provided the sum paid to the contractor does not exceed the value of the work completed; the payment of the percentage of the value shall be withheld until the purchases are supplied or until the provisional delivery of the works and the production of a certificate from the Department of *Zakat* and Income Tax testifying that the contractor has paid all his dues; the contract shall stipulate the dates and method of the payments to the contractor.

Article 9

Delay Fine

- (a) A government contractor shall be subject to a delay fine totalling not more than 4 per cent of the value of the supply contract or 10 per cent of the value of the public works contract, operation and maintenance contracts or contracts of consultancy, in accordance with a particular set forth in the contract and the implementing regulations, save when the delay is due to a *Force Majeure* an accident or is beyond the control of the government contractor.
- (b) The Minister or Head of the Department may extend the term of the contract if the delay was the result of:
 1. A requirement that the government contract carry out new works, if the order to carry them out was issued at a time when such works could not be executed during the remaining period of the contract.
 2. An order made by the contracting authority to stop the work for reasons not related to the government contractor.
- (c) If the delay is due to causes other than those mentioned in the preceding paragraph, no exemption from the delay fine shall be permitted except by agreement with the Ministry of Finance.

Article 10

Standard of Government Contracts

Upon the mention of the Ministry of Finance, the Council of Ministers shall issue an order setting down standard of government contracts of public works, supply and maintenance, until the issuance of such standards the contracts concluded by the contracting authority shall contain provisions to safeguard the rights of government and the contractor and to remedy all disputes that may arise.

Article 11

Any movables in excess of the requirements of the contracting authority may, if not needed by other authorities, be sold, after evaluation by a committee made up of at least three officials; such committee shall base its evaluation on the prevailing market prices, provided that the sale price shall not be lower than the assessed by the committee; if the value of such movables exceeds 100,000 Riyals, the sale be by public action in conformity with the proceedings laid down in the Implementing Regulations hereto.

Government officers may not buy any items sold by the government save when the sale is by public auction and the items purchased are for the personal use of the buyer.

Article 12

When through necessity it becomes necessary to deviate from a number of the provisions hereof the contracting authority shall refer the matter to a committee consisting of four ministers, one of whom shall be the Minister of Finance and another shall be the Minister concerned; they shall be nominated by an order issued by the Council of Ministers. The recommendation of the committee shall be passed to the Prime Minister or his Deputy in order that a decision may be made.

Article 13

The Minister of Finance shall issue the Implementing Regulations hereto.

Article 14

That which is inconsistent herewith is hereby repealed.

**Implementing Regulations to
The Procurement of Government Purchases and
Execution of its Projects and Works Law
No. 2131.17
Date 5.5.1379 AH (1979)**

**Implementing Regulations to
The Procurement of Government Purchases and
Execution of its Projects and Works Law**

No. 2131.17
Date 5.5.1379 AH (1979)

The Minister of Finance and National Economy:

Having perused Royal Decree No M/14 of 7.4.1397 AH, in which the Royal Assent is given to the 'Procurement of Government Purchases and Execution of its Projects and Works' Law;

Pursuant to article 13 of the foregoing Law, which provides that, the Ministry of Finance and National Economy shall issue the Implementing Regulations to said law;

Pursuant to the latter of his Excellency, the President of the Prime Minister's Cabinet, No. 7.D.9249 of 11.4.1397 AH to which is attached the Bill of the Implementing Regulations;

Orders the following:

1. The attached text of the Implementing Regulations to the 'Procurement of Government Purchases and the Execution of its Projects and Works' Law is hereby approved.
2. This Order shall operate on the date of its enactment.

Moh'd Abal Khail

Minister of Finance and National Economy

Article 1. -(a) Before inviting tenders for the supply of items and farming works or other items which it wishes to procure, the Administrative Authority shall prepare detailed and full specifications for the same, provided that they shall not refer to a type, description or number quoted in the producers' catalogues nor shall they mention any specific marks or prepare specifications conforming to specific marks.

(b) When preparing specifications, the Administrative Authorities shall give preference to products of the national industries if they satisfy the required need.

Article 2. – The specifications and conditions pertaining to the procurement may provide for divisibility of the tenders if such divisibility secures an interest for the Administrative Authority; supply may be per a sample specified by the Administrative Authority or submitted by the tenderer.

Article 3. – The advertisement or notice inviting tenders shall state the specified time and place for tendering, the opening of the tenders and the date for deciding the tenders; the date fixed for opening the tenders may be the latest date for tendering.

Article 4. – Notices and advertisements inviting tenders shall be inserted at least twice in the Official letter to the persons who are invited to tender; the first notice or advertisement shall appear at least one month prior to the date fixed for tendering save when the law provides otherwise.

Article 5. – Tenders shall be sent by registered mail or delivered by hand to the Administrative Authority who invited the tenders against a receipt showing the date and the time of delivery. The tender shall be given on the ad hoc proforma delivered to the tenderer by the Administrative Authority against payment of the value thereof; the tender shall be submitted in an envelope sealed with wax.

Article 6. – Tenders that are delivered to or received by the Administrative authority after the date for opening the tenders shall not be accepted.

Article 7. – The following conditions shall be observed when preparing a tender:

- (a) The prices shall be written in ink and expressed in Saudi currency both in figures and letters, save when the advertised conditions and specifications allow for the price to be expressed in another currency;
- (b) The price list shall indicate whether the item to be supplied is manufactured or produced in the Kingdom, or in any of the Arab League Countries or in another foreign country;
- (c) The tenderer shall sign the tender; where the tenderer is a company or a corporate body, the person duly authorised to represent the company or corporate body shall sign the tender.
- (d) No erasures or rubbing out are allowed in the price list; any correction to prices or amendment to conditions shall be re-written in figures and letters and signed.
- (e) The Administrative Authority may check the individual entries and totals of the price list submitted and may make any material corrections to the tender as may be necessary; if there is a difference between the price shown in figures and the price in words, the price expressed in words shall prevail; if there is a difference between the price of the unit and the total price thereof, the unit price shall prevail;
- (f) The categories stated in the price list shall include and cover all expenses and commitments of each individual item of whatever kind, which the contractor shall have to bear;
- (g) A tender based on reducing a percent or a specified amount from the lowest tender shall be disregarded.

Article 8. – Before submitting his tender, it shall be obligatory for a contractor tendering for work, maintenance works and operation works, to familiarise himself with the nature of the work and the local conditions and obtain sufficient particulars about all matters which may in any way effect his tender and the risks of his commitments; the Administrative Authority shall, when requested, supply all relevant particulars which it may have at its disposal before the date fixed for the submission of the tender.

Article 9. – A tender shall attach to his tender one of the securities provided for in Article 2(d) of the law, which shall remain valid until the date set for awarding the tenders.

Article 10. – A tender shall remain valid and irrevocable until the date set for awarding the tender; the Administrative Authority may require the tenderer to extend the validity thereof.

A tender shall be deemed bound by this tender if on the expiry of the date of the deposit he has not requested that his tender be withdrawn and the deposit returned.

If a tenderer withdraws his tender before a decision is made on the tenders, the Administrative Authority may without serving notice on him or taking any other action impound the provisional deposit supplied by him.

Article 11. – The minister or the head of the Autonomous Department shall issue an order setting up the formation of the Committee for Opening Envelopes and the Committee for Examining Tender, in conformity with the provisions of Articles 2 (e) and 5 (a) of the Law, provided that a substitute member shall be appointed to act for an absent member, who has been selected for his personality, to be on the Committee.

Article 12. – On assuming their duties, the Committee formed for opening the tenders shall ascertain that the envelopes containing the tenders are intact and this fact shall be included, together with the number of tenders submitted, in the minutes; the Committee shall allot a serial number for every tender in the form of a fraction, where the figure shall represent the tender number and the decimal the number and the decimal the number of the tenders received; the chairman or any member of the Committee shall read aloud the name of the tenderer and the tender price so that other tenderers or their representatives who are present may hear the same; the chairman and members of the Committee shall sign on the tender papers and the minutes of its proceedings.

Article 13. – The Committee formed for opening the tenders shall sign on the samples or on catalogues submitted with the tenders or on the letters of guarantee submitted during the session in which the tenders are opened; the Committee shall either prepare a report for each such thing or mention the same in the minutes of the session.

Article 14. – The tenders shall be opened at the time and date specified, provided that the Administrative Authority shall take particular care to receive the incoming mail on the morning of the day fixed for opening the tenders; the Committee shall complete its work on the same day.

Article 15. – The tenders, the minutes of the Committee formed to open the tenders and the samples shall be delivered for analysis, if necessary, to the Administrative Authority concerned preparatory to their being sent to the Committee charged with examining the tenders which shall take the necessary action; this shall be done as soon as possible so as to enable the Committee charged with examination of the tenders to put forward their recommendations, to the person with the authority to make the decision, before the decision date.

Article 16. – The Committee charged with examination of the tenders shall ascertain that the tenders conform to the specifications and conditions; in order to do so, the committee may seek assistance from any technician and shall recommend whichever tender it deems so be the best, taking into account the financial and technical aspects, after excluding tenders that have not conformed to the specifications and conditions set out in Article 5 of the Law.

Article 17. – In reaching its recommendations, the Committee must be guided by the latest local, or external, prices which have prevailed in previous dealings and by the current market prices.

Article 18. – The deliberations of the members of the Committee charged with examination of the tenders shall be taken down in writing and signed by the chairman and the members, and shall be forwarded to the authority vested with the power to take a decision on the matter.

Article 19. – A sole tender may not be accepted unless it is approved by the Minister concerned and the nature of the work precludes inviting another tender.

Article 20. – The provisional deposit shall be returned to the unsuccessful tenderers immediately after determination of the tenders, without the need for their requesting such refund.

Article 21. – Within at most ten days from the date following that on which he was informed by registered letter of the acceptance of his tender, the successful tenderer shall deposit one of the securities provided for in Article 7 of the Law, save when the Law provides otherwise.

Article 22. – The final deposit shall not be payable if the successful tenderer supplies and the Administrative Authority accepts all the items within the time limit set for lodgement of the final deposit; or if the successful tenderer supplies part thereof which is accepted and the price of such part is sufficient to cover the value of the deposits, provided that no part of the price covering the deposit shall be paid until the contractor has performed all his commitments.

Article 23. – If the successful bidder fails to lodge the final deposit during the specified time limit, the Administrative Authority may grant an extension, which may not exceed ten days, to enable him to do so, but if he fails to produce the said deposit within the extension period, the Administrative Authority may either impound the provisional deposit or carry out the work, which is the subject matter of the tender, at the tenderer's expense and take action against him for damages.

Article 24. – Notwithstanding the provisions of Article 7 of the Law, the final deposit shall be retained until the commitments of the contractor have been fully performed.

Article 25. – The Administrative Authority may alter the obligations of a contractor 20 per cent of the total value of his obligations either up or down.

Article 26. – A contractor shall perform all his obligations, inclusive of the extension referred to in the preceding Article, during the specified time limit, save when the award is made at a time which does not allow the contractor to perform his obligations during such time limit; in such case a suitable extension in time shall be added to the time limit specified to enable the contractual works to be completed.

Article 27. – If the amount of a contract is 100,000 (one hundred thousand) rials or less, a mutual exchange of correspondence may substitute for the contract; but when the

amount exceeds this figure, a contract shall be concluded between the Administrative Authority and the contractor as soon as the contractor is informed of the award and after he has lodged the final deposit, provided the contract is made out in at least four copies; one copy shall be delivered to the contractor, the second copy to the Accounts Department and a third copy to the Zakat and Income Department.

Article 28. – The contractor may not assign the contract or any part thereof without the written approval of the Administrative Authority; in such case the contractor shall remain jointly liable with the assignee or sub-contractor for the performance of the contract.

Article 29. - Of the Implementing Regulation states that:

“Both the public authority and the contractor shall perform the contract according to its conditions. If the contractor defaults in performing the contract, the public authority may send notice to him to remedy the situation but, if after fifteen days from the notice he has failed to so remedy, the authority may itself perform the contract at his expense or may rescind the contract. If the public authority fails to carry out its commitments, the contractor may after sending a notice letter requiring the authority to perform its part of the contract within fifteen days, take action against the public authority for damages, but the contractor may not refuse to perform the contract on the grounds that the public authority has failed to perform its commitments”.

Article 30. – The contractor shall be liable for the total or partial collapse of the construction erected by him if this occurs within ten years from the date on which such constructions were handed over to the Administrative Authority, if the collapse was due to a defect in the work, save when the contracting parties have agreed that the construction should last for a shorter period.

Article 31. – The contractor shall check all particulars of the engineering and technical designs and shall report to the Administrative Authority any technical faults which he may discover in the designs, and which may prejudice the safety of the construction.

Article 32. – When the work is withdrawn from the contractor, the Administrative Authority may execute the works at his own expense by any of the methods by which it secures its requirements, even though by mutual direct agreement.

Article 33. – The Administrative Authority may bar the contractor from taking away tools, equipment and materials which are on the site and may use them to complete the work, provided a report is prepared detailing the state of the construction, the tools, equipment and materials that were on the site, on the date of the withdrawal; provided also that the contractor is advised of the date when the report is to be made so that he can express his opinion; the report shall be used as evidence against him if he fails to attend.

Article 34. – In contracts of supply, if the contractor fails to perform his commitments during the fixed time limit, he shall be bound to pay a fine of 1 per cent per week of the value of the item, provided the delay fine shall not exceed 4 per cent of the contract value.

Article 35. – In contracts of consultancy work, if the contractor fails to perform his commitments during the fixed time limit he shall be bound to pay a fine of 1 per cent per month of the value of the delayed work provided the delay fine shall not exceed 10 per cent of the contract value.

Article 36. – In contracts of maintenance and operation work, if the contractor fails to perform his commitments, he shall be bound to pay a periodic fine to be assessed in the

contract, provided that the fine shall not on completion of execution exceed 10 per cent of the contract value.

Article 37. – In contacts of public works, if the contractor fails to complete and deliver the whole of the work within the fixed time limit and if the Administrative Authority does not see fit too withdraw the work from him he shall be bound to pay a fine in respect of the period of delay beyond the fixed time limit to be calculated on the basis of the average daily cost of the project, by diving the contract value by its term as follows:

- (a) A fine on the first part of the delay period equivalent to one quarter of the average daily cost, per day of the delay up to fifteen days or 5 per cent of the contract term, whichever is the greater.
- (b) A fine on the second part of the delay period equivalent to one half of the average daily cost, per day of delay until both parts reach thirty days or 10 per cent of the contract term, whichever is the greater.
- (c) A fine on the third part of the delay period equivalent to the full average daily cost per day of delay that follows the longest of the two period provided for in paragraph (b).

The total fines imposed may not exceed 10 per cent of the contract value; however, if the Administrative Authority considers that the delay does not impede the full beneficial use of the work within the time limit set for its completion and does not cause confusion in the use of any other utility and does not have an adverse effect on the completed part of the work, the total fine shall not exceed 10 per cent of the value of the delayed works.

Article 38. – Notwithstanding the provisions of Article 11 of the Law, the movables, which are surplus to the needs of the Administrative Authority shall be sold by public auction, which auction shall be advertised in the newspapers and at the Head Office of the Administrative Authority and municipality at least fifteen days before the date set for the auction.

Article 39. – A bidder in the public auction shall produce as security a sum amounting to 1 per cent of the value of his bid and the successful bidder shall produce a surety of 5 per cent of the value of his bid at the end of the auction; he shall pay the balance when the award is made.

Article 40. – If the mount of the award is 500,000 (five hundred thousand) rials or more, the award shall be subject to the approval of the Minister or head of the Autonomous Department, but if it is less the Under-Secretary shall have to approve the award.

The Public Works Contracts Regulations 1991

Statutory Instrument 1991 No. 2680

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The Treasury, being the Minister designated⁽¹¹⁾ for the purposes of section 2(2) of the European Communities Act 1972⁽¹²⁾ in relation to public procurement, in exercise of the powers conferred upon them by the said section 2(2) and of all other powers enabling them in that behalf, hereby make the following Regulations:-

PART I

GENERAL

Title and commencement

1. These Regulations may be cited as the Public Works Contracts Regulations 1991 and shall come into force on 21st December 1991.

Interpretation

2. -

(1) In these Regulations-

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

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

"the Commission" means the Commission of the Communities;

"concessionaire" means a person who has entered into a public works concession contract with a contracting authority;

"contract documents" means the invitation to tender for or negotiate the contract, the proposed conditions of contract, the specifications or description of the work or works required by the contracting authority and of the materials or goods to be used in or for it or them, and all documents supplementary thereto;

"contract notice" means a notice sent to the Official Journal in accordance with regulation 11(2), 12(2), 13(2), 25(2) or 26(3);

"contracting authority" has the meaning ascribed to it by regulation 3;

"contractor" has the meaning ascribed to it by regulation 4;

"ECU" means the European Currency Unit as defined in Council Regulation (EEC) No. 3180/78⁽¹³⁾;

"established" means the same as it does for the purposes of the Community Treaties;

"financial year" means the period of 12 months ending on 31st March in any year or, in relation to any person whose accounts are prepared in respect of a different 12 month period, that period of 12 months;

"government department" includes a Northern Ireland department or the head of such department;

"Minister of the Crown" means the holder of an office in Her Majesty's Government in the United Kingdom, and includes the Treasury;

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

"negotiated procedure" means a procedure leading to the award of a public works contract whereby the contracting authority negotiates the terms of the contract with one or more persons selected by it;

"Official Journal" means the Official Journal of the Communities;

"open procedure" means a procedure leading to the award of a public works contract whereby all interested persons may tender for the contract;

"public housing scheme works contract" means a public works contract relating to the design and construction of a public housing scheme;

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

"public works contract" means a contract in writing for consideration (whatever the nature of the consideration)-

(a) for the carrying out of a work or works for a contracting authority, or

(b) under which a contracting authority engages a person to procure by any means the carrying out for the contracting authority of a work corresponding to specified requirements;

"restricted procedure" means a procedure leading to the award of a public works contract whereby only persons selected by the contracting authority may submit tenders for the contract;

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

"working day" means a day other than a Saturday, Sunday or Bank Holiday within the meaning of the Banking and Financial Dealings Act 1971⁽¹⁴⁾;

"works" means any of the activities specified in Schedule 1, being activities contained in the general industrial classification of economic activities within the Communities; and

"year" means a calendar year.

(2) The value in the currency of any member State of any amount expressed in these Regulations in ECU shall be calculated by reference to the exchange rate for the time being applying for the purposes of Council Directive 71/305/EEC⁽¹⁵⁾ as published from time to time in the Official Journal.⁽¹⁶⁾

(3) Where a thing is required to be done under these Regulations-

(a) within a period after an action is taken, the day on which that action was taken shall not be counted in the calculation of that period;

(b) within a certain period, that period must include 2 working days;

(c) within a period and the last day of that period is not a working day, the period shall be extended to include the following working day.

(4) References in these Regulations to a regulation are references to a regulation in these Regulations and references to a Schedule are references to a Schedule to these Regulations.

Contracting authorities

3. -

(1) For the purposes of these Regulations each of the following is a "contracting authority"-

- (a) a Minister of the Crown,
- (b) a government department,
- (c) the House of Commons,
- (d) the House of Lords,
- (e) the Northern Ireland Assembly,
- (f) a local authority,
- (g) a fire authority constituted by a combination scheme under the Fire Services Act 1947⁽¹⁷⁾,
- (h) the Fire Authority for Northern Ireland,
- (i) a police authority constituted under section 2 of the Police Act 1964⁽¹⁸⁾ or a combined police authority established by an amalgamation scheme under that Act,
- (j) the Police Authority for Northern Ireland,
- (k) an authority established under section 10 of the Local Government Act 1985⁽¹⁹⁾,
- (l) a joint authority established by Part IV of that Act,
- (m) any body established pursuant to an order under section 67 of that Act,
- (n) the Broads Authority,
- (o) any joint board the constituent members of which consist of any of the bodies specified in paragraphs (f), (g), (i), (k), (l), (m) and (n) above,
- (p) a joint or special planning board constituted for a National Park by an order under paragraphs 1 or 3 of Schedule 17 to the Local Government Act 1972⁽¹⁰⁾, and
- (q) a joint education board constituted under the provisions of Part I of the First Schedule to the Education Act 1944⁽¹¹⁾,
- (r) a corporation established, or a group of individuals appointed to act together, for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and
 - (i) financed wholly or mainly by another contracting authority, or
 - (ii) subject to management supervision by another contracting authority, or
 - (iii) more than half of the board of directors or members of which, or, in the case of a group of individuals, more than half of those individuals, being appointed by another contracting authority, and
- (s) associations of or formed by one or more of the above.

(2) In the application of these Regulations to England and Wales, "local authority" in paragraph (1) above means-

- (a) a county council, a district council, a London borough council, a parish council, a community council, or the Council of the Isles of Scilly;

(b) the Common Council of the City of London in its capacity as local authority or police authority.

(3) In the application of these Regulations to Scotland, "local authority" in paragraph (1) above means a regional, islands or district council or any joint board or joint committee within the meaning of section 235 of the Local Government (Scotland) Act 1973.⁽¹¹²⁾

(4) In the application of these Regulations to Northern Ireland, "local authority" in paragraph (1) above means a district council within the meaning of the Local Government Act (Northern Ireland) 1972.⁽¹¹³⁾

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

Contractors

4. -

(1) For the purposes of these Regulations a "contractor" means a person-

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

(2) When these Regulations apply a contracting authority shall not treat a person who is not a national of and established in a member State more favourably than one who is.

Application of the Regulations

5. These Regulations apply whenever a contracting authority seeks offers in relation to a proposed public works contract other than public works contracts excluded from the operation of these Regulations by regulations 6 and 7; except that in Parts II, III, IV and V of these Regulations and in regulations 24, 27 and 28 references to a "public works contract" shall not include a public works concession contract.

General exclusions

6. These Regulations shall not apply to the seeking of offers in relation to a proposed public works contract-

- (a) by a contracting authority which is, or which in seeking the offers is exercising the functions of, a carrier by land, air, sea or inland waterway;
- (b) which concerns the production, transport or distribution of drinking water;
- (c) by a contracting authority whose principal activity is the production or distribution of energy;
- (d) which is classified as secret or where the carrying out of the work or works under it must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions of any part of the United Kingdom or when the protection of the basic interests of the security of the United Kingdom require it;

- (e) where different procedures govern the procedures leading to the award of the contract and it is to be entered into-
- (i) pursuant to an international agreement to which the United Kingdom and a State which is not a member State are parties and it provides for the carrying out of works intended for the joint implementation or exploitation of a project pursuant to that agreement;
 - (ii) pursuant to an international agreement relating to the stationing of troops; or
 - (iii) in accordance with the contract award procedures of an organisation of which only States are members (an "international organisation") or of which only States or international organisations are members.

Thresholds

7. -

(1) These Regulations shall not apply to the seeking of offers in relation to a proposed public works contract where the estimated value of the contract (net of value added tax) at the relevant time is less than 5,000,000 ECU.

(2) Subject to paragraphs (3), (5) and (6) below, the estimated value for the purposes of paragraph (1) above of a public works contract shall be the value of the consideration which the contracting authority expects to give under the contract.

(3) Subject to paragraphs (4) and (6) below, the estimated value for the purposes of paragraph (1) above of a public works contract which is one of a number of contracts entered into or to be entered into for the carrying out of a work shall be the aggregate of the value of the consideration which the contracting authority has paid or expects to give under all the contracts for the carrying out of the work.

(4) Paragraph (3) above shall not apply to any public works contract (unless the contracting authority chooses to apply that paragraph to that contract) if that contract has an estimated value (calculated in accordance with paragraph (2) above) of less than 1,000,000 ECU, and the aggregate value of that contract and of any other public works contract for the carrying out of the work in respect of which the contracting authority takes advantage of the disapplication of paragraph (3) above by virtue of this paragraph is less than 20 per cent of the aggregate of the value of the consideration which the contracting authority has paid or expects to pay under all the contracts for the carrying out of the work.

(5) Subject to paragraph (6) below, the estimated value for the purposes of paragraph (1) above of a public works concession contract shall be the value of the consideration which the contracting authority would expect to give for the carrying out of the work or works if it did not propose to grant a concession.

(6) Where a contracting authority intends to provide any goods to the person awarded a public works contract for the purpose of carrying out that contract, the value of the consideration for the purposes of paragraphs (2) and (3) above shall be taken to include the estimated value at the relevant time of those goods.

(7) The relevant time for the purposes of paragraphs (1) and (6) above means, in relation to a public works contract, the date on which a contract notice would be sent to the Official Journal if the requirement to send such a notice applied to that contract in accordance with these Regulations.

(8) A contracting authority shall not enter into separate public works contracts with the intention of avoiding the application of these Regulations to those contracts.

Notes:

[1] S.I. 1991/755. back

[2] 1972 c. 68. back

[3] OJ No. L379, 30.12.78, p. 1, as amended by Council Regulation (EEC) No. 2626/84 (OJ No. L247, 16.9.84, p. 1). back

[4] 1971 c. 80. back

[5] OJ No. L185, 16.8.71, p. 5, as amended by Council Directive 89/440/EEC (OJ No. L210, 21.7.89, p. 1). back

[6] The rates are determined for each successive period of 2 years by calculating the average of the daily exchange rates between each currency and the ECU over a period of 24 months preceding the determination. The exchange rates applying at the time of coming into force of these Regulations are published in OJ No. C18, 25.1.90, p. 3.

[7] 1947 c. 41.

[8] 1964 c. 48.

[9] 1985 c. 51.

[10] 1972 c. 70.

[11] 1944 c. 31.

[12] 1973 c. 65.

[13] 1972 c. 9 (N.I.)

PART II

TECHNICAL SPECIFICATIONS

Technical specifications in the contract documents

8. -

(1) In this regulation-

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

"essential requirements" means requirements relating to safety, health and certain other aspects in the general interest which the works must meet;

"European specification" means a common technical specification, a British standard implementing a European standard or a European technical approval;

"European standard" means a standard approved by the European Committee for Standardisation ("CEN") or by the European Committee for Electrotechnical Standardisation "CENELEC") as a "European Standard ("EN ") or a "Harmonisation Document ("HD ") according to the Common Rules of those organisations;

"European technical approval" means an approval of the fitness for use of a product, issued by an approval body designated for the purpose by a member State, following a technical assessment of whether the product fulfils the essential requirements for building works, having regard to the inherent characteristics of the product and the defined conditions of application and use;

"standard" means a technical specification approved by a recognised standardising body for repeated and continuous application, compliance with which is in principle not compulsory;

"technical specifications" means the technical requirements defining the characteristics required of the work or works and of the materials and goods used in or for it or them (such as quality, performance, safety or dimensions) so that the works, work, materials and goods are described objectively in a manner which will ensure that they fulfil the use for which they are intended by the contracting authority. In relation to materials and goods, "technical specifications" include requirements in respect of quality assurance, terminology, symbols, tests and testing methods, packaging, marking and labelling. In relation to a work or works, they include requirements relating to design and costing, the testing, inspection and acceptance of a work or works, and the methods or techniques of construction.

(2) If a contracting authority wishes to lay down technical specifications which the work or works to be carried out under a public works contract and which the materials and goods used in or for it or them must meet it shall specify all such technical specifications in the contract documents.

(3) Subject to paragraph (4) below, the technical specifications in the contract documents relating to a public works contract shall be defined by reference to any European specifications which are relevant.

(4) A contracting authority may define the technical specifications referred to in paragraph (3) above other than by reference to relevant European specifications if-

(a) the contracting authority is under an obligation to define the technical specifications by reference to technical requirements which are mandatory in the United Kingdom for the work or works to be carried out under the contract or for the materials or goods to be used in or for it or them, (but only to the extent that such an obligation is compatible with Community obligations);

(b) the relevant European specifications do not include provision for establishing conformity to, or it is technically impossible to establish satisfactorily that the work or works or the materials or goods do conform to, the relevant European specifications;

(c) subject to paragraph (5) below, application of the relevant European specifications would oblige the contracting authority to acquire a work, works, material or goods incompatible with equipment already in use or would entail disproportionate costs or disproportionate technical difficulties; or

(d) the work or works are of a genuinely innovative nature for which use of existing relevant European specifications would be inappropriate.

(5) A contracting authority may only define the technical specifications other than by reference to relevant European specifications on the grounds specified in paragraph (4)(c) above where the contracting authority has a clearly defined and recorded strategy for changing over, within a set period, to European specifications.

(6) A contracting authority shall state in the contract notice which of the circumstances specified in paragraph (4) above was the ground for defining the technical specifications other than by reference to European specifications or, if it is impossible to include this information in the contract notice, the contracting authority shall specify it in the contract documents and shall in any event keep a record of this information which, if the Commission or any member State requests it, it shall send to the Treasury for onward transmission to the Commission or member State which requested it.

(7) In the absence of European specifications relevant to the work or works to be carried out under a public works contract or to the materials or goods to be used in or for it or them, the technical specifications in the contract documents-

(a) shall be defined by reference to the British technical specifications recognised as complying with the basic requirements specified in any Council Directives on technical harmonisation in accordance with the procedures laid down in those directives and, in particular, in accordance with the procedures laid down in Council Directive

89/106/EEC on the approximation of laws, regulations and administrative procedures in the member States relating to construction products⁽¹⁴⁾;

(b) may be defined by reference to British technical specifications relating to design and method of calculation and execution of a work or works and use of materials and goods;

(c) may be defined by reference to the following standards (and, if they are so defined, preference shall be given to the following standards in the order in which they are listed)-

- (i) British standards implementing international standards;
- (ii) other British standards and technical approvals; or
- (iii) any other standards.

