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SCOTTISH STATUTORY INSTRUMENTS

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**2009 No. 428**

**PUBLIC PROCUREMENT**

**The Public Contracts and Utilities Contracts  
(Scotland) Amendment Regulations 2009**

*Made* - - - - - 25th November 2009  
*Laid before the Scottish  
Parliament* - - - - - 26th November 2009  
*Coming into force* - - - - - 20th December 2009

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 2(2) of, and paragraph 1A of Schedule 2 to, the European Communities Act 1972(a).

The Regulations make provision for a purpose mentioned in that section and it appears to the Scottish Ministers that it is expedient for references to Commission Regulation (EC) No. 1564/2005 of 7th September 2005 establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council(b) to be construed as references to that Regulation as amended from time to time.

**PART 1**

**GENERAL**

**Citation, commencement, extent and interpretation**

1.—(1) These Regulations may be cited as the Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2009 and come into force on 20th December 2009.

(2) These Regulations extend to Scotland only.

(3) In these Regulations—

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(a) 1972 c.68. Section 2(2) was amended by the Scotland Act 1998 (c.46) (“the Scotland Act”), Schedule 8, paragraph 15 and the Legislative and Regulatory Reform Act 2006 (c.51), section 27(1). The function conferred upon the Minister of the Crown, insofar as within devolved competence, was transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act.

(b) O.J. L 257, 1.10.2005, p.1. The standard forms set out in the Annexes to this Regulation are available at the internet address [http://simap.europa.eu/index\\_en.htm](http://simap.europa.eu/index_en.htm).

“Public Contracts Regulations” means the Public Contracts (Scotland) Regulations 2006(c);  
and

“Utilities Contracts Regulations” means the Utilities Contracts (Scotland) Regulations  
2006(d).

## PART 2

### PUBLIC CONTRACTS

#### **Amendment of the Public Contracts Regulations**

2.—(1) The Public Contracts Regulations are amended as follows.

(2) In regulation 2 (interpretation)—

(a) in paragraph (1)—

(i) after the definition of “buyer profile” insert—

““candidate” means an economic operator (other than a tenderer) which applied to be included amongst the economic operators to be selected to tender for or to negotiate a contract or framework agreement, or applied to be included amongst the economic operators to be selected to participate in a dialogue in relation to a contract or framework agreement;

“candidate concerned” means a candidate which has not been informed that they have been unsuccessful in accordance with regulation 16(23), 17(19A) or 18(19A);”

(ii) for the definition of “Commission Regulations (EC) No. 1564/2005”, substitute—

““[Commission Regulation \(EC\) No. 1564/2005](#)” means Commission Regulation (EC) No. 1564/2005 of 7th September 2005 establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives [2004/17/EC](#) and [2004/18/EC](#) of the European Parliament and of the Council as amended by Commission Regulation (EC) No. 1792/2006 of 23rd October 2006 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement of persons, competition policy, agriculture (veterinary and phytosanitary legislation), fisheries, transport policy, taxation, statistics, social policy and employment, environment, customs union, and external relations by reason of the accession of Bulgaria and Romania(e) and as amended from time to time;”

(iii) after the definition of “public works contract” insert—

““relevant standstill period” means—

(a) where the notice referred to in regulation 32(1) or 47B(9)(a) is sent to all tenderers and all candidates concerned (if any) by facsimile or by electronic means, 10 days from the date on which the last notice is sent to those economic operators; or

(b) where any such notice is sent to any tenderers or candidates concerned only by other means, 15 days from the date on which the last notice is sent to those economic operators;”

(iv) after the definition of “telecommunications services” insert—

- ““tenderer” means an economic operator which submitted an offer to perform a contract or to be party to a framework agreement, or participated in a dialogue in relation to a contract or framework agreement;
- “tenderer concerned” means a tenderer which—
- (a) has not been informed that they have been excluded from the competition in accordance with regulation 17(23)(b) or 18(23)(b); or
  - (b) has been informed that they have been excluded from the competition in accordance with regulation 17(23)(b) or 18(23)(b) and that exclusion—
    - (i) is not prevented from being the subject of proceedings under Part 9 by virtue of regulation 47(6)(b); and
    - (ii) no such proceedings have been brought, or such proceedings have been brought and it has not been determined that the exclusion was lawful;”
- (b) for paragraph (4) substitute—
- “(4) Except in regulation 47(7)(b), where these regulations refer to a period of time—
- (a) where the period follows an action taken, the day on which the action is taken is not counted in the calculation of the period; and
  - (b) where the last day of the period is not a working day, the period is extended to include the next working day.”
- (3) After regulation 16(22) (the restricted procedure) insert—
- “(23) The contracting authority shall by notice in writing as soon as reasonably practicable after sending the invitations referred to in paragraph (13), inform any candidates that have not been selected to be invited to tender that they have been unsuccessful.”
- (4) In regulation 17 (the negotiated procedure)—
- (a) after paragraph (19) insert—
- “(19A) The contracting authority shall by notice in writing as soon as reasonably practicable after sending the invitations referred to in paragraph (15), inform any candidates that have not been selected to be invited to negotiate that they have been unsuccessful.”
- (b) in paragraph (23)—
    - (i) the text from “ensure” where it second appears to the end shall become sub#paragraph (a); and
    - (ii) after that sub-paragraph insert—
- “and
- (b) by notice in writing as soon as reasonably practicable after reducing the number of tenders to be negotiated, inform the affected economic operators that they have been excluded from the competition.”
- (5) In regulation 18 (the competitive dialogue procedure)—
- (a) after paragraph (19) insert—
- “(19A) The contracting authority shall by notice in writing as soon as reasonably practicable after sending the invitations referred to in paragraph (16), inform any candidates that have not been selected to be invited to participate in the dialogue that they have been unsuccessful.”
- (b) in paragraph (23)—

- (i) the text from “ensure” where it second appears to the end shall become sub-paragraph (a); and
- (ii) after that sub-paragraph insert—
  - “and
  - (b) by notice in writing as soon as reasonably practicable after reducing the number of solutions to be discussed, inform the affected economic operators that they have been excluded from the competition.”
- (6) In regulation 19(9) (framework agreements)—
  - (a) after sub-paragraph (c), omit “and”; and
  - (b) after sub-paragraph (d), insert—
    - “; and
    - (e) by notice in writing as soon as reasonably practicable after the decision has been made, inform the economic operators that submitted tenders of its decision in relation to the award of the contract.”
- (7) In regulation 20 (dynamic purchasing systems)—
  - (a) in paragraph (9), after “tender” insert “, and shall do so in writing if requested by the economic operator”; and
  - (b) after paragraph (14) insert—
    - “(14A) The contracting authority shall by notice in writing as soon as reasonably practicable after a decision has been made in accordance with paragraph (14)(a), inform the economic operators that submitted tenders of its decision in relation to the award of the contract.”
- (8) In regulation 23(1) (criteria for the rejection of economic operators)—
  - (a) in sub-paragraph (a), for “Council Joint Action 98/733/JHA” substitute “Council Framework Decision 2008/841/JHA(f)”; and
  - (b) in sub-paragraph (e)(iv), for “section 458 of the Companies Act 1985” substitute “section 993 of the Companies Act 2006(g)”.
- (9) For regulation 32 (information about contract award procedures) substitute—

