

*NATIONAL RIVERS  
AUTHORITY*

**COMPLIANCE WITH  
REGULATIONS  
CONCERNING**

**PUBLIC PROCUREMENT**

**PMMS**

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## 1. GUIDE TO THE NOTES

These Guidance Notes are specifically intended for contracts which are covered by procurement legislation and explain:

- which Regulations apply;
- the contracts subject to the Regulations;
- the procedures which must be followed;
- where help is available.

Although the main purpose of the notes is to provide an accessible guide to the Regulations, help is also provided on issues of general concern arising from procurement legislation. The notes use examples and flowcharts to aid comprehension but it should be remembered that the legislation sets out a framework and in many areas a judgement must be made about precise requirements.

In order to process a particular procurement you should use the fold-out flow charts provided at the end of each section.

In order to reduce the length of the document and avoid duplication, a full set of notes is issued for the Public Supplies Regulations and the Public Works and Public Services sections refer back to these where there is no difference. Where the Public Works or Services sections contain a full text this is because

there are differences from the Public Supplies Regulations.

A brief guide to the legislation has been issued separately but you will also find a management summary which indicates the main requirements at Section 4.

If you are in need of further help you should contact:

2.

### INTRODUCTION

The National Rivers Authority will be covered by three separate Regulations which deal with public sector procurement. At present only the Public Works Regulations are in force for NRA but the new Public Services Regulations come into force from 1st July 1993 and it is intended that the Public Sector Regulations will be extended soon to cover the NRA. The three Regulations contain marked differences from each other which affect the way individual contracts are dealt with.

The NRA are subject to different Regulations from the water companies which operate under the more flexible regime developed for the utilities. Many of the options available under the utilities legislation are not contained in the rules governing the NRA.

#### 2.1 *Regulations Affecting the NRA*

2.1.1. The Public Works Regulations.

2.1.2. The Public Supply Regulations will shortly be amended to include the NRA.

2.1.3 The EC Public Services Directive which will come into force in the UK from July 1993.

2.1.4. The EC Compliance Directive which is included in the Regulations for each type of contract.

2.2 *Regulations Not Affecting the NRA*

2.2.1. The GATT rules do not currently affect NRA and are unlikely to do so in the near future.

2.2.2. The Utilities Regulations which only affect companies supplying drinking water to the public.

2.3 *The European Community and EFTA*

The European Community contains the countries listed below under EEC. The Community has recently reached agreement with the countries of EFTA excluding Switzerland to form the European Economic Area in which the rights and obligations of the Single Market, including procurement legislation, will be extended to all 18 countries. At the time of writing the agreement has not been ratified but in the event of the EEA coming into force all mention of the Community in this document should be taken to include the 6 countries of EFTA.

EEC

Belgium  
Denmark  
France  
Germany  
Greece  
Ireland  
Italy  
Luxemburg  
Netherlands  
Portugal  
Spain  
United Kingdom

EFTA

Austria  
Finland  
Iceland  
Lichtenstein  
Norway  
Sweden

#### 2.4

##### *Principles*

The Regulations affecting the NRA are intended to ensure that suppliers and contractors from the European Community are treated fairly and objectively when seeking contracts in the public or utilities sectors. The Regulations bring into force in UK legislation requirements which have been agreed as Directives as part of the Single Market programme. For a list of directives and Regulations see Appendix H.

#### 2.5

##### *Suppliers From Outside the EC*

The Regulations only apply to members of the European Community and do not confer rights on suppliers, contractors or service providers (which will be grouped together as "suppliers" for the rest of this guide unless the legislation affects only one category in which case the appropriate term will be used.) from outside the Community, bearing in mind the provisions of 2.3

3.

### REMEDIES AVAILABLE TO SUPPLIERS

The Regulations are enforceable through one of the following means:

- \* direct action in the Courts by an aggrieved supplier. In England and Wales this would be the High Court.
- \* action by the UK Government in the Courts
- \* action by the European Commission in the European Court of Justice.

In general it is intended that most cases will be dealt with by suppliers directly challenging the actions of the purchaser. For these reasons the Regulations create new penalties for non-compliance which aim to encourage suppliers to take action where they feel that they have suffered loss due to infringements of the rules.

The penalties available to suppliers directly in the UK Courts are:

- injunctions preventing the award of contract or instructing the contracting authority to do, or refrain from doing, the act set out in the injunction. This could be a substantial cost where the Authority is prevented from proceeding with a major project. Costs may also be payable to other contractors stood idle whilst the

injunction is in force. If an injunction is granted it must be acted upon immediately and should be passed, without delay, to the persons indicated in Appendix A.