(8) Subject to paragraph (10) below, the contract documents relating to a public works contract shall not include technical specifications which refer to materials or goods of a specific make or source or to a particular process and which have the effect of favouring or eliminating particular contractors.

(9) Without prejudice to the generality of paragraph (8) above, references to trademarks, patents, types, origin or means of production shall not be incorporated into the technical specifications in the contract documents.

(10) Notwithstanding paragraph (8) and (9) above, a contracting authority may incorporate the references referred to in paragraphs (8) and (9) above into the technical specifications in the contract documents if-

- (a) such references are justified by the subject of the contract, or
- (b) the work or works to be carried out under the contract cannot otherwise be described by reference to technical specifications which are sufficiently precise and intelligible to all contractors, provided that the references are accompanied by the words "or equivalent".

Notes:

[14] OJ No. L40, 11.2.89, p. 12.

PART III

PROCEDURES LEADING TO THE AWARD OF A PUBLIC WORKS CONTRACT

Prior information notices

9. A contracting authority intending to seek offers in relation to a public works contract shall, as soon as possible after the decision approving the planning of the work or works, send to the Official Journal a notice, in a form substantially corresponding to that set out in Part A of Schedule 2, and containing the information therein specified in relation to the contract.

Selection of contract award procedure

10. -

(1) For the purpose of seeking offers in relation to a proposed public works contract (but, in the case of a public housing scheme works contract, subject to regulation 24) a contracting authority shall use the open procedure, the restricted procedure or the negotiated procedure and shall decide which of those procedures to use in accordance with the following paragraphs of this regulation.

(2) A contracting authority may use the negotiated procedure in the following circumstances-

(a) subject to paragraph (4) below, in the event that the procedure leading to the award of a public works contract by the contracting authority using the open or negotiated procedure was discontinued-

(i) because of irregular tenders, or

(ii) following an evaluation made in accordance with regulation 11(7) or 12(4);

and without prejudice to the generality of the meaning of the words "irregular tenders" a tender may be considered irregular if the contractor fails to meet the requirements of, or the tender offers variations on the requirements specified in, the contract documents where this is not permitted under the terms of the invitation to tender, or the work, works, materials or goods offered do not meet the technical specifications (within the meaning of regulation 8(1)) of the contracting authority;

(b) when the work or works are to be carried out under the contract purely for the purpose of research, experiment or development but not where the works are to be carried out to establish commercial viability or to recover research and development costs;

(c) exceptionally, when the nature of the work or works to be carried out under the contract is such, or the risks attaching thereto are such, as not to permit prior overall pricing;

(d) subject to paragraph (4) below, in the absence of tenders or of appropriate tenders in response to an invitation to tender by the contracting authority using the open or restricted procedure;

(e) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the work or works to be carried out under the contract may only be carried out by a particular person;

(f) when (but only if it is strictly necessary) for reasons of extreme urgency brought about by events unforeseeable by, and not attributable

to, the contracting authority, the time limits specified in regulations 11, 12 and 13 if the open or restricted procedures or the negotiated procedure pursuant to paragraphs (2)(a) to (c) are used cannot be met;

(g) subject to paragraph (5) below, when a contracting authority wants a person who has entered into a public works contract with the contracting authority to carry out additional works which through unforeseen circumstances were not included in the project initially considered or in the original public works contract and-

(i) such works cannot for technical or economic reasons be carried out separately from the works carried out under the original public works contract without great inconvenience to the contracting authority, or

(ii) such works can be carried out separately from the works carried out under the original public works contract but are strictly necessary to the later stages of that contract; and

(h) subject to paragraph (6) below, when a contracting authority wishes a person who has entered into a public works contract with that contracting authority to carry out new works which are a repetition of works carried out under the original contract and which are in accordance with the project for the purpose of which the first contract was entered into.

(3) A contracting authority shall not use the negotiated procedure pursuant to paragraphs (2)(a) or (d) above unless the proposed terms of the contract are substantially unaltered from the proposed terms of the contract in relation to which offers were sought using the open or restricted procedure.

(4) A contracting authority shall not use the negotiated procedure pursuant to paragraph (2)(g) above where the aggregate value of the consideration to be given under contracts for the additional works exceeds 50 per cent of the value of the consideration payable under the original contract; and, for the purposes of this paragraph, the value of the consideration shall be taken to include the estimated value of any goods which the contracting authority provided to the person awarded the contract for the purpose of carrying out the contract.

(5) A contracting authority shall not use the negotiated procedure pursuant to paragraph (2)(h) above unless the contract notice relating to the original contract stated that a public works contract for new works which would be a repetition of the works carried out under the original contract may be awarded using the negotiated procedure pursuant to paragraph (2)(h) above and unless the procedure for the award of the new contract is commenced within three years of the original contract being entered into.

(6) In all other circumstances the contracting authority shall use the open procedure or the restricted procedure.

(7) A contracting authority using the negotiated procedure pursuant to paragraph (2)(d) above shall, if the Commission requests it, submit a report recording the fact that it has done so to the Treasury for onward transmission to the Commission.

The open procedure

11. -

(1) A contracting authority using the open procedure shall comply with the following paragraphs of this regulation.

(2) The contracting authority shall publicise its intention to seek offers in relation to the public works contract by sending to the Official Journal as soon as possible after forming the intention a notice, in a form substantially corresponding to that set out in Part B of Schedule 2, inviting tenders and containing the information therein specified in relation to the contract.

(3) Subject to paragraph (4) below, the date which the contracting authority shall fix as the last date for the receipt by it of tenders made in response to the contract notice shall be specified in the notice and shall be not less than 52 days from the date of despatch of the notice but, if the contract documents are too bulky to be supplied within this time or it is necessary that contractors be given the opportunity to inspect the site on which the work or works under the contract is or are to be carried out or documents relating to the contract documents, then that minimum period shall be extended to allow for such supply or inspection.

(4) Where the contracting authority has published a notice in accordance with regulation 9 in relation to the public works contract it may substitute for the period of not less than 52 days specified in paragraph (3) above a period of not less than 36 days.

(5) The contracting authority shall send the contract documents within 6 days of the receipt of a request from any contractor provided that the documents are requested in good time and any fee specified in the contract notice has accompanied the request.

(6) The contracting authority shall supply such further information relating to the contract documents as may reasonably be requested by a contractor provided that the request is received in sufficient time to enable the contracting authority to supply the information no later than 6 days before the date specified in the contract notice as the final date for the receipt of tenders.

(7) The contracting authority may exclude a tender from the evaluation of offers made in accordance with regulation 20 only if the contractor may be treated as ineligible to tender on a ground specified in regulation 14 or if the contractor fails to satisfy the minimum standards of economic and financial standing and technical capacity required of contractors by the contracting authority; for this purpose the contracting authority shall make its evaluation in accordance with regulations 14, 15, 16 and 17.

The restricted procedure

12. -

(1) A contracting authority using the restricted procedure shall comply with the following paragraphs of this regulation.

(2) The contracting authority shall publicise its intention to seek offers in relation to the public works contract by sending to the Official Journal as soon as possible after forming the intention a notice, in a form substantially corresponding to that set out in Part C of Schedule 2, inviting requests to be selected to tender and containing the information therein specified in relation to the contract.

(3) Subject to paragraph (14) below, the date which the contracting authority shall fix as the last date for the receipt by it of requests to be selected to tender shall be specified in the contract notice and shall be not less than 37 days from the date of the despatch of the notice.

(4) The contracting authority may exclude a contractor from those persons from whom it will make the selection of persons to be invited to tender only if the supplier may be treated as ineligible on a ground specified in regulation 14 or if the contractor fails to satisfy the minimum standards of economic and financial standing and technical capacity required of contractors by the contracting authority; for this purpose the contracting authority shall make its evaluation in accordance with regulations 14, 15, 16 and 17.

(5) The contracting authority shall make the selection of the contractors to be invited to tender in accordance with regulations 14, 15, 16 and 17; and in making the selection and in issuing invitations the contracting authority shall not discriminate between contractors on the grounds of their nationality or the member State in which they are established.

(6) The contracting authority may predetermine the range within which the number of persons which it intends to invite to tender for the contract shall be fixed but only if-

- (a) the lower number of the range is not less than 5 and the higher number not more than 20,
- (b) the range is determined in the light of the nature of the work to be carried out under the contract, and
- (c) the range is specified in the contract notice.

(7) The number of persons invited to tender shall be sufficient to ensure genuine competition.

(8) The contracting authority shall send invitations to each of the contractors selected to tender and the invitation shall be accompanied by the contract documents, or the invitation shall state the address for requesting them.

(9) The invitation shall be sent in writing simultaneously to each contractor selected to tender.

(10) The following information shall be included in the invitation-

- (a) the address to which requests for the contract documents (if not accompanying the invitation) and further information relating to those

documents should be sent, the final date for making such a request and the amount and terms of the fee which may be charged for supplying that material;

(b) the final date for the receipt of tenders, the address to which they must be sent and the language or languages in which they must be drawn up;

(c) a reference to the contract notice published in accordance with paragraph (2) above;

(d) an indication of the information to be included with the tender which the contracting authority may require to be provided in accordance with regulations 15, 16 and 17; and

(e) the criteria for the award of the contract if this information was not specified in the contract notice published in accordance with paragraph (2) above.

(11) Subject to paragraphs (12) and (14) below, the date which the contracting authority shall fix as the last date for the receipt by it of tenders made in response to the invitation to tender which shall be specified in the invitation to tender in accordance with paragraph (10)(b) above shall not be less than 40 days from the date of the despatch of the invitation but, if it is necessary that contractors should be given the opportunity to inspect the premises on which the works under the contract are to be carried out or documents relating to the contract documents, then that minimum period shall be extended to allow for such inspection.

(12) Subject to paragraph (14) below, where the contracting authority has published a notice in accordance with regulation 9 in relation to the public works contract, it may substitute for the period of not less than 40 days in paragraph (11) above a period of not less than 26 days.

(13) Subject to paragraph (14) below, the contracting authority shall supply such further information relating to the contract documents as may reasonably be requested by a contractor selected to tender provided that the request for such information is received in sufficient time to enable the contracting authority to supply it not less than 6 days before the date specified in the invitation to tender as the final date for the receipt of tenders.

(14) Where compliance with the minimum periods referred to in paragraphs (3), (11), (12) and (13) above is rendered impracticable for reasons of urgency, the contracting authority may substitute for the period specified in paragraph (3) a period of not less than 15 days and for the periods specified in (11) and (12) periods of not less than 10 days and for the period specified in paragraph (13) a period of not less than 4 days and, in those circumstances, the contracting authority must send the invitation to tender by the most rapid means possible.

(15) A contracting authority shall not refuse to consider an application to be invited to tender if it is made by letter, telegram, telex, facsimile or telephone provided that, in the last 4 cases, it is confirmed by letter before the

date fixed by the contracting authority as the last date for the receipt of requests to be selected to tender.

The negotiated procedure

13. -

- (1) A contracting authority using the negotiated procedure shall comply with the following provisions of this regulation except that-
 - (a) a contracting authority using the negotiated procedure pursuant to regulation 10(2)(d), (e), (f), (g) or (h), and
 - (b) a contracting authority using the negotiated procedure pursuant to regulation 10(2)(a) who invites to negotiate the contract every contractor who submitted a tender following an invitation made during the course of the discontinued open or restricted procedure (not being a tender which was excluded pursuant to regulation 11(6)), need not comply with paragraphs (2) to (6) below.

- (2) The contracting authority shall publicise its intention to seek offers in relation to the public works contract by sending to the Official Journal as soon as possible after forming the intention a notice, in a form substantially corresponding to that set out in Part D of Schedule 3, inviting requests to be selected to negotiate and containing the information therein specified in relation to the contract.

- (3) Subject to paragraph (4) below, the date which the contracting authority shall fix as the last date for the receipt by it of requests to be selected to negotiate shall be specified in paragraph 6(a) of the contract notice and shall be not less than 37 days from the date of despatch of the notice.

- (4) Where compliance with the minimum period of 37 days in paragraph (3) above is rendered impracticable for reasons of urgency, the contracting authority may substitute a period of not less than 15 days and, in those circumstances, the contracting authority must send the invitation to negotiate the contract by the most rapid means possible.

- (5) Where there is a sufficient number of persons who are suitable to be selected to negotiate the contract, the number selected to negotiate shall be not less than 3.

- (6) A contracting authority shall not refuse to consider an application to be selected to negotiate if it is made by letter, telegram, telex, facsimile or by telephone provided that, in the last 4 cases, it is confirmed by letter before the date fixed by the contracting authority as the last date for the receipt of requests to be selected to negotiate.

- (7) The contracting authority may exclude a contractor from those persons from whom it will make the selection of persons to be invited to negotiate the contract only if the supplier may be treated as ineligible on a ground specified in regulation 14 or if the contractor fails to satisfy the minimum standards of economic and financial standing and technical capacity required of contractors by the contracting authority; for this purpose the contracting authority shall

make its evaluation in accordance with regulations 14, 15, 16 and 17.

(8) The contracting authority shall make the selection of the contractors to be invited to negotiate in accordance with regulations 14, 15, 16 and 17; and in making the selection and in issuing the invitations to negotiate the contracting authority shall not discriminate between contractors on the grounds of their nationality or the member State in which they are established.

PART IV

SELECTION OF CONTRACTORS

Criteria for rejection of contractors

14. -

(1) A contracting authority may treat a contractor as ineligible to tender for, or to be included amongst those persons from whom it will make the selection of persons to be invited to tender for or to negotiate a public works contract in accordance with regulations 11(7), 12(4), and 13(7), or decide not to select a contractor to tender for or to negotiate a public works contract in accordance with regulations 12(5) and 13(8) on one of the following grounds, namely that the contractor-

(a) being an individual is bankrupt or has had a receiving order or administration order made against him or has made any composition or arrangement with or for the benefit of his creditors or has made any conveyance or assignment for the benefit of his creditors or appears unable to pay, or to have no reasonable prospect of being able to pay, a debt within the meaning of section 268 of the Insolvency Act 1968⁽¹¹⁵¹⁾, or article 242 of the Insolvency (Northern Ireland) Order 1989⁽¹¹⁶¹⁾, or in Scotland has granted a trust deed for creditors or become otherwise apparently insolvent, or is the subject of a petition presented for sequestration of his estate, or is the subject of any similar procedure under the law of any other state;

(b) being a partnership constituted under Scots law has granted a trust deed or become otherwise apparently insolvent, or is the subject of a petition presented for sequestration of its estate;

(c) being a company has passed a resolution or is the subject of an order by the court for the company's winding up otherwise than for the purposes of bona fide reconstruction or amalgamation, or has had a receiver, manager or administrator on behalf of a creditor appointed in respect of the company's business or any part thereof or is the subject of proceedings for any of the above procedures or is the subject of similar procedures under the law of any other state;

(d) has been convicted of a criminal offence relating to the conduct of his business or profession;

(e) has committed an act of grave misconduct in the course of his business or profession;

(f) has not fulfilled obligations relating to the payment of social security contributions under the law of any part of the United Kingdom or of the member State in which the contractor is established;

(g) has not fulfilled obligations relating to the payment of taxes under the law of any part of the United Kingdom;

(h) is guilty of serious misrepresentation in providing any information required of him under this regulation and regulation 15, 16 and 17; or

(i) subject to paragraphs (5) and (6) below, is not registered on the professional or trade register of the member State in which the contractor is established under the conditions laid down by that State.

(2) Subject to regulation 18, the contracting authority may require a contractor to provide such information as it considers it needs to make the evaluation in accordance with paragraph (1) above except that it shall accept as conclusive evidence that a contractor does not fall within the grounds specified in paragraphs (1)(a), (b), (c), (d), (f), or (g) above if that contractor provides to the contracting authority-

(a) in relation to the grounds specified in paragraphs (1)(a), (b), (c) or (d) above,

(i) an extract from the judicial record, or

(ii) in a member State which does not maintain such a judicial record, a document issued by the relevant judicial or administrative authority;

(b) in relation to the grounds specified in paragraph (1)(f) or (g) above, a certificate issued by the relevant competent authority;

(c) in a member State where the documentary evidence specified in paragraphs (2)(a) and (b) above is not issued in relation to one of the grounds specified in paragraph (1)(a), (b), (c), (d), (f) or (g) above, a declaration on oath made by the contractor before the relevant judicial, administrative or competent authority or a relevant notary public or commissioner for oaths.

(3) In this regulation, "relevant" in relation to a judicial, administrative or competent authority, notary public or commissioner for oaths means an authority designated by, or a notary public or commissioner for oaths in, the member State in which the contractor is established.

(4) The following are the appropriate professional or trade registers for the purposes of paragraph (1)(i) above-

in Belgium, the registre du commerce/Handelsregister;

in Denmark, the Erhvervsand Selskabsstyrelsen;

in France, the registre du commerce or the repertoire des metiers;

in Germany, the Handelsregister or the Handwerksrolle;

in Italy, the Registro della Camera di commercio, industria, agricoltura e artigianato;

in Luxembourg, the registre aux firmes and the role de la Chambre des metiers;

in the Netherlands, the Handelsregister;

in Portugal, the Comissao de Alvaras de Empresas de Obras Publicas e Particulares ("CAEOPP"); and

in Spain, the Registro Oficial de Contratistas del Ministerio de Industria y Energia.

(5) A contractor established in the United Kingdom or Ireland shall be treated as registered on the professional or trade register for the purposes of paragraph (1)(i) above if the contractor-

- (a) is established in Ireland and is certified as registered with the Registrar of Friendly Societies, or
- (b) is established in either State and is either-
 - (i) certified as incorporated by the Registrar of Companies, or
 - (ii) is certified as having declared on oath that he is carrying on business in the trade in question in the State in which he is established at a specific place of business and under a specific trading name.

(6) A contractor established in Greece shall be treated as registered on the professional or trade register for the purposes of paragraph (1)(i) if the contractor is certified as having declared on oath before a notary public that he exercises the profession of public works contractor.

Information as to economic and financial standing

15. -

(1) Subject to regulation 18 and paragraph (2) below, in assessing whether a contractor meets any minimum standards of economic and financial standing required of contractors by the contracting authority for the purposes of regulations 11(7), 12(4) and 13(7), and selecting the contractors to be invited to tender for or to negotiate the contract in accordance with regulations 12(5) and 13(8), a contracting authority shall only take into account any of the following information (and it may require a contractor to provide such of that information as it considers it needs to make the assessment or selection)-

- (a) appropriate statements from the contractor's bankers;
- (b) statement of accounts or extracts therefrom relating to the business of the contractor where publication of the statement is required under the law of the Member State in which the contractor is established;
- (c) a statement of the overall turnover of the business of the contractor and the turnover in respect of works in the 3 previous financial years of the contractor.

(2) Where the information specified in paragraph (1) above is not appropriate in a particular case a contracting authority may require a contractor to provide other information to demonstrate the contractor's economic and financial standing.

(3) A contracting authority which requires information to be provided in accordance with paragraphs (1) and (2) above, shall specify in the contract notice or in the invitation to tender the information which the contractor must provide.

(4) Where a contractor is unable for a valid reason to provide the information which the contracting authority has required, the contracting

authority shall accept such other information provided by the contractor as the contracting authority considers appropriate.

Information as to technical capacity

16. -

(1) Subject to regulation 18, in assessing whether a contractor meets any minimum standards of technical capacity required of contractors by the contracting authority for the purposes of regulations 11(7), 12(4) and 13(7), and in selecting the contractors to be invited to tender for or to negotiate the contract in accordance with regulations 12(5) and 13(8), a contracting authority shall only take into account any of the following information (and it may require a contractor to provide such of that information as it considers it needs to make the assessment or selection)-

(a) a list of the contractor's educational and professional qualifications where the contractor is an individual and a list of such qualifications of the contractor's managerial staff if any and those of the person or persons who would be responsible for carrying out the works under the contract;

(b) a list of works carried out over the past 5 years together with (unless the contracting authority specifies that the following certificate should be submitted direct to the contracting authority by the person certifying) certificates of satisfactory completion for the most important of those works indicating in each case the value of the consideration received, when and where the works were carried out and specifying whether they were carried out according to the rules of the trade or profession and properly completed;

(c) a statement of the tools, plant and technical equipment available to the contractor for carrying out the work under the contract;

(d) a statement of the contractor's average annual manpower and the number of managerial staff over the previous 3 years;

(e) a statement of the technicians or technical services which the contractor may call upon for the carrying out of the work under the contract, whether or not the technicians or persons providing the technical services are independent of the contractor.

(2) The contracting authority shall specify in the contract notice which of the information specified in paragraph (1) above it requires to be provided.

Supplementary information

17. Subject to regulation 18, the contracting authority may require a contractor to provide information supplementing the information provided in accordance with regulations 14, 15 and 16 or to clarify that information, provided that the information so required relates to the matters specified in regulations 14, 15 and 16.

Official lists of recognised contractors

18. Where a contractor is registered on the official list of recognised contractors in a Member State which maintains such lists and in which the contractor is established and the contractor submits to the contracting authority a certificate of registration issued by the authority administering the official list which specifies the information submitted to that authority which enabled the contractor to be registered and which states the classification given, the

contracting authority, to the extent that the certificate deals with the grounds referred to in regulation 14(1)(a) to (e), (h), and (i), 15(1)(b) and (c) and 17(1)(b) and (d)-

(a) shall accept the certificate as evidence that the contractor does not fall within the grounds specified in regulation 14(1)(a) to (e), (h) and (i) and shall not be entitled to require the contractor to submit such information relating to those grounds as is specified in regulation 14,

(b) shall not be entitled to require the contractor to provide information specified in regulations 15(1)(b) and (c) and 16(1)(b) and (d), and

(c) shall not be entitled to seek any supplementary information in accordance with regulation 17 in relation to the matters specified in paragraphs (a) and (b) above.

Consortium

19. -

(1) In this regulation a "consortium" means 2 or more persons, at least one of whom is a contractor, acting jointly for the purpose of being awarded a public works contract.

(2) A contracting authority shall not treat the tender of a consortium as ineligible nor decide not to include a consortium amongst those persons from whom it will make the selection of persons to be invited to tender for or to negotiate a public works contract on the grounds that the consortium has not formed a legal entity for the purposes of tendering for or negotiating the contract; but where a contracting authority awards a public works contract to a consortium it may require the consortium to form a legal entity before entering into, or as a term of, the contract.

(3) In these Regulations references to a contractor or to a concessionaire where the contractor or concessionaire is a consortium includes a reference to each person who is a member of that consortium.

Notes:

[15] 1986 c. 45.

[16] S.I. 1989/2405 (N.I. 19).

PART V

THE AWARD OF A PUBLIC WORKS CONTRACT

Criteria for the award of a public works contract

20. -

(1) Subject to paragraphs (6) and (7) below, a contracting authority shall award a public works contract on the basis of the offer which-

(a) offers the lowest price, or

(b) is the most economically advantageous to the contracting authority.

(2) The criteria which a contracting authority may use to determine that an offer is the most economically advantageous include price, period for completion, running costs, profitability and technical merit.

(3) Where a contracting authority intends to award a public works contract on the basis of the offer which is the most economically advantageous it shall state the criteria on which it intends to base its decision, where possible in descending order of importance, in the contract notice or in the contract documents.

(4) Where a contracting authority awards a public works contract on the basis of the offer which is the most economically advantageous, it may take account of offers which offer variations on the requirements specified in the contract documents if the offer meets the minimum requirements of the contracting authority and it has indicated in the contract notice that offers offering variations will be considered and has stated in the contract documents the minimum requirements which the offer must meet and any specific requirements for the presentation of an offer offering variations.

(5) A contracting authority may not reject a tender on the ground that the technical specifications in the tender have been defined by reference to European specifications (within the meaning of regulation 8(1)) or to the national technical specifications specified in regulation 8(7)(a) and (b).

(6) If an offer for a public works contract is abnormally low the contracting authority may reject that offer but only if it has requested in writing an explanation of the offer or of those parts which it considers contribute to the offer being abnormally low and has-

(a) if awarding the contract on the basis of the offer which offers the lowest price, examined the details of all the offers made, taking into account any explanation given to it of the abnormally low tender, before awarding the contract, or

(b) if awarding the contract on the basis of the offer which is the most economically advantageous, taken any such explanation into account in assessing which is the most economically advantageous offer, and, in considering that explanation, the contracting authority may take into account explanations which justify the offer on objective grounds including the economy of the construction method, the technical solutions suggested by

the contractor or the exceptionally favourable conditions available to the contractor for the carrying out of the works or the originality of the works proposed by the contractor.

(7) If a contracting authority which rejects an abnormally low offer is awarding the contract on the basis of the offer which offers the lowest price, it shall send a report justifying the rejection to the Treasury for onward transmission to the Commission.

(8) For the purposes of this regulation an "offer" includes a bid by one part of a contracting authority to carry out work or works for another part of the contracting authority when the former part is invited by the latter part to compete with the offers sought from other persons.

Contract award notice

21. -

(1) A contracting authority which has awarded a public works contract shall, no later than 48 days after the award, send to the Official Journal a notice, substantially corresponding to the form set out in Part E of Schedule 2 and, subject to paragraph (2) below, including the information therein specified in relation to the contract.

(2) Any of the information specified in Part E of Schedule 2 to be included in the contract award notice may be omitted in a particular case where to publish such information would impede law enforcement, would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of any person or might prejudice fair competition between contractors.

Information about contract award procedures

22. -

(1) A contracting authority which has awarded a public works contract shall, within 15 days of the date on which it receives a request from any contractor who was unsuccessful (whether pursuant to regulation 11(7), 12(4), 12(5), 13(7), 13(8) or 20), inform that contractor of the reasons why he was unsuccessful and, if the contractor was unsuccessful as a result of the evaluation of offers made in accordance with regulation 20, the name of the person awarded the contract.

(2) A contracting authority shall prepare a record in relation to each public works contract awarded by it specifying-

- (a) the name and address of the contracting authority;
- (b) the work or works to be carried out under the contract and the value of the consideration to be given under it;
- (c) the names of the persons whose offers were evaluated in accordance with regulation 20 and, where the contracting authority has used the restricted or negotiated procedure, the reasons for their selection;
- (d) the names of the persons who were unsuccessful pursuant to regulation 11(7), 12(4), 12(5), 13(7) or 13(8);

- (e) the name of the person to whom the contract was awarded and the reasons for having awarded the contract to him;
- (f) if known to the contracting authority, the works under the contract which the person to whom the contract has been awarded intends to sub-contract to another person;
- (g) in the case of a contracting authority which used the negotiated procedure, which of the circumstances specified in regulation 10(2) constituted the grounds for using that procedure.

(3) If the Commission requests a report in relation to a public works contract containing the information specified in paragraph (2) above, the contracting authority shall send a written report containing that information, or the main features of it, to the Treasury for onward transmission to the Commission.

(4) Where a contracting authority decides not to award a public works contract in respect of which a contract notice was published nor to seek offers in relation to another public works contract for the same purpose it shall inform the Official Journal of that decision and shall, if so requested by any contractor who submitted an offer or who applied to be included amongst the persons to be selected to tender for or negotiate the contract, the reasons for its decision.

PART VI

MISCELLANEOUS

Subsidised works contracts

23. -

(1) Where a contracting authority undertakes to contribute more than half of the consideration to be or expected to be paid under a contract to which this paragraph applies by virtue of paragraph (2) below which has been or is to be entered into by a person other than another contracting authority (in this paragraph referred to as "the subsidised body"), that contracting authority shall-

- (a) make it a condition of the making of such contribution that the subsidised body complies with the provisions of these Regulations in relation to that contract as if it were a contracting authority, and
- (b) ensure that the subsidised body does so comply or recover the contribution.

(2) Paragraph (1) above applies to a contract which would be a public works contract if the subsidised body were a contracting authority and which is for the carrying out of any of the activities specified in Schedule 1 as are included in Group 502 or for the carrying out of building work for hospitals, facilities intended for sports, recreation and leisure, school and university building or buildings for administrative purposes.

Public housing scheme works contracts

24. -

(1) For the purpose of seeking offers in relation to a public housing scheme works contract, where the size and complexity of the scheme and the estimated duration of the works involved require that the planning of the scheme be based from the outset on a close collaboration of a team comprising representatives of the contracting authority, experts and the contractor, a contracting authority may, except as indicated in the following paragraphs, depart from the provisions of these Regulations insofar as it is necessary to do so to select the contractor who is most suitable for integration into the team.

(2) The contracting authority shall comply with the provisions of regulation 12(1) to (5).

(3) The contracting authority shall include in the contract notice a job description which is as accurate as possible so as to enable contractors to form a valid idea of the scheme and of the minimum standards relating to the business or professional status, the economic and financial standing and the technical capacity which the person awarded the contract will be expected to fulfil.

Public works concession contracts

25. -

(1) A contracting authority seeking offers in relation to a public works concession contract shall comply with the following paragraphs of this regulation.

(2) The contracting authority shall publicise its intention to seek offers in relation to the concession contract by sending to the Official Journal as soon as possible after forming the intention a notice in a form substantially corresponding to that set out in Part F of Schedule 2 and containing the information therein specified in relation to the concession contract.

(3) The date which the contracting authority shall fix as the last date for the receipt by it of tenders or of requests to be selected to tender for or negotiate the contract, as the case may be, shall be specified in paragraph 3(a) of the notice and shall be not less than 52 days from the date of despatch of the notice.