**“Information about contract award procedures and standstill period**

**32.**—(1) Subject to paragraphs (4) and (10), a contracting authority shall by notice in writing as soon as possible after the decision has been made, inform all tenderers and all candidates concerned (if any) of its decision to—

- (a) award the contract; or
- (b) conclude the framework agreement.
- (2) The notice referred to in paragraph (1) shall include—
  - (a) the criteria for the award of the contract;
  - (b) where practicable, the score obtained by—
    - (i) the economic operator which is to receive the notice; and
    - (ii) the economic operator—
      - (aa) to be awarded the contract; or
      - (bb) to become a party to the framework agreement;
  - (c) the name of the economic operator—

- (i) to be awarded the contract; or
  - (ii) to become a party to the framework agreement;
  - (d) in the case of an unsuccessful economic operator, a summary of the reasons why the economic operator was unsuccessful;
  - (e) in the case of an unsuccessful tenderer, the characteristics and relative advantages of the successful tender; and
  - (f) a precise statement of the effect of paragraph (3) on the economic operator which is to receive the notice.
- (3) A contracting authority shall allow a period of at least the relevant standstill period to elapse between the date of despatch of the notice referred to in paragraph (1) and the date on which that contracting authority enters into the contract or concludes the framework agreement.
- (4) Paragraphs (1) to (3) do not apply where—
- (a) the only tenderer is the economic operator to be awarded the contract or to become a party to the framework agreement, and there are no candidates concerned; or
  - (b) the contract is a contract based on a framework agreement or a contract awarded under a dynamic purchasing system.
- (5) Without prejudice to paragraph (4), paragraph (3) does not apply where—
- (a) the contract or framework agreement is exempt from the requirement for prior publication of a contract notice; or
  - (b) there are no tenderers concerned or candidates concerned.
- (6) Subject to paragraph (10), a contracting authority shall within 15 days of the date on which it receives a request in writing from any economic operator which was unsuccessful—
- (a) inform that economic operator of the reasons why it was unsuccessful; and
  - (b) in the case of an unsuccessful tenderer, other than a tenderer which has been informed by notice under paragraph (1), inform that economic operator of the characteristics and relative advantages of the successful tender and the name of—
    - (i) the economic operator to be awarded the contract;
    - (ii) the parties to the framework agreement; or
    - (iii) the economic operators admitted to the dynamic purchasing system.
- (7) The reasons referred to in paragraphs (2)(d) and (6)(a) include any reason for the contracting authority's decision that the economic operator did not meet the technical specifications or their equivalent—
- (a) as specified in regulation 9(6); or
  - (b) in terms of the performance or functional requirements referred to in regulation 9(7).
- (8) Subject to paragraph (10), a contracting authority shall as soon as possible after the decision has been made, inform all candidates and tenderers of its decision to abandon or to recommence a contract award procedure in respect of which a contract notice has been published, in relation to—
- (a) the award of a contract;
  - (b) the conclusion of a framework agreement; or
  - (c) the establishment of a dynamic purchasing system.

(9) A contracting authority which informs an economic operator of its decision in accordance with paragraph (8) shall include the reasons for the decision and, if so requested by the economic operator, shall provide the decision and reasons in writing.

(10) A contracting authority may withhold any information to be provided in accordance with paragraph (1), (6) or (8) where the disclosure of such information—

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

(11) A contracting authority shall prepare a record in relation to each public contract awarded by it, framework agreement concluded by it or dynamic purchasing system established by it, specifying—

- (a) the name and address of the contracting authority;
- (b) the value of the consideration to be given under the contract, framework agreement or dynamic purchasing system;
- (c) the type of goods to be purchased or hired, the work or works to be carried out or, as the case may be, the services to be provided;
- (d) where offers were evaluated in accordance with regulation 30, the names of the economic operators which submitted those offers and where the contracting authority has used the restricted procedure or negotiated procedure, the reasons why those economic operators were selected;
- (e) the name of any economic operator—
  - (i) to which the contract was awarded;
  - (ii) with which the framework agreement was concluded; or
  - (iii) which was admitted to the dynamic purchasing system;
- (f) the reasons for having—
  - (i) awarded the contract to, or concluded the framework agreement with, the economic operator referred to in sub-paragraph (e); or
  - (ii) admitted that economic operator to the dynamic purchasing system;
- (g) the names of the economic operators which were unsuccessful and the reasons why they were unsuccessful;
- (h) if known to the contracting authority, the parts of the contract or framework agreement that the economic operator to which the contract has been awarded or with which the framework agreement has been concluded, intends to sub contract to another economic operator;
- (i) in the case of a contracting authority which used the negotiated procedure, which of the circumstances specified in regulation 13 or 14 constituted grounds for using that procedure;
- (j) in the case of a contracting authority which used the competitive dialogue procedure, details of the circumstances which constituted grounds for using that procedure in accordance with regulation 18(2); and
- (k) where a contracting authority has abandoned a contract award procedure, the conclusion of a framework agreement or the establishment of a dynamic purchasing system, the reasons why the contracting authority has decided not to award

the contract, to conclude the framework agreement or to establish the dynamic purchasing system as the case may be.

(12) A contracting authority shall keep appropriate information to document the progress of contract award procedures conducted by electronic means.

(13) If the Commission requests a report containing the information specified in paragraph (11), the contracting authority shall send a written report containing that information, or the main features of it, to the Scottish Ministers for onward transmission to the Commission.”

(10) In regulation 33(14) (design contests)—

(a) after sub-paragraph (a), omit “and”; and

(b) after sub-paragraph (b), insert—

“; and

(c) by notice in writing as soon as reasonably practicable after restricting the number of economic operators, inform the affected economic operators that they have been excluded from the design contest.”

(11) For regulation 47 (enforcement of obligations) substitute—

**“Enforcement of obligations**

**47.—(1)** The obligation on—

(a) a contracting authority to comply with the provisions of these Regulations, other than regulations 14(2), 30(9), 32(11), 40 and 41(1), and with any enforceable Community obligation in respect of a contract, framework agreement, dynamic purchasing system or design contest (other than one excluded from the application of these Regulations by regulation 6, 8 or 33); and

(b) a concessionaire to comply with the provisions of regulation 37(3),

is a duty owed to an economic operator.

(2) Subject to paragraph (3), the duty owed to an economic operator in accordance with paragraph (1) is also owed to a GPA economic operator, except in relation to—

(a) a Part B services contract;

(b) a contract for research and development services specified in category 8 of Part A of Schedule 3;

(c) regulation 34;

(d) regulation 36;

(e) regulation 37(1); or

(f) regulation 37(2).

(3) The duty owed to a GPA economic operator in accordance with paragraph (2) is only owed by the Secretary of State for Defence in relation to public supply contracts for the purchase or hire of goods specified in Schedule 5.

