

2016 No. 275

PUBLIC PROCUREMENT

The Public Procurement (Amendments, Repeals and Revocations) Regulations 2016

<i>Made</i> - - - -	<i>11th March 2016</i>
<i>Laid before Parliament</i>	<i>17th March 2016</i>
<i>Coming into force</i> - -	<i>18th April 2016</i>

The Minister for the Cabinet Office is designated for the purposes of section 2(2) of the European Communities Act 1972(a) in relation to public procurement(b) and in relation to the combating of late payment in commercial transactions(c).

The Minister for the Cabinet Office makes these Regulations in exercise of the powers conferred by section 2(2) of, as read with paragraph 1A(d) of Schedule 2 to, that Act.

These Regulations make provision for a purpose mentioned in section 2(2) of that Act and it appears to the Minister for the Cabinet Office that it is expedient for certain references to EU instruments to be construed as references to those instruments as amended from time to time.

Citation, commencement and extent

1.—(1) These Regulations may be cited as the Public Procurement (Amendments, Repeals and Revocations) Regulations 2016 and come into force on 18th April 2016.

(2) The amendments, repeals and revocations made by these Regulations have the same extent as the provisions to which they relate.

Amendments to Acts of Parliament

2. Schedule 1 (which contains amendments to Acts of Parliament) has effect.

Amendments to statutory instruments

3. Schedule 2 (which contains amendments to statutory instruments) has effect.

(a) 1972 c.68; section 2(2) was amended by the Legislative and Regulatory Reform Act 2006 (c.51), section 27(1)(a), and by the European Union (Amendment) Act 2008 (c.7), Part 1 of the Schedule.
(b) S.I. 2010/2473.
(c) S.I. 2014/2705.
(d) Paragraph 1A was inserted by the Legislative and Regulatory Reform Act 2006, section 28, and was amended by the European Union (Amendment) Act 2008, Part 1 of the Schedule and by S.I. 2007/1388.

Repeals and revocations

4. Schedule 3 (which contains repeals and revocations) has effect.

Transitional provisions

5.—(1) Nothing in these Regulations affects any contract award procedure or design contest commenced before 18th April 2016.

(2) For that purpose, a contract award procedure or design contest has been commenced before 18th April 2016 if, before that date—

- (a) a contract notice has been sent to the Official Journal in accordance with the Public Contracts Regulations 2015^(a) in order to invite offers or requests to be selected to tender for, or to negotiate in respect of, a proposed public contract, framework agreement or dynamic purchasing system;
- (b) the contracting authority has had published any form of advertisement seeking offers or expressions of interest in a proposed public contract, framework agreement or dynamic purchasing system;
- (c) 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 received from that economic operator in relation to a proposed public contract, framework agreement or dynamic purchasing system; or
- (d) a contest notice has been sent to the Official Journal in accordance with the Public Contracts Regulations 2015 for the purpose of regulation 79 of those Regulations.

(3) Nothing in these Regulations affects the award of a specific contract based on a framework agreement where the framework agreement was concluded—

- (a) before 18th April 2016; or
- (b) on or after that date following a contract award procedure which, by virtue of paragraph (1), was not affected by these Regulations.

(4) Nothing in these Regulations affects the award of a specific contract under a dynamic purchasing system where the system was established—

- (a) before 18th April 2016; or
- (b) on or after that date following a contract award procedure which, by virtue of paragraph (1), was not affected by these Regulations.

(5) Nothing in these Regulations affects a contract awarded—

- (a) before 18th April 2016; or
- (b) on or after that date but where the award itself was not, by virtue of paragraphs (1) to (4), affected by these Regulations.

(6) In this regulation, “contracting authority”, “design contests”, “dynamic purchasing system”, “economic operator”, “framework agreement”, “Official Journal” and “public contract” have the same meanings as in the Public Contracts Regulations 2015.

(7) In so far as this regulation relates to contracts affected by the amendments and modifications made by paragraphs 48 to 50 of Schedule 2—

- (a) the reference in regulation 5(2)(a) to the “Public Contracts Regulations 2015” is a reference to the Utilities Contracts Regulations 2006^(b);

^(a) S.I. 2015/102.

^(b) S.I. 2006/6, amended by S.I. 2007/2157, 3542, 2008/2256, 2848, 2009/3100, 2011/1043, 1441, 1848, 2053, 2012/1659, 2013/610 and 2015/102.

- (b) the references in regulation 5(2)(b) and (c) to the “contracting authority” are references to a “licenced infrastructure provider” or an “incumbent undertaker” (as the case may be) within the meaning of the Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013(a);
- (c) the references in regulation 5(2) to a “proposed public contract” are references to a “proposed contract”.

11th March 2016

Matthew Hancock
Minister for the Cabinet Office

SCHEDULE 1

Amendments to Acts of Parliament

Regulation 2

Greater London Authority Act 1999

1. The Greater London Authority Act 1999(b) is amended as follows.
- 2.—(1) Section 355(c) (duties of waste collection authorities etc.) is amended as follows.
 - (2) Omit subsection (7).
 - (3) In subsection (8)—
 - (a) in paragraph (a) for “Public Contracts Regulations 2015” substitute “Public Procurement Regulations”;
 - (b) in paragraph (b) after “notice” insert “or the concession notice (as the case may require)”.
- 3.—(1) Section 356(d)(directions by the Mayor) is amended as follows.
 - (2) Omit subsection (3).
 - (3) In subsection (3A)—
 - (a) in paragraph (a) for “Public Contracts Regulations 2015” substitute “Public Procurement Regulations”;
 - (b) in paragraph (b) after “notice” insert “or the concession notice (as the case may require)”.
- 4.—(1) Section 358(e) (information about new waste contracts) is amended as follows.
 - (2) Omit subsection (1).
 - (3) In subsection (1ZA)—
 - (a) after “Public Contracts Regulations 2015” insert “or the Utilities Contracts Regulations 2016”;
 - (b) in paragraph (a) after “notice” insert “, a periodic indicative notice or a qualification system notice (as the case may require)”.
 - (4) Omit subsection (1B).
 - (5) In subsection (1BA)—

(a) S.I. 2013/1582, amended by S.I. 2015/102.