Sub-contracting the work or works to be carried out under a public works concession contract

26. -

(1) A contracting authority seeking offers in relation to a public works concession contract shall either-

(a) include in the invitation to tender for, or to apply to be selected to tender for or to negotiate, the concession contract a request that the applicant specify whether he would intend, if awarded the concession contract, to sub-contract to persons who are not affiliated to him any of the work or works to be carried out under the concession contract and,

if so, how much as a proportion of the value of such work or works would be so sub-contracted, or

(b) require as a term of the concession contract-

(i) that the concessionaire sub-contract to persons who are not affiliated to the concessionaire some or all of the work or works to be carried out under the concession contract, and

(ii) that the amount of the works so sub-contracted be not less than 30%, or such higher percentage as may be specified in the contract at the option of the contracting authority or the concessionaire, of the value of the consideration which the contracting authority would expect to give for the carrying out of the work or works if it did not grant a concession.

(2) Where the concessionaire is a contracting authority that contracting authority shall comply with the provisions of these Regulations in respect of public works contracts it seeks offers in relation to for the purpose of sub-contracting the work or works to be carried out under the public works concession contract.

(3) Where the concessionaire is not a contracting authority the concessionaire shall-

(a) publicise his intention to seek offers in relation to any contract to which this paragraph applies by virtue of paragraph (4) below by sending to the Official Journal as soon as possible after forming the intention a notice in a form substantially corresponding to that set out in Part G of Schedule 2 and containing the information therein specified in relation to the contract;

(b) comply with regulation 30 in relation to that notice as if the concessionaire were a contracting authority;

(c) if that notice invites tenders, fix as the last date for the receipt by the concessionaire of tenders a date of not less than 40 days from the date of the despatch of the notice and specify that date in paragraph 4(a) of the notice; and

(d) if the notice invites applications to be selected to tender for or negotiate the contract-

(i) fix as the last date for the receipt of such applications a date not less than 37 days from the date of despatch of the notice and specify that date in paragraph 4(a) of the notice; and

(ii) fix as the last date for the receipt of tenders following selection of the persons to be invited to tender a date of not less than 40 days from the date of despatch of the invitation and specify that date in the invitation.

(4) Paragraph (3) above applies to a contract-

(a) in relation to which the concessionaire is seeking offers for the purpose of sub-contracting any of the work or works to be carried out under the public works concession contract,

(b) which the concessionaire does not intend to enter into with a person affiliated to him,

(c) which would, if the concessionaire were a contracting authority, be a public works contract other than a public works contract in respect of which a contracting authority would be entitled to use the negotiated procedure pursuant to regulation 10(2)(d) to (h).

(5) For the purposes of this regulation a person is to be treated as affiliated to another person if either exercises, directly or indirectly, a dominant influence over the other or any person exercises, directly or indirectly, a dominant influence over both of them or if they are both members of any consortium formed for the purpose of performing the public works concession contract; and a person shall be taken to exercise a dominant influence over another person-

- (a) if he possesses the greater part of the issued share capital of that person or controls the voting power attached to such greater part, or
- (b) if he may appoint more than half of the individuals who are ultimately responsible for managing that person's affairs.

(6) A contracting authority shall require applicants for a public works concession contract to submit a list of all persons affiliated to the applicant with the application and to update that list from time to time to take account of any changes in the persons affiliated to the applicant.

Obligations relating to employment protection and working conditions

27. A contracting authority which includes in the contract documents relating to a public works contract information as to where a contractor may obtain information about obligations relating to employment protection and working conditions which will apply to the works to be carried out under the contract, shall request contractors to indicate that they have taken account of those obligations in preparing their tender or in negotiating the contract.

Statistical and other reports

28. -

(1) A contracting authority shall, no later than 31st July 1993 and 31st July in each alternate year thereafter, send to the Treasury a report specifying in relation to each public works contract awarded by it during the year preceding the year in which the report is made-

- (a) the value (estimated if necessary) of the consideration payable under the contract;
- (b) whether the open, restricted or negotiated procedure was used in awarding the contract;
- (c) if the negotiated procedure was used, pursuant to which provision of regulation 10(2) that procedure was used;
- (d) the principal category of works carried or to be carried out under the contract; and
- (e) the nationality of the person to whom the contract was awarded.

(2) A contracting authority shall send to the Treasury a report containing such other information as the Treasury may from time to time require in respect of a particular public works contract (including public works contracts excluded from the application of these Regulations by regulations 6 and 7) for the purpose of informing the Commission.

Responsibility for obtaining reports

29. -

(1) Where a contracting authority is not a Minister of the Crown or a government department, that contracting authority shall send any report which it is required in accordance with regulations 8(6), 10(7), 20(7), 22(3) and 28 to send to the Treasury instead to the Minister responsible for that contracting authority and that Minister shall be responsible for sending the report to the Treasury.

(2) The Minister responsible for a contracting authority shall be the Minister of the Crown whose areas of responsibility are most closely connected with the functions of the contracting authority; and any question as to which Minister of the Crown's areas of responsibility are most closely connected with the functions of a contracting authority shall be determined by the Treasury whose determination shall be final.

(3) The requirement on a contracting authority to send any report in accordance with paragraph (1) above to the Minister of the Crown responsible for that contracting authority shall be enforceable, on the application of the Minister responsible, by mandamus or, in Scotland, for an order for specific performance.

(4) Proceedings under paragraph (3) above brought in Scotland shall be brought before the Court of Session.

(5) In the application of this regulation to Northern Ireland references to the Minister shall include references to the head of a Northern Ireland department.

Publication of notices

30. -

(1) Any notice required by these Regulations to be sent to the Official Journal shall be sent by the most appropriate means to the Office for Official Publications of the European Communities⁽¹⁷⁾ and where the contracting authority is applying the restricted procedure or the negotiated procedure and, for reasons of urgency, is applying the provisions of regulations 12(14) and 13(4), the notice shall be sent by telex, telegram or telefax.

(2) Any such notice shall not contain more than 650 words.

(3) The contracting authority shall retain evidence of the date of despatch to the Official Journal of each notice.

(4) The contracting authority shall not place a contract notice in the press or like publications in the United Kingdom before the date on which the notice is despatched in accordance with paragraph (1) above and if it does after that date, so place the notice it shall not add to the notice any information in relation to the contract which was not contained in the notice sent to the Official Journal.

Notes:

[17] The address for the Office for Official Publications of the European Communities is 2 Rue Mercier, 2985, Luxembourg (tel: 499 28-1, telex: 1324 pubof lu, fax: 49 00 03, 49 57 19).

PART VII

APPLICATIONS TO THE COURT

Enforcement of obligations relating to a public works contract

31. -

(1) The obligation on a contracting authority to comply with the provisions of these Regulations other than regulations 8(6), 10(7), 20(7), 22(3), 28 and 29(1), and with any enforceable Community obligation in respect of a public works contract (other than one excluded from the application of these Regulations by regulations 6 and 7), and the obligation on a concessionaire to comply with the provisions of regulation 26(3) is a duty owed to contractors.

(2) In this regulation and notwithstanding regulation 4, references to "contractor" include, where the duty owed pursuant to paragraph (1) above is the obligation on a concessionaire to comply with regulation 26(3), any person-

- (a) who sought, or who seeks, or would have wished, to be the person to whom a contract to which regulation 26(3) applies is awarded, and
- (b) who is a national of and established in a member State.

(3) A breach of the duty owed pursuant to paragraph (1) above shall not be a criminal offence but any breach of the duty shall be actionable by any contractor who, in consequence, suffers, or risks suffering, loss or damage.

(4) Proceedings under this regulation shall be brought in England and Wales and in Northern Ireland in the High Court and, in Scotland, before the Court of Session.

- (5) Proceedings under this regulation may not be brought unless-
- (a) the contractor bringing the proceedings has informed the contracting authority or concessionaire, as the case may be, of the breach or apprehended breach of the duty owed to him pursuant to paragraph (1) above by that contracting authority or concessionaire and of his intention to bring proceedings under this regulation in respect of it; and
 - (b) they are brought promptly and in any event within 3 months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending the period within which proceedings may be brought.

(6) Subject to paragraph (6) below, but otherwise without prejudice to any other powers of the Court, in proceedings brought under this regulation the Court may-

(a) by interim order suspend the procedure leading to the award of the contract in relation to the award of which the breach of the duty owed pursuant to paragraph (1) above is alleged, or suspend the implementation of any decision or action taken by the contracting authority or concessionaire, as the case may be, in the course of following such a procedure; and

(b) if satisfied that a decision or action taken by a contracting authority was in breach of the duty owed pursuant to paragraph (1) above-

(i) order the setting aside of that decision or action or order the contracting authority to amend any document, or

(ii) award damages to a contractor who has suffered loss or damage as a consequence of the breach, or

(iii) do both of those things.

(7) In proceedings under this regulation the Court shall not have power to order any remedy other than an award of damages in respect of a breach of the duty owed pursuant to paragraph (1) above if the contract in relation to which the breach occurred has been entered into.

(8) Notwithstanding sections 21 and 42 of the Crown Proceedings Act 1947^[18], in proceedings brought under this regulation against the Crown the court shall have power to grant an injunction or interdict.

Irvine Patnick

Thomas Sackville

Two of the Lords Commissioners of Her Majesty's Treasury

28th November 1991

Notes:

[18] 1947 c. 44; the Crown Proceedings Act 1947 was extended to Northern Ireland in relation to Her Majesty's Government in the United Kingdom and in Northern Ireland by and with the additions, exceptions and modifications set out in the Crown Proceedings (Northern Ireland) Order 1981, S.I. 1981/233, to which there is an amendment not relevant to these regulations.

**SCHEDULE 1
Regulation 2(1)**

ACTIVITIES CONSTITUTING WORKS

<i>Classes</i>	<i>Groups</i>	<i>Subgroups and items</i>	<i>Descriptions</i>
50			BUILDING AND CIVIL ENGINEERING
	500		General building and civil engineering work (without any particular specialisation) and demolition work
		500.1	General building and civil engineering work (without any particular specialisation)
		500.2	Demolition work
	501		Construction of flats, office blocks, hospitals and other buildings, both residential and non-residential
		501.1	General building contractors
		501.2	Roofing
		501.3	Construction of chimneys, kilns and furnaces
		501.4	Waterproofing and damp-proofing
		501.5	Restoration and maintenance of outside walls (repainting, cleaning, etc.)
		501.6	Erection and dismantlement of scaffolding
		501.7	Other specialised activities relating to construction work (including carpentry)
	502		Civil engineering: construction of roads, bridges, railways, etc.
		502.1	General civil engineering work
		502.2	Earth-moving (navvying)
		502.3	Construction of bridges, tunnels and shafts, drilling
		502.4	Hydraulic engineering (rivers, canals, harbours, flows, locks and dams)
		502.5	Road-building (including specialised construction of airports and runways)
		502.6	Specialised construction work relating to water (i.e. to irrigation, land drainage, water supply, sewage disposal, sewerage, etc.)
		502.7	Specialised activities in other areas of civil engineering
	503		Installation (fittings and fixtures)

<i>Classes</i>	<i>Groups</i>	<i>Subgroups and items</i>	<i>Descriptions</i>
		503.1	General installation work
		503.2	Gas fitting and plumbing, and the installation of sanitary equipment
		503.3	Installation of heating and ventilating apparatus (central heating, air conditioning, ventilation)
		503.4	Sound and heat insulation, insulation against vibration
		503.5	Electrical fittings
		503.6	Installation of aerials, lightning conductors, telephones, etc.
	504		Building completion work
		504.1	General building completion work
		504.2	Plastering
		504.3	Joinery, primarily engaged in on the site assembly and/or installation (including the laying of parquet flooring)
		504.4	Painting, glazing, paper hanging
		504.5	Tiling and otherwise covering floors and walls
		504.6	Other building completion work (putting in fireplaces, etc.)

SCHEDULE 2

Regulations 9, 11(2), 12(2), 13(2), 25(2), and 26(3)

FORMS OF NOTICES FOR PUBLICATION IN THE OFFICIAL JOURNAL

PART A

PRIOR INFORMATION NOTICE

1. The name, address, telegraphic address, telephone, telex and facsimile numbers of the contracting authority.
2.
 - (a) The site.
 - (b) The nature and extent of the services to be provided and, where relevant, the main characteristics of any lots by reference to the work.
 - (c) If available: an estimate of the cost range of the proposed services.
3.
 - (a) Estimated date for initiating the award procedures in respect of the contract or contracts.
 - (b) If known: estimated date for the start of the work.
 - (c) If known: estimated timetable for completion of the work.
4. If known: terms of financing of the work and of price revision and/or references to the provisions in which these are contained.
5. Other information.
6. Date of despatch of the notice.

PART B

OPEN PROCEDURE NOTICE

1. The name, address, telephone number, telegraphic address, telex and facsimile numbers of the contracting authority.
2.
 - (a) The award procedure chosen.
 - (b) Nature of the contract for which tenders are being requested.
3.
 - (a) The site.
 - (b) The nature and extent of the services to be provided and general nature of the work.
 - (c) If the work or the contract is subdivided into several lots, the size of the different lots and the possibility of tendering for one, for several or for all of the lots.
 - (d) Information concerning the purpose of the work or the contract where the latter also involves the drawing up of projects.
4. Any time limit for completion.
- 5.

- (a) Name and address of the service from which the contract documents and additional documents may be requested.
 - (b) Where applicable, the amount and terms of payment of the sum to be paid to obtain such documents.
- 6.
- (a) The final date for receipt of tenders.
 - (b) The address to which they must be sent.
 - (c) The language or languages in which they must be drawn up.
- 7.
- (a) Where applicable, the persons authorised to be present at the opening of tenders.
 - (b) The date, hour and place of such opening.
8. Any deposit and guarantees required.
9. Main terms concerning financing, and payment and/or references to the provisions in which these are contained.
10. Where applicable, the legal form to be taken by the grouping of contractors to whom the contract is awarded.
11. Minimum standards of economic and financial standing and technical capacity required of the contractor to whom the contract is awarded.
12. Period during which the tenderer is bound to keep open his tender.
13. The criteria for the award of the contract. Criteria other than that of the lowest price shall be mentioned where they do not appear in the contract documents.
14. Where applicable, prohibition on variants.
15. Other information.
16. Date of publication of the prior information notice in the *Official Journal of the European Communities* or references to its non-publication.
17. Date of despatch of the notice.

PART C

RESTRICTED PROCEDURE NOTICE

1. The name, address, telephone number, telex and facsimile numbers of the contracting authority.
2.
 - (a) The award procedure chosen.
 - (b) Where applicable, justification for the use of the shorter time limits.^[19]
 - (c) Nature of the contract which tenders are being requested.
3.
 - (a) The site.
 - (b) The nature and extent of the services to be provided and general nature of the work.
 - (c) If the work of the contract is subdivided into several lots, the size of the different lots and the possibility of tendering for one, for several or for all of the lots.

- (d) Information concerning the purpose of the work or the contract where the latter also involves the drawing up of projects.
- 4. Any time limit for completion.
- 5. Where applicable, the legal form to be taken by the grouping of contractors to whom the contract is awarded.
- 6.
 - (a) The final date for receipt of requests to participate.
 - (b) The address to which they must be sent.
 - (c) The language or languages in which they must be drawn up.
- 7. The final date for despatch of invitations to tender.
- 8. Any deposit and guarantees required.
- 9. Main terms concerning financing and payment and/or provisions in which these are contained.
- 10. Information concerning the contractor's personal position and minimum standards of economic and financial standing and technical capacity required of the contractor to whom the contract is awarded.
- 11. The criteria for the award of the contract where they are not mentioned in the invitation to tender.
- 12. Where applicable, prohibition on variants.
- 13. Other information.
- 14. Date of publication of the prior information notice in the *Official Journal of the European Communities* or reference to its non-publication.
- 15. Date of despatch of the notice.

PART D

NEGOTIATED PROCEDURE NOTICE

- 1. The name, address, telegraphic address, telephone, telex and facsimile numbers of the contracting authority.
- 2.
 - (a) The award procedure chosen.
 - (b) Where applicable, justification for the use of the shorter time limits.^[20]
 - (c) Nature of the contract for which tenders are being requested.
- 3.
 - (a) The site.
 - (b) The nature and extent of the services to be provided and general nature of the work.
 - (c) If the work or the contract is subdivided into several lots, the size of the different lots and the possibility of tendering for one, for several or for all of the lots.
 - (d) Information concerning the purpose of the work or the contract where the latter also involves the drawing up of projects.
- 4. Any time limit.

5. Where applicable, the legal form to be taken by the grouping of contractors to whom the contract is awarded.
6.
 - (a) final date for receipt of tenders.
 - (b) The address to which they must be sent.
 - (c) The language or languages in which they must be drawn up.
7. Any deposit and guarantees required.
8. Main terms concerning financing and payment and/or the provisions in which these are contained.
9. Information concerning the contractor's personal position and information and formalities necessary in order to evaluate the minimum standards of economic and financial standing and technical capacity required of the contractor to whom the contract is awarded.
10. Where applicable, prohibition on variants.
11. Where applicable, the names and addresses of suppliers already selected by the awarding authority.
12. Where applicable, date(s) of previous publications in the *Official Journal of the European Communities*.
13. Other information.
14. Date of publication of the prior information notice in the *Official Journal of the European Communities*.
15. Date of despatch of the notice.

PART E

CONTRACT AWARD NOTICE

1. Name and address of contracting authority.
2. Award procedure chosen.
3. Date of award of contract.
4. Criteria for award of contract.
5. Number of offers received.
6. Name and address of successful contractor(s).
7. Nature and extent of the services provided, general characteristics of the finished structure.
8. Price or range of prices (minimum/maximum) paid.
9. Where appropriate, value and proportion of contract likely to be subcontracted to third parties.
10. Other information.
11. Date of publication of the tender notice in the *Official Journal of the European Communities*.
12. Date of despatch of the notice.

PART F

PUBLIC WORKS CONCESSION CONTRACT NOTICE

1. The name, address, telegraphic address, telephone, telex and facsimile numbers of the contracting authority.
2.
 - (a) The site.
 - (b) The subject of the concession and extent of the services to be provided.
3.
 - (a) Final date for receipt of candidatures.
 - (b) The address to which they must be sent.
 - (c) The language or languages in which they must be drawn up:
4. Personal, technical and financial conditions to be fulfilled by the candidates.
5. The criteria for the award of the contract.
6. Where applicable, the minimum percentage of the works contracts awarded to third parties.
7. Other information.
8. Date of despatch of the notice.

PART G

NOTICE OF WORKS CONTRACTS AWARDED BY CONCESSIONAIRES

1.
 - (a) The site.
 - (b) The nature and extent of the service to be provided and the general nature of the work.
2. Any time limit for the completion of the works.
3. Name and address of the service from which the contract documents and additional documents may be requested.
4.
 - (a) The final date for receipt of requests to participate and/or for receipt of tenders.
 - (b) The address to which they must be sent.
 - (c) The language or languages in which they must be drawn up.
5. Any deposit and guarantees required.
6. The minimum standards of economic and financial standing and technical capacity required of the contractor.
7. The criteria for the award of the contract.
8. Other information.
9. Date of despatch of the notice.

Notes:

[19] In accordance with regulation 12. [back](#)

[20] In accordance with regulation 13. [back](#)

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations enact in its entirety Council Directive 71/305/EEC concerning the co-ordination of procedures for the award of public works contracts (OJ No. L185, 16.8.71, p. 5) as amended by Council Directive 89/440/EEC (OJ No. L210, 21.7.89, p. 1). They also implement, to the extent that it relates to that Directive, Council Directive 89/665/EEC on the co-ordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ No. L395, 30.12.89, p. 33).

The Regulations apply to certain public bodies called in the Regulations "contracting authorities" (regulation 3) when they are seeking offers in relation to certain contracts providing for, or engaging a person to procure, the carrying out or the design and carrying out of certain building and engineering works called in the Regulations "public works contracts" (regulations 2(1) and 5). They deal in particular with the treatment to be accorded to contractors or potential contractors who are nationals of and established in member State (regulation 4). Certain contracts are excluded from the application of the Regulations, principally where the contracting authority operates in the transport, water and energy fields, secret contracts or contracts connected with international agreements (regulation 6) and those contracts where the value of the contract is beneath the threshold for coverage (regulation 7).

The principal requirement of the Regulations is that, in seeking offers in relation to a public works contract, a contracting authority must use one of three procedures: the open procedure, whereby any person who is interested may submit a tender; the restricted procedure whereby only those persons selected by the contracting authority may submit tenders; and the negotiated procedure whereby the contracting authority negotiates the terms of the contract with one or more persons selected by it. The Regulations lay down provisions for making the choice of procedure. The negotiated procedure may only be used in certain limited circumstances (regulation 10).

The contracting authority is required to publicise its intention to seek offers in relation to a public works contract in the Official Journal of the European Communities as soon as the decision approving the planning of works has been taken (regulation 9) and again when it starts the procedure leading to the award although this latter requirement is dispensed with in certain circumstances when the negotiated procedure is used. The form of the advertisement and the information which it has to contain in relation to the proposed contract is specified in Schedule 2. If the notice is also to be published in the UK press it must be limited to the information published in the Official Journal and must not be published before the notice is sent to the Official Journal (regulation 30). The various procedures also lay down the time to be allowed for the response by potential contractors to the invitations and for obtaining relevant documents. The Regulations also specify the matters to which the contracting authority may have regard in excluding

tenders from contractors who are regarded as ineligible or in selecting contractors to tender for or to negotiate the contract (regulations 11 to 13). The detailed rules for the selection of contractors are laid down and relate to their business and professional status, their economic and financial standing and their technical capacity. The contracting authority is restricted in the information on which it may rely to demonstrate these matters (regulations 14 to 17).

The contracting authority is required to award a public works contract on the basis either of the offer (including in-house bids) which offers the lowest price or the one which is the most economically advantageous (regulation 20).

There are various other requirements in the Regulations. The most important is the requirement that where the contracting authority wishes to lay down technical specifications which the work or works to be carried out under the contract and the material or goods used in or for them must meet all such specifications must be specified in the contract documents and that, except in certain circumstances, these specifications must be defined by reference to European specifications. It is also provided that, except where it is not possible to describe the goods or materials otherwise, the technical specifications may not refer to goods or materials of a specific make or source or to a particular process which have the effect of favouring or eliminating particular contractors (regulation 8). All contracting authorities are required to publicise in the Official Journal information about the public works contracts they have awarded (regulation 21). The contracting authorities are also required to submit various reports in respect of works and public works contracts awarded by them, in particular, a biennial report (regulation 28). There is a requirement that, where a contracting authority contributes more than half the consideration payable under certain works contracts awarded by another person, compliance with the Regulations is made a condition of the contribution (regulation 23). Special provisions apply to public works concession contracts (public works contracts whereby the contractor is granted the right to exploit the works under the contract) (regulation 25) and for works contracts awarded by such concessionaires (regulation 26), and there is a relaxation of the rules for public works contracts relating to the design and construction of a public housing scheme (regulation 24).

Finally, the Regulations provide that the obligation on a contracting authority to comply with the Regulations, and with any enforceable Community obligation in relation to the award of a public works contract, is a duty owed to contractors. A breach of the duty is not a criminal offence but is actionable by a contractor. Proceedings are assigned to the High Court in England, Wales and Northern Ireland and to the Court of Session in Scotland. The court is given power to grant appropriate interim and final relief and to award damages except that, where the contract in respect of which there has been an infringement has already been entered into, the court's powers are restricted to awarding damages. The obligation on concessionaires in respect of sub-contracting works under a public works concession contract is likewise enforceable (regulation 31).

1991 No. 2680

PUBLIC PROCUREMENT

The Public Works Contracts Regulations 1991

Made 28th November 1991

Laid before 29th November

Parliament 1991

Coming into force 21st December 1991

The Public Services Contracts Regulations 1993

Statutory Instrument 1993 No. 3228

Statutory Instrument 1993 No. 3228

The Public Services Contracts Regulations 1993

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The Treasury, being the Minister designated^[1] for the purposes of section 2(2) of the European Communities Act 1972^[2] in relation to public procurement, in exercise of the powers conferred on them by the said section 2(2) and of all other powers enabling them in that behalf, hereby make the following Regulations:—

GENERAL

Title and commencement

1. These Regulations may be cited as the Public Services Contracts Regulations 1993 and shall come into force on 13th January 1994.

Interpretation

2.—(1) In these Regulations—

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

"the Commission" means the Commission of the Communities;

"contract documents" means the invitation to tender for or to negotiate the contract, the proposed conditions of contract, the specifications or descriptions of the services required by the contracting authority and all documents supplementary thereto;

"contracting authority" has the meaning ascribed to it by regulation 3;

"contract notice" means a notice sent to the Official Journal in accordance with regulations 11(2), 12(2) or 13(2);

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

(a) which is conducted by a contracting authority and in which it invites the entry of plans and designs;

(b) under the rules of which the plans or designs will be judged by a jury;

(c) under which prizes may or may not be awarded; and

(d) which enables the contracting authority to acquire the use or ownership of plans or designs selected by the jury;

"ECU" means the European Currency Unit as defined in Council Regulation (EEC) No. 3180/78^[3];

"established" means the same as it does for the purposes of the Community Treaties;

"financial year" means the period of 12 months ending on 31st March in any year or, in relation to any person whose accounts are prepared in respect of a different 12 month period, that period of 12 months;

"government department" includes a Northern Ireland department or the head of such department;

"Minister of the Crown" means the holder of an office in Her Majesty's Government in the United Kingdom, and includes the Treasury;

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

"negotiated procedure" means a procedure leading to the award of a contract whereby the contracting authority negotiates the terms of the contract with one or more persons selected by it;

"Official Journal" means the Official Journal of the Communities;

"open procedure" means a procedure leading to the award of a contract whereby all interested persons may tender for the contract;

"prior information notice" means a notice sent to the Official Journal in accordance with regulation 9;

"public services contract" means a contract in writing for consideration (whatever the nature of the consideration) under which a contracting authority engages a person to provide services but does not include—

- (a) a contract of employment or other contract of services;
- (b) a public works contract within the meaning of the Public Works Contracts Regulations 1991^[4];
- (c) a public supply contract within the meaning of the Public Supply Contracts Regulations 1991^[5];
- (d) any contract where the contracting authority is a utility within the meaning of regulation 3 of the Utilities Supply and Works Contracts Regulations 1992^[6] and the services are to be provided under it for the purposes of carrying out an activity specified in the Part of Schedule 1 of those Regulations in which the utility is specified; or
- (e) a contract under which a contracting authority engages a person to provide services to the public lying within its responsibility and under which the consideration given by the contracting authority consists of or includes the right to exploit the provision of the services.

"restricted procedure" means a procedure leading to the award of a contract whereby only persons selected by the contracting authority may submit tenders for the contract;

"services provider" has the meaning ascribed to it by regulation 4;

"working day" means a day other than a Saturday, Sunday or Bank Holiday within the meaning of the Banking and Financial Dealings Act 1971^[7]; and

"year" means a calendar year.

(2) For the purposes of these regulations—

(a) "a part A services contract" is a contract under which services specified in Part A of Schedule 1 are to be provided;

(b) "a Part B services contract" is a contract under which services in Part B of Schedule 1 are to be provided,

and, where services specified in both Parts A and B are to be provided under a single contract, then—

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

(3) The value in the currency of any member State of any amount expressed in these Regulations in ECU shall be determined by reference to the rate for the time being applying for the purposes of Council Directive 92/50/EEC^[8] as published from time to time in the Official Journal^[9].

- (4) Where a thing is required to be done under these Regulations—
- (a) within a period after an action is taken, the day on which that action was taken shall not be counted in the calculation of that period.
 - (b) within a certain period, that period must include 2 working days;
 - (c) within a period and the last day of that period is not a working day, the period shall be extended to include the following working day.

(5) References in these Regulations to a regulation are references to a regulation in these Regulations and references to a Schedule are references to a Schedule to these Regulations.

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

- (a) a Minister of the Crown,
- (b) a government department,
- (c) the House of Commons,
- (d) the House of Lords,
- (e) the Northern Ireland Assembly,
- (f) a local authority,
- (g) a fire authority constituted by a combination scheme under the Fire Services Act 1947^[10],
- (h) the Fire Authority for Northern Ireland,
- (i) a police authority constituted under section 2 of the Police Act 1964^[11] or a combined police authority established by an amalgamation scheme under that Act,
- (j) the Police Authority for Northern Ireland,
- (k) an authority established under section 10 of the Local Government Act 1985^[12],
- (l) a joint authority established by Part IV of that Act,
- (m) any body established pursuant to an order under section 67 of that Act,
- (n) the Broads Authority,
- (o) any joint board the constituent members of which consist of any of the bodies specified in paragraphs (f), (g), (i), (k), (l), (m) and (n) above,
- (p) a joint or special planning board constituted for a National Park by an order under paragraphs 1 or 3 of Schedule 17 to the Local Government Act 1972^[13],

(q) a joint education board constituted under the provisions of Part I of the First Schedule to the Education Act 1944^[14]

(r) a corporation established, or a group of individuals appointed to act together, for the specific purposes of meeting needs in the general interest, not having an industrial or commercial character, and

(i) financed wholly or mainly by another contracting authority, or

(ii) subject to management supervision by another contracting authority, or

(iii) more than half of the board of directors or members of which, or, in the case of a group of individuals, more than half of these individuals, being appointed by another contracting authority, and

(s) an association of or formed by one or more of the above.