(4) Notwithstanding regulation 4, references to an “economic operator” in this Part—

(a) where the duty owed under paragraph (1) is the obligation on a concessionaire to comply with regulation 37(3), include any person—

(i) who sought, who seeks or would have wished, to be the person to whom a contract to which regulation 37(3) applies is awarded; and

(ii) who is a national of and established in a relevant State; and

(b) except in paragraph (1) of this regulation, include a reference to a GPA economic operator.

(5) A breach of the duty owed under paragraph (1) or (2) is actionable by any economic operator which, in consequence of the breach, suffers, or risks suffering, loss or damage and such proceedings may be brought in either the Sheriff Court or the Court of Session.

(6) Proceedings under this Part shall not be brought unless—

(a) the economic operator bringing the proceedings has informed the contracting authority or concessionaire, as the case may be, of—

(i) the breach or apprehended breach of the duty owed to it in accordance with paragraph (1) or (2); and

(ii) its intention to bring proceedings under this Part in respect of that breach or apprehended breach; and

(b) the proceedings are brought in accordance with paragraph (7).

(7) For the purposes of paragraph (6)(b), proceedings shall be brought—

(a) in the case of proceedings seeking an ineffectiveness order (as defined in regulation 47B)—

(i) where paragraph (9) applies, within 30 days from the relevant date referred to in that paragraph; or

(ii) in any other case, within 6 months from the date of the contract being entered into or the date of conclusion of the framework agreement; and

(b) in any other case, 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.

(8) Where proceedings under this Part relate to a decision of a contracting authority or concessionaire, the requirement in paragraph (7)(b) for proceedings to be brought promptly never requires proceedings to be brought before the end of any of the following periods—

(a) where the decision is sent to the economic operator by facsimile or by electronic means, 10 days from the date on which the decision is sent to the economic operator by such means;

(b) where the decision is sent to the economic operator only by other means, 15 days from the date on which the decision is sent to the economic operator by those means; or

(c) where the decision is not sent to the economic operator, 10 days from the date on which the decision is published.

(9) For the purposes of paragraph (7)(a)(i), this paragraph applies where—

(a) the contracting authority has sent a contract award notice to the Official Journal in accordance with regulation 31 (contract award notice), including reasons for its decision to enter into the contract or conclude the framework agreement without prior publication of a contract notice, in which case the relevant date is the date of publication of the notice in the Official Journal; or

(b) the contracting authority has by notice in writing informed all tenderers concerned and all candidates concerned (if any) of its decision in relation to the award of the contract or the conclusion of the framework agreement, and the notice includes the information referred to in regulation 32(2)(d), in which case the relevant date is the date of sending of the notice.



(10) Except in the case of a contract or framework agreement to which regulation 6 applies, and without prejudice to the application of any relevant standstill period, where proceedings under this Part are served on a contracting authority or concessionaire in relation to a contract that has not been entered into or a framework agreement that has not been concluded, the contracting authority shall not enter into the contract or conclude the framework agreement unless—

- (a) the proceedings are determined, discontinued or disposed of; or
- (b) the Court, by interim order, brings to an end the prohibition.

(11) In this regulation—

“GPA economic operator” means a person from a GPA State who sought, who seeks, or would have wished, to be the person to whom the contract is awarded;

“GPA State” means any country other than a relevant State which at the relevant time is a signatory to the GPA and has agreed with the European Community that the GPA applies to a contract of the type to be awarded(h); and

“relevant time” has the same meaning it has in regulation 8(20).”

(12) After regulation 47 (enforcement of obligations) insert—

#### **“Powers and duties of the court**

**47A.**—(1) Subject to paragraphs (3) and (7), but otherwise without prejudice to any other powers of the Court, in proceedings brought under this Part the Court—

- (a) may by interim order suspend—
  - (i) the procedure leading to the award of a contract, the conclusion of a framework agreement, the establishment of a dynamic purchasing system or the determination of a design contest; and
  - (ii) the implementation of any decision or action taken by the contracting authority or concessionaire, as the case may be, in the course of following a procedure referred to in paragraph (i); and
- (b) if satisfied that a decision or action taken by a contracting authority or concessionaire was in breach of the duty owed under regulation 47(1) or (2), may—
  - (i) order the setting aside of that decision or action;
  - (ii) order the contracting authority to amend any document; and
  - (iii) award damages to an economic operator which has suffered loss or damage as a consequence of the breach.

(2) In any interim proceedings under this Part the Court may decide not to grant an interim order when the negative consequences of such an order are likely to outweigh the benefits, having regard to the following considerations—

- (a) that decisions taken by a contracting authority shall be reviewed effectively and, in particular, as rapidly as possible;
- (b) the probable consequences of an interim order for all interests likely to be harmed; and
- (c) the public interest.

(3) Where the Court is satisfied that regulation 47B(7)(a) applies but the second ground for ineffectiveness is not otherwise met, the Court shall, without prejudice to the other powers of the Court, order—

- (a) the payment by the contracting authority of a financial penalty; or

(b) where the contract in relation to which the breach occurred has been entered into, or the framework agreement in relation to which the breach occurred has been concluded, the shortening of the duration of the contract or framework agreement.

(4) In determining what order to make under paragraph (3) the Court shall—

(a) ensure that the order is effective, proportionate and dissuasive; and

(b) have regard to all relevant factors including—

(i) the seriousness of the breach; and

(ii) the behaviour of the contracting authority.

(5) Where the Court makes an order under paragraph (3)(b) the Court shall, without prejudice to the other powers of the Court, make such other order as the Court considers appropriate to address the consequences of the shortening of the duration of the contract or framework agreement on the rights and obligations of the parties to the contract or framework agreement.

(6) Before making an order under paragraph (5), the Court shall have regard to any terms of the contract or framework agreement relating to the rights and obligations of the parties should the duration of the contract or framework agreement be shortened.

(7) Subject to paragraph (3) and regulation 47B, in proceedings under this Part the Court does not have power to order any remedy other than an award of damages in respect of a breach of the duty owed under regulation 47(1) or (2) if the contract in relation to which the breach occurred has been entered into, or the framework agreement in relation to which the breach occurred has been concluded.

(8) Sections 21 and 42 of the Crown Proceedings Act 1947(i) do not apply in proceedings brought under this Part against the Crown.

### **Ineffectiveness orders**

**47B.**—(1) Without prejudice to all rights and obligations in respect of the period leading up to the date of the order, an ineffectiveness order made in relation to a contract renders unenforceable all rights and obligations directly arising from the contract in respect of the period commencing on the date of the order.

(2) Subject to any order made under paragraph (10)(b), obligations rendered unenforceable by an ineffectiveness order made in relation to a contract shall not be performed by the parties to the contract.

(3) Without prejudice to any power of the Court to make an ineffectiveness order in relation to a contract based on a framework agreement in accordance with this Part, an ineffectiveness order made in relation to a framework agreement prohibits, with effect from the date of the order, the awarding of contracts based on the framework agreement.

(4) Subject to paragraphs (12) and (18), the Court shall make an ineffectiveness order where one of the grounds for ineffectiveness set out in paragraphs (5), (7) and (8) applies.