- setting aside of decisions made by the Authority. The Court may set aside or strike down any decision which has not been taken lawfully. An example might be a tender list drawn up in contravention of the rules.
- rectification of documents allowing the courts to remove discriminatory clauses or provisions. The Court may act to remove a discriminatory clause from a technical specification for example insisting on the use of a particular patented or brand named product.
- damages including the costs of tendering, which in many cases will be substantial and, in some circumstances, loss of profits. As the legislation does not limit the number of claimants it is possible to have to pay damages to more than one claimant.

Once a contract has been entered into, the Court will only have the power to order an award of damages. Suppliers must also register their complaint within



three months of the breach becoming known to them and must notify the NRA of their intention to start proceedings.

4.

#### A SUMMARY OF THE PRINCIPAL REQUIREMENTS

This section gives you a brief guide to the main requirements in the legislation and tells you which part of the guide you should refer to for more information. It should be used in conjunction with Chart 1.

The legislation is intended to prevent discrimination by making public purchasers follow a set of standard procedures when purchasing the goods and services they need. These procedures are based on three key principles:

- transparency
- objectivity
- non-discrimination.

Not all contracts are subject to the Regulations. There are general exclusions in certain cases, such as the preservation of state security, but these are limited and are unlikely to be available to the NRA. These general exclusions are contained in Appendix B. The most important exclusions exist for contracts which are below certain financial thresholds, these are:

- Supplies and services      £141,000 (200,000 ECU)
- Works                              £3.53 million (5 MECU)

The method of calculating the value of contracts is different under the Public Works Regulations from the

Public Supplies and Public Services Regulations. Because of the complexity of the requirements to aggregate the value of some contracts you should refer to Section 7 for supplies and services contracts and to Section 18 for works contracts.

#### 4.1

##### *Transparency*

The Regulations ensure that public purchasers behave openly by enforcing the use of notices at each stage of the procurement cycle.

The first of these notices sets out the broad requirements at the beginning of each year and is known as the prior information notice. It is currently only required for services and works contracts but will shortly be extended to cover supplies as well.

Specific requirements must be published as a call for competition which also indicates the type of award procedure to be used.

Once a contract has been awarded a contract award notice must be issued. The contract award notice includes information which is for publication and information which is available only to the Commission.

The criteria for the selection of tenderers and the assessment of tenders must be made available to suppliers.

The Commission or any other member State has the right to request any files concerning contract awards from the NRA although it must make the request through the Treasury.

#### 4.2 *Objectivity*

The Regulations lay down requirements intended to ensure that public purchasers make decisions based upon objective grounds.

The Regulations enforce the use of European specifications and national standards, where these exist, unless there are exceptional circumstances such as incompatibility with existing equipment.

The Regulations also enforce the use of objective criteria when deciding which award procedure to adopt, which tenderers to select and which criteria to use in assessment.

#### 4.3 *Non-discrimination*

The Regulations require that there is no discrimination between different suppliers or contractors from within the European Community but

these rights are not extended to suppliers from  
outside the Community.

5.

SUPPLIERS, CONTRACTORS AND SERVICE PROVIDERS

Suppliers, contractors and service providers are defined by the Regulations as being any person who sought or who seeks or who would have wished to be the person to whom a supply, works or service contract was awarded and is limited to a person who is a national of and established in a Member State of the Community. It would be quite reasonable to expect such a person to have the capacity, or have access to the capacity, at the time the NRA is seeking offers, to supply the goods or services being required under the contract.

The Regulations create no rights for persons who are not nationals of, or established in, the Community. Consequently such a person may not cite the Regulation in any application to the courts.

Although the Regulations refer to the "seeking of offers" in relation to a proposed supply contract, the Directive merely refers to the award of contract. Although it can be tempting to think that the Regulations would not apply to an offer made by a supplier without the Authority's encouragement, this is most unlikely to be accepted by the Courts and would not be a correct reading of the Directive.

6. DETERMINING WHICH REGULATIONS APPLY

This section explains which Regulations apply and tells you how to deal with contracts which includes items covered by more than one Regulation and where a decision needs to be made about which Regulations should apply. The text should be read in conjunction with Chart 2.