(b) 1999 c.29.

(c) Section 355 was amended by the Greater London Authority Act 2007 (c.24), section 37; the Localism Act 2011 (c.20), Schedule 23, paragraphs 1, 6(a) and 7 and Schedule 25, Part 33 and by S.I. 2015/102, Schedule 6, paragraphs 2 and 3.

(d) Section 356 was amended by the Greater London Authority Act 2007, section 39(5); the Localism Act 2011, Schedule 23, paragraphs 1 and 6(b) and by S.I. 2015/102, Schedule 6, paragraphs 2 and 4.

(e) Section 358 was amended by the Greater London Authority Act 2007, section 39(1) to (4); the Localism Act 2011, Schedule 23, paragraphs 1 and 6(e) and by S.I. 2015/102, Schedule 6, paragraphs 2 and 5.

- (a) for “Public Contracts Regulations 2015” substitute “Public Procurement Regulations”;
- (b) in paragraph (a) after “notice” insert “, a periodic indicative notice or a qualification system notice (as the case may require)”;
- (c) in paragraph (b) after “notice” insert “or a concession notice (as the case may require)”.

(6) In subsection (2) for “Utilities Contracts Regulations 2006 or the Public Contracts Regulations 2015” substitute “Public Procurement Regulations”.

5. In section 359(1)(c)(a) (confidential information about waste contracts) for “Utilities Contracts Regulations 2006 or the Public Contracts Regulations 2015” substitute “Public Procurement Regulations”.

6.—(1) Section 360(b) (interpretation) is amended as follows.

(2) In subsection (2)—

- (a) in the definition of “buyer profile” for “Utilities Contracts Regulations 2006 or the Public Contracts Regulations 2015” substitute “Public Contracts Regulations 2015 or the Utilities Contracts Regulations 2016 (as the case may require)”;
- (b) after the definition of “buyer profile” insert—
 - ““concession notice” has the same meaning as in regulation 31 of the Concession Contracts Regulations 2016,”;
- (c) at the end of the definition of “contract notice” insert “or regulation 69 of the Utilities Contracts Regulations 2016 (as the case may require)”;
- (d) after the definition of “the national waste management plan” insert—
 - ““periodic indicative notice” has the same meaning as in regulation 67 of the Utilities Contracts Regulations 2016,”;
- (e) after the definition of “prior information notice” insert—
 - ““the Public Procurement Regulations” means the Public Contracts Regulations 2015, the Utilities Contracts Regulations 2016 or the Concession Contracts Regulations 2016 (as the case may require),
 - “qualification system notice” means a notice under regulation 68 of the Utilities Contracts Regulations 2016.”.

(3) Omit subsections (3) and (4).

Equality Act 2010

7. In section 155(3) of the Equality Act 2010(c) (power to impose specific duties: supplementary), for the definition of “the Public Sector Directive” substitute—

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

Public Services (Social Value) Act 2012

8.—(1) Section 1 of the Public Services (Social Value) Act 2012(d) (contracts of relevant authorities) is amended as follows.

(2) In subsection (15), at the appropriate place, insert—

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- (a) Section 359 was amended by the Greater London Authority Act 2007, section 11(1) and (4) and by S.I. 2015/102, Schedule 6, paragraphs 2 and 6.
 - (b) Section 360 was amended by the Greater London Authority Act 2007, section 39(6) to (8); the Localism Act 2011, Schedule 25, Part 33; S.I. 2006/5, Schedule 7, paragraph 1; S.I. 2011/988, Schedule 4, paragraphs 5(1) and (4); and by S.I. 2015/102, Schedule 6, paragraphs 2 and 7.
 - (c) 2010 c.15.
 - (d) 2012 c.3; section 1 was amended by S.I. 2015/102, Schedule 6, paragraph 8.

““central government authority” has the same meaning as in the Regulations (even though the Regulations do not apply);”;

““sub-central contracting authority” has the same meaning as in the Regulations (even though the Regulations do not apply).”.

(3) For subsection (16) substitute—

“(16) For the purposes of this section references to a public services contract are to—

- (a) a public service contract to which the Regulations apply (or which is treated as such a contract by the Regulations);
- (b) a public service contract for social and other specific services listed in Schedule 3 to the Regulations awarded by a central government authority, the value of which (net of value-added tax) is estimated to be equal to or greater than the threshold mentioned in regulation 5(1)(b) of the Regulations; or
- (c) a public service contract for social and other specific services listed in Schedule 3 to the Regulations awarded by a sub-central contracting authority, the value of which (net of value-added tax) is estimated to be equal to or greater than the threshold mentioned in regulation 5(1)(c) of the Regulations.”.

Health and Social Care Act 2012

9. In section 76(8)(b) of the Health and Social Care Act 2012(a) (regulations under section 75) after “(S.I. 2015/102)” insert “or the Concession Contracts Regulations 2016 (S.I. 2016/273)”.

SCHEDULE 2

Regulation 3

Amendments to statutory instruments

PART 1

The Public Contracts Regulations 2015

1. The Public Contracts Regulations 2015(b) are amended as follows.

2.—(1) Regulation 1 (citation, commencement, extent and application) is amended as follows.

(2) After paragraph (3)(a), insert—

“(aa) for the purposes of regulation 29(9), on 18th April 2016;”.

(3) In paragraph (7) after “Except for” insert “Part 4 and”.