(5) The first ground for ineffectiveness is that the contracting authority has entered into a contract or has concluded a framework agreement without sending a contract notice to the Official Journal in circumstances where the contract or framework agreement was not exempt from the requirement for prior publication of a contract notice.

(6) The first ground for ineffectiveness does not apply where—

(a) the contracting authority sent to the Official Journal a notice in the form of the voluntary ex ante transparency notice in Annex XIV to [Commission Regulation \(EC\)](#)

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(i) [1947 c.44](#), to which there are amendments not relevant to these Regulations.

- No. 1564/2005, expressing its intention to enter into the contract or to conclude the framework agreement and containing—
- (i) the name and contact details of the contracting authority;
  - (ii) a description of the object of the contract or framework agreement;
  - (iii) a justification of the decision of the contracting authority to award the contract or conclude the framework agreement without prior publication of a contract notice;
  - (iv) the name and contact details of the economic operator to be awarded the contract or to become party to the framework agreement; and
  - (v) any other information which the contracting authority considered useful; and
- (b) the contracting authority allowed a period of at least 10 days to elapse between the date of publication in the Official Journal of the notice referred to in sub-paragraph (a) and the date on which the contracting authority entered into the contract or concluded the framework agreement.
- (7) The second ground for ineffectiveness is that—
- (a) the contracting authority has breached regulation 32(1) (requirement to send decision notice to all tenderers and all candidates concerned) or (3) (requirement to delay entering into a contract or concluding a framework agreement for an applicable standstill period) or 47(10) (prohibition on entering into a contract or concluding a framework agreement when proceedings are brought);
  - (b) the contracting authority's breach prevented the economic operator from bringing proceedings or obtaining a remedy before the contract was entered into or the framework agreement was concluded;
  - (c) in awarding the contract or concluding the framework agreement there has been another breach of these Regulations, other than a breach of regulation 4(3) (in the case of a Part B services contract), 8(21), 32(1) or (3) or this Part; and
  - (d) the breach referred to in sub-paragraph (c) has affected the chances of the economic operator bringing proceedings under this Part to obtain the contract or become a party to the framework agreement.
- (8) The third ground for ineffectiveness is that—
- (a) the contract is a contract based on a framework agreement or a contract awarded under a dynamic purchasing system;
  - (b) the contract was awarded in breach of—
    - (i) regulation 19(7)(b) or (8), in the case of a contract based on a framework agreement (rules governing the award of contracts based on a framework agreement); or
    - (ii) regulation 20(11), (12), (13) or (14), in the case of a contract awarded under a dynamic purchasing system (rules governing the award of contracts under a dynamic purchasing system); and
  - (c) the estimated value of the contract at the relevant time is not less than the relevant threshold.
- (9) The third ground for ineffectiveness does not apply where—
- (a) the contracting authority has by notice in writing informed the economic operators that submitted tenders of its decision in relation to the award of the contract in accordance with regulation 19(9)(e) or 20(14A), and the notice includes the information referred to in regulation 32(2)(d); and

- (b) the contracting authority allowed a period of at least the relevant standstill period to elapse between the date of sending of the notice referred to in sub-paragraph (a) and the date on which the contracting authority entered into the contract.
- (10) If an ineffectiveness order is made, the Court shall, without prejudice to the other powers of the Court—
- (a) order the payment by the contracting authority of a financial penalty; and
  - (b) make such other order as the Court considers appropriate to address the consequences of the ineffectiveness order on the rights and obligations of the parties to the contract or framework agreement.
- (11) Before making an order under paragraph (10)(b), the Court shall have regard to any terms of the contract or framework agreement relating to the rights and obligations of the parties should an ineffectiveness order be made in relation to the contract or framework agreement.
- (12) The Court may decline to make an ineffectiveness order where the Court is satisfied that overriding reasons relating to a general interest require that the enforceability of the rights and obligations arising from the contract or framework agreement should be maintained.
- (13) For the purposes of paragraph (12)—
- (a) economic interests directly linked to the contract or framework agreement do not constitute overriding reasons relating to a general interest; and
  - (b) economic interests in the effectiveness of the contract or framework agreement may only be considered as overriding reasons relating to a general interest in exceptional circumstances where ineffectiveness would lead to disproportionate consequences.
- (14) For the purposes of paragraph (13)(a), economic interests directly linked to the contract or framework agreement include the costs—
- (a) resulting from the delay in the performance of the contract or framework agreement;
  - (b) resulting from the commencement of a new procurement procedure;
  - (c) resulting from the change of the economic operator performing the contract or framework agreement; and
  - (d) of legal obligations resulting from an ineffectiveness order.
- (15) Where the Court declines to make an ineffectiveness order under paragraph (12), the Court shall, without prejudice to the other powers of the Court, order—
- (a) the payment by the contracting authority of a financial penalty; or
  - (b) the shortening of the duration of the contract or framework agreement.
- (16) In determining what order to make under paragraph (10)(a) or (15), regulation 47A(4) applies and, in the case of an order made under paragraph (10)(a), the Court shall have regard to the extent to which the contract or framework agreement will remain in effect in respect of the period leading up to the date of the ineffectiveness order.
- (17) Regulation 47A(5) and (6) applies to an order made under paragraph (15)(b) as it applies to an order made under regulation 47A(3)(b).
- (18) In proceedings under this Part to which regulation 47(7)(b) applies, the Court does not have power to make an ineffectiveness order if the proceedings would be incompetent if regulation 47(7)(a) applied to the proceedings.
- (19) In paragraph (8)(c), “estimated value”, “relevant time” and “relevant threshold” have the same meanings they have in regulation 8.

### **Financial penalties**

**47C.**—(1) Subject to paragraph (2), where a financial penalty is ordered to be paid under this Part—

- (a) the order shall state that the financial penalty shall be paid to the Scottish Ministers; and
- (b) the clerk of the Court shall send an extract of the decree (without charge) to the Scottish Ministers.

(2) Paragraph (1) does not apply to any financial penalty ordered to be paid by the Scottish Ministers or an office in the Scottish Administration which is not a ministerial office.

(3) The Scottish Ministers shall pay into the Scottish Consolidated Fund any financial penalty—

- (a) ordered to be paid by them under this Part; or
- (b) recovered by them under paragraph (1).

(4) An office in the Scottish Administration which is not a ministerial office shall pay any financial penalty ordered to be paid by them under this Part into the Scottish Consolidated Fund.

(5) In this regulation, “an office in the Scottish Administration which is not a ministerial office” is construed in accordance with section 126(8) of the Scotland Act 1998(j).”

### **Transitional provision – public contracts**

**3.**—(1) Nothing in these Regulations, except regulation 2(2)(a)(ii) and (8), affects any contract award procedure or design contest commenced in accordance with the Public Contracts Regulations before 20th December 2009.