6.1 *Contracts Covered by the Public Supplies Regulations*

Supply contracts are contracts in writing for goods which are defined in the Regulations as being things separable from the land and can be substances, products or crops. In general goods must be transportable and tangible. A supply contract can include the procurement of goods by means of purchase, hire, lease or hire-purchase. The hire of a bulldozer with an operator would be a services contract whilst the hire of a crane without an operator would be regarded as a supply contract.

The definition of a supplies contract may also cover any siting and installation operations. Where the main purpose of the contract is the supply of goods, siting and installation costs should be treated as supply also although these may be the major part of the expenditure.

6.2 *Contracts Covered by the Public Works Regulations*

Works contracts only include items listed in Schedule 1 of the Public Works Regulations. This list is reproduced at Appendix C. Works items are purely related to building and civil engineering and the intention is that this should generally be limited to the new construction or major refurbishment of buildings. Consequently although such items as tiling and electrical fitting are listed under the works definition, this is intended to apply when these services are carried out as part of "Building completion work". When such works are carried out as part of the completion of a new building these items can thus be added into the works elements. However, when a person is hired to rewire an existing building this should be classified as a services contract.

A number of works contracts may be necessary for the completion of a work, which is defined as being the achievement of an economic function. For details of how to assess a project with several different contracts you should see the section below dealing with projects.

### 6.3

#### *Contracts Covered by the Public Services Directive*

Services are classified as any contract that is not exempt, classified as works contract, or as a supply contract. Services therefore contains a very large number of different areas. Land and immovable property



are specifically excluded from the scope of the legislation as are contracts of employment.

#### 6.4 *Mixed Contracts*

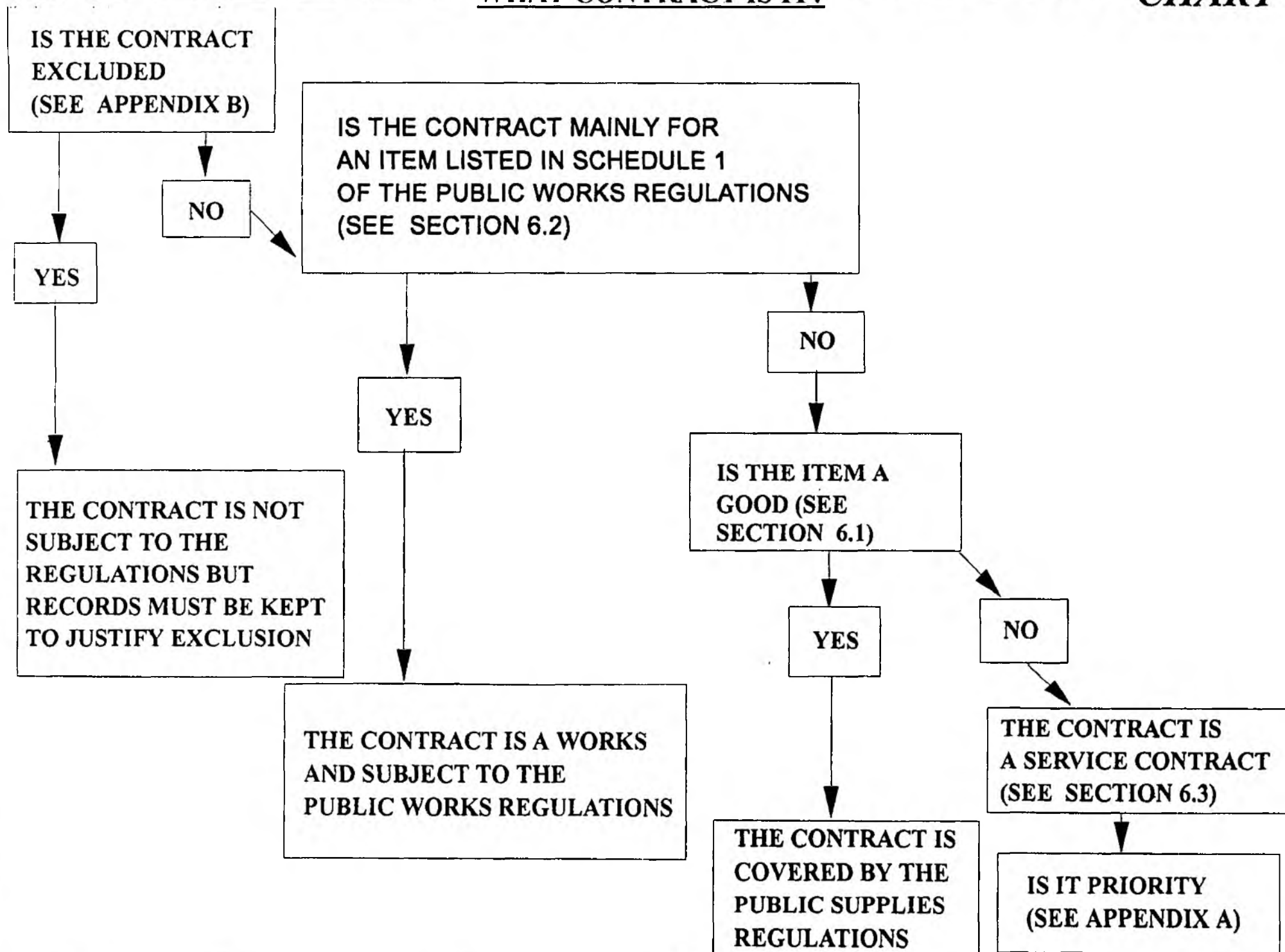
Certain contracts will contain elements of two or three types of contracts. An examples of such a supply/service contract would be the purchase of a new bulldozer including a long term maintenance agreement. The building of a new pumping station would be an example of a contract with works and supplies elements.

