

SCHEDULE 2

Amendments to statutory instruments

PART 2

Other statutory instruments

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

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

“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.

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<i>Provision applied</i>	<i>Modification</i>
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.

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<i>Provision applied</i>	<i>Modification</i>
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,

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	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;

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- (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.

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(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.””