(2) In the application of these Regulations to England and Wales, "local authority" in paragraph (1) above means—

(a) a county council, a district council, a London borough council, a parish council, a community council, or the Council of the Isles of Scilly;

(b) the Common Council of the City of London in its capacity as local authority or police authority.

(3) In the application of these Regulations to Scotland, "local authority" in paragraph (1) above means a regional, islands or district council or any joint board or joint committee within the meaning of section 235 of the Local Government (Scotland) Act 1973^[15].

(4) In the application of these Regulations to Northern Ireland, "local authority" in paragraph (1) above means a district council within the meaning of the Local Government Act (Northern Ireland) 1972^[16].

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

Services providers

4.—(1) For the purposes of these Regulations, a "services provider" means a person—

(a) who sought, or who seeks, or who would have wished,

(i) to be the person to whom a public services contract is awarded, or

(ii) to participate in a design contest, and

(b) who is a national of and established in a member State.

(2) When these Regulations apply a contracting authority shall not treat a person who is not a national of and established in a member State more favourably than one who is.

Application of the Regulations

5.—(1) Whenever a contracting authority seeks offers in relation to a

proposed Part A services contract other than one excluded by virtue of regulation 6 or 7, these Regulations apply in their entirety.

(2) Whenever a contracting authority seeks offers in relation to a proposed Part B services contract other than one excluded by virtue of regulation 6 or 7, Part I(General) and Part VII(Applications to the court) apply but only the following provisions in pArts II to VI apply—

- regulation 8 (Technical specifications in contract documents)
- regulation 22 (Contract award notices)
- regulation 27(2) (Statistical and other reports)
- regulation 28 (Responsibility for obtaining reports)
- regulation 29 (Publication of notices)

General exclusions

6. These Regulations shall not apply to the seeking of offers in relation to a proposed public services contract—

- (a) for the acquisition of land, including buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land;
- (b) for the acquisition, development, production or co-production of programme material for radio or television by a broadcaster or for the purchase of broadcasting time;
- (c) for voice telephony, telex, radiotelephony, paging or satellite services;
- (d) for arbitration or conciliation services;
- (e) for financial services in connection with the issue, purchase, sale or transfer of securities or other financial instruments;
- (f) for central banking services;
- (g) for research and development services unless—
 - (i) the benefits are to accrue exclusively to the contracting authority for its use in the conduct of its own affairs, and
 - (ii) the services are to be wholly paid for by the contracting authority;
- (h) to which the provisions of Article 223 of the EEC Treaty apply;
- (i) which is classified as secret or where the carrying out of the services under it must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions of any part of the United Kingdom or when the protection of the basic interests of the security of the United Kingdom require it;
- (j) where different procedures govern the procedures leading to the award of the contract and it is to be entered into—
 - (i) pursuant to an international agreement to which the United Kingdom and a State which is not a member State are parties and it provides for the provision of services intended for the joint implementation or exploitation of a project pursuant to that agreement;
 - (ii) pursuant to an international agreement relating to the stationing of troops; or
 - (iii) in accordance with the contract award procedures of an organisation of which only States are members (an

"international organisation") or of which only States or international organisations are members; or

(k) under which services are to be provided by another contracting authority, or by a person which is a contracting authority in another member State for the purposes of Council Directive 92/50/EEC^[17], because that contracting authority or person has an exclusive right—

(i) to provide the services, or

(ii) which is necessary for the provision of the services, pursuant to any published law, regulation or administrative provision, which is compatible with the EEC Treaty.

Thresholds

7.—(1) These Regulations shall not apply to the seeking of offers in relation to a proposed public services contract where the estimated value of the contract (net of value added tax) at the relevant time is less than 200,000 ECU.

(2) Subject to paragraphs (3) to (11) below, the estimated value for the purposes of paragraph (1) above of a public services contract shall be the value of the consideration which the contracting authority expects to give under the contract.

(3) In determining the value of the consideration which the contracting authority expects to give under a public services contract it shall, where appropriate, take account of—

(a) the premium payable for insurance services,

(b) the fees, commissions or other remuneration payable for banking and financial services, and

(c) the fees or commissions payable for design services.

(4) Subject to paragraphs (5) and (8) below, where a contracting authority has a single requirement for services and a number of public services contracts have been entered or are to be entered into to fulfil that requirement the estimated value for the purposes of paragraph (1) above of each public services contract shall be the aggregate of the value of the consideration which the contracting authority expects to give under each of those contracts.

(5) Paragraph (4) above shall not apply to any public services contract (unless the contracting authority chooses to apply that paragraph to that contract) if that contract has an estimated value (calculated in accordance with paragraph (2) above) of less than 80,000 ECU and the aggregate value of that contract and of any other contract in respect of which the contracting authority takes advantage of the disapplication of paragraph (4) above by virtue of this paragraph is less than 20 per cent of the aggregate of the value of the consideration which the contracting authority has given or expects to give under all the contracts entered or to be entered into to fulfil the requirement.

(6) Subject to paragraph (8) below, where a contracting authority has a requirement over a period for services of the type to be provided under the public services contract and for that purpose enters into—

(a) a series of contracts, or

(b) a contract which under its terms is renewable,

the estimated value of the contract for the purposes of paragraph (1) above shall be the amount calculated under paragraph (7) below.

(7) The contracting authority shall calculate the amount referred to in paragraph (6) above either—

(a) by taking the aggregate of the value of the consideration given by the contracting authority under public services contracts which have similar characteristics and which were for the provision of services of the type to be provided under the contract, during its last financial year ending before, or during the period of 12 months ending immediately before, the relevant time and by adjusting that amount to take account of any expected changes in the quantity and cost of the services in the period of 12 months commencing with the relevant time, or

(b) by estimating the aggregate of the value of the consideration which the contracting authority expects to give under such contracts which have similar characteristics and which are for the provision of services of the type to be provided under the contract during the period of 12 months from the first date on which the services will be performed or, where the contract is for a definite term of more than 12 months, during the term of the contract.

(8) Notwithstanding paragraphs (4) and (6) above, when the services to be provided under the contract are required for the sole purposes of a discrete operational unit within the organisation of the contracting authority and—

(a) the decision whether to enter the contact has been devolved to such a unit, and

(b) that decision is taken independently of any other part of the contracting authority,

the valuation methods described in paragraphs (4) and (7) above shall be adapted by aggregating only the value of the consideration which the contracting authority has given or expects to give, as the case may be, under contracts for the provision of services which were or are required for the sole purposes of that unit.

(9) The estimated value for the purposes of paragraph (1) above of a public services contract under which services are to be provided over a period exceeding 4 years or over an indefinite period shall be the value of the consideration which the contracting authority expects to give in respect of each month of the period multiplied by 48.

(10) Where a public services contract includes one or more options the estimated value of the contract for the purposes of paragraph (1) above shall be determined by calculating the highest possible consideration which could be given under the contract.

(11) A contracting authority shall not enter into separate public services contracts nor select nor exercise a choice under a valuation method in accordance with paragraph (7) above with the intention of avoiding the application of these Regulations to those contracts.

(12) The relevant time for the purposes of paragraphs (1) and (7)(a) above means the date on which a contract notice would be sent to the Official Journal if the requirement to send such a notice applied to that contract in accordance with these Regulations.

Notes:

[1] S. I. 1991/755.

[2] 1972 c. 68.

[3] OJ No. L379, 30.12.78, p.1, as amended by Council Regulation (EC) No. 2626/84 (OJ No. L247, 16.9.84, p.1) and Council Regulation EEC No. 1971/89 (OJ No. L189, 4.7.89, p.1).

[4] S. I. 1991/2680 as amended by S. I. 1992/2379.

[5] S. I. 1991/2679 as amended by S. I. 1992/3279.

[6] S. I. 1992/3279 as amended by S. I. 1993/3227.

[7] 1971 c. 80.

[8] OJ No. L209, 24.7.92, p.1.

[9] The rates are determined for each successive period of two years by calculating the average of the daily exchange rates between each currency and the ECU in a period of 24 months preceding the determination.

[10] 1947 c. 41.

[11] 1964 c. 48.

[12] 1985 c. 51.

[13] 1972 c. 70.

[14] 1944 c. 31.

[15] 1973 c. 65.

[16] 1972 c. 9 (N. I.).

[17] OJ No. L209, 24.7.92, p. 1.

PART II

TECHNICAL SPECIFICATIONS

Technical specifications in contract documents

8.—(1) In this regulation—

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

"essential requirements" means requirements relating to safety, health and certain other aspects in the general interest which the services must meet;

"European specification" means a common technical specification, a British standard implementing a European standard or a European technical approval;

"European standard" means a standard approved by the European Committee for Standardisation ("CEN") or by the European Committee for Electrotechnical Standardisation ("CENELEC") as a "European Standard ("EN")" or a "Harmonisation Document ("HD")" according to the Common Rules of those organisations, or by the European Telecommunications Standards Institute ("ETSI") as a "European Telecommunications Standard" ("ETSI") as a "European Telecommunications Standard" ("ETS");

"European technical approval" means an approval of the fitness for use of a product, issued by an approval body designated for the purpose by a member State, following a technical assessment of whether the product fulfils the essential requirements for building works, having regard to the inherent characteristics of the product and the defined conditions of application and use;

"standard" means a technical specification approved by a recognised standardising body for repeated and continuous application, compliance with which is in principle not compulsory;

"technical specifications" means the technical requirements defining the characteristics required of the work or works and of the materials and goods used in or for it or them (such as quality, performance, safety or dimensions) so that the works, work, materials and goods are described objectively in a manner which will ensure that they fulfil the use for which they are intended by the contracting authority. In relation to materials and goods, "technical specifications" include requirements in respect of quality assurance, terminology, symbols, tests and testing methods, packaging, marking and labelling. In relation to a work or works, they include requirements relating to design and costing, the testing, inspection and acceptance of a work or works, and the methods or techniques of construction.

(2) If a contracting authority wishes to lay down technical specifications which the services to be provided under a public services contract and which

the materials and goods used in or for it must meet it shall specify all such technical specifications in the contract documents.

(3) Subject to paragraph (4) below, the technical specifications in the contract documents relating to a public services contract shall be defined by reference to any European specifications which are relevant.

(4) A contracting authority may define the technical specifications referred to in paragraph (3) above other than by reference to relevant European specifications if—

(a) the contracting authority is under an obligation to define the technical specifications by reference to technical requirements which are mandatory in the United Kingdom for the services to be provided under the contract or for the materials or goods to be used in or for it (but only to the extent that such an obligation is compatible with Community obligations);

(b) the relevant European specifications do not include provision for establishing conformity to, or it is technically impossible to establish satisfactorily that the services or the material or goods do conform to, the relevant European specifications;

(c) definition by reference to European specifications would conflict with the application of—

(i) Council Directive 86/361/EEC on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment^[18],

(ii) Council Decision 87/95/EEC on standardisation in the field of information technology and telecommunications^[19], or

(iii) other Community instruments relating to specific types of services, material or goods;

(d) subject to paragraph (5) below, application of the relevant European specifications would oblige the contracting authority to use material or goods incompatible with equipment already in use or would entail disproportionate costs or disproportionate technical difficulties;
or

(e) the project is of a genuinely innovative nature for which use of existing relevant European specifications would be inappropriate.

(5) A contracting authority may only define the technical specifications other than by reference to relevant European specifications on the grounds specified in paragraph (4)(d) above where the contracting authority has a clearly defined and recorded strategy for changing over, within a set period, to European specifications.

(6) A contracting authority shall state in the contract notice which of the circumstances specified in paragraph (4)(b) to (e) above was the ground for defining the technical specifications other than by reference to European specifications or, if it is impossible to include this information in the contract notice or it is a proposed Part B services contract, the contracting authority shall specify it in the contract documents and shall in any event keep a record of this information which, if the Commission or any member State requests it,

it shall send to the Treasury for onward transmission to the Commission or member State which requested it.

(7) In the absence of European specifications relevant to the services to be provided under a public services contract or to the materials or goods to be used in or for it, the technical specifications in the contract documents—

(a) shall be defined by reference to the British technical specifications recognised as complying with the basic requirements specified in any Council Directive on technical harmonisation in accordance with the procedures laid down in those directives and, in particular, in accordance with the procedures laid down in Council Directive 89/106/EEC on the approximation of laws, regulations and administrative procedures in the member States relating to construction products^[20];

(b) may be defined by reference to British technical specifications relating to design and method of calculation and execution of a work or works and use of materials and goods;

(c) may be defined by reference to the following standards (and, if they are so defined, preference shall be given to the following standards in the order in which they are listed)—

- (i) British standards implementing international standards;
- (ii) other British standards and technical approvals; or
- (iii) any other standards

(8) Subject to paragraph (10) below, the contract documents shall not include technical specifications which refer to materials or goods of a specific make or source or to a particular process and which have the effect of favouring or eliminating particular services providers.

(9) Without prejudice to the generality of paragraph (8) above, references to trademarks, patents, types, origin or means of production shall not be incorporated into the technical specifications in the contract documents.

(10) Notwithstanding paragraph (8) or (9) above, a contracting authority may incorporate the references referred to in paragraphs (8) and (9) above into the technical specifications in the contract documents if—

- (a) such references are justified by the subject of the contract, or
- (b) the subject of the contract cannot otherwise be described by reference to technical specifications which are sufficiently precise and intelligible to all services providers, provided that the references are accompanied by the words "or equivalent".

Notes:

[18] OJ No. L217, 5.8.86, p. 21, as amended by Council Directive 91/263/EEC (OJ No. L128, 23.5.91, p.1).

[19] OJ No. L36, 7.2.87, p. 31.

[20] OJ No. L40, 11.2.89, p.12.

PART III

PROCEDURES LEADING TO THE AWARD OF A PUBLIC SERVICES CONTRACT

Prior information notices

9.—(1) Subject to paragraph (2) below, a contracting authority shall, as soon as possible after the commencement of each of its financial years, send to the Official Journal a notice, in a form substantially corresponding to that set out in Part A of Schedule 2 and containing the information therein specified, in respect of the public services contracts in relation to which it expects to seek offers leading to an award during that financial year and the notice shall be subdivided to give that information separately for each category of services specified in Part A of Schedule 1.

- (2) The obligation under paragraph (1) above shall only apply—
- (a) to proposed Part A services contracts which are not excluded from the application of these Regulations by virtue of regulation 6 or 7; and
 - (b) where, at the date of despatch of the notice, the total considerations which the contracting authority expects to give under all the proposed public services contracts for the provision of services falling within the same category specified in Part A of Schedule 1, equals or exceeds 750,000 ECU.

Selection of contract award procedure

10.—(1) For the purposes of seeking offers in relation to a proposed public services contract a contracting authority shall use the open procedure, the restricted procedure or the negotiated procedure and shall decide which of those procedures to use in accordance with the following paragraphs of this regulation.

- (2) A contracting authority may use the negotiated procedure in the following circumstances—
- (a) subject to paragraph (3) below, in the event that the procedure leading to the award of a contract by the contracting authority using the open or restricted procedure was discontinued—
 - (i) because of irregular tenders, or
 - (ii) following an evaluation made in accordance with regulation 11(8) or 12(4),and, without prejudice to the generality of the meaning of the words "irregular tenders", a tender may be considered irregular if the services provider fails to meet the requirements of, or the tender offers variations on the requirements specified in, the contract documents where this is not permitted under the terms of the invitation to tender, or the services, materials or goods offered do not meet the technical specifications (within the meaning of regulation 8(1) above) of the contracting authority;

(b) exceptionally, when the nature of the services to be provided, or the risks attaching thereto, are such as not to permit prior overall pricing;

(c) when the nature of the services to be provided, in particular in the case of intellectual services or services specified in category 6 of Part A of Schedule 1, is such that specifications cannot be drawn up with sufficient precision to permit the award of the contract using the open or restricted procedure;

(d) subject to paragraph (3) below, in the absence of tenders or of appropriate tenders in response to an invitation to tender by the contracting authority using the open or restricted procedure;

(e) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the services to be provided may only be provided by a particular person;

(f) when the rules of a design contest require the contract to be awarded to the successful contestant or to one of the successful contestants, provided that all successful contestants are invited to negotiate the contract;

(g) when (but only if it is strictly necessary) for reasons of extreme urgency brought about by events unforeseeable by, and not attributable to, the contracting authority, the time limits specified in regulations 11 and 12 if the open or restricted procedure is used, or the time limits specified in regulation 13 if the negotiated procedure is used pursuant to paragraph (2)(a) to (c) above, cannot be met;

(h) subject to paragraph (4) below, when a contracting authority wants a person who has entered into a public services contract with the contracting authority to provide additional services which were not included in the project initially considered or in the original services contract but which through unforeseen circumstances have become necessary, and—

(i) such services cannot for technical or economic reasons be provided separately from the services provided under the original contract without great inconvenience to the contracting authority, or

(ii) such services can be provided separately from the services provided under the original contract but are strictly necessary to the performance of that contract; and

(i) subject to paragraph (5) below, when a contracting authority wishes a person who has entered into a public services contract with it to provide new services which are a repetition of services provided under the original contract and which are in accordance with the project for the purpose of which the first contract was entered into.

(3) A contracting authority shall not use the negotiated procedure pursuant to paragraph (2)(a) or (d) above unless the proposed terms of the contract are substantially unaltered from the proposed terms of the contract in relation to which offers were sought using the open or restricted procedure.

(4) A contracting authority shall not use the negotiated procedure pursuant to paragraph (2)(h) above where the aggregate value of the consideration to be

given under contracts for the additional services exceeds 50 per cent of the value of the consideration payable under the original contract; and, for the purposes of this paragraph, the value of the consideration shall be taken to include the estimated value of any goods which the contracting authority provided to the person awarded the contract for the purpose of carrying out the contract.

(5) A contracting authority shall not use the negotiated procedure pursuant to paragraph (2)(i) above unless the contract notice relating to the original contract stated that a services contract for new services which would be a repetition of the services provided under the original contract may be awarded using the negotiated procedure pursuant to paragraph (2)(i) above and unless the procedure for the award of the new contract is commenced within three years of the original contract being entered into.

(6) In all other circumstances the contracting authority shall use the open procedure or restricted procedure.

(7) A contracting authority using the negotiated procedure pursuant to paragraph (2)(d) above shall, if the Commission requests it, submit a report recording the fact that it has done so to the Treasury for onward transmission to the Commission.

The open procedure

11.—(1) A contracting authority using the open procedure shall comply with the following paragraphs of this regulation.

(2) The contracting authority shall publicise its intention to seek offers in relation to the public services contract by sending to the Official Journal as soon as possible after forming the intention a notice, in a form substantially corresponding to that set out in Part B of Schedule 2, inviting tenders and containing the information therein specified.

(3) Subject to paragraph (4) below, the date which the contracting authority shall fix as the last date for the receipt by it of tenders made in response to the contract notice shall be specified in the contract notice and shall be not less than 52 days from the date of despatch of the notice.

(4) Where the contracting authority has published a notice in accordance with regulation 9 above in relation to the category of services to be provided under the public services contract it may substitute for the period of not less than 52 days specified in paragraph (3) above a period of not less than 36 days.

(5) The contracting authority shall send the contract documents within 6 days of the receipt of a request from any services provider provided that the documents are requested in good time and any fee specified in the contract notice has accompanied the request.

(6) The contracting authority shall supply such further information relating to the contract documents as may reasonably be requested by a service

provider provided that the request is received in sufficient time to enable the contracting authority to supply the information no later than 6 days before the date specified in the contract notice as the final date for the receipt of tenders.

(7) If the contract documents are too bulky to be supplied within the periods referred to in paragraphs (5) or (6) above or it is necessary that services providers be given the opportunity to inspect the site in relation to which the services are to be provided or documents relating to the contract documents, then the minimum periods referred to in paragraphs (3) and (4) above shall be extended to allow for such supply or inspection.

(8) The contracting authority may exclude a tender from the evaluation of offers made in accordance with regulation 21 only if the services provider may be treated as ineligible to tender on a ground specified in regulation 14 or if the services provider fails to satisfy the minimum standards of economic and financial standing, ability and technical capacity required of services providers by the contracting authority; for this purpose the contracting authority shall make its evaluation in accordance with regulations 14, 15, 16 and 17.

The restricted procedure

12.—(1) A contracting authority using the restricted procedure shall comply with the following paragraphs of this regulation.

(2) The contracting authority shall publicise its intention to seek offers in relation to the public services contract by sending to the Official Journal as soon as possible after forming the intention a notice, in a form substantially corresponding to that set out in Part C of Schedule 2, inviting requests to be selected to tender and containing the information therein specified.

(3) Subject to paragraph (15) below, the date which the contracting authority shall fix as the last date for the receipt by it of requests to be selected to tender shall be specified in the contract notice and shall not be less than 37 days from the date of the despatch of the notice.

(4) The contracting authority may exclude a services provider from those persons from whom it will make the selection of persons to be invited to tender only if the services provider may be treated as ineligible on a ground specified in regulation 14 or if the services provider fails to satisfy the minimum standards of economic and financial standing, ability and technical capacity required of services providers by the contracting authority; for this purpose the contracting authority shall make its evaluation in accordance with regulations 14, 15, 16 and 17.

(5) The contracting authority shall make the selection of the services providers to be invited to tender in accordance with regulations 14, 15, 16 and 17; and in making the selection and in issuing invitations the contracting authority shall not discriminate between services providers on the grounds of their nationality or the member State in which they are established.

(6) The contracting authority may predetermine the range within which the

number of persons which it intends to invite to tender for the contract shall be fixed but only if—

- (a) the lower number of the range is not less than 5 and the higher number not more than 20,
- (b) the range is determined in the light of the nature of the services to be provided under the contract, and
- (c) the range is specified in the contract notice.

(7) The number of persons invited to tender shall be sufficient to ensure genuine competition.

(8) The contracting authority shall send invitations to each of the services providers selected to tender and the invitation shall be accompanied by the contract documents, or the invitation shall state the address for requesting them.

(9) The invitation shall be sent in writing simultaneously to each services provider selected to tender.

(10) The following information shall be included in the invitation—

- (a) the address to which requests for the contract documents (if not accompanying the invitation) and further information relating to those documents should be sent, the final date for making such a request and the amount and terms of the fee which may be charged for supplying that material;
- (b) the final date for the receipt of tenders, the address to which they must be sent and the language or languages in which they must be drawn up;
- (c) a reference to the contract notice published in accordance with paragraph (2) above;
- (d) an indication of the information to be included with the tender which the contracting authority may require to be provided in accordance with regulations 15, 16 and 17; and
- (e) the criteria for the award of the contract if this information was not specified in the contract notice published in accordance with paragraph (2) above.

(11) Subject to paragraphs (12) and (15) below, the date which the contracting authority shall fix as the last date for the receipt by it of tenders made in response to the invitation to tender which shall be specified in the invitation to tender in accordance with paragraph (10)(b) above shall not be less than 40 days from the date of the despatch of the invitation.

(12) Subject to paragraph (15) below, where the contracting authority has published a notice in accordance with regulation 9 above in relation to the category of services to be provided under the public services contract, it may substitute for the period of not less than 40 days in paragraph (11) above a period of not less than 26 days.

(13) If it is necessary that services providers should be given the

opportunity to inspect the site in relation to which the services under the contract are to be provided or documents relating to the contract documents, then the minimum periods referred to in paragraphs (11) and (12) above shall be extended to allow for such inspection.

(14) Subject to paragraph (15) below, the contracting authority shall supply such further information relating to the contract documents as may reasonably be requested by a services provider selected to tender provided that the request for such information is received in sufficient time to enable the contracting authority to supply it not less than 6 days before the date specified in the invitation to tender as the final date for the receipt of tenders.

(15) Where compliance with the minimum periods referred to in paragraphs (3), (11), (12) and (14) above is rendered impracticable for reasons of urgency, the contracting authority may substitute for the period specified in paragraph (d) a period of not less than 15 days and for the period specified in paragraphs (11) and (12) periods of not less than 10 days and for the period specified in paragraph (14) a period of not less than 4 days and, in those circumstances, the contracting authority must send the invitation to tender by the most rapid means possible.

(16) A contracting authority shall not refuse to consider an application to be invited to tender for a contract if it is made by letter, telegram, telex, facsimile or telephone provided that, in the last 4 cases, it is confirmed by letter despatched before the date fixed by the contracting authority as the last date for the receipt of applications to be invited to tender for the contract.

The negotiated procedure

13.—(1) A contracting authority using the negotiated procedure shall comply with the following provisions of this regulation except that—

(a) a contracting authority using the negotiated procedure pursuant to regulation 10(2)(d) to (i), and

(b) a contracting authority using the negotiated procedure pursuant to regulation 10(2)(a) who invites to negotiate the contract every services provider who submitted a tender following an invitation made during the course of the discontinued open or restricted procedure (not being a tender which was excluded pursuant to regulation 11(8) or 12(4)),

need not comply with paragraphs (2) to (6) below.

(2) The contracting authority shall publicise its intention to seek offers in relation to the contract by sending to the Official Journal as soon as possible after forming the intention a notice, in a form substantially corresponding to that set out in Part D of Schedule 2, inviting requests to be selected to negotiate and containing the information therein specified.

(3) Subject to paragraph (4) below, the date which the contracting authority shall fix as the last date for the receipt by it of requests to be selected to negotiate shall be specified in the contract notice and shall be not less than 37 days from the date of despatch of the notice.

(4) Where compliance with the minimum period of 37 days in paragraph

(3) above is rendered impracticable for reasons of urgency, the contracting authority may substitute a period of not less than 15 days and, in those circumstances, the contracting authority must send the invitation to negotiate the contract by the most rapid means possible.

(5) Where there is a sufficient number of persons who are suitable to be selected to negotiate the contract, the number selected to negotiate the contract shall not be less than 3.

(6) A contracting authority shall not refuse to consider an application to be selected to negotiate if it is made by letter, telegram, telex, facsimile or by telephone provided that, in the last 4 cases, it is confirmed by letter before the date fixed by the contracting authority as the last date for the receipt of requests to be selected to negotiate.

(7) The contracting authority may exclude a services provider from those persons from whom it will make the selection of persons to be invited to negotiate the contract only if the services provider may be treated as ineligible on a ground specified in regulation 14 or if the services provider fails to satisfy the minimum standards of economic and financial standing, ability and technical capacity required of services providers by the contracting authority; for this purpose the contracting authority shall make its evaluation in accordance with regulations 14, 15, 16 and 17 below.

(8) The contracting authority shall make the selection of the services providers to be invited to negotiate in accordance with regulations 14, 15, 16 and 17; and in making the selection and in issuing invitations to negotiate the contracting authority shall not discriminate between services providers on the grounds of their nationality or the member State in which they are established.

PART IV

SELECTION OF SERVICES PROVIDERS

Criteria for rejection of services providers

14.—(1) A contracting authority may treat a services provider as ineligible to tender for, or to be included amongs those persons from whom it will make the selection of persons to be invited to tender for or to negotiate a contract in accordance with regulations 11(8), 12(4), and 13(7) above, or decide not to select a services provider to tender for or to negotiate a contract in accordance with regulations 12(5) and 13(8) above on one of the following grounds, namely that the services provider—

(a) being an individual is bankrupt or has had a receiving order or administration order made against him or has made any composition or arrangement with or for the benefit of his creditors or has made any conveyance or assignment for the benefit of his creditors or appears unable to pay, or to have no reasonable prospect of being able to pay, a debt within the meaning of section 268 of the Insolvency Act 1986^[21], or article 242 of the Insolvency (Northern Ireland) Order 1989^[22], or in

Scotland has granted a trust deed for creditors or become otherwise apparently insolvent, or is the subject of a petition presented under the law of any other state;

(b) being a partnership constituted under Scots law has granted a trust deed or become otherwise apparently insolvent, or is the subject of a petition presented for sequestration of its estate;

(c) being a company has passed a resolution or is the subject of an order by the court for the company's winding up otherwise than for the purposes of bona fide reconstruction or amalgamation, or has had a receiver, manager or administrator on behalf of a creditor appointed in respect of the company's business or any part thereof or is the subject of proceedings for any of the above procedures or is the subject of similar procedures under the law of any other state;

(d) has been convicted of a criminal offence relating to the conduct of his business or profession;

(e) has committed an act of grave misconduct in the course of his business or profession;

(f) has not fulfilled obligations relating to the payment of social security contributions under the law of any part of the United Kingdom or of the member State in which the services provider is established;

(g) has not fulfilled obligations relating to the payment of taxes under the law of any part of the United Kingdom;

(h) is guilty of serious misrepresentation in providing any information required of him under this regulation and regulations 15, 16 and 17;

(i) is not licensed in the member State in which he is established or is not a member of an organisation in that member State when the law of that member State prohibits the provision of the services to be provided under the contract by a person who is not so licensed or who is not such a member; or

(j) subject to paragraphs (5) and (6) below, is not registered on the professional or trade register of the member State in which he is established under conditions laid down by that State.

(2) Subject to regulation 18, the contracting authority may require a services provider to provide such information as it considers it needs to make the evaluation in accordance with paragraph (1) above except that it shall accept as conclusive evidence that a services provider does not fall within the grounds specified in paragraph (1)(a), (b), (c), (d), (f) or (g) above if that services provider provides to the contracting authority—

(a) in relation to the grounds specified in paragraph (1)(a), (b), (c), (d) above,

(i) an extract from the judicial record, or

(ii) in a member State which does not maintain such a judicial record, a document issued by the relevant judicial or administrative authority;

(b) in relation to the grounds specified in paragraph (1)(f) or (g) above, a certificate issued by the relevant competent authority; and

(c) in a member State where the documentary evidence specified in paragraphs (2)(a) and (b) above is not issued in relation to one of the grounds specified in paragraph (1)(a), (b), (c), (d), (f) or (g) above, a

declaration on oath made by the services provider before the relevant judicial, administrative or competent authority or a relevant notary public or commissioner for oaths.