##### 6.4.1 *Contracts for Supplies and Services*

Where an individual contract contains elements of supply and services requirements then the nature of the contract should be determined by assessing the part which will have the greater value. Prior to services legislation coming into force, the NRA should not artificially add supplies into services contracts with the intention of avoiding the application of the Regulations.

##### 6.4.2 *Contracts for Supplies or Services and Works*

Where the authority has to decide whether to apply the supplies, services or the works threshold to a single contract containing elements of all three, they should decide which is the largest proportion of the value of



the contract. If the contract is largely works then they may apply the works threshold.

7. PUBLIC SUPPLIES REGULATIONS

The Public Supply Regulations (S.I. 1991/2679) lay down rules for all contracts for goods. You should refer to Section 6 to determine which contracts are classified as supplies. Not all contracts are covered, some contracts are exempt because they fall below the financial thresholds.

7.1 *The Thresholds*

The threshold level for supply contracts, excluding V.A.T., is:

ECU200,000	£141,000
------------	----------

The value of the thresholds is fixed in European Currency Units (ECU) and the exchange rate is published every two years and applies for the following two years. The revisions take place on 1st January of each even year (i.e. 1st January 1994). The UK Regulations refer to the consideration payable under any contract.

7.2 *Consideration*

The Regulations allow for the total value of contracts to be assessed without regard as to how payment is to be made. Therefore where the NRA gives services or goods in kind in return for supplies, services or works they must estimate the value of these items and include them in the total figure against which the thresholds are assessed.

### 7.3 *Determining Which Contracts Exceed the Thresholds.*

There are three types of test which must be applied when determining if the contract exceeds the threshold:

- does the value of the contract to be awarded exceed the thresholds;
- is the contract one of a number of lots being awarded at the same time to meet a need. If so does the total value of the lots exceed the threshold;
- is the contract one of a series to meet a recurrent demand.

#### 7.3.1 Individual Contracts

Contracts which are individually above the threshold will be subject to the rules.

#### Indefinite Contracts

Where a rental or other contract is of an indeterminate nature or has no fixed timescale then the value of the contract must be assessed based on the value of the consideration which the NRA expects to give in the first four years of the contract.

### 7.3.2 Contracts Awarded in Lots

Where an individual requirement is met by a number of separate contracts which are awarded at the same time, perhaps because of the need to ensure security of supply, then the total value of all the lots needs to be taken into consideration when assessing whether the thresholds have been exceeded.

### 7.3.3 Contracts to Meet a Recurrent Need

Where we place more than one contract throughout a year to meet a recurrent need, we are required to aggregate the total value of all the contracts to determine if the threshold is exceeded. If it is, then all of the contracts will be covered. However, it is difficult to determine if a number of contracts are for a recurrent need and we will therefore need to apply the following rules when deciding:

- when we shall review our forthcoming demand for the year;
- which contracts are of "the same type"
- whether the contracts are part of a series;
- the duration of the anticipated contracts
- whether the contracts will have options.
- the expected value of variations

In cases of doubt it should be remembered that the purpose of the so-called "aggregation" clause is to prevent the artificial breaking down of contracts to avoid the application of the rules. The intention is

not to cause the artificial aggregation of dissimilar contracts.