(2) For the purposes of paragraph (1), a procedure or contest has been commenced before 20th December 2009 if, before that date—

- (a) a contract notice has been sent to the Official Journal in accordance with the Public Contracts Regulations in order to invite offers or requests to be selected to tender for or to negotiate, or to be selected to participate in a dialogue in relation to a contract, in respect of a proposed public contract, framework agreement or dynamic purchasing system;
- (b) in any case where there is no requirement to send a contract notice to the Official Journal in accordance with the Public Contracts Regulations, the contracting authority has despatched any form of advertisement seeking offers or expressions of interest in a proposed public contract, framework agreement or dynamic purchasing system;
- (c) where there is no such advertising, the contracting authority has contacted any economic operator in order to—
  - (i) seek expressions of interest or offers in respect of a proposed public contract, framework agreement or dynamic purchasing system; or
  - (ii) respond to an unsolicited expression of interest or offer in respect of a proposed public contract, framework agreement or dynamic purchasing system; or
- (d) the contracting authority has sent a notice to the Official Journal in accordance with the Public Contracts Regulations in order to hold a design contest.

(3) Nothing in these Regulations affects the award of any contract based on a framework agreement where the award procedure leading to the conclusion of framework agreement is not affected by these Regulations (other than by regulation 2(2)(a)(ii) or (8)) by virtue of paragraph (1).

(4) Nothing in these Regulations affects the award of any contract under a dynamic purchasing system where the award procedure leading to the establishment of the dynamic purchasing system is not affected by these Regulations (other than by regulation 2(2)(a)(ii) or (8)), by virtue of paragraph (1).

(5) Expressions used in this regulation have the meanings given in the Public Contracts Regulations.

## PART 3

### UTILITIES CONTRACTS

#### Amendment of the Utilities Contracts Regulations

4.—(1) The Utilities Contracts Regulations are amended as follows.

(2) In regulation 2 (interpretation)—

(a) in paragraph (1)—

(i) omit the definition of “attestation system”;

(ii) after the definition of “buyer profile” insert—

““candidate” means an economic operator (other than a tenderer) which applied to be included amongst the economic operators to be selected to tender for or to negotiate a contract or framework agreement;

“candidate concerned” means a candidate which has not been informed that they have been unsuccessful in accordance with regulation 22(18);”

(iii) in the definition of “[Commission Regulation \(EC\) No. 1564/2005](#)”, after “Council” insert, “as amended by [Commission Regulation \(EC\) No 1792/2006](#) of 23rd October 2006 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement of persons, competition policy, agriculture (veterinary and phytosanitary legislation), fisheries, transport policy, taxation, statistics, social policy and employment, environment, customs union, and external relations by reason of the accession of Bulgaria and Romania and as amended from time to time;”;

(iv) after the definition of “Public Sector Directive” insert—

““relevant standstill period” means—

(a) where the notice referred to in regulation 33(1) or 45B(9)(a) is sent to all tenderers and all candidates concerned (if any) by facsimile or by electronic means, 10 days from the date on which the last notice is sent to those economic operators; or

(b) where any such notice is sent to any tenderers or candidates concerned only by other means, 15 days from the date on which the last notice is sent to those economic operators;”

(v) after the definition of “supply contract” insert—

““tenderer” means an economic operator which submitted an offer to perform a contract or to be party to a framework agreement;

“tenderer concerned” means a tenderer which—

(a) has not been informed that they have been excluded from the competition in accordance with regulation 22(19); or

- (b) has been informed that they have been excluded from the competition in accordance with regulation 22(19) and that exclusion—
  - (i) is not prevented from being the subject of proceedings under Part 9 by virtue of regulation 45(5)(b); and
  - (ii) no such proceedings have been brought, or such proceedings have been brought and it has not been determined that the exclusion was lawful;”
- (vi) omit the definition of “the Utilities Remedies Directive”; and
- (b) for paragraph (4) substitute—
  - “(4) Except in regulation 45(6)(b), where these regulations refer to a period of time—
    - (a) where the period follows an action taken, the day on which the action is taken is not counted in the calculation of the period; and
    - (b) where the last day of the period is not a working day, the period is extended to include the next working day.”
- (3) In regulation 19 (dynamic purchasing systems)—
  - (a) in paragraph (9) after “tender” insert “, and shall do so in writing if requested by the economic operator”; and
  - (b) after paragraph (14) insert—
    - “(14A) The utility shall by notice in writing as soon as reasonably practicable after a decision has been made in accordance with paragraph (14)(a), inform the economic operators that submitted tenders of its decision in relation to the award of the contract.”
- (4) After regulation 22(17) (time limits) insert—
  - “(18) The utility shall by notice in writing as soon as reasonably practicable after sending the invitations referred to in paragraph (15), inform any candidates that have not been selected to be invited to tender or to negotiate that they have been unsuccessful.
  - (19) Where a utility using the negotiated procedure reduces the number of tenders to be negotiated, the utility shall by notice in writing as soon as reasonably practicable inform the affected economic operators that they have been excluded from the competition.”
- (5) In regulation 26(1) (criteria for rejection of economic operators)—
  - (a) in sub-paragraph (a), for “Council Joint Action 98/733/JHA” substitute “Council Framework Decision 2008/841/JHA”; and
  - (b) in sub-paragraph (d)(iv), for “section 458 of the Companies Act 1985” substitute “section 993 of the Companies Act 2006”.
- (6) In regulation 31(2) (rejection of third country tenders – supply contracts) for “Council Regulation (EC) No. 2913/92 of 12th October 1992 establishing the Community Customs Code” substitute “Council Regulation (EC) No. 450/2008 of the European Parliament and of the Council laying down the Community Customs Code (Modernised Customs Code)(k)”.
- (7) In regulation 32(5) (contract award notices) for “48 days” substitute “2 months”.
- (8) For regulation 33 (information about contract award procedures) substitute—

**“Information about contract award procedures and standstill period**

**33.**—(1) Subject to paragraphs (4) and (10), a utility shall by notice in writing as soon as possible after the decision has been made, inform all tenderers and all candidates concerned (if any) of its decision to—

- (a) award the contract; or
- (b) conclude the framework agreement.

(2) The notice referred to in paragraph (1) shall include—

- (a) the criteria for the award of the contract;
- (b) where practicable, the score obtained by—
  - (i) the economic operator which is to receive the notice; and
  - (ii) the economic operator—
    - (aa) to be awarded the contract; or
    - (bb) to become a party to the framework agreement;
- (c) the name of the economic operator—
  - (i) to be awarded the contract; or
  - (ii) to become a party to the framework agreement;
- (d) in the case of an unsuccessful economic operator, a summary of the reasons why the economic operator was unsuccessful;
- (e) in the case of an unsuccessful tenderer, the characteristics and relative advantages of the successful tender; and
- (f) a precise statement of the effect of paragraph (3) on the economic operator which is to receive the notice.

(3) A utility shall allow a period of at least the relevant standstill period to elapse between the date of despatch of the notice referred to in paragraph (1) and the date on which that utility enters into the contract or concludes the framework agreement.

(4) Paragraphs (1) to (3) do not apply where—

- (a) the only tenderer is the economic operator to be awarded the contract or to become a party to the framework agreement, and there are no candidates concerned; or
- (b) the contract is a contract awarded under a framework agreement or a dynamic purchasing system.