(4) In paragraph (8)—

(a) omit “or” at the end of sub-paragraph (a);

(b) at the end of sub-paragraph (b) insert—

“; or

(c) Scottish devolved functions, that is to say functions the exercise of which would be within devolved competence (within the meaning of section 54 of the Scotland Act 1998(c)).”.

(5) After paragraph (8), insert—

“(9) Part 4 does not apply to the National Assembly for Wales Commission.”.

(a) 2012 c.7; section 76(8) was amended by S.I. 2015/102, Schedule 6, paragraph 9.

(b) S.I. 2015/102.

(c) 1998 c.46.

3.—(1) Regulation 2 (definitions) is amended as follows.

(2) In paragraph (1)—

- (a) in the definition of “innovation” for “Europe 2012” substitute “Europe 2020”;
- (b) in the definition of “invitation to confirm interest” after “regulation 31(18)” insert “and (19)”;
- (c) at the end of the definition of “public contracts” add “but does not include concession contracts within the meaning of the Concession Contracts Regulations 2016”;
- (d) after the definition of “selection criteria” insert—
““sixth form college corporation” has the meaning given by section 90(1) of the Further and Higher Education Act 1992(a);”.

(3) Paragraph (4) is amended as follows—

- (a) for “In Parts 2 and 3” substitute “In Parts 2, 3 and 4 (except regulation 52(4))”;
- (b) for “which is expressed otherwise than in hours”, substitute “, however expressed,”.

4.—(1) Regulation 4 (mixed procurement) is amended as follows.

(2) In paragraph (2)—

- (a) omit “and” at the end of sub-paragraph (a)(ii);
- (b) at the end of sub-paragraph (a)(iii) insert—

“; and

- (iv) where, in the case of mixed contracts containing elements of public contracts covered by this Part and of concession contracts, contracting authorities choose to award a single contract, that contract shall be awarded in accordance with this Part, provided that the estimated value of the part of the contract which constitutes a public contract covered by this Part, calculated in accordance with regulation 6, is equal to or greater than the relevant threshold set out in regulation 5;”.

(3) After paragraph (2) insert—

“(2A) In the case of contracts which have as their subject-matter both procurement covered by this Part and procurement for the pursuit of an activity which is subject to the Utilities Contracts Regulations 2016, the applicable rules shall, despite paragraph (2), be determined by regulations 6 and 7 of those Regulations.”.

(4) In paragraph (3) for “paragraph (1) or (2)” substitute “paragraphs (1) to (2A)”.

5. For regulation 7 (utilities) substitute—

“Contracts in the water, energy, transport and postal services sectors

7.—(1) This Part does not apply to public contracts or design contests which—

- (a) under the UCR 2016 are awarded or organised by contracting authorities—
 - (i) exercising one or more of the activities referred to in regulations 9 to 15 of those Regulations, and
 - (ii) for the pursuit of those activities;
- (b) are excluded from the scope of the UCR 2016 by regulations 18, 23 or 34 of those Regulations; or
- (c) are awarded or organised—
 - (i) by a contracting authority which provides postal services within the meaning of regulation 14 of the UCR 2016, and

(a) 1992 c.13; section 90(1) was amended by the Apprenticeships, Skills, Children and Learning Act 2009 (c.22), Schedule 8, paragraphs 1 and 12(1) and (3).

- (ii) for the pursuit of any of the following activities—
 - (aa) added value services linked to and provided entirely by electronic means (including the secure transmission of coded documents by electronic means, address management services and transmission of registered electronic mail);
 - (bb) financial services which are covered by CPV codes 66100000-1 to 66720000-3 and by regulation 21(1)(d) of the UCR 2016, including in particular postal money orders and postal giro transfers;
 - (cc) philatelic services;
 - (dd) logistics services (services combining physical delivery and warehousing, or either of them, with other non-postal functions).

(2) In this regulation, “the UCR 2016” means the Utilities Contracts Regulations 2016.”.

6. In regulation 15(3) (defence and security) for “intrusive means” substitute “intrusive measures”.

7. In regulation 17(2) (public contracts and design contests involving defence or security aspects etc.) after “awards” insert “or organises”.

8. In regulation 25 (conditions relating to the GPA and other international agreements) omit “and the General Notes”.

9. In regulation 29(4) (competitive procedure with negotiation) for “paragraph (6)” substitute “paragraph (10)”.

10. For regulation 35(13) (electronic auctions) substitute—

“(13) For the purposes of paragraph (10)(b), a tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority’s needs and requirements as specified in the procurement documents.”.

11. For regulation 48(4) (prior information notices) substitute—

“(4) Where the prior information notice is published by the contracting authority on its buyer profile, the contracting authority shall send for publication, in accordance with regulation 51, a notice containing the information set out in Part A of Annex V to the Public Contracts Directive.”.

12. For regulation 51(1) (form and manner of sending notices for publication at EU level) substitute—

“(1) The notices required by regulations 48, 49, 50, 72, 75 and 79 to be sent for publication in accordance with this regulation (and any corrigenda to those notices)—

- (a) shall be sent by electronic means to the EU Publications Office for publication; and
- (b) shall be in the format of the relevant standard forms set out in Commission Implementing Regulation (EU) 2015/1986(a) as amended from time to time.”.

13. In regulation 52(3) (publication at national level) omit “, 72”.

14.—(1) Regulation 57 (exclusion grounds) is amended as follows.

(2) After paragraph (1)(l) insert—

“(1a) an offence under section 2 or 4 of the Modern Slavery Act 2015(b);”.

(3) In paragraph (11) for “paragraphs (1) to (3)” substitute “paragraphs (1) and (2)”.

(a) OJ No L 296, 12.11.2015, p1.

(b) 2015 c.30.

(4) In paragraph (12) for “cases referred to in paragraphs (4) and (8)” substitute “situations referred to in paragraph (8)”.