#### 7.3.3.1 When the Contracts should be Reviewed

The NRA must make a decision annually as to whether a particular contract or series of contracts is likely to exceed the thresholds. This decision can be taken at a fixed point in time, such as the financial year end, or at the time when a contract is coming up for renewal.

It must make this decision based on the best information it has available at the time. The Regulations permit the authority to either look forward over the following 12 months and predict the value of contracts envisaged or look back over the previous 12 months taking into consideration any anticipated changes in price or volume of demand. These estimates should be carried out for the last financial year or for the 12 months ending directly before the time when the Authority makes the decision.

Once the Authority has taken this decision for the year it should regard any contracts it places as either covered or not covered. The NRA should not need to revise the decision every time a new contract is awarded unless the volume of demand changes substantially.

#### 7.3.3.2 Determining the Type

When assessing whether a contract is of the same type two aspects should be examined; the physical nature of the product or service and the nature of the contract itself. Whilst the type is to be determined by the NRA, some ground rules must be followed which imply a commitment to make reasonable judgements of items which could have been awarded together. It is important to remember that the contract must have similar characteristics and not just the product.

Contracts will be of the same type if they are for items which:

- could have been placed on a single contract and
- are available from the same or similar suppliers and
- demonstrate technically similar characteristics

The Authority must decide which items are of the same type based on their normal commercial practices. For example, some industries may classify pipe as a single commodity or type. Others may seek to classify it under several separate headings however it is important to note that the breaking down of commodities into several types should not be regarded as a means of avoiding the legislation and should only be done for sound commercial or technical reasons.





The NRA should take into consideration the total value of contracts of the same type being awarded during the annual period and not the annual value. Hence a three year contract will need to be assessed based on its total value and may need to be aggregated with other contracts awarded during the same year.

#### 7.3.3.5 Contracts with Options

The NRA may award contracts with options which either extend the life of the contract, allow for additional supplies or provide for alternatives under the contract. In these cases when assessing the total value of the contract against the threshold the total value of all possible options must be taken into account notwithstanding whether or not the options are actually taken up. Clearly only options which are envisaged at the time the contract is awarded can be included. Any option not envisaged at the time of first award, if it were subject to the rules, would normally need to be the subject of a separate call for competition.

Where a contract offers a number of alternatives which are mutually exclusive, you should assess the value based upon the highest cost option.