(3) In this regulation, "relevant" in relation to a judicial, administrative or competent authority, notary public or commissioner for oaths means an authority designated by, or a notary public or commissioner for oaths in, the member State in which the services provider is established.

(4) The following are the appropriate professional or trade registers for the purposes of paragraph(1)(j) above—

in Belgium the registre du commerce/Handelsregister or the ordres professionnels - Beroepsorden;

in Denmark, the Erhvervs- and Selskabstyrelsen;

in France, the registre du commerce or the répertoire des métiers;

in Germany, the Handelsregister, the Handwerksrolle or the Vereinsregister;

in Italy, the Registro della Camera di commercio, industria, agricoltura e artigianato, the Registro delle commissioni provinciali per l'artigianato or the Consiglio nazionale degli ordini professionali;

in Luxembourg, the registre aux firmes and the rôle de la Chambre des métiers;

in the Netherlands, the Handelsregister;

in Portugal, the Registo nacional das Pessoas Colectivas; and

in Spain, the Registro Central de Empresas Consultoras y de Servicios del Ministerio de Economía y Hacienda.

(5) A services provider established in the United Kingdom or Ireland shall be treated as registered on the professional or trade register for the purposes of paragraph (1)(j) above if the services provider—

(a) is established in Ireland and is certified as registered with the Registrar of Friendly Societies, or

(b) is established in either State and is either—

(i) certified as incorporated by the Registrar of Companies, or

(ii) is certified as having declared on oath that he is carrying on business in the trade in question in the State in which he is established at a specific place of business and under a specific trading name.

(6) A services provider established in Greece shall be treated as registered on the professional or trade register for the purposes of paragraph (1)(j) above—

(a) when the services to be provided under the contract are specified in paragraph 8 of Schedule 1 and when Greek legislation requires persons who provide those services to be registered on the professional register "ΜητρωοΜελετητων" and "ΜητρωοΓραφειωνΜελετων", if he is registered on that register; and

(b) in any other case, if the services provider is certified as having declared on oath before a notary public that he exercises the profession which will be exercised in providing the services under the contract.

Information as to economic and financial standing

15.—(1) Subject to regulation 18 and paragraph (2) below, in assessing whether a services provider meets any minimum standards of economic and financial standing required of services providers by the contracting authority for the purposes of regulations 11(8), 12(4) and 13(7), and in selecting the services providers to be invited to tender for or to negotiate the contract in accordance with regulations 12(5) and 13(8), a contracting authority shall only take into account any of the following information (and it may require a services provider to provide such of the information as it considers it needs to make the assessment or selection)—

(a) appropriate statements from the services provider's bankers, or evidence of relevant professional risk indemnity insurance;

(b) statement of accounts or extracts therefrom relating to the business of the services provider where publication of the statement is required under the law of the member State in which the services provider is established;

(c) a statement of the overall turnover of the business of the services provider and the turnover in respect of the provision of services of the type to be provided under the proposed services contract in the 3 previous financial years of the services provider.

(2) Where the information specified in paragraph (1) above is not appropriate in a particular case a contracting authority may require a services provider to provide other information to demonstrate the services provider's economic and financial standing.

(3) A contracting authority which requires information to be provided in accordance with paragraphs (1) and (2) above shall specify in the contract notice or in the invitation to tender the information which the services provider must provide.

(4) Where a services provider is unable for a valid reason to provide the information which the contracting authority has required, the contracting authority shall accept such other information provided by the services provider as the contracting authority considers appropriate.

Information as to ability and technical capacity

16.—(1) Subject to regulation 18, in assessing whether or not a services provider meets any minimum standards of ability and technical capacity required of services providers by the contracting authority for the purposes of regulations 11(8), 12(4) and 13(7), and in selecting the services providers to be invited to tender for or to negotiate the contract in accordance with regulations 12(5) and 13(8), a contracting authority may have regard to—

(a) the services provider's ability, taking into account in particular his skills, efficiency, experience and reliability; and

(b) his technical capacity, taking into account any of the following—

- (i) the services provider's educational and professional qualifications where the services provider is an individual and the qualifications of the services provider's managerial staff if any and those of the person or persons who would be responsible for providing the services under the contract;
- (ii) the principal services provided by the services provider of a similar type to the services to be provided under the contract in the past 3 years, the dates on which the services were provided, the consideration received and the identity of the person to whom the services were provided, any certificate issued or countersigned by that person confirming the details of the services provided or, but only where that person was not a contracting authority, any declaration by the services provider attesting the details of the services provided;
- (iii) the technicians or technical bodies who would be involved in the provision of the services under the contract, particularly those responsible for quality control whether or not they are independent of the services provider;
- (iv) the services provider's average annual manpower and the number of managerial staff over the previous 3 years;
- (v) the tools, plant and technical equipment available to the services provider for providing the services under the contract;
- (vi) the services provider's measures for ensuring quality and his study and research facilities in relation to the services to be provided under the contract;
- (vii) where the services to be provided under the contract are complex or are required for a special purpose, any check, carried out by the contracting authority or on its behalf by a competent official boy of the member State in which the services provider is established, on the technical capacity of the services provider in relation to the services to be provided under the contract and, if relevant, on the services provider's study and research facilities and quality control measures;
- (viii) any certificate that the services of the services provider to be provided under the contract conform to BS 5750 or any certificate of an independent body established in any member State conforming to the EN 45 000 European standards series attesting conformity to relevant quality assurance standards based on the EN 29 000 series, or where the services provider has no access to such a certificate, or cannot obtain such a certificate within the relevant time limits, any other evidence of conformity to equivalent quality assurance standards;
- (ix) any proportion of the contract which the services provider intends to sub-contract to another person.

(2) The contracting authority shall specify in the contract notice or in the invitation to tender or to negotiate what information, for the purposes of making the assessment or selection for the purposes of paragraph (1) above, it requires to be provided and it may require a services provider to provide such of that information as it considers it needs to make the assessment or selection.

Supplementary information

17. The contracting authority may require a services provider to provide information supplementing the information supplied in accordance with regulations 14, 15 and 15 or to clarify that information, provided that the information so required relates to the matters specified in regulations 14, 15 and 16.

Official lists of recognised services providers

18. Where a services provider is registered on the official list of recognised services providers in a member State which maintains such lists and in which the services provider submits to the contracting authority a certificate of registration issued by the authority administering the official lists which specifies the information submitted to that authority which enabled the services provider to be registered and which states the classification given, the contracting authority, to the extent that the certificate deals with the grounds referred to in regulations 14(1)(a) to (e) and (h) to (j), 15(1)(b) and (c) and 16(1)(b)(i)—

(a) shall accept the certificate as evidence that the services provider does not fall within the grounds specified in regulation 14(1)(a) to (e) and (h) to (j) and shall not be entitled to require the services provider to submit such information relating to those grounds as is specified in regulation 14,

(b) shall not be entitled to require the services provider to provide information specified in regulations (15)(1)(b) and (c) and 16(1)(b)(i), and

(c) shall not be entitled to seek any supplementary information in accordance with regulation 17 above in relation to the matters specified in paragraphs (a) and (b) above.

Consortia

19.—(1) In this regulation a "consortium" means 2 or more persons, at least one of whom is a services provider, acting jointly for the purpose of being awarded a public services contract.

(2) A contracting authority shall not treat the tender of a consortium as ineligible nor decide not to include a consortium amongst those persons from whom it will make the selection of persons to be invited to tender for or to negotiate a public services contract on the grounds that the consortium has not formed a legal entity for the purposes of tendering for or negotiating the contract; but where a contracting authority awards a public services contract to a consortium it may require the consortium to form a legal entity before entering into, or as a term of, the contract.

(3) In these Regulations references to a services provider where the services provider is a consortium includes a reference to each person who is a member of that consortium.

Corporations

20.—(1) A contracting authority shall not treat the tender of a services provider as ineligible nor decide not to include a services provider amongst those persons from whom it will make the selection of persons to be invited to tender for or to negotiate a contract on the ground that under the law of any part of the United Kingdom the services provider is required to be an

individual, a corporation or other type of body, if under the law of the member State in which the services provider is established, he is authorised to provide such services.

(2) A contracting authority may require a services provider which is not an individual to indicate in the tender or in the request to be selected to tender for or to negotiate the public services contract the names and relevant professional qualifications of the staff who will be responsible for the provision of the services.

Notes:

[21] 1986 c. 45.

[22] S. I. 1989/2405 (N.I.19).

PART V

THE AWARD OF A PUBLIC SERVICES CONTRACT

Criteria for the award of a public services contract

21.—(1) Subject to paragraphs (5), (6) and (7) below, a contracting authority shall award a public services contract on the basis of the offer which—

- (a) is the most economically advantageous to the contracting authority, or
- (b) offers the lowest price.

(2) The criteria which a contracting authority may use to determine that an offer is the most economically advantageous include period from completion or delivery, quality, aesthetic and functional characteristics, technical merit, after sales service, technical assistance and price.

(3) Where a contracting authority intends to award a public services contract on the basis of the offer which is the most economically advantageous it shall state the criteria on which it intends to base its decision, where possible in descending order of importance, in the contract notice or in the contract documents.

(4) Where a contracting authority awards a public services contract on the basis of the offer which is the most economically advantageous, it may take account of offers which offer variations on the requirements specified in the contract documents if—

- (a) the offer meets the minimum requirements on the contracting authority, and
- (b) it has stated those minimum requirements and any specific requirements for the presentation of an offer offering variations in the contract documents,

but if the contracting authority will not take account of offers which offer such variations it shall state that fact in the contract notice.

(5) A contracting authority may not reject an offer which offers variations on the requirements specified in the contract documents on the ground that it would lead to the award of a public supply contract within the meaning of the Public Supply Contracts Regulations 1991^[23].

(6) A contracting authority may not reject an offer on the ground that the technical specifications in the offer have been defined by reference to European specifications (within the meaning of regulation 8(1)) or to the national technical specifications specified in regulation 8(7)(a) and (b).

(7) If an offer for a public services contract is abnormally low the contracting authority may reject that offer but only if it has requested in writing an explanation of the offer or of those parts which it considers contribute to the offer being abnormally low and has—

(a) if awarding the public services contract on the basis of the offer which offers the lowest price, examined the details of all the offers made, taking into account any explanations given to it of the abnormally low tender, before awarding the contract, or

(b) if awarding the public services contract on the basis of the offer which is the most economically advantageous, taken any such explanation into account in assessing which is the most economically advantageous offer,

and, in considering that explanation, the contracting authority may take into account explanations which justify the offer on objective grounds including the economy of the method of providing the services, the technical solutions suggested by the services provider or the exceptionally favourable conditions available to the services provider for the provision of the services or the originality of the services proposed by the services provider.

(8) If a contracting authority which rejects an abnormally low offer is awarding the public services contract on the basis of the offer which offers the lowest price, it shall send a report justifying the rejection to the Treasury for onward transmission to the Commission.

(9) For the purposes of this regulation "offer" includes a bid by one part of a contracting authority to provide services to another part of the contracting authority when the former part is invited by the latter part to compete with the offers sought from other persons.

Contract award notice

22.—(1) A contracting authority which has awarded a Part A or Part B services contract shall, no later than 48 days after the award, send to the Official Journal a notice, substantially corresponding to the form set out in part E of schedule 2 and, subject to paragraph (2) below, including the information therein specified.

(2) Any of the information specified in Part E of Schedule 2 to be included in the contract award notice may be omitted in a particular case where to

publish such information would impede law enforcement, would otherwise be contrary to the public interest, would prejudice the legitimate commercial interest of any person or might prejudice fair competition between services providers.

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

Information about contract award procedures

23.—(1) A contracting authority shall, within 15 days of the date on which it receives a written request from any services provider who was unsuccessful (whether pursuant to regulation 11(8), 12(4), 12(5), 13(7), 13(8) or (21), inform that services provider of the reasons why he was unsuccessful and, if the services provider was unsuccessful as a result of the evaluation of offers made in accordance with regulation 21, the name of the person awarded the public services contract.

(2) A contracting authority shall prepare a record in relation to each public services contract awarded by it specifying—

- (a) the name and address of the contracting authority;
- (b) the services to be provided under the public services contract and the value of the consideration to be given under it;
- (c) the names of the persons whose offers were evaluated in accordance with regulation 21 and, where the contracting authority has used the restricted or negotiated procedure, the reasons for their selection;
- (d) the names of the persons who were unsuccessful pursuant to regulation 11(8), 12(4), 12(5), 13(7) or 13(8) and the reasons why they were not successful;
- (e) the name of the person to whom the public services contract was awarded and the reasons for having awarded the contract to him;
- (f) if known to the contracting authority, the services under the public services contract which the person to whom the contract has been awarded intends to sub-contract to another person;
- (g) in the case of a contracting authority which used the negotiated procedure, which of the circumstances specified in regulation 10(2) constituted grounds for using that procedure.

(3) If the Treasury requests a report containing the information specified in paragraph (2) above in relation to public services contract, the contracting authority shall send a written report containing that information, or the main features of it, to the Treasury for onward transmission to the Commission.

(4) Where a contracting authority decides not to award a public services contract in respect of which a contract notice was published nor to seek offers in relation to another contract for the same purposes it shall inform the Official Journal of that decision and shall, if so requested in writing by any services provider who submitted an offer or who applied to be included amongst the persons to be selected to tender for or to negotiate the contract, inform him of the reasons for its decision.

Notes:

[23] S. I. 1991/2679 as amended by S. I. 1992/3279.

PART VI

MISCELLANEOUS

Design contests

- 24.**—(1) This regulation shall apply to a design contest—
- (a) if it is organised as part of a procedure leading to the award of a public services contract and the estimated value of any public services contract (calculated in accordance with regulation 7 above) which it is intended to award as the outcome of the contest is not less than 200,000 ECU, or
 - (b) whether or not it is organised as part of a procedure leading to the award of such a contract, if the aggregate of the value of the prizes or payments for the contest is not less than 200,000 ECU.

(2) The contracting authority shall publicise its intention to hold a design contest by sending to the Official Journal a notice in a form substantially corresponding to that set out in Part F of Schedule 2 and containing the information therein specified.

(3) The contracting authority shall make the rules of the design contest available to services providers who wish to participate in the contest.

(4) The contracting authority may restrict the number of persons invited to participate in the design contest, but it shall make the selection on the basis of clear and non discriminatory criteria.

(5) The contracting authority shall take account of the need to ensure adequate competition in determining the number of persons invited to participate in the design contest.

(6) Regulation 20 applies to design contests as it applies to the seeking of offers in relation to a proposed public services contract.

(7) The contracting authority shall provide for the participants' proposals to be submitted to the jury without any indication as to the authorship of each proposal.

(8) The contracting authority shall ensure that the members of the jury are all individuals who are independent of participants in the design contest and, when the participants are required to possess a particular professional qualification, that at least one third of the members of the jury also possess that qualification or an equivalent qualification.

(9) The contracting authority shall ensure that the jury makes its decision independently and solely on the basis of the criteria set out in the notice referred to in paragraph (2) above.

(10) The contracting authority shall, no later than 48 days after the date the jury has made its selection, publicise the results of the design contest by sending to the Official Journal a notice substantially corresponding to the form set out in Part G of Schedule 2 and including the information therein specified.

Subsidised public services contracts

25.—(1) Where a contracting authority undertakes to contribute more than half of the consideration to be or expected to be paid under a public services contract to which this paragraph applies by virtue of paragraph (2) below which has been or is to be entered into by a person other than a contracting authority (in this paragraph referred to as "the subsidised body"), that contracting authority shall—

- (a) make it a condition of the making of such contribution that the subsidised body complies with the provisions of these Regulations in relation to that public services contract as if it were a contracting authority, and
- (b) ensure that the subsidised body does so comply or recover the contribution.

(2) Paragraph (1) above applies to a contract which would be a public services contract if the subsidised body were a contracting authority and which is for the carrying out of services in connection with the carrying out of any of the activities specified in Schedule 1 of the Public Works Contracts Regulations 1991^[24] as are included in Group 502 or for the carrying out of building work for hospitals, facilities intended for sports, recreation and leisure, school and university building or buildings for administrative purposes.

Obligations relating to employment protection and working conditions

26. A contracting authority which includes in the contract documents information as to where a services provider may obtain information about obligations relating to employment protection and working conditions which will apply to the services to be provided under the public services contract shall request services providers to indicate that they have taken account of those obligations in preparing their tender or in negotiating the contract.

Statistical and other reports

27.—(1) A contracting authority shall, no later than 31st July 1995 and 31st July in each alternate year thereafter, send to the Treasury a report specifying in relation to each public services contract awarded by it during the year preceding the year in which the report is made—

- (a) the value (estimated if necessary) of the consideration payable under the contract;
- (b) whether the open, restricted or negotiated procedure was used in awarding the contract;
- (c) if the negotiated procedure was used, pursuant to which provision of regulation 10(2) that procedure was used;

- (d) the services specified in Part A of Schedule 1 provided or to be provided under the contract; and
- (e) the nationality of the person to whom the contract was awarded.

(2) A contracting authority shall send to the Treasury a report containing such other information as the Treasury may from time to time require in respect of a particular public services contract (including a public services contract excluded from the application of these Regulations by regulation 6 or 7 and a Part B services contract) for the purpose of informing the Commission.

Responsibility for obtaining reports

28.—(1) Where a contracting authority is not a Minister of the Crown or a government department that contracting authority shall send any report which it is required in accordance with regulations 8(6), 10(7), 21(8), 23(3) and 27 to send to the Treasury instead to the Minister responsible for that contracting authority and that Minister shall be responsible for sending the report to the Treasury.

(2) The Minister responsible for a contracting authority shall be the Minister of the Crown whose areas of responsibility are most closely connected with the functions of the contracting authority; and any question as to which Minister of the Crown's areas of responsibility are most closely connected with the functions of a contracting authority shall be determined by the Treasury whose determination shall be final.

(3) The requirement on a contracting authority to send any report in accordance with paragraph (1) above to the Minister of the Crown responsible for that contracting authority shall be enforceable, on the application of the Minister responsible, by mandamus or, in Scotland, for an order for specific performance.

(4) Proceedings under paragraph (3) above brought in Scotland shall be brought before the Court of Session.

(5) In the application of this regulation to Northern Ireland references to the Minister shall include references to the head of a Northern Ireland department.

Publication of notices

29.—(1) Any notice required by these Regulations to be sent to the Official Journal shall be sent by the most appropriate means to the Office for Official Publications of the European Communities^[25] and where the contracting authority is applying the restricted procedure or the negotiated procedure and, for reasons of urgency, is applying the provisions of regulation 12(15) or 13(4), the notice shall be sent by telex, telegram or telefax.

(2) Any such notice shall not contain more than 650 words.

(3) The contracting authority shall retain evidence of the date of despatch to the Official Journal of each notice.

(4) The contracting authority shall not place a contract notice in the press or like publications in the United Kingdom before the date on which the notice is

despatched in accordance with paragraph (1) above and if it does after that date so place the notice it shall not add to the notice any information in relation to the contract which was not contained in the notice sent to the Official Journal.

(5) When a contracting authority is not required to send a contract notice to the Official Journal in respect of a particular services contract it may nevertheless send such a notice and request that it be published.

Confidentiality of information

30. A contracting authority shall comply with such requirements as to confidentiality of information provided to it by a services provider as the services provider may reasonably request.

Sub-contractors

31. A contracting authority may require a services provider to indicate in his tender what part of the public services contract he intends to sub-contract to another person.

Notes:

[24] S. I. 1991/2680 as amended by S. I. 1992/3279.

[25] The address for the Office for Official Publications of the European Communities is 2 Rue Mercier, L-2985, Luxembourg (tel: 499 28-1; telex: 1324 PUBOF LU; fax: 49 00 03, 49 57 19).

PART VII

APPLICATIONS TO THE COURT

Enforcement of obligations

32.—(1) The obligation on a contracting authority to comply with the provisions of these Regulations other than regulations 8(6), 10(7), 21(8), 23(3) and 27, and with any enforceable Community obligation in respect of a public services contract (other than one excluded from the application of these Regulations by regulation 6 or 7), is a duty owed to services providers.

(2) A breach of the duty owed pursuant to paragraph (1) above shall not be a criminal offence but any breach of the duty shall be actionable by any services provider who, in consequence, suffers, or risks suffering, loss or damage.

(3) Proceedings under this regulation shall be brought in England and Wales and in Northern Ireland in the High Court and, in Scotland, before the Court of Session.

(4) Proceedings under this regulation may not be brought unless—
(a) the services provider bringing the proceedings has informed the contracting authority of the breach or apprehended breach of the duty

owed to him pursuant to paragraph (1) above by the contracting authority and of his intention to bring proceedings under this regulation in respect of it; and

(b) they are brought promptly and in any event within 3 months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending the period within which proceedings may be brought.

(5) Subject to paragraph (6) below, but otherwise without prejudice to any other powers of the Court, in proceedings brought under this regulation the Court may—

(a) by interim order suspend the procedure leading to the award of the contract in relation to which the breach of the duty owed pursuant to paragraph (1) above is alleged, or suspend the implementation of any decision or action taken by the contracting authority in the course of following such procedure; and

(b) if satisfied that a decision or action taken by a contracting authority was in breach of the duty owed pursuant to paragraph (1) above—

(i) order the setting aside of the decision or action or order the contracting authority to amend any documents, or

(ii) award damages to a services provider who has suffered loss or damage as a consequence of the breach, or

(iii) do both of those things.

(6) In any proceedings under this regulation the Court shall not have power to order any remedy other than an award of damages in respect of a breach of the duty owed pursuant to paragraph (1) above if the contract in relation to which the breach occurred has been entered into.

(7) Notwithstanding sections 21 and 42 of the Crown Proceedings Act 1947^[26], in proceedings brought under this regulation against the Crown the Court shall have power to grant an injunction or interdict.

Amendment of the Public Supply Contracts Regulations

33. The Public Supply Contracts Regulations 1991^[27] shall be amended—

(a) in regulation 2(1) by omitting from the definition of "public supply contract" subparagraph (ii);

(b) by deleting regulation 7(7).

Tim Wood

Irvine Patnick

Two of the Lords Commissioners of Her Majesty's Treasury.

22nd December 1993

Notes:

[26] 1947 c. 44; the Crown Proceedings Act 1947 was extended to Northern Ireland in relation to Her Majesty's Government in the United Kingdom and in Northern Ireland by and with the additions, exceptions and modifications set out in the Crown Proceedings (Northern Ireland) Order 1981, to which there is an amendment not relevant to these Regulations.

[27] S. I. 1991/2679 as amended by S. I. 1992/3279.

**SCHEDULE 1
Regulation 5**

CATEGORIES OF SERVICES

PART A

Category	Services	CPC^[28] Reference
1.	Maintenance and repair of vehicles and equipment	6112, 6122, 633, 886
2.	Transport by land, including armoured car services and courier services and courier services but not including transport of mail and transport by rail	721 (except 71235), 7512, 87304
3.	Transport by air but not transport of mail	73(except 7321)
4.	Transport of mail by land, other than by rail, and by air	71235, 7321
5.	Telecommunications services other than voice telephony, telex, radiotelephony paging and satellite services	752
6.	Financial services (a) Insurance services (b) Banking & investment services other than financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, and central bank services	81 (Part) 812, 814
7.	Computer and related services	84
8.	R&D services where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs and the services are to be wholly paid for by the contracting authority	85
9.	Accounting, auditing and book-keeping services	862
10.	Market research and public opinion polling services	864
11.	Management consultancy services and related services, but	865, 866

Category	Services	CPC^[28] Reference
	not arbitration and conciliation services	
12.	Architectural services: engineering services and integrated engineering services: urban planning and landscape architectural services: related scientific and technical consulting services: technical testing and analysis services	867
13.	Advertising services	871
14.	Building-cleaning services and property management services	874 82201 to 82206
15.	Publishing and printing services on a fee or contract basis	88442
16.	Sewerage and refuse disposal service: sanitation and similar services	94

PART B

Category	Services	CPC Reference
17.	Hotel and restaurant services	64
18.	Transport by rail	711
19.	Transport by water	72
20.	Supporting and auxiliary transport services	74
21.	Legal services	861
22.	Personnel placement and supply services	872
23.	Investigation and security services, other than armoured car services	873 (except 87304)
24.	Education and vocational education services	92
25.	Health and social services	93
26.	Recreational, cultural and sporting services	96
27.	Other services	

Notes:

[28] CPC stands for the Central Product Classification of the United Nations.

SCHEDULE 2

Regulations 9(1), 11(2), 12(2), 13(2), 22(1) and 24(2) and (10)

FORMS OF NOTICES FOR PUBLICATION IN THE OFFICIAL JOURNAL

PART A

PRIOR INFORMATION NOTICES

1. Name, address and telephone, telegraphic, telex and facsimile numbers of the contracting authority and of the service from which additional information may be obtained.
2. For each category of services in Part A of Schedule 1, the total quantity in value to be provided.
3. For each category of services in (2), the estimated date of the commencement of the procedures leading to the award of the contract(s) (if known).
4. Other information.
5. Date of despatch of the notice.

PART B

OPEN PROCEDURE NOTICE

1. Name, address and telephone, telex and facsimile numbers of the contracting authority.
2. Category of services and description. CPC reference number.
3. Place of delivery.
4.
 - (a) Indication of whether the provision of the services is reserved by law, regulation or administrative provision to a particular profession;
 - (b) Reference to the law, regulation or administrative provision;
 - (c) Indication of whether legal persons should indicate the names and professional qualifications of the staff to be responsible for the provision of the services.
5. Indication of whether services providers can tender for some or all the services required.
6. Where applicable, prohibition on variants.
7. Period of contract or time-limit, if any, for completion.
- 8.

- (a) Name and address of the service from which the contract and additional documents may be requested;
- (b) Final date for making such requests;
- (c) Where applicable, the amount and terms of payment of any sum payable for such documents.

9

- (a) Where applicable, the persons authorised to be present at the opening of tenders;
- (b) Date, time and place of opening.

10. Any deposits and guarantees required.

11. The main terms concerning financing and payment and/or references to the relevant provisions.

12. Where applicable, the legal form to be taken by the grouping of services providers to whom the contract is awarded.

13. The information and formalities necessary for an appraisal of the minimum standards of economic and financial standing, ability and technical capacity required of the services provider.

14. Period during which the tenderer is bound to keep open his tender.

15. Criteria for the award of the contract. Criteria other than that of the lowest price shall be mentioned where they do not appear in the contract documents.

16. Other information

17. Date of despatch of the notice.

PART C

RESTRICTED PROCEDURE NOTICE

1. Name, address and telephone, telegraphic, telex and facsimile numbers of the contracting authority.

2. Category of services and description. CPC reference number.

3. Place of delivery.

4.

- (a) Indication of whether the provision of the services is reserved by law, regulation or administrative provision to a particular profession;
- (b) Reference to the law, regulation or administrative position;
- (c) Indication whether legal persons should indicate the names and professional qualifications of the staff to be responsible for the provision of the services.

5. Indication of whether the services provider can tender for all or part of the services required.

6. If known, the number of services providers which will be invited to tender or the range within which that number is expected to fall.

7. Where applicable, prohibition on variants.

8. Period of contract or time limit, if any, for completion of the services.

9. Where applicable, the legal form to be assumed by the grouping of services providers to whom the contract is awarded.

10.

- (a) Where applicable, justification for the use of shorter time limits^[29];

- (b) Final date for the receipt of requests to participate;
- (c) Address to which they must be drawn up.
- (d) Language(s) in which they must be drawn up.
- 11. Final date for the despatch of invitations to tender.
- 12. Any deposits and guarantees required.
- 13. The information and formalities necessary for an appraisal of the minimum standards of economic and financial standing, ability and technical capacity required of the services provider.
- 14. Criteria for the award of the contract. Criteria other than that of lowest price shall be mentioned where these do not appear in the contract documents.
- 15. Other information.
- 16. Date of despatch of the notice.

PART D

NEGOTIATED PROCEDURE NOTICE

- 1. Name, address and telephone, telegraphic, telex and facsimile numbers of the contracting authority.
- 2. Category of services and description. CPC reference number.
- 3. Place of delivery.
- 4.
 - (a) Indication of whether the provision of the services is reserved by law, regulation or administrative provision to a particular profession;
 - (b) Reference to the law, regulation or administrative provision;
 - (c) Indication of whether legal persons should indicate the names and professional qualifications of the staff to be responsible for the provision of the services.
- 5. Indication of whether services providers can offer some or all of the services required.
- 6. If known, the number of services providers which will be invited to tender or the range within which that number is expected to fall.
- 7. Where applicable, non-acceptance of variants.
- 8. Period of contract or time-limit, if any, for completion of the services.
- 9. Where applicable, the legal form to be assumed by a grouping of services providers to whom the contract is awarded.
- 10.
 - (a) Where applicable, justification for use of the shorter time limits^[30];
 - (b) Final date for the receipt of requests to participate;
 - (c) Address to which they must be sent;
 - (d) Language(s) in which they must be drawn up.
- 11. Any deposits and guarantees required.
- 12. The information and formalities necessary for an appraisal of the minimum standards of economic and financial standing, ability and technical capacity required of the services provider.
- 13. Where applicable, the names and addresses of services providers already selected by the contracting authority.
- 14. Other information.
- 15. Date of despatch of the notice.