(5) Without prejudice to paragraph (4), paragraph (3) does not apply where—

- (a) the contract or framework agreement is exempt from the requirement to make a call for competition; or
- (b) there are no tenderers concerned or candidates concerned.

(6) Subject to paragraph (10), a utility shall within 15 days of the date on which it receives a request in writing from any economic operator which was unsuccessful—

- (a) inform that economic operator of the reasons why it was unsuccessful; and
- (b) in the case of an unsuccessful tenderer, other than a tenderer which has been informed by notice under paragraph (1), inform that economic operator of the characteristics and relative advantages of the successful tender and the name of—
  - (i) the economic operator to be awarded the contract;
  - (ii) the parties to the framework agreement; or
  - (iii) the economic operators admitted to the dynamic purchasing system.



(7) The reasons referred to in paragraphs (2)(d) and (6)(a) include any reason for the utility's decision that the economic operator did not meet the technical specifications or their equivalent

- (a) as specified in regulation 12(6); or
- (b) in terms of the performance or functional requirements referred to in regulation 12(7).

(8) Subject to paragraph (10), a utility shall as soon as possible after the decision has been made, inform all candidates and tenderers of its decision to abandon or to recommence a contract award procedure in respect of which a call for competition has been made, in relation to—

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

(9) A utility which informs an economic operator of its decision in accordance with paragraph (8) shall include the reasons for the decision and, if so requested by the economic operator, shall provide the decision and reasons in writing.

(10) A utility may withhold any information to be provided in accordance with paragraph (1), (6) or (8) where the disclosure of such information—

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

(9) In regulation 34(13) (design contests)—

- (a) after sub-paragraph (a), omit “and”; and
- (b) after sub-paragraph (b), insert—

“and

- (c) by notice in writing as soon as reasonably practicable after restricting the number of economic operators, inform the affected economic operators that they have been excluded from the design contest.”

(10) Omit regulation 44 (attestation).

(11) For regulation 45 (enforcement of obligations) substitute—

#### **“Enforcement of obligations**

**45.—**(1) The obligation on a utility to comply with the provisions of these Regulations, other than regulations 30(9) and 38, and with any enforceable Community obligation in respect of a contract, framework agreement, dynamic purchasing system or design contest (other than one excluded from the application of these Regulations by regulation 6, 7, 8, 9, 11 or 34) is a duty owed to an economic operator.

(2) The duty owed to an economic operator in accordance with paragraph (1) is also owed to a GPA economic operator, except in relation to—

- (a) a Part B services contract; or
- (b) a contract for research and development services specified in category 8 of Part A of Schedule 3.

(3) Notwithstanding regulation 4, references to an “economic operator” in this Part, except in paragraph (1) of this regulation, include a reference to a GPA economic operator.

(4) A breach of the duty owed under paragraph (1) or (2) is actionable by any economic operator which, in consequence of the breach, suffers, or risks suffering, loss or damage and such proceedings may be brought in either the Sheriff Court or the Court of Session.

(5) Proceedings under this Part shall not be brought unless—

(a) the economic operator bringing the proceedings has informed the utility of—

(i) the breach or apprehended breach of the duty owed to it in accordance with paragraph (1) or (2); and

(ii) its intention to bring proceedings under this Part in respect of that breach or apprehended breach; and

(b) the proceedings are brought in accordance with paragraph (6).

(6) For the purposes of paragraph (5)(b), proceedings shall be brought—

(a) in the case of proceedings seeking an ineffectiveness order (as defined in regulation 45B)—

(i) where paragraph (8) applies, within 30 days from the relevant date referred to in that paragraph; or

(ii) in any other case, within 6 months from the date of the contract being entered into or the date of conclusion of the framework agreement; and

(b) in any other case, 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.

(7) Where proceedings under this Part relate to a decision of a utility, the requirement in paragraph (6)(b) for proceedings to be brought promptly never requires proceedings to be brought before the end of any of the following periods—

(a) where the decision is sent to the economic operator by facsimile or by electronic means, 10 days from the date on which the decision is sent to the economic operator by such means;

(b) where the decision is sent to the economic operator only by other means, 15 days from the date on which the decision is sent to the economic operator by those means; or

(c) where the decision is not sent to the economic operator, 10 days from the date on which the decision is published.

(8) For the purposes of paragraph (6)(a)(i), this paragraph applies where—

(a) the utility has sent a contract award notice to the Official Journal in accordance with regulation 32 (contract award notices), including reasons for its decision to enter into the contract or conclude the framework agreement without making a call for competition, in which case the relevant date is the date of publication of the notice in the Official Journal; or

(b) the utility has by notice in writing informed all tenderers concerned and all candidates concerned (if any) of its decision in relation to the award of the contract or the conclusion of the framework agreement, and the notice includes the information referred to in regulation 33(2)(d), in which case the relevant date is the date of sending of the notice.

(9) Except in the case of a contract or framework agreement to which regulation 6, 7 or 9 applies, and without prejudice to the application of any relevant standstill period, where proceedings under this Part are served on a utility in relation to a contract that has not been entered into or a framework agreement that has not been concluded, the utility shall not enter into the contract or conclude the framework agreement unless—

- (a) the proceedings are determined, discontinued or disposed of; or
- (b) the Court, by interim order, brings to an end the prohibition.

(10) In this regulation—

“GPA economic operator” means a person from a GPA State who sought, who seeks, or would have wished, to be the person to whom the contract is awarded;

“GPA State” means any country other than a relevant State which at the relevant time is a signatory to the GPA and has agreed with the European Community that the GPA applies to a contract of the type to be awarded; and

“relevant time” has the same meaning it has in regulation 11(19).”

(12) After regulation 45 (enforcement of obligations), insert—

#### **“Powers and duties of the court**

**45A.**—(1) Subject to paragraphs (3) and (7), but otherwise without prejudice to any other powers of the Court, in proceedings brought under this Part the Court—

- (a) may by interim order suspend—
  - (i) the procedure leading to the award of a contract, the conclusion of a framework agreement, the establishment of a dynamic purchasing system or the determination of a design contest; and
  - (ii) the implementation of any decision or action taken by the utility in the course of following a procedure referred to in paragraph (i); and
- (b) if satisfied that a decision or action taken by a utility was in breach of the duty owed under regulation 45(1) or (2), may—
  - (i) order the setting aside of that decision or action;
  - (ii) order the utility to amend any document; and
  - (iii) award damages to an economic operator which has suffered loss or damage as a consequence of the breach.

(2) In any interim proceedings under this Part the Court may decide not to grant an interim order when the negative consequences of such an order are likely to outweigh the benefits, having regard to the following considerations—

- (a) that decisions taken by a utility shall be reviewed effectively and, in particular, as rapidly as possible;
- (b) the probable consequences of an interim order for all interests likely to be harmed; and
- (c) the public interest.