#### 7.3.3.6 Contingencies

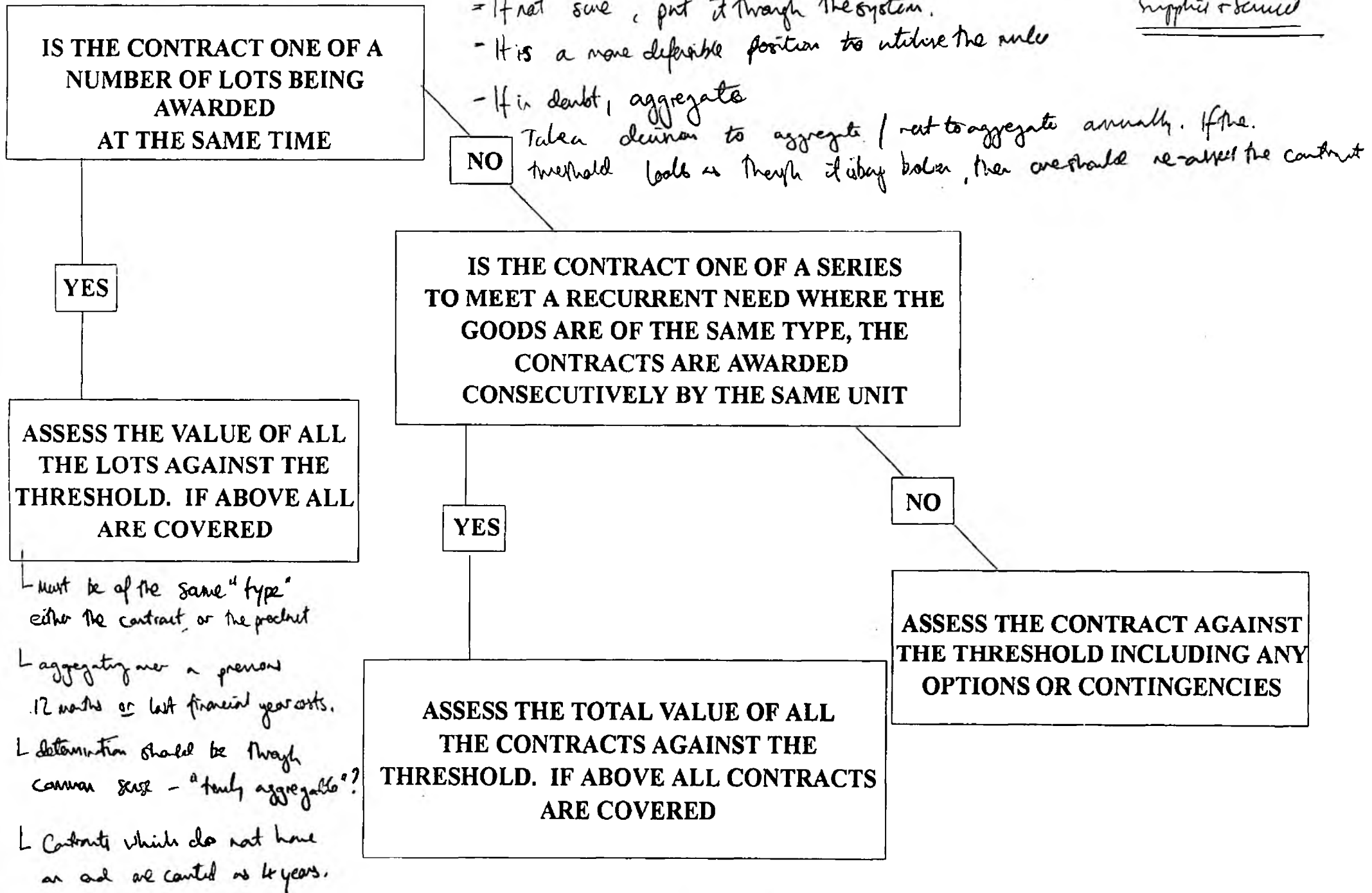
# ASSESSING WHETHER THE REGULATIONS APPLY

## CHART 2

Supplies + Services

- If not sure, put it through the system.
- It is a more defensible position to utilise the rule
- If in doubt, aggregate

Take a decision to aggregate / not to aggregate annually. If the threshold looks as though it may be broken, then one should re-assess the contract



When the NRA puts an amount aside to cover contingencies on a contract it may choose whether to include this figure within the aggregated total. This decision should be based on the NRA's reasonable expectation of likely expenditure. If experience shows that the contingency is an accurate pre-estimate of the extra costs which were not fully predicted at the start of the contract then this amount should be added to the total figure for the purpose of deciding if the contract is subject to the Regulations. If the figure is rarely used and is mainly for exceptional circumstances or emergencies then the NRA are justified in not including it when assessing the value of the contract in relation to the threshold.

#### 7.3.3.7 Variations

The NRA will need to act with some discretion when varying contracts. There are three types of variation which may occur:

- minor variations individually below the thresholds set out in the Regulations which keep the scheme within the financial limits decided by the NRA. In general these would not need to be placed under the rules.
- major variations which are individually above the thresholds but change the scope of the original project little. In general the NRA should award

such variations through the rules unless such variations can be awarded using the negotiated procedure without a call for competition as set out in 10.5.4 below;

- major variations which are above the thresholds and substantially different in scope from the project initially advertised in the Official Journal so that new suppliers may be interested in tendering for the work. In these cases the authority will need to go out to competition unless it has very sound reasons for using the negotiated procedure as set out in 10.5.4 below.

#### 7.3.3.8 Discrete Operational Units

The Public Supplies Regulations allow for procurement to be carried out in autonomous parts of the organisation without requiring these parts to aggregate their total spend to see if the rules apply.