15.—(1) Regulation 60 (means of proof) is amended as follows.

(2) In paragraph (4)(b) for “regulation 57(3) to (5)” substitute “regulation 57(3), (4)”.

(3) In paragraph (5) for “regulation 57(1) to (5)” substitute “regulation 57(1) to (4)”.

16. In regulation 72(1)(b) (modification of contracts during their term) at the end of paragraph (i) for “or” substitute “and”.

17. In regulation 88(2) (interpretation of Chapter 6) for “this Part” substitute “this Chapter”.

18. In regulation 89(1)(a) (duty owed to economic operators from EEA states) for “Part 2” substitute “Parts 2 and 3”.

19. In regulation 99(4) (grounds for ineffectiveness) after “a notice which” insert “is in the standard format set out in Annex XII to Commission Implementing Regulation (EU) 2015/1986(a) as amended from time to time and which”.

20. In regulation 105(2)(b) (scope of Chapter 7) for “or an Academy” substitute “, an Academy or a sixth form college corporation”.

21. In regulation 109(5) (scope of Chapter 8) for “or an Academy” substitute “, an Academy or a sixth form college corporation”.

22.—(1) Regulation 113 (payment of undisputed invoices etc.) is amended as follows.

(2) In paragraph (1)(b) for “or an Academy” substitute “, an Academy or a sixth form college corporation”.

(3) In paragraph (6) omit “or subcontract”.

23.—(1) Regulation 118 (general transitional provision and saving where procurement procedure commenced before 26th February 2015) is amended as follows.

(2) For paragraph (5) substitute—

“(5) Paragraphs (5A) to (5D) apply in the case of a contract awarded—

(a) before 26th February 2015; or

(b) after that date but where the award itself was not, by virtue of paragraphs (1) to (4), affected by these Regulations.

(5A) Except in the case of a contract referred to in paragraph (5B) to the extent referred to in paragraph (5C), nothing in these Regulations affects a contract to which paragraph (5) applies.

(5B) This paragraph refers to a contract which was awarded under the 2006 Regulations (other than a public works concession contract).

(5C) A contract referred to in paragraph (5B) is subject to regulations 72 and 73(3) and Chapter 6 of Part 3 (so far as that Chapter applies to regulations 72 and 73(3)).

(5D) For the purposes of paragraph (5C), any reference in regulation 72 or 73(3) or Chapter 6 of Part 3 to a contract or to a public contract includes a contract to which paragraph (5B) applies.”.

(3) In paragraph (6) for “and “public contract”” substitute “, “public contract” and “public works concession contract””.

24.—(1) Schedule 1 (central government authorities) is amended as follows.

(2) For “Education and Library Boards” listed under “Northern Ireland, Department of Education” substitute “Education Authority”.

(a) OJ No L 296, 12.11.2015, p1.

- (3) At the appropriate place insert “Northern Ireland Assembly Commission”.
- (4) At the appropriate place insert “The National Assembly for Wales Commission”.
- (5) Omit “The Wales Assembly Parliamentary Service”.

PART 2

Other statutory instruments

Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975

25. The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975(a) is amended as follows.

26.—(1) Article 2(1) is amended as follows.

(2) For the definition of “contracting authority” substitute—

““contracting authority” has the meaning given by regulation 2(1) of the Public Contracts Regulations 2015, regulation 4(1) of the Utilities Contracts Regulations 2016 or regulation 4 of the Concession Contracts Regulations 2016, as appropriate;”.

(3) Omit the definitions of “contracting entity”, “Directive 2004/17/EC” and “Directive 2004/18/EC”.

(4) After the definition of “trustee” insert—

““utility” has the meaning given by regulation 5(1) of the Utilities Contracts Regulations 2016 or regulation 5 of the Concession Contracts Regulations 2016, as appropriate;”.

27. For article 3(1)(j) substitute—

“(j) any question asked by or on behalf of a contracting authority or utility in relation to a conviction for an offence listed in regulation 57(1) of the Public Contracts Regulations 2015 or regulation 38(8) of the Concession Contracts Regulations 2016 which is a spent conviction (or any circumstances ancillary to such a conviction) for the purpose of determining whether or not a person is excluded—

- (i) for the purposes of regulation 57 of the Public Contracts Regulations 2015,
- (ii) from participation in a design contest for the purposes of regulation 80 of the Public Contracts Regulations 2015,
- (iii) for the purposes of regulation 80 of the Utilities Contracts Regulations 2016,
- (iv) from participation in a design contest for the purposes of regulation 96 of the Utilities Contracts Regulations 2016, or
- (v) for the purposes of regulation 38 of the Concession Contracts Regulations 2016,

where the person questioned is informed at the time the question is asked that, by virtue of this Order, spent convictions for such offences are to be disclosed;”.

28. Omit article 3(1)(ja).

Rehabilitation of Offenders (Exceptions) Order (Northern Ireland) 1979

29. The Rehabilitation of Offenders (Exceptions) Order (Northern Ireland) 1979(b) is amended as follows.

(a) S.I. 1975/1023, amended by S.I. 2006/2143 and 2015/102; there are other amending instruments but none is relevant.
(b) S.R.(NI) 1979 No 195, amended by S.R. NI 2009 No 173; there are other amending instruments but none is relevant.

30.—(1) Article 1(2) (citation, commencement and interpretation) is amended as follows.

(2) For the definition of “contracting authority” substitute—

““contracting authority” has the meaning given by regulation 2(1) of the Public Contracts Regulations 2015, regulation 4(1) of the Utilities Contracts Regulations 2016 or regulation 4 of the Concession Contracts Regulations, as appropriate;”.

(3) Omit the definitions of “contracting entity”, “Directive 2004/17/EC” and “Directive 2004/18/EC”.