(3) Where the Court is satisfied that regulation 45B(7)(a) applies but the second ground for ineffectiveness is not otherwise met, the Court shall, without prejudice to the other powers of the Court, order—

- (a) the payment by the utility of a financial penalty; or

- (b) where the contract in relation to which the breach occurred has been entered into, or the framework agreement in relation to which the breach occurred has been concluded, the shortening of the duration of the contract or framework agreement.
- (4) In determining what order to make under paragraph (3) the Court shall—
  - (a) ensure that the order is effective, proportionate and dissuasive; and
  - (b) have regard to all relevant factors including—
    - (i) the seriousness of the breach; and
    - (ii) the behaviour of the utility.
- (5) Where the Court makes an order under paragraph (3)(b) the Court shall, without prejudice to the other powers of the Court, make such other order as the Court considers appropriate to address the consequences of the shortening of the duration of the contract or framework agreement on the rights and obligations of the parties to the contract or framework agreement.
- (6) Before making an order under paragraph (5), the Court shall have regard to any terms of the contract or framework agreement relating to the rights and obligations of the parties should the duration of the contract or framework agreement be shortened.
- (7) Subject to paragraph (3) and regulation 45B, in proceedings under this Part the Court does not have power to order any remedy other than an award of damages in respect of a breach of the duty owed under regulation 45(1) or (2) if the contract in relation to which the breach occurred has been entered into, or the framework agreement in relation to which the breach occurred has been concluded.
- (8) Where paragraph (9) applies, the economic operator is entitled to damages amounting to its costs in preparing its tender and in participating in the procedure leading to the award of the contract, the conclusion of a framework agreement or admission to a dynamic purchasing system, or its costs of participating in the procedure leading to the determination of the design contest.
- (9) This paragraph applies where, in proceedings under this Part, the Court is satisfied that an economic operator would have had a real chance of being awarded a contract, becoming a party to a framework agreement, being admitted to a dynamic purchasing system or winning a design contest if that chance had not been adversely affected by a breach of the duty owed to it by the utility in accordance with regulation 45(1) or (2).
- (10) Paragraph (8) does not affect a claim by an economic operator that it has suffered other loss or damage or that it is entitled to relief other than damages and is without prejudice to the matters on which an economic operator may be required to satisfy the Court in respect of any other such claim.
- (11) Sections 21 and 42 of the Crown Proceedings Act 1947 do not apply in proceedings brought under this Part against the Crown.

### **Ineffectiveness orders**

**45B.**—(1) Without prejudice to all rights and obligations in respect of the period leading up to the date of the order, an ineffectiveness order made in relation to a contract renders unenforceable all rights and obligations directly arising from the contract in respect of the period commencing on the date of the order.

(2) Subject to any order made under paragraph (10)(b), obligations rendered unenforceable by an ineffectiveness order made in relation to a contract shall not be performed by the parties to the contract.

(3) Without prejudice to any power of the Court to make an ineffectiveness order in relation to a contract awarded under a framework agreement in accordance with this Part, an ineffectiveness order made in relation to a framework agreement prohibits, with effect from the date of the order, the awarding of contracts under the framework agreement.

(4) Subject to paragraphs (12) and (18), the Court shall make an ineffectiveness order where one of the grounds for ineffectiveness set out in paragraphs (5), (7) and (8) applies.

(5) The first ground for ineffectiveness is that the utility has entered into a contract or has concluded a framework agreement without making a call for competition in circumstances where the contract or framework agreement was not exempt from the requirement to make a call for competition.

(6) The first ground for ineffectiveness does not apply where—

(a) the utility sent to the Official Journal a notice in the form of the voluntary ex ante transparency notice in Annex XIV to Commission Regulation (EC) No. 1564/2005, expressing its intention to enter into the contract or to conclude the framework agreement and containing—

- (i) the name and contact details of the utility;
- (ii) a description of the object of the contract or framework agreement;
- (iii) a justification of the decision of the utility to award the contract or conclude the framework agreement without making a call for competition;
- (iv) the name and contact details of the economic operator to be awarded the contract or to become party to the framework agreement; and
- (v) any other information which the utility considered useful; and

(b) the utility allowed a period of at least 10 days to elapse between the date of publication in the Official Journal of the notice referred to in sub-paragraph (a) and the date on which the utility entered into the contract or concluded the framework agreement.

(7) The second ground for ineffectiveness is that—

(a) the utility has breached regulation 33(1) (requirement to send decision notice to all tenderers and all candidates concerned) or (3) (requirement to delay entering into a contract or concluding a framework agreement for an applicable standstill period) or 45(9) (prohibition on entering into a contract or concluding a framework agreement when proceedings are brought);

(b) the utility's breach prevented the economic operator from bringing proceedings or obtaining a remedy before the contract was entered into or the framework agreement was concluded;

(c) in awarding the contract or concluding the framework agreement there has been another breach of these Regulations, other than a breach of regulation 4(3) (in the case of a Part B services contract), 11(20), 33(1) or (3) or this Part; and

(d) the breach referred to in sub-paragraph (c) has affected the chances of the economic operator bringing proceedings under this Part to obtain the contract or become a party to the framework agreement.

(8) The third ground for ineffectiveness is that—

(a) the contract is a contract awarded under a dynamic purchasing system;

(b) the contract was awarded in breach of regulation 19(11), (12), (13) or (14) (rules governing the award of contracts under a dynamic purchasing system); and

- (c) the estimated value of the contract at the relevant time is not less than the relevant threshold.
- (9) The third ground for ineffectiveness does not apply where—
- (a) the utility has by notice in writing informed the economic operators that submitted tenders of its decision in relation to the award of the contract in accordance with regulation 19(14A), and the notice includes the information referred to in regulation 33(2)(d); and
  - (b) the utility allowed a period of at least the relevant standstill period to elapse between the date of sending of the notice referred to in sub-paragraph (a) and the date on which the utility entered into the contract.
- (10) If an ineffectiveness order is made, the Court shall, without prejudice to the other powers of the Court—
- (a) order the payment by the utility of a financial penalty; and
  - (b) make such other order as the Court considers appropriate to address the consequences of the ineffectiveness order on the rights and obligations of the parties to the contract or framework agreement.
- (11) Before making an order under paragraph (10)(b), the Court shall have regard to any terms of the contract or framework agreement relating to the rights and obligations of the parties should an ineffectiveness order be made in relation to the contract or framework agreement.
- (12) The Court may decline to make an ineffectiveness order where the Court is satisfied that overriding reasons relating to a general interest require that the enforceability of the rights and obligations arising from the contract or framework agreement should be maintained.
- (13) For the purposes of paragraph (12)—
- (a) economic interests directly linked to the contract or framework agreement do not constitute overriding reasons relating to a general interest; and
  - (b) economic interests in the effectiveness of the contract or framework agreement may only be considered as overriding reasons relating to a general interest in exceptional circumstances where ineffectiveness would lead to disproportionate consequences.
- (14) For the purposes of paragraph (13)(a), economic interests directly linked to the contract or framework agreement include the costs—
- (a) resulting from the delay in the performance of the contract or framework agreement;
  - (b) resulting from the commencement of a new procurement procedure;
  - (c) resulting from the change of the economic operator performing the contract or framework agreement; and
  - (d) of legal obligations resulting from an ineffectiveness order.
- (15) Where the Court declines to make an ineffectiveness order under paragraph (12), the Court shall, without prejudice to the other powers of the Court, order—
- (a) the payment by the utility of a financial penalty; or
  - (b) the shortening of the duration of the contract or framework agreement.
- (16) In determining what order to make under paragraph (10)(a) or (15), regulation 45A(4) applies and, in the case of an order made under paragraph (10)(a), the Court shall have regard to the extent to which the contract or framework agreement will remain in effect in respect of the period leading up to the date of the ineffectiveness order.
- (17) Regulation 45A(5) and (6) applies to an order made under paragraph (15)(b) as it applies to an order made under regulation 45A(3)(b).