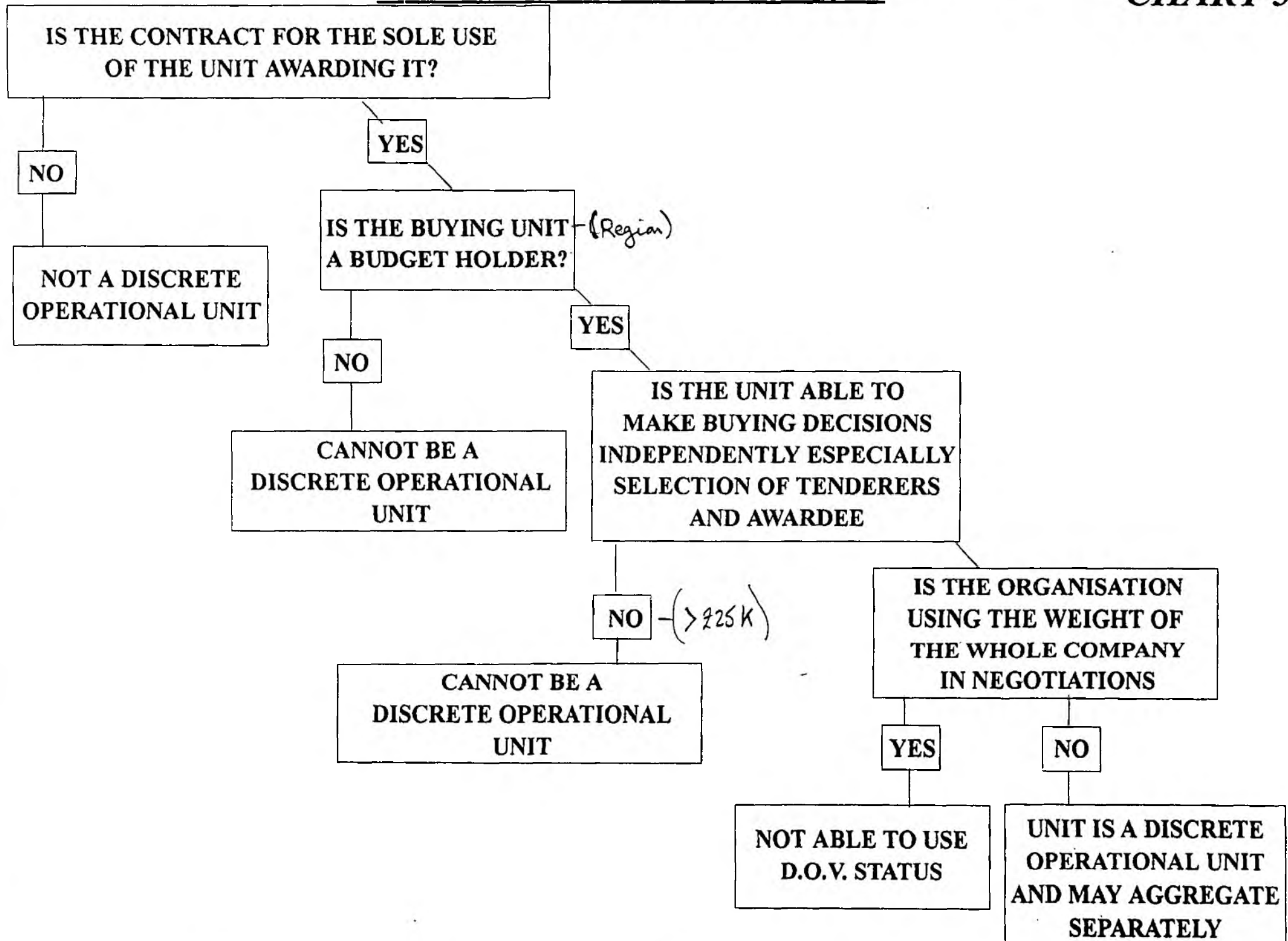
The Regulations lay down a number of tests as to what is an autonomous unit within the organisation of the authority:

- the unit must have some degree of independence when exercising buying decisions without approval from another part of the organisation. This may

be indicated by a degree of budgetary independence.

- there must be a genuine devolution of procurement authority to such a unit which must be able to choose its own tenderers and to decide on the organisation which is to be awarded the contract.
- the goods or services being purchased must be for the sole use of the discrete operational unit.

Additionally the Commission believe that the organisation must be able to demonstrate that it will not use the commercial weight of the whole when negotiating with suppliers or contractors. The Treasury have previously indicated that they do not agree with this view.



8. OTHER PROCUREMENT METHODS

8.1 Framework Agreements

The public sector legislation makes no specific reference to framework agreements which, in the legislation relating to the utilities, have been defined as "a contract or other arrangement which is not in itself a supply.., works [or services]<sup>3</sup> contract but which establishes the terms (in particular the terms as to price and, where appropriate, quantity) under which the supplier, contractor or service provider will enter into supply, works or services contracts with a utility in the period during which the framework agreement applies".