(4) At the appropriate place insert—

““utility” has the meaning given by regulation 5(1) of the Utilities Contracts Regulations 2016 or regulation 5 of the Concession Contracts Regulations 2016, as appropriate;”.

31. For article 2(g) (exclusion of article 5(2) of the Order in relation to certain questions) substitute—

“(g) any question asked by or on behalf of a contracting authority or utility in relation to a conviction for an offence listed in regulation 57(1) of the Public Contracts Regulations 2015 or regulation 38(8) of the Concession Contracts Regulations 2016 which is a spent conviction (or any circumstances ancillary to such a conviction) for the purpose of determining whether or not a person is excluded—

- (i) for the purposes of regulation 57 of the Public Contracts Regulations 2015,
- (ii) from participation in a design contest for the purposes of regulation 80 of the Public Contracts Regulations 2015,
- (iii) for the purposes of regulation 80 of the Utilities Contracts Regulations 2016,
- (iv) from participation in a design contest for the purposes of regulation 96 of the Utilities Contracts Regulations 2016, or
- (v) for the purposes of regulation 38 of the Concession Contracts Regulations 2016,

where the person questioned is informed at the time the question is asked that, by virtue of this Order, spent convictions for such offences are to be disclosed.”.

Heavy Goods Vehicles (Charging for the Use of Certain Infrastructure on the Trans-European Road Network) Regulations 2009

32. In regulation 18(2) of the Heavy Goods Vehicles (Charging for the Use of Certain Infrastructure on the Trans-European Road Network) Regulations 2009(a) (information requirements where a concession toll is involved) for sub-paragraph (b) substitute—

“(b) the base case on which the grantor under the concession contract has founded the concession notice within the meaning of regulation 6 of the Concession Contracts Regulations 2016.”.

Quality Contracts Schemes (Tendering Requirements) (England) Regulations 2009

33. In regulation 9 of the Quality Contracts Schemes (Tendering Requirements) (England) Regulations 2009(b) for “the Utilities Contracts Regulations 2006” substitute “the Utilities Contracts Regulations 2016, the Concession Contracts Regulations 2016,”.

Cleaner Road Transport Vehicles Regulations 2011

34. The Cleaner Road Transport Vehicles Regulations 2011(c) are amended as follows.

(a) S.I. 2009/1914, amended by S.I. 2014/2437; there are other amending instruments but none is relevant.

(b) S.I. 2009/3244, amended by S.I. 2015/102.

(c) S.I. 2011/1631, amended by S.I. 2015/102.

35.—(1) Regulation 2(1) (interpretation) is amended as follows.

(2) Before the definition of “contract documents” insert—

““concession notice” has the same meaning as in regulation 6 of the Concession Contracts Regulations 2016;”.

(3) In the definition of “contract notice” for “Utilities Contracts Regulations 2006” substitute “Utilities Contracts Regulations 2016”.

(4) At the end of the definition of “contracting authority” add “, regulation 4 of the Utilities Contracts Regulations or regulation 4 of the Concession Contracts Regulations 2016 (as applicable)”.

(5) At the end of the definition of “declaration of ineffectiveness” add “, regulation 103(1) of the Utilities Contracts Regulations 2016 or regulation 49(1) of the Concession Contracts Regulations 2016 (as applicable)”.

(6) In paragraph (a) of the definition of “economic operator” for “or the Utilities Contracts Regulations 2006” substitute “, the Utilities Contracts Regulations 2016 or the Concession Contracts Regulations 2016 (as applicable)”.

(7) In the definition of “procurement procedure”, for paragraph (b) substitute—

“(b) the open procedure, the restricted procedure, the negotiated procedure with prior call for competition, the negotiated procedure without prior call for competition, competitive dialogue or an innovation partnership within the meaning of the Utilities Contracts Regulations 2016;”.

(8) In the definition of “utility” for “regulation 2(1) of the Utilities Contracts Regulations 2006” substitute “regulation 5 of the Utilities Contracts Regulations 2016 or regulation 5 of the Concession Contracts Regulations 2016 (as applicable)”.

36.—(1) Regulation 3 (scope of the Regulations) is amended as follows.

(2) In paragraph (3) for sub-paragraphs (b) and (c) substitute—

“(b) the Utilities Contracts Regulations 2016 apply in respect of that contract;

(c) the Concession Contracts Regulations 2016 apply in respect of that contract; or

(d) that contract is to be entered into by an operator and the condition specified in paragraph (4) is satisfied.”.

(3) For paragraph (4)(b) substitute—

“(b) if that operator were a contracting authority or a utility, that contract would not be excluded from the application of the Utilities Contracts Regulations 2016 by regulation 16 (thresholds) of those regulations (whether or not it would also be so excluded for any other reason);

(c) if that operator were a contracting authority or a utility, that contract would not be excluded from the application of the Concession Contracts Regulations 2016 by regulation 9 (threshold amounts) of those Regulations (whether or not it would also be so excluded for any other reason).”.

37. For regulation 6(3) and (4) (enforcement of duties) substitute—

“(3) Subject to paragraph (4), Part 5 of the Utilities Contracts Regulations 2016 has effect as if any reference in that Part to—

(a) the duty owed in accordance with regulation 104 of those Regulations included reference to the duty owed in accordance with paragraph (1);

(b) a utility included a reference to an operator;

(c) an economic operator included any person who is an economic operator for the purpose of these Regulations.