16. Date(s) of previous publications in the Official Journal of the European Communities.

PART E

CONTRACT AWARD NOTICE

1. Name and address of contracting authority.
2.
 - (a) Award procedure chosen;
 - (b) Where applicable, justification for the use of the negotiated procedure^[31].
3. Category of services and description. CPC reference number.
4. Date of award of contract.
5. Criteria for award of contract.
6. Number of offers received.
7. Name(s) and address(es) of services provider(s).
8. Price or range of prices paid or to paid.
9. Where appropriate, value and proportion of the contract which may be sub-contracted to third parties.
10. Other information.
11. Date of publication of the contract notice in the Official Journal of the European Communities.
12. Date of despatch of the notice.
13. In the case of contracts for services specified in Part B of Schedule 1, agreement by the contracting authority to publication of the notice.

PART F

DESIGN CONTEST NOTICE

1. Name, address and telephone, telegraphic, telex and facsimile numbers of the contracting authority and of the service from which additional information may be obtained.
2. Project description.
3. Nature of the contest: open or restricted.
4. In the case of open contests: final date for receipt of plans and designs.
5. In the case of restricted contests:
 - (a) the number of participants envisaged;
 - (b) where applicable, names of the participants already selected;
 - (c) criteria for the selection of participants;
 - (d) final date for receipt of requests to participate.
6. Where applicable, an indication of whether participation is reserved to a particular profession.
7. Criteria to be applied in the evaluation of projects.
8. Where applicable, names of the persons selected to be members of the jury.

9. Indication of whether the decision of the jury is binding on the contracting authority.
10. Where applicable, number and value of the prizes.
11. Where applicable, details of payments to all participants.
12. Indication of whether follow-up contracts will be awarded to one of the winners.
13. Other information.
14. Date of despatch of the notice.

PART G

DESIGN CONTEST RESULT NOTICE

1. Name, address and telephone, telegraphic, telex and facsimile numbers of the contracting authority.
2. Project description.
3. Number of participants.
4. Number of participants established outside the United Kingdom.
5. Winner(s) of the contest.
6. Where applicable, the prize(s) awarded.
7. Other information.
8. Reference to publication of the design contest notice in the Official Journal of the European Communities.
9. Date of despatch of the notice.

Notes:

[29] In accordance with regulation 12.

[30] In accordance with regulation 12.

[31] In accordance with regulation 10.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement in its entirety Council Directive 92/50/EEC (OJ No.L209, 24.7.92,p.1) relating to the coordination of procedures for the award of public services contracts.

The Regulations apply to certain public bodies called in the Regulations "contracting authorities" (regulation 3) when they are seeking offers in relations to certain contracts for the provision of services (called in the Regulations "public service contracts") (regulation 2(1)). The Regulations do not apply to some services contracts (regulations 2(1) and 6), nor to those contracts where the value is beneath the threshold for coverage (regulation 7). They deal in particular with the treatment to be accorded to services providers

or potential services providers who are nationals of and established in member States (regulation 4).

The categories of services are specified in Schedule 1: the Regulations apply in their entirety to public services contracts for services specified in Part A of Schedule 1 ("Part A services contracts"); only certain provisions apply to those services specified in Part B of that Schedule ("Part B services contracts") (regulation 5).

With respect to Part A services contracts the principal requirement of the Regulations is that, in seeking offers in relation to such a contract, a contracting authority must use one of three procedures: the open procedure, whereby any person who is interested may submit a tender; the restricted procedure, whereby only those persons selected by the contracting authority may submit tenders; and the negotiated procedure, whereby the contracting authority negotiates the terms of the public services contract with one or more persons selected by it. The negotiated procedure may only be used in certain limited circumstances (regulation 10).

The contracting authority is required to publicise its intention to seek offers in relation to Part A services contracts in the Official Journal of the European Communities although this requirement is dispensed with in some circumstances when the negotiated procedure is used. The form of the advertisement and the information which it has to contain in relation to the proposed contract is specified in Schedule 2. If the notice is also to be published in the United Kingdom press it must be limited to the information published in the Official Journal and must not be published before the notice is sent to the Official Journal (regulation 29). The various procedures also lay down the time to be allowed for the response by potential services providers to the invitations and for obtaining the relevant documents (regulations 11, 12 and 13). The Regulations also specify the matters to which the contracting authority may have regard in treating services providers as ineligible to tender for or negotiate the contract (regulation 14). Detailed rules for the selection of services providers are laid down and relate to their business and professional status, their economic and financial standing, ability and technical capacity. The contracting authority is restricted in the information on which it may rely to demonstrate these matters (regulations 15 and 16).

The contracting authority is required to award Part A services contracts on the basis either of the offer (including in-house bids) which offers the lowest price or the one which is the most economically advantageous (regulation 21). If requested by an unsuccessful services provider the contracting authority must provide reasons as to why that services provider was unsuccessful (regulation 23).

There are various other requirements in the Regulations. The most important is the requirement (applying to both Part A and Part B services contracts) that where the contracting authority wishes to lay down technical specifications which the services to be provided under the contract and which the materials and goods used in or for it must meet all such specifications must be specified in the contract documents and that, except in certain circumstances, these specifications must be defined by reference to European specifications. This includes a British Standard which implements a European standard or European technical approval. It is also provided that, except where it is not possible to describe the goods or materials otherwise, the technical

specifications may not refer to goods or materials of a specific make or source or a particular process which have the effect of favouring or eliminating certain services providers (regulation 8). Contracting authorities are required to publicise in the Official Journal at the beginning of their financial year certain Part A services contracts which they expect to award during the course of that year (regulation 9). Contracting authorities are also required to publicise in the Official Journal information about both Part A and B services contracts which they have awarded (regulation 22). Contracting authorities are required to submit various reports in respect of each Part A services contract awarded by it, in particular, a biennial report (regulations 23 and 27). There is also a requirement that, where a contracting authority contributes more than half the consideration payable under certain Part A services contracts awarded by another person, compliance with the Regulations is made a condition of the contribution (regulation 25).

In addition, the Regulations regulate the procedures for the holding of a design contest, which may or not be part of the procedure leading to the award of a public services contract, where a jury selects the successful plans and designs from those submitted (regulation 24).

The Regulations also implement Council Directive 89/665/EEC (OJ No.L395,30.12.89,p.33) on the co-ordination of the laws, regulations and administrative provisions relating to the application of review proceedings to the award of public supply and public works contracts as amended by Council Directive 92/50/EEC to the extent that it relates to that Directive. The Regulations provide that the obligation on a contracting authority to comply with the Regulations, and with any enforceable Community obligation in relation to the award of a public services contract is a duty owed to services providers. A breach of the duty is not a criminal offence but is actionable by a services provider. Proceedings are assigned to the High Court in England, Wales and Northern Ireland and to the Court of Session in Scotland. The court is given power to grant appropriate interim and final relief and to award damages except that, where the contract in respect of which there has been an infringement has already been entered into, the court's powers are restricted to awarding damages (regulation 32).

Finally, the Regulations amend the Public Supply Contracts Regulations 1991 to ensure that not more than one set of Regulations applies to any contract (regulation 33).

1993 No. 3228

PUBLIC PROCUREMENT

The Public Services Contracts Regulations 1993

Made 22nd December 1993

*Laid before 22nd December
Parliament 1993*

Coming into force 13th January 1994

The Public Supply Contracts Regulations 1995

Statutory Instrument 1995 No. 201

Statutory Instrument 1995 No. 201

The Public Supply Contracts Regulations 1995

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The Treasury, being designated^[1] for the purposes of section 2(2) of the European Communities Act 1972^[2] in relation to public procurement, in exercise of the powers conferred upon them by the said section 2(2) and of all other powers enabling them in that behalf, hereby make the following Regulations:—

PART I

GENERAL

Title and commencement

1. These Regulations may be cited as the Public Supply Contracts Regulations 1995 and shall come into force on 21st February 1995.

Interpretation

2.—(1) In these Regulations—

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

"the Commission" means the European Commission;

"contract documents" means the invitation to tender for or to negotiate the contract, the proposed conditions of contract, the specifications or description of the goods required by the contracting authority, and all documents supplementary thereto;

"contract notice" means a notice sent to the Official Journal in accordance with regulation 11(2), 12(2) or 13(2);

"contracting authority" has the meaning ascribed to it by regulation 3;

"ECU" means the European Currency Unit as defined in Council Regulation (EEC) No. 3180/78^[3];

"established" means the same as it does for the purposes of the Community Treaties;

"financial year" means the period of 12 months ending on 31st March in any year or, in relation to any person whose accounts are prepared in respect of a different 12 month period, that period of 12 months;

"a GATT contracting authority" means one of the entities specified in Schedule 1, being entities in respect of which special provision is made by these Regulations in pursuance of the obligations of the Economic

Community under the Agreement on Government Procurement between certain parties to the General Agreement on Tariffs and Trade (GATT) signed in Geneva on 12 April 1979^[4];

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

"government department" includes a Northern Ireland department or the head of such department;

"Minister of the Crown" means the holder of an office in Her Majesty's Government in the United Kingdom, and includes the Treasury;

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

"negotiated procedure" means a procedure leading to the award of a public supply contract whereby a contracting authority negotiates the terms of the contract with one or more persons selected by it;

"Official Journal" means the Official Journal of the European Communities;

"open procedure" means a procedure leading to the award of a public supply contract whereby all interested persons may tender for the contract;

"prior information notice" means a notice sent to the Official Journal in accordance with regulation 9;

"public supply contract" means a contract in writing for consideration (whatever the nature of the consideration)—

(a) for the purchase of goods by a contracting authority (whether or not the consideration is given in instalments and whether or not the purchase is conditional upon the occurrence of a particular event), or

(b) for the hire of goods by a contracting authority (both where the contracting authority becomes the owner of the goods after the end of the period of hire and where it does not),

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

"relevant State" means a member State, Hungary, Poland, Iceland, Norway and, as from the date that the Agreement on the European Economic Area signed at Oporto on 2nd May 1992^[5], as adjusted by the Protocol signed at Brussels on 17th March 1993^[6], is in force in relation to it, Liechtenstein;

"restricted procedure" means a procedure leading to the award of a public supply contract whereby only persons selected by the contracting authority may submit tenders for the contract;

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

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

"supplier" has the meaning ascribed to it by regulation 4;

"working day" means a day other than a Saturday, Sunday or Bank Holiday (within the meaning of the Banking and Financial Dealings Act 1971^[7]); and

"year" means a calendar year.

(2) The value in the currency of any relevant State of any amount expressed in these Regulations in ECU or of the amount in ECU for the purposes of regulation 7(2) shall be calculated by reference to the exchange rate for the time being applying for the purposes of Council Directive 93/36/EEC^[8] as published from time to time in the Official Journal^[9].

- (3) Where a thing is required to be done under these Regulations—
- (a) within a period after an action is taken, the day on which that action was taken shall not be counted in the calculation of that period;
 - (b) within a certain period, that period must include two working days;
 - (c) within a period and the last day of that period is not a working day, the period shall be extended to include the following working day.

(4) References in these Regulations to a regulation are references to a regulation in these Regulations and references to a Schedule are references to a Schedule to these Regulations.

Contracting Authorities

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

- (a) a Minister of the Crown,
- (b) a government department,
- (c) the House of Commons,
- (d) the House of Lords,
- (e) the Northern Ireland Assembly,
- (f) a local authority,

- (g) a fire authority constituted by a combination scheme under the Fire Services Act 1947^[10],
- (h) the Fire Authority for Northern Ireland,
- (i) a police authority established under section 3 of the Police Act 1964^[11],
- (j) the Police Authority for Northern Ireland,
- (k) an authority established under section 10 of the Local Government Act 1985^[12],
- (l) a joint authority established by Part IV of that Act,
- (m) any body established pursuant to an order under section 67 of that Act,
- (n) the Broads Authority,
- (o) any joint board the constituent members of which consist of any of the bodies specified in paragraphs (f), (g), (i), (k), (l), (m) and (n), above,
- (p) a joint or special planning board constituted for a National Park,
- (q) a joint education board constituted under the provisions of Part I of the first Schedule to the Education Act 1944^[13],
- (r) a corporation established, or a group of individuals appointed to act together, for the specific purposes of meeting needs in the general interest, not having an industrial or commercial character, and—
 - (i) financed wholly or mainly by another contracting authority, or
 - (ii) subject to management supervision by another contracting authority, or
 - (iii) more than half of the board of directors or members of which, or, in the case of a group of individuals, more than half of those individuals, being appointed by another contracting authority,
- (s) an association of or formed by one or more of the above, and
- (t) to the extent not specified in sub-paragraphs (a) to (q) above, a GATT contracting authority.

(2) In the application of these Regulations to England and Wales, "local authority" in paragraph (1) above means—

- (a) a county council, a county borough council, a district council, a London borough council, a parish council, a community council or the Council of the Isles of Scilly;
- (b) the Common Council of the City of London in its capacity as local authority or police authority.

(3) In the application of these Regulations to Scotland, "local authority" in paragraph (1) above has the same meaning as in section 235(1) of the Local Government (Scotland) Act 1973 and also includes joint board or joint committee within the meaning of section 235^[14].

(4) In the application of these Regulations to Northern Ireland, "local authority" in paragraph (1) above means a district council within the meaning of the Local Government Act (Northern Ireland) 1972^[15].

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

Suppliers

4.—(1) For the purposes of these Regulations a "supplier" means a person—

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

(2) Where these Regulations apply a contracting authority shall not treat a person who is not a national of and established in a relevant State more favourably than one who is.

Application of the Regulations

5. These Regulations apply whenever a contracting authority seeks offers in relation to a proposed public supply contract other than a public supply contract excluded from the application of these Regulations by virtue of regulation 6 or 7.

General exclusions

6. These Regulations shall not apply to the seeking of offers in relation to a proposed public supply contract—

- (a) for the purpose of carrying out an activity specified in the second column of Schedule 1 to the Utilities Supply and Works Contracts Regulations 1992^[16] other than an activity specified in paragraph 2 or 3 thereof;
- (b) when a contracting authority exercises the activity specified in paragraph 1 of Schedule 1 to the Utilities Supply and Works Contracts Regulations 1992 for the purpose of carrying out an activity specified in paragraph 2 or 3 thereof;
- (c) which is classified as secret or where the delivery of the goods under it must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions of any part of the United Kingdom or when the protection of the basic interests of the security of the United Kingdom require it;
- (d) where goods to be purchased or hired under the contract are goods to which the provisions of Article 223.1(b) of the EEC Treaty apply; or
- (e) where different procedures govern the procedures leading to the award of the contract and it is to be entered into—
 - (i) pursuant to an international agreement to which the United Kingdom and a State which is not a relevant State are parties and it relates to goods intended for the joint implementation or exploitation of a project pursuant to that agreement;
 - (ii) pursuant to an international agreement relating to the stationing of troops; or
 - (iii) in accordance with the contract award procedures of an organisation of which only States are members (an "international organisation") or of which only States or international organisations are members.

Thresholds

7.—(1) These Regulations shall not apply to the seeking of offers in

relation to a proposed public supply contract where the estimated value of the contract (net of value added tax) at the relevant time is less than the relevant threshold.

- (2) The relevant threshold for the purposes of paragraph (1) above—
- (a) in relation to a public supply contract in relation to which offers are sought by a GATT contracting authority, but in the case of such a contract in relation to which offers are sought by the Secretary of State for Defence only if it is for the purchase or hire of the goods specified in Schedule 2, is the amount for the time being to be treated as the ECU equivalent of 130,000 special drawing rights for the purposes of Council Directive 93/36/EEC^[17] as published from time to time in the Official Journal^[18];
 - (b) in relation to all other public supply contracts, is 200,000 ECU.

(3) Subject to paragraphs (4) to (10) below, the estimated value for the purposes of paragraph (1) above of a public supply contract shall be the value of the consideration which the contracting authority expects to give under the contract.

(4) Subject to paragraph (7) below, where a contracting authority has a single requirement for goods and a number of public supply contracts has been entered or is to be entered into to fulfil that requirement, the estimated value for the purposes of paragraph (1) above of each public supply contract shall be the aggregate of the value of the consideration which the contracting authority expects to give under each of those contracts.

(5) Subject to paragraph (7) below, where a contracting authority has a requirement over a period for goods of the type to be purchased or hired under the public supply contract and for that purpose enters into—

- (a) a series of contracts; or
 - (b) a contract which under its terms is renewable,
- the estimated value for the purposes of paragraph (1) above of the contract shall be the amount calculated under paragraph (6) below.

(6) The contracting authority shall calculate the amount referred to in paragraph (5) above either—

- (a) by taking the aggregate of the value of the consideration given by the contracting authority under such public supply contracts which have similar characteristics and which were for the purchase or hire of goods of the type to be purchased or hired under the contract, during its last financial year ending before, or during the period of 12 months ending immediately before, the relevant time, and by adjusting that amount to take account of any expected changes in quantity and cost of the goods of that type in the period of 12 months commencing with the relevant time, or
- (b) by estimating the aggregate of the value of the consideration which the contracting authority expects to give under such public supply contracts which have similar characteristics and which are for the purchase or hire of goods of the type to be purchased or hired under the

contract during the period of 12 months from the first date of delivery of the goods to be purchased or hired or, where the contract is for a definite term of more than 12 months, during the term of the contract.

(7) Notwithstanding paragraphs (4) and (5) above, when the goods to be purchased or hired under the contract are required for the sole purposes of a discrete operational unit within the organisation of the contracting authority and—

(a) the decision whether to purchase or hire goods of that type has been devolved to such a unit, and

(b) that decision is taken independently of any other part of the contracting authority,

the valuation methods described in paragraphs (4) and (6) above shall be adapted by aggregating only the value of the consideration which the contracting authority has given or expects to give, as the case may be, for goods of the type to be purchased or hired under the contract which were or are required for the sole purposes of that unit.

(8) The estimated value for the purposes of paragraph (1) above of a public supply contract for the hire of goods for an indefinite period, or for a period which is uncertain at the time the contract is entered into, shall be the value of the consideration which the contracting authority expects to give in respect of each month of the hire multiplied by 48.

(9) Where a public supply contract includes one or more options the estimated value of the contract for the purposes of paragraph (1) above shall be determined by calculating the highest possible amount which could be payable under the contract.

(10) A contracting authority shall not enter into separate public supply contracts nor select nor exercise a choice under a valuation method in accordance with paragraph (6) above with the intention of avoiding the application of these Regulations to those contracts.

(11) The relevant time for the purposes of paragraphs (1) and (6)(a) above means, in relation to a public supply contract, the date on which a contract notice would be sent to the Official Journal if the requirement to send such a notice applied to that contract in accordance with these Regulations.

Notes:

[1] S.I. 1991/755. back

[2] 1972 c. 68. back

[3] OJ No. L379, 30.12.78, p.1, as amended by Council Regulation (EEC) No. 2626/84 (OJ No. L247, 16.9.84, p.1) and Council Regulation EEC No. 1971/89 (OJ No. L189, 4.7.89, p. 1). back

[4] Cmnd. 7662. [back](#)

[5] Cmnd. 2073. [back](#)

[6] Cmnd. 2183. [back](#)

[7] 1971 c. 80. [back](#)

[8] OJ No. L199, 9.8.93, p. 1. [back](#)

[9] The rates are determined for each successive period of two years by calculating the average of the daily exchange rates between each currency and the ECU over a period of 24 months preceding the determination. [back](#)

[10] 1947 c. 41. [back](#)

[11] 1964 c. 48 as amended by section 2 of the Police and Magistrates Court Act 1994 c. 29. [back](#)

[12] 1985 c. 51. [back](#)

[13] 1944 c. 31. [back](#)

[14] 1973 c. 65. [back](#)

[15] 1972 c. 9 (N.I.). [back](#)

[16] S.I. [1992/3279](#) as amended by S.I. [1993/3227](#). [back](#)

[17] OJ No. L199, 9.8.93, p.1. [back](#)

[18] The amount is determined for each successive period of 2 years commencing on 1st January 1988 by calculating the average of the daily exchange rate between the ECU and the special drawing right over a period of 24 months preceding the commencement of the revised valuation and adjusting that figure to exclude value added tax at a notional rate of 13 per cent.

PART II

TECHNICAL SPECIFICATIONS

Technical Specifications in the Contract Documents

8.—(1) In this regulation—

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

"European specification" means a common technical specification, a British standard implementing a European standard or a European technical approval;

"European standard" means a standard approved by the European Committee for Standardisation ("CEN") or by the European Committee for Electrotechnical Standardisation ("CENELEC") as a "European Standard ("EN")" or a "Harmonisation Document ("HD")" according to the Common Rules of those organisations;

"European technical approval" means an approval of the fitness for use of a product, issued by an approval body, designated for the purpose by a member State following a technical assessment of whether the product fulfils the essential requirements for building works, having regard to the inherent characteristics of the product and the defined conditions of application and use;

"standard" means a technical specification approved by a recognised standardising body for repeated and continuous application, compliance with which is in principle not compulsory; and

"technical specifications" means the technical requirements defining the characteristics required of goods (such as quality, performance, safety or dimensions and requirements in respect of quality assurance, terminology, symbols, tests and testing methods, packaging, marking and labelling) so that the goods are described objectively in a manner which will ensure that they fulfil the use for which they are intended by the contracting authority.

(2) If a contracting authority wishes to lay down technical specifications which the goods to be purchased or hired under a public supply contract must meet it shall specify all such technical specifications in the contract documents.

(3) Subject to paragraph (4) below, the technical specifications in the contract documents relating to a public supply contract shall be defined by reference to any European specifications which are relevant.

(4) A contracting authority may define the technical specifications referred to in paragraph (3) above other than by reference to relevant European specifications if—

(a) the contracting authority is under an obligation to define the technical specifications by reference to technical requirements which are mandatory in the United Kingdom for the goods to be purchased or hired under the contract (but only to the extent that such an obligation is compatible with Community obligations);

(b) the relevant European specifications do not include provision for establishing conformity to, or it is technically impossible to establish satisfactorily that the goods to be purchased or hired under the contract do conform to, the relevant European specifications;

(c) definition by reference to the relevant European specifications would conflict with the application of—

(i) Council Directive 86/361/EEC on the initial stage of mutual recognition of type approval for telecommunication terminal equipment^[19];

(ii) Council Decision 87/95/EEC on standardisation in the field of information technology and telecommunications^[20]; or

(iii) other Community obligations in specific service or goods areas;

(d) subject to paragraph (5) below, application of the relevant European specifications would oblige the contracting authority to acquire goods incompatible with equipment already in use or would entail disproportionate costs or disproportionate technical difficulties; or

(e) the project for which the goods to be purchased or hired under the contract are required is of a genuinely innovative nature for which use of existing relevant European specifications would be inappropriate.

(5) A contracting authority may only define the technical specifications other than by reference to relevant European specifications on the grounds specified in paragraph 4(d) above where the contracting authority has a clearly defined and recorded strategy for changing over, within a set period, to European specifications.

(6) A contracting authority shall state in the contract notice which of the circumstances specified in paragraph (4)(b) to (e) above was the ground for defining the technical specifications other than by reference to European specifications, or, if it is impossible to include this information in the contract notice, the contracting authority shall specify it in the contract documents and shall in any event keep a record of this information which, if the Commission or any relevant State requests it, it shall send to the Treasury for onward transmission to the Commission or relevant State which requested it.

(7) In the absence of European specifications relevant to the supplies to be

provided under a public supply contract, the technical specifications in the contract documents—

(a) shall be defined by reference to British technical specifications recognised as complying with the basic requirements specified in any Council Directives on technical harmonisation in accordance with the procedures laid down in those directives and, in particular, in accordance with the procedures laid down in Council Directive 89/106/EEC on the approximation of laws, regulations and administrative procedures in the member States relating to construction products^[21];

(b) may be defined by reference to British technical specifications relating to design and method of calculation and execution of a work or works and use of materials and goods;

(c) may be defined by reference to the following standards (and, if they are so defined, preference shall be given to the following standards in the order in which they are listed)—

- (i) British standards implementing international standards;
- (ii) other British standards and technical approvals; or
- (iii) any other standards.

(8) Subject to paragraph (10) below, the contract documents shall not include technical specifications which refer to goods of a specific make or source or to a particular process and which have the effect of favouring or eliminating particular goods or suppliers.

(9) Without prejudice to the generality of paragraph (8) above but subject to paragraph (10) references to trademarks, patents, types, origin or means of production shall not be incorporated into the technical specifications in the contract documents.

(10) Notwithstanding paragraphs (8) and (9) above, a contracting authority may incorporate the references referred to in paragraphs (8) and (9) above into the technical specifications in the contract documents if—

- (a) such references are justified by the subject of the contract, or
- (b) the goods to be purchased or hired under the contract cannot otherwise be described by reference to technical specifications which are sufficiently precise and intelligible to all suppliers, provided that the references are accompanied by the words "or equivalent".

Notes:

[19] OJ No. L217, 5.8.86, p.21 as amended by Council Directive 91/263/EEC (OJ No. L128, 23.5.91, p.1).

[20] OJ No. L36, 7.2.87, p.31.

[21] OJ No. L40, 11.2.89, p.12.

PART III

PROCEDURES LEADING TO THE AWARD OF A PUBLIC SUPPLY CONTRACT

Prior Information Notices

9.—(1) Subject to paragraph (2) below, a contracting authority shall, as soon as possible after the commencement of each of its financial years, send to the Official Journal a notice, in a form substantially corresponding to that set out in Part A of Schedule 3 and containing the information therein specified, in respect of the public supply contracts in relation to which it expects to seek offers leading to an award during that financial year and the notice shall be subdivided to give that information separately for each product area^[22].

- (2) The obligation under paragraph (1) above shall only apply—
- (a) to proposed public supply contracts which are not excluded from the application of these Regulations by virtue of regulation 6 or 7; and
 - (b) where, at the date of despatch of the notice, the total consideration which the contracting authority expects to give under all the proposed public supply contracts which are for the purchase or hire of goods falling within the same product area equals or exceeds 750,000 ECU.

Selection of contract award procedure

10.—(1) For the purposes of seeking offers in relation to a proposed public supply contract a contracting authority shall use the open procedure, the restricted procedure or the negotiated procedure and shall decide which of those procedures to use in accordance with the following paragraphs of this regulation.

- (2) A contracting authority may use the negotiated procedure in the following circumstances—
- (a) subject to paragraph (3) below, in the event that the procedure leading to the award of a public supply contract by the contracting authority using the open or restricted procedure was discontinued—
 - (i) because of irregular tenders, or
 - (ii) following an evaluation made in accordance with regulation 11(7) or 12(4);
- and, without prejudice to the generality of the meaning of the words "irregular tenders", a tender may be considered irregular if the supplier fails to meet the requirements of, or the tender offers variations on the requirements specified in, the contract documents where this is not permitted under the terms of the invitation to tender, or the goods offered do not meet the technical specifications (within the meaning of regulation 8(1)) of the contracting authority;

(b) subject to paragraphs (3) and (6) below, in the absence of tenders or of appropriate tenders in response to an invitation to tender by the contracting authority using the open or restricted procedure;

(c) when the goods to be purchased or hired under the contract are to be manufactured purely for the purpose of research, experiment, study or development but not when the goods are to be purchased or hired to establish their commercial viability or to recover their research and development costs;

(d) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the goods to be purchased or hired under the contract may only be manufactured or supplied by a particular person;

(e) when (but only if it is strictly necessary), for reasons of extreme urgency brought about by events unforeseeable by, and not attributable to, the contracting authority, the time limits specified in regulations 11 and 12 if the open or restricted procedure is used, or the time limits specified in regulation 13 if the negotiated procedure is used pursuant to sub-paragraph (a) above, cannot be met; and

(f) subject to paragraph (4) below, when the goods to be purchased or hired under the contract are required by the contracting authority as a partial replacement for, or addition to, existing goods or an installation and when to obtain the goods from a person other than the person who supplied the existing goods or the installation would oblige the contracting authority to acquire goods having different technical characteristics which would result in—

(i) incompatibility between the existing goods or the installation and the goods to be purchased or hired under the contract, or

(ii) disproportionate technical difficulties in the operation and maintenance of the existing goods or the installation.

(3) A contracting authority shall not use the negotiated procedure pursuant to paragraphs (2)(a) or (b) above unless the proposed terms of the contract are substantially unaltered from the proposed terms of the contract in relation to which offers were sought using the open or restricted procedure.

(4) A contracting authority shall not use the negotiated procedure pursuant to paragraph (2)(f) above if the term of the proposed contract, or the term of that contract and of any other contract entered into for the same purpose, is more than three years unless there are reasons why it is unavoidable that this period should be exceeded.

(5) In all other circumstances the contracting authority shall use the open or restricted procedure.

(6) A contracting authority using the negotiated procedure pursuant to paragraph (2)(b) above shall submit a report recording the fact that it has done so to the Treasury for onward transmission to the Commission.

The open procedure

11.—(1) A contracting authority using the open procedure shall comply

with the following paragraphs of this regulation.

(2) The contracting authority shall publicise its intention to seek offers in relation to the public supply contract by sending to the Official Journal as soon as possible after forming the intention a notice, in a form substantially corresponding to that set out in Part B of Schedule 3, inviting tenders and containing the information therein specified.

(3) Subject to paragraph (6) below, the date which the contracting authority shall fix as the last date for the receipt by it of tenders made in response to the contract notice shall be specified in the notice and shall be not less than 52 days from the date of despatch of the notice.

(4) The contracting authority shall send the contract documents within 6 days of the receipt of a request from any supplier provided that the documents are requested by the date specified in the contract notice and any fee specified in the notice has accompanied the request.