(18) In proceedings under this Part to which regulation 45(6)(b) applies, the Court does not have power to make an ineffectiveness order if the proceedings would be incompetent if regulation 45(6)(a) applied to the proceedings.

(19) In paragraph (8)(c), “estimated value”, “relevant time” and “relevant threshold” have the same meanings they have in regulation 11.

### **Financial penalties**

**45C.**—(1) Subject to paragraph (2), where a financial penalty is ordered to be paid under this Part—

- (a) the order shall state that the financial penalty shall be paid to the Scottish Ministers; and
- (b) the clerk of the Court shall send an extract of the decree (without charge) to the Scottish Ministers.

(2) Paragraph (1) does not apply to any financial penalty ordered to be paid by the Scottish Ministers.

(3) The Scottish Ministers shall pay into the Scottish Consolidated Fund any financial penalty—

- (a) ordered to be paid by them under this Part; or
- (b) recovered by them under paragraph (1).”

(13) Omit regulation 46 (conciliation).

### **Transitional provision – utilities contracts**

**5.**—(1) Nothing in these Regulations, except regulation 4(2)(a)(i), (iii) and (vi), (5) to (7), (10) and (13), affects any contract award procedure or design contest commenced in accordance with the Utilities Contracts Regulations before 20th December 2009.

(2) For the purposes of paragraph (1), a procedure or contest has been commenced before 20th December 2009 if, before that date—

- (a) a call for competition has been made in order to invite offers or requests to be selected to tender for or to negotiate in respect of a proposed contract, framework agreement or dynamic purchasing system;
- (b) in any case where there is no requirement to make a call for competition, the utility has despatched any form of advertisement seeking offers or expressions of interest in a proposed contract, framework agreement or dynamic purchasing system;
- (c) where there is no such advertising, the utility has contacted any economic operator in order to—
  - (i) seek expressions of interest or offers in respect of a proposed contract, framework agreement or dynamic purchasing system; or
  - (ii) respond to an unsolicited expression of interest or offer in respect of a proposed contract, framework agreement or dynamic purchasing system; or
- (d) the utility has sent a notice to the Official Journal in accordance with the Utilities Contracts Regulations in order to hold a design contest.

(3) Nothing in these Regulations affects the award of any contract under a framework agreement where the award procedure leading to the conclusion of the framework agreement is not affected by these Regulations (other than by regulation 4(2)(a)(i), (iii) or (vi), (5), (6), (7), (10) or (13)) by virtue of paragraph (1).

(4) Nothing in these Regulations affects the award of any contract under a dynamic purchasing system where the award procedure leading to the conclusion of the dynamic purchasing system is not affected by these Regulations (other than by regulation 4(2)(a)(i), (iii) or (vi), (5), (6), (7), (10) or (13)) by virtue of paragraph (1).

(5) Expressions used in this regulation have the meanings given in the Utilities Contracts Regulations.

St Andrew's House, Edinburgh  
25th November 2009

*JOHN SWINNEY*  
A member of the Scottish Executive



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## EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations amend the Public Contracts (Scotland) Regulations 2006 (“the Public Contracts Regulations”) and the Utilities Contracts (Scotland) Regulations 2006 (“the Utilities Contracts Regulations”). The Public Contracts Regulations implemented, for Scotland, Directive [2004/18/EC](#) of the European Parliament and of the Council on the co-ordination of the procedures for the award of public works contracts, public supply contracts and public services contracts (O.J. L 134, 30.4.2004, p.114) and Council Directive [89/665/EEC](#) on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (O.J. L 395, 30.12.1989, p.33). The Utilities Contracts Regulations implemented, for Scotland, Directive [2004/17/EC](#) of the European Parliament and of the Council on the co-ordination of procurement procedures of entities operating in the water, energy, transport and postal service sectors (O.J. L 134, 30.4.2004, p.1) and Council Directive [92/13/EEC](#) of 25th February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (O.J. L 76, 23.3.1992, p.14).

These Regulations implement, for Scotland, Directive [2007/66/EC](#) of the European Parliament and Council of 11th December 2007 amending Council Directives [89/665/EEC](#) and [92/13/EEC](#) with regard to improving the effectiveness of review procedures concerning the award of public contracts (O.J. L 335, 20.12.2007, p.31) (“the Remedies Directive”).

The Remedies Directive requires certain changes to be made to the standstill period between contract award decisions and contract award, and the time limits for bringing court proceedings to challenge a contract award procedure or decision. The Remedies Directive also requires the introduction of an automatic prohibition on entering into a contract when proceedings are brought and new special penalties for serious breaches of the Public Contracts Regulations and the Utilities Contracts Regulations, namely financial penalties, contract shortening and ineffectiveness for awarded contracts.

Regulation 2 amends the Public Contracts Regulations in consequence of the Remedies Directive. Replacement regulations 32 (information about contract award procedures and standstill period) and 47 (enforcement of obligations) are inserted into the Public Contracts Regulations, as are new regulations 47A (powers and duties of the court), 47B (ineffectiveness orders) and 47C (financial penalties). Regulation 2 also inserts new requirements to notify economic operators that are excluded in the course of contract award procedures of that fact. References to legislation that has been updated have been amended accordingly.

Regulation 3 prescribes transitional provisions for contract award procedures subject to the Public Contracts Regulations that commence prior to the coming into force of these Regulations.

Regulation 4 amends the Utilities Contracts Regulations in consequence of the Remedies Directive. Replacement regulations 33 (information about contract award procedures and standstill period) and 45 (enforcement of obligations) are inserted into the Public Contracts Regulations, as are new regulations 45A (powers and duties of the court), 45B (ineffectiveness orders) and 45C (financial penalties). Regulations 44 (attestation) and 46 (conciliation) are omitted. Regulation 4 also inserts new requirements to notify economic operators that are excluded in the course of contract award procedures of that fact. References to legislation that has been updated have been amended accordingly.

Regulation 5 prescribes transitional provisions for contract award procedures subject to the Utilities Contracts Regulations that commence prior to the coming into force of these Regulations.

A full regulatory assessment of the effect that this Instrument will have on the costs of business has been prepared and placed in the Scottish Parliament Information Centre. Copies may be obtained from the Scottish Procurement Directorate's website at [www.scotland.gov.uk/topics/government/procurement](http://www.scotland.gov.uk/topics/government/procurement).