(3A) Subject to paragraph (4), Part 5 of the Concession Contracts Regulations 2016 has effect as if any reference in that Part to—

- (a) the duty owed in accordance with regulation 50 of those Regulations included reference to that duty owed in accordance with paragraph (1);
 - (b) a contracting authority or a utility included a reference to an operator;
 - (c) an economic operator included any person who is an economic operator for the purpose of these Regulations.
- (4) Where Part 3 of the Public Contracts Regulations 2015 or Parts 5 of the Utilities Contracts Regulations 2016 or the Concessions Contracts Regulations 2016 have effect in relation to an economic operator by virtue of paragraph (2)(b), (3)(b) or (3A)(b)—
- (a) the operator does not owe any duty under that Part to a person who is not a national of or established in an EEA State;
 - (b) in proceedings against an operator under that Part the Court may not make a declaration of ineffectiveness, an order imposing a civil financial penalty or an order shortening the duration of the contract;
 - (c) the operator is not required to refrain from entering into any contract by reason of any proceedings having been started under that Part.”.

Defence and Security Public Contracts Regulations 2011

38. The Defence and Security Public Contracts Regulations 2011(a) are amended as follows.

39. In regulation 3(1) (interpretation) at the end of the definition of “contract” add “but does not include a concession contract within the meaning of the Concession Contracts Regulations 2016”.

40.—(1) Regulation 4 (contracting authorities) is amended as follows.

(2) At the end of paragraph (a) add “or regulation 4(1) of the Utilities Contracts Regulations 2016”.

(3) In paragraph (c) for “regulation 3 of the Utilities Contracts Regulations 2016” substitute “regulation 5 of the Utilities Contracts Regulations 2016”.

41. In regulation 6(4) to (6) (application)—

- (a) for “Utilities Contracts Regulations 2006” in each place it occurs substitute “Utilities Contracts Regulations 2016, the Concession Contracts Regulations 2016,”;
- (b) after “Utilities Contracts (Scotland) Regulations 2012” in each place it occurs insert “(or, as a result of regulation 118 of the Public Contracts Regulations 2015 or regulation 123 of the Utilities Contracts Regulations 2016, the Public Contracts Regulations 2006 or the Utilities Contracts Regulations 2006, as the case may be)”.

42. In regulation 17(5) after “contract” insert “notice”.

43. In Schedule 4 (consequential amendments, repeals and revocations), omit paragraphs 1 and 3.

The Railways (Interoperability) Regulations 2011

44. In regulation 2(1) of the Railways (Interoperability) Regulations 2011(b)(interpretation) for the definition of “European specification” substitute—

““European specification” means a common technical specification, a technical specification formulated by reference to a European Technical Assessment or a national standard transposing a European standard, the terms used in this definition having the meaning given in Annex VIII to Directive 2014/25/EU of the European Parliament and

(a) S.I. 2011/1848, amended by S.I. 2015/102; there are other amending instruments but none is relevant.

(b) S.I. 2011/3066, to which there are amendments not relevant to these Regulations.

of the Council on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC(a);”.

National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013

45. The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013(b) are amended as follows.

46. In regulation 13(3) (powers of Monitor to investigate) after “2015” insert “or the Concession Contracts Regulations 2016”.

47.—(1) In regulation 17 (actions brought under the Public Contracts Regulations 2006) after “2015” insert “or the Concession Contracts Regulations 2016”.

(2) In the heading to regulation 17, for “Public Contracts Regulations 2006” substitute “Public Contracts Regulations 2015 or the Concession Contracts Regulations 2016”.

Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013

48. The Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013(c) are amended as follows.

49.—(1) Regulation 6 (tender requirements and procedure) is amended as follows.

(2) In paragraph (2)(a) for “Utilities Contracts Regulations 2006” substitute “Utilities Contracts Regulations 2016 nor the Concession Contracts Regulations 2016”.

(3) In paragraph (2)(b) for “Utilities Contracts Regulations 2006” substitute “Utilities Contracts Regulations 2016”.

(4) For paragraph (2)(c) substitute—

“(c) the incumbent undertaker seeks offers without a call for competition pursuant to regulation 50(1)(b) to (j) of the Utilities Contracts Regulations 2016, or”.

(5) In the final words of paragraph (2) for “Utilities Contracts Regulations 2006”, in each place, substitute “Utilities Contracts Regulations 2016”.

(6) In paragraph (3) for “Utilities Contracts Regulations 2006” in the first place it occurs substitute “Utilities Contracts Regulations 2016”.

(7) For paragraph (3)(b)(ii) substitute—

“(ii) for Chapter 2 of Part 5 of the Utilities Contracts Regulations 2016 (applications to the Court), there were substituted the Chapter 2 of Part 5 set out in Part 2 of Schedule 2.”.

(8) In paragraph (8)(b) after “occurs” insert “other than in relation to the modifications made to regulations 42 and 98 of the Utilities Contracts Regulations 2016 specified in the second column of the table in Part 1 of Schedule 2”.

50. For Schedule 2 (application of the Utilities Contracts Regulations 2006) substitute—

(a) OJ No L 94, 28.3.2014, p243.

(b) S.I. 2013/500, amended by S.I. 2015/102.

(c) S.I. 2013/1582, amended by S.I. 2015/102.