(5) The contracting authority shall supply such further information relating to the contract documents as may reasonably be requested by a supplier provided that the request is received in sufficient time to enable the contracting authority to supply the information no later than 6 days before the date specified in the contract notice as the final date for the receipt of tenders.

(6) If the contract documents are too bulky to be supplied within the periods referred to in paragraphs (4) and (5) above or it is necessary that suppliers be given the opportunity to inspect the premises at which the goods are to be used or documents relating to the contract documents, then the minimum period laid down in paragraph (3) above shall be extended to allow for such supply or inspection.

(7) The contracting authority may exclude a tender from the evaluation of offers made in accordance with regulation 21 only if the supplier may be treated as ineligible on a ground specified in regulation 14 or if the supplier fails to satisfy the minimum standards of economic and financial standing and technical capacity required of suppliers by the contracting authority; for this purpose the contracting authority shall make its evaluation in accordance with regulations 14, 15, 16 and 17.

The restricted procedure

12.—(1) A contracting authority using the restricted procedure shall comply with the following paragraphs of this regulation.

(2) The contracting authority shall publicise its intention to seek offers in relation to the public supply contract by sending to the Official Journal as soon as possible after forming the intention a notice, in a form substantially corresponding to that set out in Part C of Schedule 3, inviting requests to be selected to tender and containing the information therein specified.

(3) Subject to paragraph (14) below, the date which the contracting authority shall fix as the last date for the receipt by it of requests to be selected

to tender shall be specified in the contract notice and shall not be less than 37 days from the date of the despatch of the notice.

(4) The contracting authority may exclude a supplier from those persons from whom it will make the selection of the persons to be invited to tender only if the supplier may be treated as ineligible on a ground specified in regulation 14 or if the supplier fails to satisfy the minimum standards of economic and financial standing and technical capacity required of suppliers by the contracting authority; for this purpose the contracting authority shall make its evaluation in accordance with regulations 14, 15, 16 and 17.

(5) The contracting authority shall make the selection of the suppliers to be invited to tender in accordance with regulations 14, 15, 16 and 17; and in making the selection and in issuing invitations the contracting authority shall not discriminate between suppliers on the grounds of their nationality or the relevant State in which they are established.

(6) The contracting authority may predetermine the range within which the number of persons which it intends to invite to tender for the contract shall be fixed but only if—

- (a) the lower number of the range is not less than 5 and the higher number not more than 20;
- (b) the range is determined in the light of the nature of the goods to be purchased or hired under the contract, and
- (c) the range is specified in the contract notice.

(7) In any event, the number of persons invited to tender shall be sufficient to ensure genuine competition.

(8) The contracting authority shall send invitations to each of the suppliers selected to tender and the invitation shall be accompanied by the contract documents, or the invitation shall state the address for requesting them.

(9) The invitation to tender shall be sent in writing simultaneously to each supplier selected to tender.

(10) The following information shall be included in the invitation—

- (a) the address to which requests for the contract documents (if not accompanying the invitation) and further information relating to those documents should be sent, the final date for making such a request and the amount and terms of the fee which may be charged for supplying that material;
- (b) the final date for the receipt of tenders, the address to which they must be sent and the language or languages in which they must be drawn up;
- (c) a reference to the contract notice published in accordance with paragraph (2) above;
- (d) an indication of the information to be included with the tender which the contracting authority may require to be provided in accordance with regulations 15, 16 and 17; and

(e) the criteria for the award of the contract if this information was not specified in the contract notice published in accordance with paragraph (2) above.

(11) Subject to paragraph (14) below, the date which the contracting authority shall fix as the last date for the receipt by it of tenders made in response to the invitation to tender which shall be specified in the invitation to tender in accordance with paragraph (10)(b) above shall be not less than 40 days from the despatch of the invitation.

(12) If it is necessary that suppliers should be given the opportunity to inspect the premises at which the goods are to be used or documents relating to the contract documents, then the minimum period referred to in paragraph (11) above shall be extended to allow for such inspection.

(13) Subject to paragraph (14) below, the contracting authority shall supply such further information relating to the contract documents as may reasonably be requested by a supplier selected to tender provided that the request for such information is received in sufficient time to enable the contracting authority to supply it not less than 6 days before the date specified in the invitation to tender as the final date for the receipt of tenders.

(14) Where compliance with the minimum periods referred to in paragraphs (3), (11) and (13) above is rendered impracticable for reasons of urgency, the contracting authority may substitute for the periods specified in those paragraphs periods of not less than 15 days, 10 days and 4 days respectively and, in those circumstances, the contracting authority shall send the invitation to tender by the most rapid means possible.

(15) A contracting authority shall not refuse to consider an application to be invited to tender if it is made by letter, telegram, telex, facsimile or telephone provided that, in the last four cases, it is confirmed by letter despatched before the date fixed by the contracting authority as the last date for the receipt of applications to be invited to tender for the contract.

The negotiated procedure

13.—(1) A contracting authority using the negotiated procedure shall comply with the following paragraphs of this regulation except that—

(a) a contracting authority using the negotiated procedure pursuant to regulation 10(2)(b), (c), (d), (e) or (f), and

(b) a contracting authority using the negotiated procedure pursuant to regulation 10(2)(a) who invites to negotiate the contract every supplier who submitted a tender following an invitation made during the course of the discontinued open or restricted procedure (not being a tender which was excluded pursuant to regulation 11(7) or 12(4)),

need not comply with paragraphs (2) to (6) below.

(2) The contracting authority shall publicise its intention to seek offers in relation to the public supply contract by sending to the Official Journal as soon as possible after forming the intention a notice, in a form substantially corresponding to that set out in Part D of Schedule 3, inviting requests to be

selected to negotiate and containing the information therein specified.

(3) Subject to paragraph (4) below, the date which the contracting authority shall fix as the last date for the receipt by it of requests to be selected to negotiate shall be specified in the contract notice and shall be not less than 37 days from the date of despatch of the notice.

(4) Where compliance with the minimum period of 37 days in paragraph (3) above is rendered impracticable for reasons of urgency, the contracting authority may substitute a period of not less than 15 days and, in those circumstances, the contracting authority shall send the invitation to negotiate the contract by the most rapid means possible.

(5) A contracting authority shall not refuse to consider an application to be selected to negotiate if it is made by letter, telegram, telex, facsimile or telephone provided that, in the last four cases, it is confirmed by letter despatched before the date fixed by the contracting authority as the last date for the receipt of applications to be invited to tender for the contract.

(6) Where there is a sufficient number of persons who are suitable to be selected to negotiate the contract, the number selected to negotiate shall not be less than 3.

(7) The contracting authority may exclude a supplier from those persons from whom it will make the selection of persons to be invited to negotiate the contract only if the supplier may be treated as ineligible on a ground specified in regulation 14 or if the supplier fails to satisfy the minimum standards of economic and financial standing and technical capacity required of suppliers by the contracting authority; for this purpose the contracting authority shall make its evaluation in accordance with regulations 14, 15, 16 and 17.

(8) The contracting authority shall make the selection of the suppliers to be invited to negotiate in accordance with regulations 14, 15, 16 and 17; and in making the selection and in issuing invitations to negotiate the contracting authority shall not discriminate between suppliers on the grounds of their nationality or the relevant State in which they are established.

Notes:

[22] The relevant classification for product area shall be defined by reference to the Classification of Products by Activity as determined by the Commission in consultation with member States and published from time to time in the Official Journal

PART IV

SELECTION OF SUPPLIERS

Criteria for rejection of suppliers

14.—(1) A contracting authority may treat a supplier as ineligible to tender for or to be included amongst those persons from whom it will make the selection of persons to be invited to tender for or to negotiate a contract in accordance with regulations 11(7), 12(4) and 13(7) above, or decide not to select a supplier to tender for or to negotiate a contract in accordance with regulations 12(5) and 13(8), on one of the following grounds, namely that the supplier—

(a) being an individual is bankrupt or has had a receiving order or administration order made against him or has made any composition or arrangement with or for the benefit of his creditors or has made any conveyance or assignment for the benefit of his creditors or appears unable to pay, or to have no reasonable prospect of being able to pay, a debt within the meaning of section 268 of the Insolvency Act 1986^[23], or article 242 of the Insolvency (Northern Ireland) Order 1989^[24], or in Scotland has granted a trust deed for creditors or become otherwise apparently insolvent, or is the subject of a petition presented for sequestration of his estate, or is the subject of any similar procedure under the law of any other state;

(b) being a partnership constituted under Scots law has granted a trust deed or become otherwise apparently insolvent, or is the subject of a petition presented for sequestration of its estate;

(c) being a company has passed a resolution or is the subject of an order by the court for the company's winding up otherwise than for the purposes of bona fide reconstruction or amalgamation, or has had a receiver, manager or administrator on behalf of a creditor appointed in respect of the company's business or any part thereof or is the subject of proceedings for any of the above procedures or is the subject of similar procedures under the law of any other state;

(d) has been convicted of a criminal offence relating to the conduct of his business or profession;

(e) has committed an act of grave misconduct in the course of his business or profession;

(f) has not fulfilled obligations relating to the payment of social security contributions under the law of any part of the United Kingdom or of the relevant State in which the supplier is established;

(g) has not fulfilled obligations relating to the payment of taxes under the law of any part of the United Kingdom or the relevant State in which the supplier is established;

(h) is guilty of serious misrepresentation in supplying any information required of him under this regulation and regulations 15, 16 and 17; or

(i) subject to paragraphs (5) and (6) below, is not registered on the professional or trade register of the relevant State in which the supplier is established under the conditions laid down by that State.

(2) Subject to regulation 19, the contracting authority may require a supplier to provide such information as it considers it needs to make the evaluation in accordance with paragraph (1) above except that it shall accept as conclusive evidence that a supplier does not fall within the grounds specified in paragraphs (1)(a), (b), (c), (d), (f) or (g) above if that supplier provides to the contracting authority—

(a) in relation to the grounds specified in paragraphs (1)(a), (b), (c) or (d) above,

(i) an extract from the judicial record, or

(ii) in a relevant State which does not maintain such a judicial record, a document issued by the relevant judicial or administrative authority;

(b) in relation to the grounds specified in paragraph (1)(f) or (g) above, a certificate issued by the relevant competent authority;

(c) in a relevant State where the documentary evidence specified in paragraphs 2(a) and (b) above is not issued or where it is issued but does not extend to all of the grounds specified in paragraph (1)(a), (b), (c) or (d) above, a declaration on oath, or in a relevant State which does not provide for a declaration on oath a solemn declaration, made by the supplier before the relevant judicial, administrative or competent authority or a relevant notary public or commissioner for oaths.

(3) In this regulation, "relevant" in relation to a judicial, administrative or competent authority, notary public or commissioner for oaths means such an authority designated by, or a notary public or commissioner of oaths in, the relevant State in which the supplier is established.

(4) The following are the appropriate professional or trade registers for the purposes of paragraph (1)(i) above—

in Austria, the Firmenbuch, the Gewerberegister or the Mitgliederverzeichnisse der Landeskammern;

in Belgium, the Registre du commerce/Handelsregister;

in Denmark, the Aktieselskabsregistret, Foreningsregistret or Handelsregistret;

in Finland, the Kaupparekisteri or Handelsregistret;

in France, the Registre du commerce or repertoire des metiers;

in Germany, the Handelsregister or Handwerksrolle;

in Greece, the ΒιοΤεΧνικὴ Βιομηχανικὴ Ἐμπορικὴ ἘπιμεληΤηριο

in Iceland, the Firmaskrà;

in Italy, the Registro della Camera di commercio, industria, agricoltura e artigianato or Registro delle Commissioni provinciali per l'artigianato;

in Liechtenstein, the Gewerberegister;

in Luxembourg, the Registre aux firmes or Rue de la chambre des metiers;

in Norway, the Foretaksregisteret;

in the Netherlands, the Handelsregister;

in Portugal, the Registo Nacional das Pessoas Colectivas;

in Spain, the Registro Mercantil; and

in Sweden, the Aktiebolagsregistret or the Handelsregistret.

(5) A supplier established in the United Kingdom or Ireland shall be treated as registered on the professional or trade register for the purposes of paragraph (1)(i) above if the supplier—

(a) is established in Ireland and is certified as registered with the Registrar of Friendly Societies, or

(b) is established in either State and is either—

(i) certified as incorporated by the Registrar of Companies, or

(ii) is certified as having declared on oath that he is carrying on business in the trade in question in the State in which he is established at a specific place of business and under a specific trading name.

(6) An individual who is established in Spain shall be treated as registered on the professional or trade register for the purposes of paragraph (1)(i) above if he is certified as having declared an oath that he exercises the particular profession or trade.

(7) A supplier established in a relevant State, other than the United Kingdom or Ireland, which either has an equivalent professional or trade register which is not listed in paragraph (4) above or which does not have an equivalent professional or trade register shall be treated as registered on a professional or trade register for the purposes of paragraph 1(i) above on production of either a certificate that he is registered on the equivalent professional or trade register or where no such register exists, a declaration on oath, or in a relevant State which does not provide for a declaration on oath a solemn declaration, made by the supplier before the relevant judicial, administrative or competent authority or a relevant notary public or Commissioner for oaths, that he exercises the particular profession or trade.

Information as to economic and financial standing

15.—(1) Subject to regulation 19 and paragraph (2) below, in assessing whether a supplier meets any minimum standards of economic and financial standing required of suppliers by the contracting authority for the purposes of regulations 11(7), 12(4) and 13(7), and in selecting the suppliers to be invited to tender for or to negotiate the contract in accordance with regulations 12(5) and 13(8), a contracting authority may take into account any of the following information—

- (a) appropriate statements from the supplier's bankers;
- (b) statements of accounts or extracts therefrom relating to the business of the supplier where publication of the statement is required under the law of the relevant State in which the supplier is established;
- (c) a statement of the overall turnover of the business of the supplier and the turnover in respect of goods of a similar type to the goods to be purchased or hired under the public supply contract in the 3 previous financial years of the supplier.

(2) Where the information specified in paragraph (1) above is not appropriate in a particular case, a contracting authority may require a supplier to provide other information to demonstrate the supplier's economic and financial standing.

(3) A contracting authority which requires information to be provided in accordance with paragraphs (1) and (2) above shall specify in the contract notice or in the invitation to tender the information which the supplier must provide and it may require a supplier to provide only such of that information as it considers it needs to make the assessment or selection.

(4) Where a supplier is unable for a valid reason to provide the information which the contracting authority has required, the contracting authority shall accept such other information provided by the supplier as the contracting authority considers appropriate.

Information as to technical capacity

16.—(1) Subject to regulation 19, in assessing whether a supplier meets any minimum standards of technical capacity required of suppliers by the contracting authority for the purposes of regulations 11(7), 12(4) and 13(7), and in selecting the suppliers to be invited to tender for or to negotiate the contract in accordance with regulations 12(5) and 13(8), a contracting authority may take into account any of the following information—

- (a) the principal deliveries by the supplier of goods of a similar type to the goods to be purchased or hired under the public supply contract in the past 3 years, specifying in each case the date of delivery, the consideration received and the identity of the purchaser accompanied by a certificate issued or countersigned by the purchaser confirming the details of the purchase or hire or, but only where the purchaser was not a contracting authority, a declaration by the supplier attesting the details of the purchase or hire;
- (b) the supplier's technical facilities, measures for ensuring quality and study and research facilities in relation to the goods to be purchased or hired under the public supply contract;

(c) the technicians or technical bodies who would be involved with the production of the goods to be purchased or hired under the public supply contract, particularly those responsible for quality control, whether or not they are independent of the supplier;

(d) samples, descriptions and photographs of the goods to be purchased or hired under the public supply contract and certification of the authenticity of such samples, descriptions or photographs;

(e) certification by official quality control institutes or agencies of recognised competence attesting that the goods to be purchased or hired under the public supply contract conform to standards and technical specifications (within the meaning of regulation 8(1)) identified by the contracting authority;

(f) where the goods to be sold or hired under the public supply contract are complex or are required for a special purpose, a check, carried out by the contracting authority or on its behalf by a competent official body of the relevant State in which the supplier is established, on the production capacity of the supplier in respect of the goods to be purchased or hired under the contract and, if relevant, on the supplier's study and research facilities and quality control measures.

(2) The contracting authority may only require a supplier to provide information specified in paragraph (1) above and only such of that information as it considers it needs to make the assessment or selection and it shall specify in the contract notice or in the invitation to tender which of that information it requires to be provided.

Supplementary information

17. The contracting authority may require a supplier to provide information supplementing the information supplied in accordance with regulations 14, 15 and 16 or to clarify that information, provided that the information so required relates to the matters specified in regulations 14, 15 and 16.

Confidentiality of information

18. A contracting authority shall comply with such requirements as to the confidentiality of information provided to it by a supplier as the supplier may reasonably request.

Official lists of recognised suppliers

19. Where a supplier is registered on the official list of recognised suppliers in a relevant State which maintains such lists and in which the supplier is established and the supplier submits to the contracting authority a certificate of registration issued by the authority administering the official lists which specifies the information submitted to that authority which enabled the supplier to be registered and which states the classification given, the contracting authority, to the extent that the certificate deals with the grounds referred to in regulations 14(1)(a) to (e), (h) and (i), 15(1)(b) and (c) and 16(1)(a)—

(a) shall accept the certificate as evidence that the supplier does not fall within the grounds specified in regulations 14(1)(a) to (e), (h) and (i) and shall not be entitled to require the supplier to submit such information relating to those grounds as is specified in regulation 14,

- (b) shall not be entitled to require the supplier to provide information specified in regulations 15(1)(b) and (c) and 16(1)(a), and
(c) shall not be entitled to seek any supplementary information in accordance with regulation 17 above in relation to the matters specified in subparagraphs (a) and (b) above.

Consortia

20.—(1) In this regulation a "consortium" means 2 or more persons, at least one of whom is a supplier, acting jointly for the purpose of being awarded a public supply contract.

(2) A contracting authority shall not treat the tender of a consortium as ineligible nor decide not to include a consortium amongst those persons from whom it will make the selection of persons to be invited to tender for or to negotiate a public supply contract on the grounds that that consortium has not formed a legal entity for the purpose of tendering for or negotiating the contract; but where a contracting authority awards a public supply contract to a consortium it may, if to do so is justified for the satisfactory performance of the contract, require the consortium to form a legal entity before entering into, or as a term of, the contract.

(3) In this part of these Regulations references to a supplier where the supplier is a consortium includes a reference to each person who is a member of that consortium.

Notes:

[23] 1986 c. 45.

[24] S.I. 1989/2405 (N.I.19).

PART V

THE AWARD OF A PUBLIC SUPPLY CONTRACT

Criteria for the Award of a Public Supply Contract

21.—(1) Subject to paragraphs (5), (6) and (7) below, a contracting authority shall award a public supply contract on the basis of the offer which—

- (a) is the most economically advantageous to the contracting authority, or
(b) offers the lowest price.

(2) The criteria which a contracting authority may use to determine that an offer is the most economically advantageous include delivery date, running costs, cost effectiveness, quality, aesthetic and functional characteristics, technical merit, after sales service, technical assistance and price.

(3) Where a contracting authority intends to award a public supply contract

on the basis of the offer which is the most economically advantageous it shall state the criteria on which it intends to base its decision, where possible in descending order of importance, in the contract notice or in the contract documents.

(4) Where a contracting authority awards a public supply contract on the basis of the offer which is the most economically advantageous, it may take account of offers which offer variations on the requirements specified in the contract documents if—

(a) the offer meets the minimum requirements of the contracting authority, and

(b) it has stated those minimum requirements and any specific requirements for the presentation of an offer offering variations in the contract documents,

but if the contracting authority shall not take account of offers which offer such variations it shall state that fact in the contract notice.

(5) A contracting authority may not reject an offer which offers variations on the requirements specified in the contract documents on the ground that it would lead to the award of a public services contract within the meaning of the Public Services Contracts Regulations 1993^[25].

(6) A contracting authority may not reject an offer on the ground that the technical specifications in the offer have been defined by reference to European specifications (within the meaning of regulation 8(1)) or to the British technical specifications specified in regulation 8(7)(a) and (b).

(7) If an offer for a public supply contract is abnormally low the contracting authority may reject that offer but only if it has requested in writing an explanation of the offer, or of those parts which it considers contribute to the offer being abnormally low, and has—

(a) if awarding the public supply contract on the basis of the offer which offers the lowest price, examined the details of all the offers made, taking into account any explanation given to it of the abnormally low tender, before awarding the contract, or

(b) if awarding the public supply contract on the basis of the offer which is the most economically advantageous, taken any such explanation into account in assessing which is the most economically advantageous offer,

and, in considering that explanation, the contracting authority may take into account explanations relating to the economics of the manufacturing process, or to the technical solutions suggested by the supplier or the exceptionally favourable conditions available to the supplier for the provision of the supply of goods or the originality of the supplies proposed by the supplier.

(8) If a contracting authority which rejects an abnormally low offer is awarding the public supply contract on the basis of the offer which offers the lowest price, it shall send a report justifying the rejection to the Treasury for onward transmission to the Commission.

(9) For the purposes of this regulation an "offer" includes a bid by one part of a contracting authority to make available to another part of the contracting authority the goods required by it when the former part is invited by the latter part to compete with the offers sought from other persons.

Contract award notice

22.—(1) A contracting authority which has awarded a public supply contract shall, no later than 48 days after the award, send to the Official Journal a notice, substantially corresponding to the form set out in Part E of Schedule 3 and, subject to paragraph (2) below, including the information therein specified.

(2) Any of the information specified in Part E of Schedule 3 to be included in the contract award notice may be omitted in a particular case where to publish such information would impede law enforcement, would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of any person or might prejudice fair competition between suppliers.

Information about contract award procedures

23.—(1) A contracting authority shall, within 15 days of the date on which it receives a request from any supplier who was unsuccessful (whether pursuant to regulation 11(7), 12(4), 12(5), 13(7), 13(8) or 21), inform that supplier of the reasons why he was unsuccessful and, if the supplier was unsuccessful as a result of the evaluation of offers made in accordance with regulation 21, the name of the person awarded the contract.

(2) A contracting authority shall prepare a record in relation to each public supply contract awarded by it specifying—

- (a) the name and address of the contracting authority;
- (b) the type of goods purchased or hired or to be purchased or hired under the contract and the value of the consideration to be given under it;
- (c) the names of the persons whose offers were evaluated in accordance with regulation 21 and, where the contracting authority has used the restricted or negotiated procedure, the reasons why those persons were selected;
- (d) the names of the persons who were unsuccessful pursuant to regulation 11(7), 12(4), 12(5), 13(7) or 13(8) and the reasons why they were unsuccessful;
- (e) the name of the person to whom the public supply contract was awarded and the reasons for having awarded the contract to him;
- (f) if known to the contracting authority, which part of the contract the person to whom the public supply contract has been awarded intends to sub-contract to another person;
- (g) in the case of a contracting authority which used the negotiated procedure, which of the circumstances specified in regulation 10(2) constituted grounds for using that procedure.

(3) If the Commission requests a report containing the information specified in paragraph (2) above, the contracting authority shall send a written report containing that information, or the main features of it, to the Treasury for onward transmission to the Commission.

(4) Where a contracting authority decides not to award a public supply contract in respect of which a contract notice was published nor to seek offers in relation to another contract for the same purpose it shall inform the Official Journal of that decision and shall, if so requested by any supplier who submitted an offer or who applied to be included amongst the persons to be selected to tender for or to negotiate the contract, inform him of the reasons for its decision.

Notes:

[25] S.I. 1993/3228

PART VI

MISCELLANEOUS

Public service bodies

24. Where a contracting authority, other than one which is a contracting authority only by reason of being a GATT contracting authority, grants to a person other than a contracting authority special or exclusive rights to carry on a service for the benefit of the public, it shall impose an express duty on that person not to discriminate in seeking offers in relation to, or in awarding, a contract for the purchase or hire of goods on the grounds of nationality against a person who is a national of and established in a relevant State or on the grounds that the goods to be supplied under the contract originate in another relevant State.

Statistical and other reports

25.—(1) A GATT contracting authority shall, no later than 31st July in each year, send to the Treasury a report specifying—

(a) in relation to each public supply contract awarded by it during the reporting period—

(i) the value (estimated if necessary) of the consideration payable under the contract;

(ii) whether the open, restricted or negotiated procedure was used;

(iii) if the negotiated procedure was used, pursuant to which provision of regulation 10(2) that procedure was used;

(iv) the type of goods purchased or hired or to be purchased or hired under the contract; and

(v) the nationality of the person to whom the contract was awarded; and

(b) the aggregate value (estimated if necessary) of the consideration payable under the public supply contracts excluded from the operation of these Regulations by regulation 7 and awarded by it during the reporting period.

(2) A contracting authority which is not a GATT contracting authority

shall, no later than 31st July 1995 and 31st July in each alternate year thereafter, send to the Treasury a report specifying in relation to each public supply contract awarded by it during the reporting period the information specified in paragraph (1)(a)(i) to (v) above.

(3) A contracting authority shall send to the Treasury a report containing such other information as the Treasury may from time to time require in respect of a particular public supply contract (including public supply contracts excluded from the application of these Regulations by regulations 6 and 7) for the purposes of informing the Commission.

(4) In this regulation "the reporting period" means the year preceding the year in which the reports referred to in paragraphs (1) and (2) above are to be made.

Responsibility for obtaining reports

26.—(1) Where a contracting authority is not a Minister of the Crown or a government department, that contracting authority shall send any report which it is required in accordance with regulations 8(6), 10(6), 21(8), 23(3) and 25 to send to the Treasury instead to the Minister responsible for that contracting authority and that Minister shall be responsible for sending the report to the Treasury.

(2) The Minister responsible for a contracting authority shall be the Minister of the Crown whose areas of responsibility are most closely connected with the functions of the contracting authority; and any question as to which Minister of the Crown's areas of responsibility are most closely connected with the functions of a contracting authority shall be determined by the Treasury whose determination shall be final.

(3) The requirement on a contracting authority to send any report in accordance with paragraph (1) above to the Minister of the Crown responsible for that contracting authority shall be enforceable, on the application of the Minister responsible, by mandamus or, in Scotland, for an order for specific performance.

(4) Proceedings under paragraph (3) above brought in Scotland shall be brought before the Court of Session.

(5) In the application of this regulation to Northern Ireland references to the Minister shall include references to the head of a Northern Ireland department.

Publication of notices

27.—(1) Any notice required by these Regulations to be sent to the Official Journal shall be sent by the most appropriate means to the Office for Official Publications of the European Communities^[26] and where the contracting authority is applying the restricted procedure or the negotiated procedure and, for reasons of urgency, is applying the provisions of regulations 12(14) and 13(4), the notice shall be sent by telex, telegram or facsimile.

(2) Any such notice shall not contain more than 650 words.

(3) The contracting authority shall retain evidence of the date of despatch to the Official Journal of each notice.

(4) The contracting authority shall not place a contract notice in the press or like publications in the United Kingdom before the date on which the notice is despatched in accordance with paragraph (1) above and if it does, after that date, so place the notice it shall not add to the notice any information in relation to the public supply contract which was not contained in the notice sent to the Official Journal except that it shall mention the date on which that notice was despatched.

Sub-contractors

28. A contracting authority may require a supplier to indicate in his tender what part of the contract he intends to sub-contract to another person.

Notes:

[26] The address for the Office for Official Publications of the European Communities is 2 Rue Mercier, L 2985, Luxembourg (tel: 499 28-1; telex: 1324 PUBOF LU; fax: 49 00 03, 49 57 19).

PART VII

APPLICATIONS TO THE COURT

Enforcement of obligations

29.—(1) The obligation on a contracting authority to comply with the provisions of these Regulations other than regulations 8(6), 10(6), 21(8), 23(3) and 25, and with any enforceable Community obligation in respect of a public supply contract (other than one excluded from the application of these Regulations by regulations 6 and 7), is a duty owed to suppliers.

(2) A breach of the duty owed pursuant to paragraph (1) above shall not be a criminal offence but any breach of the duty shall be actionable by any supplier who, in consequence, suffers, or risks suffering, loss or damage.

(3) Proceedings under this regulation shall be brought in England and Wales and in Northern Ireland in the High Court and, in Scotland, before the Court of Session.

(4) Proceedings under this regulation may not be brought unless—
(a) the supplier bringing the proceedings has informed the contracting authority of the breach or apprehended breach of the duty owed to him pursuant to paragraph (1) above by the contracting authority and of his intention to bring proceedings under this regulation in respect of it; and
(b) they are brought promptly and in any event within 3 months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending the period within which proceedings may be brought.

(5) Subject to paragraph (6) below, but otherwise without prejudice to any other powers of the Court, in proceedings brought under this regulation the Court may—

(a) by interim order suspend the procedure leading to the award of the contract in relation to which the breach of the duty owed pursuant to paragraph (1) above is alleged, or suspend the implementation of any decision or action taken by the contracting authority in the course of following such procedure; and

(b) if satisfied that a decision or action taken by a contracting authority was in breach of the duty owed pursuant to paragraph (1) above—

(i) order the setting aside of that decision or action or order the contracting authority to amend any document, or

(ii) award damages to a supplier who has suffered loss or damage as a consequence of the breach, or

(iii) do both of those things.

(6) In proceedings under this regulation the Court shall not have power to order any remedy other than an award of damages in respect of a breach of the duty owed pursuant to paragraph (1) above if the contract in relation to which the breach occurred has been entered into.