“SCHEDULE 2

Regulation 6

Application of the Utilities Contracts Regulations 2016

PART 1

<i>Provision applied</i>	<i>Modification</i>
regulation 2 (definitions) and Schedule 1 (activities constituting works), regulation 4 (contracting authorities), regulation 36 (principles of procurement), regulation 37 (economic operators)	These provisions apply only to the extent that they are relevant to the provisions referred to in this Schedule.
regulation 39 (confidentiality)	In paragraph (2)(a), for “such as the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in regulations 70 and 75 respectively”, there were substituted “such as the obligations relating to the information to candidates and tenderers set out in regulation 75”.
regulation 40 (rules applicable to communication)	Paragraph (15)(a)(ii) does not apply.
regulation 41 (nomenclatures)	
regulation 42 (conflicts of interest)	The incumbent undertaker is bound by paragraph (1) as if it were a contracting authority.
regulation 44 (choice of procedures)	Paragraphs (4)(a) and (5) do not apply.
regulation 45 (open procedure)	Paragraph (4) does not apply.
regulation 46 (restricted procedure)	Paragraph (2)(b) does not apply.
regulation 47 (negotiated procedure with prior call for competition)	Paragraph (2)(b) does not apply.
regulation 48 (competitive dialogue)	Paragraph (2)(b) does not apply.
regulation 49 (innovation partnership)	
regulation 50 (use of the negotiated procedure without prior call for competition)	Only paragraphs (1)(a) and (2) apply.
regulation 51 (framework agreements)	
regulation 54 (electronic catalogues)	Paragraphs (11) to (13) do not apply.
regulation 55 (centralised purchasing activities and central purchasing bodies)	Paragraph (11) applies as if the words from “Procurement”, where it first appears, to the end of that paragraph were substituted by “For the purposes of this regulation, “dynamic purchasing system” has the same meaning as the system referred to in regulation 52 of the Utilities Contracts Regulations 2016.”.
regulation 56 (occasional joint procurement)	
regulation 58 (preliminary market consultations)	
regulation 59 (prior involvement of candidates or tenderers)	
regulation 60 (technical specifications)	
regulation 61 (labels)	

regulation 62 (test reports, certification and other means of proof)	
regulation 63 (communication of technical specifications)	Paragraph (1)(b) does not apply.
regulation 64 (variants)	
regulation 65 (division of contracts into lots)	
regulation 66 (setting time limits)	
regulation 68 (notices on the existence of a qualification system)	
regulation 69 (contract notices)	
regulation 71(form and manner of sending notices for publication at EU level)	Paragraph (1) applies as if “regulations 67 to 70” were substituted by “regulations 68, 69”.
regulation 72 (publication at national level)	Paragraph (1) and (3) apply as if “regulations 67 to 70” were substituted by “regulations 68, 69”. Paragraph (2) applies as if the words “(in addition to the periodic indicative notices referred to in regulation 67(3)(b))” were omitted. Paragraph (6) does not apply.
regulation 73 (electronic availability of procurement documents)	
regulation 74 (invitations to candidates)	Paragraphs (2) and (6) do not apply.
regulation 75 (informing applicants for qualification, candidates and tenderers)	Paragraph (1) applies as if “framework agreement, the award of a contract, or admittance to a dynamic purchasing system” were substituted by “framework agreement or the award of a contract”. Paragraph (1)(d) does not apply.
regulation 76 (general principles)	
regulation 77 (qualification systems)	
regulation 78 (criteria for qualitative selection)	
regulation 79 (reliance on the capacity of other entities)	
regulation 80 (use of exclusion grounds and selection criteria provided for under the Public Contracts Regulations)	The incumbent undertaker is bound by paragraph (2) as if it were a contracting authority.
regulation 81 (quality assurance standards and environmental management standards)	
regulation 82 (contract award criteria)	
regulation 83 (life-cycle costing)	
regulation 84 (abnormally low tenders)	Paragraph (7) applies as if the reference to “the Commission” were a reference to “the Secretary of State and the Water Services Regulation Authority”.
regulation 86 (conditions for performance of contracts)	
regulation 87 (subcontracting)	The incumbent undertaker is bound by paragraphs (5), (8), (9), (10) and (11) as if it were a contracting authority.
regulation 88 (modifications of contracts during their term)	

regulation 89 (termination of contracts)	
regulation 98 (retention of contract copies)	The incumbent undertaker is bound by this regulation as if it were a contracting authority.
regulation 99 (information and documentation requirements)	Paragraph (1) applies as if the words “and each time a dynamic purchasing system is established” were omitted. Paragraph (7) applies as if the reference to “the Commission”, in the first place it occurs, were a reference to “the Secretary of State or the Water Services Regulation Authority” and, in the second place it occurs, were a reference to “the Secretary of State or the Water Services Authority (as the case may be)”. Paragraphs (2)(c), (3), (8) and (9) do not apply.
regulation 100 (scope of Chapter 1)	
regulation 101 (notices of decisions to award a contract or conclude a framework agreement)	Paragraph (5)(a) does not apply. Paragraph (5)(c) applies as if “or a dynamic purchasing system” were omitted. Paragraph (8) applies as if the words after “expired” in sub-paragraph (b) were omitted.
regulation 102 (standstill period)	
Chapter 2 of Part 5 (applications to the Court)	

PART 2

“CHAPTER 2

Applications to the court

Enforcement of obligations

103.—(1) The obligation on an incumbent undertaker to comply with the provisions of these Regulations, other than regulations 84(7) and 99(7), is a duty owed to an economic operator.

(2) A breach of the duty owed in accordance with paragraph (1) is actionable by any economic operator which in consequence suffers, or risks suffering, loss or damage and those proceedings shall be in the High Court.

(3) Subject to paragraphs (4) to (6), such proceedings must be started within 30 days beginning with the date on which the economic operator first knew or ought to have known that grounds for starting proceedings had arisen.

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

- (a) where the proceedings relate to a decision which is sent to the economic operator by facsimile or electronic means, 10 days beginning with—
 - (i) the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision, or
 - (ii) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons;

- (b) where the proceedings relate to a decision which is sent to the economic operator by other means, whichever of the following periods ends first—
 - (i) 15 days beginning with the day after the date on which the decision is sent, if the decision is accompanied by a summary of the reasons for the decision, or
 - (ii) 10 days beginning with—
 - (aa) the day after the date on which the decision is received, if the decision is accompanied by a summary of the reasons for the decision; or
 - (bb) if the decision is not so accompanied, the day after the date on which the economic operator is informed of a summary of those reasons; and
 - (c) where sub-paragraphs (a) and (b) do not apply but the decision is published, 10 days beginning with day on which the decision is published.
- (5) Subject to paragraph (6), the Court may extend the time limit imposed by paragraph (3) where the Court considers that there is good reason for doing so.
- (6) The Court must not exercise its power under paragraph (5) so as to permit proceedings to be started more than 3 months after the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.
- (7) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is issued.
- (8) Subject to paragraph (9), but otherwise without prejudice to any other powers of the Court in proceedings brought under this regulation, the Court may—
- (a) by interim order—
 - (i) suspend the procedure leading to the award of the contract or the procedure leading to the determination of a design contest in relation to the award of a contract of which the breach of duty owed in accordance with paragraph (1) is alleged; or
 - (ii) suspend the implementation of any decision or action taken by the incumbent undertaker in the course of following such a procedure; and
 - (b) if satisfied that a decision or action taken by an incumbent undertaker was a breach of the duty owed in accordance with paragraph (1)—
 - (i) order the setting aside of that decision or action, or order the incumbent undertaker to amend any document;
 - (ii) award damages to an economic operator which has suffered loss or damage as a consequence of the breach; or
 - (iii) do both of those things.
- (9) In proceedings under this regulation 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 in accordance with paragraph (1) if the contract in relation to which the breach occurred has been entered into.
- (10) Where, in proceedings under this regulation, the Court is satisfied that an economic operator would have had a real chance of being awarded a contract or winning a design contest if that chance had not been adversely affected by a breach of the duty owed to it by the incumbent undertaker in accordance with paragraph (1), the economic operator shall be entitled to damages amounting to its costs in preparing its tender and in participating in the procedure leading to the award of the contract or its costs of participating in the procedure leading to the determination of the design contest.

(11) Paragraph (10) 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.””

SCHEDULE 3

Regulation 4

Repeals and revocations

PART 1

Repeals

<i>Short title and chapter</i>	<i>Extent of repeal</i>
Greater London Authority Act 2007 (c. 24)	In section 39— subsection (5); subsection (8)

PART 2

Revocations

<i>Instruments revoked</i>	<i>References</i>	<i>Extent of revocation</i>
The Rehabilitation of Offenders Act 1974 (Exceptions) (Amendment) (England and Wales) Order 2006	S.I. 2006/2143	Article 3(b)
The Money Laundering Regulations 2007	S.I. 2007/2157	In Schedule 6, paragraphs 14 and 15
The Public Contracts and Utilities Contracts (Amendment) Regulations 2007	S.I. 2007/3542	The whole Regulations
The Public Contracts and Utilities Contracts (CPV Code Amendments) Regulations 2008	S.I. 2008/2256	The whole Regulations
The Tribunals, Courts and Enforcement Act 2007 (Transitional and Consequential Provisions) Order 2008	S.I. 2008/2683	In Schedule 1, paragraph 307
The Public Contracts and Utilities Contracts (Postal Services Amendments) Regulations 2008	S.I. 2008/2848	The whole Regulations
The Transfer of Tribunal Functions (Lands Tribunal and Miscellaneous Amendments) Order 2009	S.I. 2009/1307	In Schedule 2, paragraph 107
The Rehabilitation of Offenders (Exceptions) (Amendment) Order (Northern Ireland) 2009	S.R. (NI) 2009 No 173	Articles 3 and 4
The Public Contracts (Amendment) Regulations 2009	S.I. 2009/2992	The whole Regulations
The Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010	S.I. 2010/976	In Schedule 19, paragraph 8

The Treaty of Lisbon (Changes in Terminology) Order 2011	S.I. 2011/1043	In Schedule 1, paragraphs 7 and 8
Bribery Act 2010 (Consequential Amendments) Order 2011	S.I. 2011/1441	In Schedule 1, paragraphs 2 and 3
The Public Procurement (Miscellaneous Amendments) Regulations 2011	S.I. 2011/2053	Regulations 2(1) and (2) and 12 to 25
The Local Policing Bodies (Consequential Amendments) Regulations 2011	S.I. 2011/3058	Regulation 21
The Budget Responsibility and National Audit Act 2011 (Consequential Amendments) Order 2012	S.I. 2012/725	Article 2(9)
The British Waterways Board (Transfer of Functions) Order 2012	S.I. 2012/1659	In Schedule 3, paragraph 34
The Civil Aviation Act 2012 (Regulation of Operators of Dominant Airports) (Consequential Amendments) Regulations 2013	S.I. 2013/610	In Schedule 1, paragraph 5

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations make miscellaneous amendments to Acts of Parliament and statutory instruments that are consequential on the coming into force of the Public Contracts Regulations 2015 (which transpose Directive 2014/24/EU of the European Parliament and of the Council on public procurement (OJ No L 94, 28.3.2014, p63)), the Utilities Contracts Regulations 2016 (which transpose Directive 2014/25/EU of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors (OJ No L 94, 28.3.2014, p243)) and the Concession Contracts Regulations 2016 (which transpose Directive 2014/23/EU of the European Parliament and of the Council on the award of concession contracts (OJ No L 94, 28.3.2104)). Schedule 3 to these Regulations contains consequential revocations and repeals.

These Regulations also make a corrective amendment to the Defence and Security Public Contracts Regulations 2011 and miscellaneous amendments to the Public Contracts Regulations 2015, including some corrective amendments and amendments to transpose Commission Implementing Regulation (EU) 2015/1986 establishing standard forms for the publication of notices in the field of public procurement (OJ No L 296, 12.11.2015, p1). This Commission Implementing Regulation sets out the required standard format for notices sent to the Publications Office of the European Union for publication in the Official Journal of the European Union.

A full impact assessment has not been produced for this instrument as no impact on the private or voluntary sectors is foreseen. An Explanatory Memorandum is available alongside the instrument at www.legislation.gov.uk.

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£6.00

UK201603156 03/2016 19585

<http://www.legislation.gov.uk/id/uksi/2016/275>

ISBN 978-0-11-114531-9



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