(7) Notwithstanding sections 21 and 42 of the Crown Proceedings Act 1947^[27], in proceedings brought under this regulation against the Crown the court shall have power to grant an injunction or interdict.

Notes:

[27] 1947 c. 44; the Crown Proceedings Act 1947 was extended to Northern Ireland in relation to Her Majesty's Government in the United Kingdom and in Northern Ireland by and with the additions exceptions and modifications set out in the Crown Proceedings (Northern Ireland) Order 1981, to which there is an amendment not relevant to these regulations.

PART VIII

REVOCATION AND AMENDMENT

Revocation of the Public Supply Contracts Regulations

30. These Regulations revoke the Public Supply Contracts Regulations 1991^[28], regulation 32(2) of the Utilities Supply and Works Contracts Regulations 1992^[29] and regulation 33 of the Public Services Contracts Regulations 1993^[30].

Amendments to the Public Works Contracts Regulations and the Public Services Contracts Regulations

31. —(1) The Public Works Contracts Regulations 1991^[31] shall be amended—

- (a) in Regulation 2(1), by inserting the following definition:
 ""relevant State" means a member State, Hungary, Poland, Iceland, Norway and, as from the date that the Agreement on the European Economic Area signed at Oporto on 2nd May 1992, as adjusted by the Protocol signed at Brussels on 17th March 1993, is in force in relation to it, Liechtenstein."
(b) in the following regulations, by substituting "relevant State" for "member State":

regulation 2(1)

regulation 2(2)

regulation 4

regulation 6(e)(i)

regulation 8(6)

regulation 12(5)

regulation 13(8)

regulation 14(1)(f)(i)

regulation 14(2)

regulation 14(3)

regulation 15(1)(b)

regulation 18

regulation 31(2)(b)

(c) in regulation 14(4), by inserting the following:

in Austria, the Firmenbuch, Gewerberegister or Mitgliederverzeichnisse der Landeskammern;

in Finland, the Kaupparekisteri or Handelsregistret;

in Iceland, the Firmaskrá;

in Norway, the Foretaksregisteret;

in Sweden, the Aktiebolagsregistret, Handelsregistret or Föreningsregistret;

in Greece, the registrar of contractors' enterprises
"(ΜητρωοΕργοληπτικωνΕπιχειρησεων)" of the Ministry for
Environment, Town and Country Planning and Public Works;

and, in relation to Denmark, by substituting "the Handelsregistret,
Aktieselskabsregistret or Erhvervsregistret" for "the Erhvervs— and
Selskabsstyrelsen"

(d) in regulation 14(6), by substituting the following new paragraph:

" (6) A contractor established in a relevant State, other than
the United Kingdom or Ireland, which either has an equivalent
professional or trade register which is not listed in paragraph
(4) above or which does not have an equivalent professional or
trade register shall be treated as registered on a professional or
trade register for the purposes of paragraph 1(i) above on
production of either a certificate that he is registered on the
equivalent professional or trade register or where no such
register exists, a declaration on oath, or in a relevant State
which does not provide for a declaration on oath a solemn
declaration, made by the contractor before the relevant judicial,
administrative or competent authority or a relevant notary
public or Commissioner for oaths, that he exercises the
particular profession or trade."

(2) The Public Services Contracts Regulations 1993^[32] shall be amended—

(a) in regulation 2(1), by inserting the following definition:

""relevant State" means a member State, Hungary, Poland,
Iceland, Norway and, as from the date that the Agreement on
the European Economic Area signed at Oporto on 2nd May
1992, as adjusted by the Protocol signed at Brussels on 17th
March 1993, is in force in relation to it, Liechtenstein."

(b) in the following regulations, by substituting "relevant State" for
"member State":

regulation 2(1)

regulation 2(3)

regulation 4

regulation 6(j)(i)

regulation 6(k)

regulation 8(6)

regulation 12(5)

regulation 13(8)

regulation 14(1)(f),(i),(j)

regulation 14(2)(a)(ii),(c)

regulation 14(3)

regulation 15(1)(b)

regulation 16(1)(b)(vii),(viii)

regulation 18

regulation 20(1)

(c) in regulation 14(4), by inserting the following:

in Austria, the Firmenbuch, Gewerberegister or Mitgliederverzeichnisse der Landeskammern;

in Finland, the Kaupparekisteri or Handelsregistret;

in Iceland, the Firmaskrá or Hlutafélagaskrá;

in Norway, the Foretaksregisteret;

in Sweden, the Aktiebolagsregistret, Handelsregistret or Föreningsregistret;

(d) in regulation 14(6)(b), by substituting the following paragraph:

"(b) in any other case, in accordance with paragraph (7) below"

(e) in regulation 14, by inserting the following new paragraph:
"(7)

A services provider established in a relevant State, other than the United Kingdom or Ireland, which either has an equivalent professional or trade register which is not listed in paragraph (4) above or which does not have an equivalent professional or trade register shall be treated as registered on a professional or trade register for the purposes of paragraph 1(j) above on production of either a certificate that he is registered on the equivalent professional or trade register or where no such register exists, a declaration on oath, or in a relevant State which does not provide for a declaration on oath a solemn declaration, made by the services provider before the relevant judicial, administrative or competent authority or a relevant notary public or Commissioner for oaths, that he exercises the particular profession or trade."

(f) in regulation 23(3), by substituting where it first appears "the Commission" for "the Treasury".

Andrew Mitchell

Derek Conway

Two of the Lords Commissioners of Her Majesty's Treasury

30th January 1995

Notes:

[28] S.I. 1991/2679 as amended by S.I. 1992/3279 and 1993/3228.

[29] S.I. 1992/3279.

[30] S.I. 1993/3228.

[31] S.I. 1991/2680, as amended by S.I. 1992/3279.

[32] S.I. 1993/3228.

SCHEDULE 1
Regulation 2(1)

GATT CONTRACTING AUTHORITIES

Cabinet Office

Chessington Computer Centre
Civil Service College
Civil Service Occupational Health Service
Office of Public Services and Science
Parliamentary Counsel Office
Recruitment and Assessment Services
The Government Centre on Information Systems (CCTA)

Central Office of Information

Charity Commission

Crown Estate Commissioners (Vote Expenditure only)

Crown Prosecution Service

Customs and Excise Department

Department for National Savings

Department for Education

Higher Education Funding Council for England

Department of Employment

Employment Appeal Tribunal

Industrial Tribunals

Office of Manpower Economics

Department of Health

Central Council for Education and Training in Social Work
Dental Practice Board
English National Board for Nursing, Midwifery and Health Visitors
National Health Service Authorities and Trusts
Prescription Pricing Authority
Public Health Laboratory Service Board
UK Central Council for Nursing, Midwifery and Health Visiting

Department of National Heritage

British Library
British Museum
Historic Buildings and Monuments Commission for England (English Heritage)
Imperial War Museum
Museums and Galleries Commissions
National Gallery
National Maritime Museum
National Portrait Gallery
Natural History Museum
Royal Commission on Historical Manuscripts
Royal Commission on Historical Monuments of England
Royal Fine Art Commission (England)
Science Museum
Tate Gallery
Victoria and Albert Museum
Wallace Collection

Department of Social Security

Disability Living Allowance Advisory Board
Independent Tribunal Service
Medical Boards and Examining Medical Officers (War Pensions)
Occupational Pensions Board
Regional Medical Service
Social Security Advisory Committee

Department of the Environment

Building Research Establishment Agency
Commons Commission
Countryside Commission
Rent Assessment Panels
Royal Commission on Environmental Pollution
The Buying Agency
Valuation Tribunal

Department of the Procurator General and Treasury Solicitor

Legal Secretariat to the Law Officers

Department of Trade and Industry

Central Transport Consultative Committee

Domestic Coal Consumers' Council
Electricity Committees
Gas Consumers' Council
Laboratory of the Government Chemist
Monopolies and Mergers Commission
National Engineering Laboratory
National Physical Laboratory
National Weights and Measures Laboratory
Patent Office

Department of Transport
Coastguard Services
Transport Research Laboratory

Export Credits Guarantee Department
Foreign and Commonwealth Office
Wilton Park Conference Centre

Government Actuary's Department
Government Communications Headquarters
Home Office
Boundary Commission for England
Gaming Board for Great Britain
Inspectors of Constabulary
Parole Board and Local Review Committees

House of Commons
House of Lords
Inland Revenue, Board of
Intervention Board for Agricultural Produce
Lord Chancellor's Department
Combined Tax Tribunal
Council on Tribunals
Immigration Appellate Authorities
Immigration Adjudicators
Immigration Appeals Tribunal

Lands Tribunal
Law Commission
Legal Aid Fund (England and Wales)
Pensions Appeal Tribunals
Public Trust Office
Office of the Social Security Commissioners
Supreme Court Group (England and Wales)
Court of Appeal—Criminal
Circuit Offices and Crown, County and Combined Courts (England and Wales)
Transport Tribunal

Ministry of Agriculture, Fisheries and Food

Agricultural Development and Advisory Service
Agricultural Dwelling House Advisory Committees
Agricultural Land Tribunals
Agricultural Wages Board and Committees
Cattle Breeding Centre
Plant Variety Rights Office
Royal Botanic Gardens, Kew

Ministry of Defence^[33]
Meteorological Office
Procurement Executive

National Audit Office
National Investment and Loans Office
Northern Ireland Court Service
Coroners Courts
County Courts
Court of Appeal and High Court of Justice in Northern Ireland
Crown Court
Enforcement of Judgements Office
Legal Aid Fund
Magistrates Courts
Pensions Appeals Tribunals

Northern Ireland, Department of Agriculture
Northern Ireland, Department of Economic Development
Northern Ireland, Department of Education
Northern Ireland, Department of the Environment
Northern Ireland, Department of Finance and Personnel
Northern Ireland, Department of Health and Social Services
Northern Ireland Office
Crown Solicitor's Office
Department of the Director of Public Prosecutions for Northern Ireland
Northern Ireland Forensic Science Laboratory
Office of Chief Electoral Officer for Northern Ireland
Police Authority for Northern Ireland
Probation Board for Northern Ireland
State Pathologist Service

Office of Fair Trading
Office of Population Censuses and Surveys
National Health Service Central Register

Office of the Parliamentary Commissioner for Administration and Health
Service Commissioners
Overseas Development Administration
Natural Resources Institute

Paymaster General's Office
Postal Business of the Post Office

Privy Council Office
Public Record Office
Registry of Friendly Societies
Royal Commission on Historical Manuscripts
Royal Hospital, Chelsea
Royal Mint
Scotland, Crown Office and Procurator Fiscal Service
Scotland, Registers of Scotland
Scotland, General Register Office
Scotland, Lord Advocate's Department
Scotland, Queen's and Lord Treasurer's Remembrancer
Scottish Courts Administration
 Accountant of Court's Office
 Court of Justiciary
 Court of Session
 Lands Tribunal for Scotland
 Pensions Appeal Tribunals
 Scottish Land Court
 Scottish Law Commission
 Sheriff Courts
 Social Security Commissioners' Office

The Scottish Office Agriculture and Fisheries Department
 Crofters Commission
 Red Deer Commission
 Royal Botanic Garden, Edinburgh

The Scottish Office Central Services
The Scottish Office Education Department
 National Galleries of Scotland
 National Library of Scotland
 National Museums of Scotland
 Scottish Higher Education Funding Council

The Scottish Office Environment Department
 Rent Assessment Panel and Committees
 Royal Commission on the Ancient and Historical Monuments of
 Scotland
 Royal Fine Art Commission for Scotland

The Scottish Office Home and Health Department
 HM Inspectorate of Constabulary
 Local Health Councils
 National Board for Nursing, Midwifery and Health Visiting for
 Scotland
 Parole Board for Scotland and Local Review Committees
 Scottish Council for Postgraduate Medical Education
 Scottish Crime Squad
 Scottish Criminal Record Office
 Scottish Fire Service Training School

Scottish National Health Service Authorities and Trusts
Scottish Police College

The Scottish Office Industry Department
Scottish Record Office
Her Majesty's Stationery Office (HMSO)
HM Treasury
Welsh Office

Royal Commission for Ancient and Historical Monuments in Wales
Welsh National Board for Nursing, Midwifery and Health Visiting
Local Government Boundary Commission for Wales
Valuation Tribunals (Wales)
Welsh Higher Education Funding Council
Welsh National Health Service Authorities and Trusts
Welsh Rent Assessment Panels

Notes:

[33] Non-warlike materials.

SCHEDULE 2

Regulation 7(2)(a)

GOODS FOR THE PURPOSES OF THE THRESHOLDS

The goods for the purpose of regulation 7(2)(a) are those specified in the following chapters of the CCCN (Customs Co-operation Council Nomenclature).

Chapter 25: Salt; sulphur; earths and stone; plating materials, lime and cement

Chapter 26: Metallic ores, slag and ash

Chapter 27: Mineral fuels, mineral oils and products of their distillation; bituminous substances; mineral waxes

except:

ex 27.10: special engine fuels

Chapter 28: Inorganic chemicals; organic and inorganic compounds of precious metals, of rare-earth metals, of radio-active elements and of isotopes

except:

ex 28.09: explosives

ex 28.13: explosives

ex 28.14: tear gas

ex 28.28: explosives

ex 28.32: explosives

ex 28.39: explosives

ex 28.50: toxic products

ex 28.51: toxic products

ex 28.54: explosives

Chapter 29: Organic chemicals

except:

ex 29.03: explosives

ex 29.04: explosives

ex 29.07: explosives

ex 29.08: explosives

ex 29.11: explosives

ex 29.12: explosives

ex 29.13: toxic products

ex 29.14: toxic products

ex 29.15: toxic products

ex 29.21: toxic products

ex 29.22: toxic products

ex 29.23: toxic products

ex 29.26: explosives

ex 29.27: toxic products

ex 29.29: explosives

Chapter 30: Pharmaceutical products

Chapter 31: Fertilizers

Chapter 32: Tanning and dyeing extracts; tannins and their derivatives; dyes, colours, paints and varnishes; putty, fillers and stoppings; inks

Chapter 33: Essential oils and resinoids; perfumery, cosmetic or toilet preparations

Chapter 34: Soap, organic surface-active agents, washing preparations, lubricating preparations, artificial waxes, prepared waxes, polishing and scouring preparations, candles and similar articles, modelling pastes and "dental waxes"

Chapter 35: Albuminoidal substances; glues; enzymes

Chapter 37: Photographs and cinematographic goods

Chapter 38: Miscellaneous chemical products

except:

ex 38.19: toxic products

Chapter 39: Artificial resins and plastic materials, cellulose esters and ethers; articles thereof

except:

ex 39.03: explosives

Chapter 40: Rubber, synthetic rubber, factice, and articles thereof

except:

ex 40.11: bullet-proof tyres

Chapter 41: Raw hides and skins (other than furskins) and leather

Chapter 42: Articles of leather; saddlery and harness; travel goods, handbags and similar containers; articles of animal gut (other than silk-worm gut)

Chapter 43: Furskins and artificial fur; manufactures thereof

- Chapter 44: Wood and articles of wood; wood charcoal
Chapter 45: Cork and articles of cork
Chapter 46: Manufactures of straw of esparto and of other plaiting materials; basketware and wickerwork
Chapter 47: Paper-making material
Chapter 48: Paper and paperboard; articles of paper pulp, of paper or of paperboard
Chapter 49: Printed books, newspapers, pictures and other products of the printing industry; manuscripts, typescripts and plans
Chapter 65: Headgear and parts thereof
Chapter 66: Umbrellas, sunshades, walking-sticks, whips, riding-crops and parts thereof
Chapter 67: Prepared feathers and down and articles made of feathers or of down; artificial flowers; articles of human hair
Chapter 68: Articles of stone, of plaster, of cement, of asbestos, of mica and of similar materials
Chapter 69: Ceramic products
Chapter 70: Glass and glassware
Chapter 71: Pearls, precious and semi-precious stones, precious metals, rolled precious metals, and articles thereof, imitation jewellery
Chapter 73: Iron and steel and articles thereof
Chapter 74: Copper and articles thereof
Chapter 75: Nickel and articles thereof
Chapter 76: Aluminium and articles thereof
Chapter 77: Magnesium and beryllium and articles thereof
Chapter 78: Lead and articles thereof
Chapter 79: Zinc and articles thereof
Chapter 80: Tin and articles thereof
Chapter 81: Other base metals employed in metallurgy and articles thereof
Chapter 82: Tools, implements, cutlery, spoons and forks, of base metal; parts thereof

except:

ex 82.05: tools

ex 82.07: tools, parts

Chapter 83: Miscellaneous articles of base metal

Chapter 84: Boilers, machinery and mechanical appliances; parts thereof

except:

ex 84.06: engines

ex 84.08: other engines

ex 84.45: machinery

ex 84.53: automatic data-processing machines

ex 84.55: parts of machines under heading No. 84.53

ex 84.59: nuclear reactors

Chapter 85: Electrical machinery and equipment; parts thereof

except:

ex 85.13: telecommunications equipment

ex 85.15: transmission apparatus

Chapter 86: Railway and tramway locomotives, rolling-stock and parts thereof; railway and tramway tracks fixtures and fittings; traffic signalling equipment of all kinds (not electrically powered)

except:

- ex 86.02: armoured locomotives, electric
- ex 86.03: other armoured locomotives
- ex 86.05: armoured wagons
- ex 86.06: repair wagons
- ex 86.07: wagons

Chapter 87: Vehicles, other than railway or tramway rolling-stock, and parts thereof

except:

- 87.08: tanks and other armoured vehicles
- ex 87.01: tractors
- ex 87.02: military vehicles
- ex 87.03: breakdown lorries
- ex 87.09: motorcycles
- ex 87.14: trailers

Chapter 89: Ships, boats and floating structures

except:

- 89.01 A: warships

Chapter 90: Optical, photographic, cinematographic, measuring, checking, precision, medical and surgical instruments and apparatus; parts thereof

except:

- ex 90.05: binoculars
- ex 90.13: miscellaneous instruments, lasers
- ex 90.14: telemeters
- ex 90.28: electrical and electronic measuring instruments
- ex 90.11: microscopes
- ex 90.17: medical instruments
- ex 90.18: mechano-therapy appliances
- ex 90.19: orthopaedic appliances
- ex 90.20: X-ray apparatus

Chapter 91: Clocks and watches and parts thereof

Chapter 92: Musical instruments; sound recorders or reproducers; television image and sound recorders or reproducers; parts and accessories or such articles

Chapter 94: Furniture and parts thereof; bedding, mattresses, mattress supports, cushions and similar stuffed furnishings

except:

- ex 94.01 A: aircraft seats

Chapter 95: Articles and manufactures of carving or moulding material

Chapter 96: Brooms, brushes, powder-puffs and sieves

Chapter 98: Miscellaneous manufactured articles

SCHEDULE 3

Regulations 9(1), 11(2) 12(2), 13(2) and 22(1)

FORMS OF NOTICES FOR PUBLICATION IN THE OFFICIAL JOURNAL

PART A

PRIOR INFORMATION NOTICE

1. Name, address, telegraphic address, telephone, telex and facsimile numbers of the contracting authority and of the service from which additional information may be obtained.
2. Nature and quantity or value of the goods to be supplied. CPA reference number.
3. Estimated date of the commencement of the procedures leading to the award of the contract(s) (if known).
4. Other information.
5. Date of despatch of the notice.

PART B

OPEN PROCEDURE NOTICE

1. Name, address, telegraphic address, telephone, telex and facsimile numbers of the contracting authority.
2.
 - (a) Award procedure chosen;
 - (b) form of contract for which offers are invited.
3.
 - (a) Place of delivery;
 - (b) nature and quantity of the goods to be supplied: CPA reference number;
 - (c) indication of whether the suppliers can tender for some and/or all of the goods required;
 - (d) derogation from use of European specifications^[34].
4. Time limit for delivery, if any.
5.
 - (a) Name and address of the service from which the contract documents and additional documents may be requested;

- (b) final date for making such requests;
- (c) where applicable, the amount and terms of payment of any sum payable for such documents.
- 6.
 - (a) Final date for receipt of tenders;
 - (b) address to which they must be sent;
 - (c) language(s) in which they must be drawn up.
- 7.
 - (a) Person authorised to be present at the opening of tenders;
 - (b) date, time and place of opening.
- 8. Where applicable, any deposits and guarantees required.
- 9. The main terms concerning financing and payment and/or references to the relevant provisions.
- 10. Where applicable, the legal form to be taken by a grouping of suppliers winning the contract.
- 11. The information and formalities necessary for an appraisal of the minimum standards of economic and financial standing and technical capacity required of the supplier.
- 12. Period during which the tenderer is bound to keep open his tender.
- 13. Criteria for the award of the contract. Criteria other than that of the lowest price shall be mentioned if they do not appear in the contract documents.
- 14. Where applicable, prohibition on variations.
- 15. Other information.
- 16. Date of publication of the prior information notice in the *Official Journal* or references to its non-publication.
- 17. Date of despatch of the notice.

PART C

RESTRICTED PROCEDURE NOTICE

- 1. Name, address, telegraphic address, telephone, telex and facsimile numbers of the contracting authority.
- 2.
 - (a) Award procedure chosen;
 - (b) where applicable, justification for use of the shorter time limits^[35];
 - (c) form of contract for which offers are invited.
- 3.
 - (a) Place of delivery;
 - (b) nature and quantity of goods to be delivered: CPA reference number;
 - (c) indication of whether the supplier can tender for some and/or all of the goods required;
 - (d) derogation from the use of European specifications^[36].
- 4. Time limit on delivery, if any.
- 5. Where applicable, the legal form to be assumed by a grouping of suppliers winning the contract.
- 6.

- (a) Final date for the receipt of requests to participate;
- (b) address to which they must be sent;
- (c) language(s) in which they must be drawn up.
- 7. Final date for the dispatch of invitations to tender.
- 8. Any deposits and guarantees required.
- 9. Information concerning the supplier's own position, and the information and formalities necessary for an appraisal of the minimum standards of economic and financial standing and technical capacity required of him.
- 10. Criteria for the award of the contract if these are not stated in the invitation to tender.
- 11. If known, the number or range of numbers of suppliers which will be invited to tender.
- 12. Where applicable, prohibition on variations.
- 13. Other information.
- 14. Date of publication of the prior information notice in the *Official Journal* or references to its non-publication.
- 15. Date of despatch of the notice.

PART D

NEGOTIATED PROCEDURE NOTICE

- 1. Name, address, telegraphic address, telephone, telex and facsimile number of the contracting authority.
- 2.
 - (a) Award procedure chosen;
 - (b) where applicable, justification for use of the shorter time limits^[37];
 - (c) where applicable, form of contract for which offers are invited.
- 3.
 - (a) Place of delivery;
 - (b) nature and quantity of goods to be delivered: CPA reference number;
 - (c) indication of whether the suppliers can tender for some and/or all of the goods required;
 - (d) derogation from the use of European specifications^[38].
- 4. Time limit on delivery, if any.
- 5. Where applicable, the legal form to be assumed by a grouping of suppliers winning the contract.
- 6.
 - (a) Final date for the receipt of request to participate;
 - (b) address to which they must be sent;
 - (c) language(s) in which they must be drawn up.
- 7. Any deposits or guarantee required.
- 8. Information concerning the supplier's own position, and the information and formalities necessary for an appraisal of the minimum standards of economic and financial standing and technical capacity required of him.
- 9. If known, the number or range of numbers of suppliers which will be invited to tender.
- 10. Where applicable, prohibition on variations.

11. Where applicable, the names and addresses of suppliers already selected by the awarding authority.
12. Date(s) of previous publications in the *Official Journal*.
13. Other information.
14. Date of despatch of the notice.

PART E

CONTRACT AWARD NOTICE

1. Name and address of contracting authority.
2.
 - (a) Award procedure chosen;
 - (b) where appropriate, justification for the use of the negotiated procedures^[39].
3. Date of award of contract.
4. Criteria for award of contract.
5. Number of offers received.
6. Name(s) and address(es) of supplier(s).
7. Nature and quantity of goods supplied, where applicable, by supplier:
CPA reference number.
8. Price or range of prices paid or to be paid.
9. Where appropriate, value and proportion of the contract which may be subcontracted to third parties.
10. Other information.
11. Date of publication of the tender notice in the *Official Journal*.
12. Date of despatch of the notice.

Notes:

[34] Within the meaning of Regulation 8.

[35] In accordance with Regulation 12.

[36] Within the meaning of Regulation 8.

[37] In accordance with Regulation 13.

[38] Within the meaning of Regulation 8.

[39] In accordance with Regulation 10(2).

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement in its entirety Council Directive 93/36/EEC co-ordinating procedures for the award of public supply contracts (OJ No. L199, 9.8.93, p.1). This Directive consolidates the provisions of Council Directive 77/62/EEC co-ordinating procedures for the award of public supply contracts (OJ No. L13, 15.1.77, p.1), as amended by Council Directives 80/767/EEC (OJ No. L215, 18.8.80, p.1) and 88/295/EEC (OJ No. L127, 20.5.88, p.1) and amends them to conform more closely with similar measures for public services and works contracts (Council Directives 92/50/EEC (OJ No. L209, 24.7.92, p.1) and 93/37/EEC (OJ L199, 9.8.93, p.54) respectively).

The Regulations apply to certain public bodies called in the regulations "contracting authorities" (regulation 3) when they are seeking offers in relation to certain contracts for the purchase or hire of goods called in the Regulations "public supply contracts" (regulations 2(1) and 5). They deal in particular with the treatment to be accorded to suppliers or potential suppliers who are nationals of and established in a relevant State, which is defined to include member States, Hungary, Poland, Iceland, Norway and as from the date the Agreement on the European Economic Area is in force in relation to it, Liechtenstein (regulation 2(1)). Certain contracts are excluded from the application of the Regulations, principally where the contracting authority is exercising activities falling within the provisions of the Utilities Supply and Works Contracts Regulations 1992 (S.I. 1992/3279), secret contracts or contracts for the purchase of certain defence material or connected with international agreements (regulation 6) and those contracts where the value of the contract is beneath the threshold for coverage (regulation 7).

The principal requirement of the Regulations is that, in seeking offers in relation to a public supply contract, a contracting authority must use one of three procedures: the open procedure, whereby any person who is interested may submit a tender; the restricted procedure whereby only those persons selected by the contracting authority may submit tenders; and the negotiated procedure whereby the contracting authority negotiates the terms of the contract with one or more persons selected by it. The Regulations lay down provisions for making the choice of procedure. The open or restricted procedure may be used in all circumstances but the negotiated procedure may only be used in certain limited circumstances (regulation 10).

The contracting authority is required to publicise its intention to seek offers in relation to a public supply contract in the Official Journal of the European Communities although this requirement is dispensed with in most circumstances when the negotiated procedure is used. The form of the advertisement and the information which it has to contain in relation to the proposed contract is specified in Schedule 3. If the notice is also to be published in the United Kingdom press it must be limited to the information

published in the Official Journal and must not be published before the notice is sent to the Official Journal (regulation 27). The various procedures also lay down the time to be allowed for the response by potential suppliers to the invitations and for obtaining relevant documents. The Regulations also specify the matters to which the contracting authority may have regard in treating suppliers as ineligible or in selecting suppliers to tender for or to negotiate the contract (regulations 11 to 13). The detailed rules for the selection of suppliers are laid down and relate to their business and professional status, their economic and financial standing and their technical capacity. The contracting authority is restricted in the information which it may request to demonstrate these matters (regulations 14 to 17).

Where a contracting authority decides to award a public supply contract, it is required to do so on the basis either of the offer (including in-house bids) which offers the lowest price or the one which is the most economically advantageous (regulation 21). If requested by an unsuccessful supplier the contracting authority must provide reasons as to why the supplier was unsuccessful (regulation 23).

There are various other requirements in the Regulations. The most important is the requirement that where the contracting authority wishes to lay down technical specifications which the goods must meet all such specifications must be specified in the contract documents and that, except in certain circumstances, these specifications must be defined by reference to European specifications. This includes a British standard which implements a European standard or a European technical approval. It is also provided that, except where it is not possible to describe the goods otherwise, the technical specifications may not refer to goods of a specific make or source or to a particular process which have the effect of favouring or eliminating certain goods or suppliers (regulation 8).

Previously only GATT contracting authorities were required to publicise in the Official Journal at the beginning of their financial year certain public supply contracts which they expect to award during the course of that year: however, now all contracting authorities are required to do so (regulation 9). All contracting authorities are required to publicise in the Official Journal information about the public supply contracts they have awarded (regulation 22). There is a requirement that a body granted a special or exclusive right to carry on a service for the benefit of the public should be subject to a duty not to discriminate in awarding a supply contract on the grounds of nationality against nationals of a relevant State or on the grounds that the goods to be supplied originate in another relevant State (regulation 24). The contracting authorities are also required to submit various reports in respect of public supply contracts awarded by them, in particular, an annual or biennial report (regulation 25).

These Regulations also implement, to the extent that it relates to Directive 93/36/EEC, Council Directive 89/665/EEC on the co-ordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ No. L395, 30.12.89, p.33). The Regulations provide that the obligation on a contracting authority to comply with the Regulations, and with any enforceable Community obligation in relation to the award of a public supply contract, is a duty owed to suppliers. A breach of the duty is not a criminal

offence but is actionable by a supplier. Proceedings are assigned to the High Court in England, Wales and Northern Ireland and to the Court of Session in Scotland. The court is given power to grant appropriate interim and final relief and to award damages except that, where the contract in respect of which there has been an infringement has already been entered into, the court's powers are restricted to awarding damages (regulation 29).

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