The NRA currently operate many framework agreements which would normally require an individual call for competition for each call off. However, the NRA can use framework agreements under one of the two following circumstances:

- \* The initial contract notice advertises the call offs to be made against the framework and not the framework itself, although it can say that the contracts will be placed against one supplier for all contracts

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<sup>3</sup> The services legislation for the utilities has not yet been issued and the amendment to include services is assumed to be the final form.



- \* The agreement is binding and does not merely establish the terms under which future contracts will be awarded. In this case the agreement would need to contain break clauses which allow the amounts to be drawn off the contract to be varied.

## 8.2 *Using Price Lists*

Purchasing against various price lists or discount arrangements will also fall within the scope of the rules. Where the NRA asks a number of vendors to submit prices and then draws from these at will, the following procedure should be followed where the total value of contracts to be awarded exceeds the relevant threshold:

- the choice of which price lists are available to purchasers should be made in the same way as a contract to be awarded through the rules including following the rules of the Regulations;
- call offs against the price lists should be made on the basis of the most economically advantageous offer for the particular circumstance in mind.

## 9. Technical Specifications

### 9.1 *General Requirements*

The Regulations require the NRA to obey certain rules when laying down technical specifications during the process of seeking offers. In general the rules may modify the way the NRA behave but are not intended to take away the right of the organisation to procure the goods and services necessary for the effective running of its operations.

The rules have been drawn up to allow organisations some flexibility when choosing the specifications they are to use and to allow them to exempt themselves from the rules where they are clear and demonstrable reasons for doing so. However the Regulations lay down requirements to use non-discriminatory means of specifying their requirements which do not favour or eliminate certain suppliers. The Regulations confirm the earlier rulings of the European Court of Justice in cases concerning the discriminatory use of standards.

## 9.2

### *Availability of Specifications*

Technical specifications required must be set down in the contract documents. Where the specifications are generally available a reference to the documents is sufficient although we should, wherever possible provide the names and addresses from where the documents may be obtained. A list of useful addresses is attached at Appendix E.

*European Specifications*

The NRA must use European specifications as a reference where they exist. A European specification is one of three things:

- a British standard incorporating a European standard;
- a common technical specification such as items covered by the Electromagnetic Compatibility Directive;
- a European technical approval which is defined in the legislation as items covered by the Construction Products Directive

A standard must be made by an appropriate standardization body which, within Europe, is a member of CEN, CENELEC or of ETSI. Some standards may be developed outside the Community but may be widely used within the EC and these shall be regarded as standards in common use in the Community. Some of the standards developed by the organisations such as the American Petroleum Institute are in common use in the Community and may be regarded as standards in common use. However, such standards are only permissible where they are standards within the meaning of the legislation<sup>4</sup> made by a recognised standardising body.

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<sup>4</sup> Not all of the bodies which create standards are officially sanctioned to do so. For example, references are often made to water industry standards (WSi) but this is not a standardising body within the meaning of the Regulations.

To meet these requirements the NRA should ensure that it has current information about the development of new European specifications which are notified through the British Standards Institute.

#### 9.4 *Use of Other Standards*

Where there is no relevant European specification the technical standards should be defined by reference to the following standards in order indicated:

- a British standard implementing an International standard;
- other British standards;
- any other standard.

Where the NRA quotes a national standard it must be prepared to accept other equivalent standards where these comply with national legislative requirements which are consistent with Community law. The specification should quote the national standard followed by the words "or equivalent". Under the mutual recognition of standards an authority must be prepared to accept other national standards as equivalent unless it has objective reasons for showing that they are not fit for the purpose intended.

#### 9.5 *Discriminatory Provisions*

The NRA may not in a technical specification refer to goods of a specific make or source or to a particular

process nor should they refer to trademarks, patents, types or specific origin or production where to do so would eliminate or favour certain suppliers or contractors. However these references may be incorporated where they are indispensable or where the subject of the contract cannot accurately be described by references which are sufficiently precise and fully intelligible to all concerned but subject to the words "or equivalent" being inserted after the reference<sup>5</sup>.

Particularly care should be taken to avoid using a specification which lays down technical details drawn from equipment already in use. Where possible performance specifications should be employed in preference to detailed technical specifications.

#### 9.6 *Exemptions from the Use of European Specifications*

The use of exemptions from the requirement to use European specifications is carefully constrained to avoid these exemptions being abused. Exemptions from the use of European specifications are available to the NRA in the following instances:

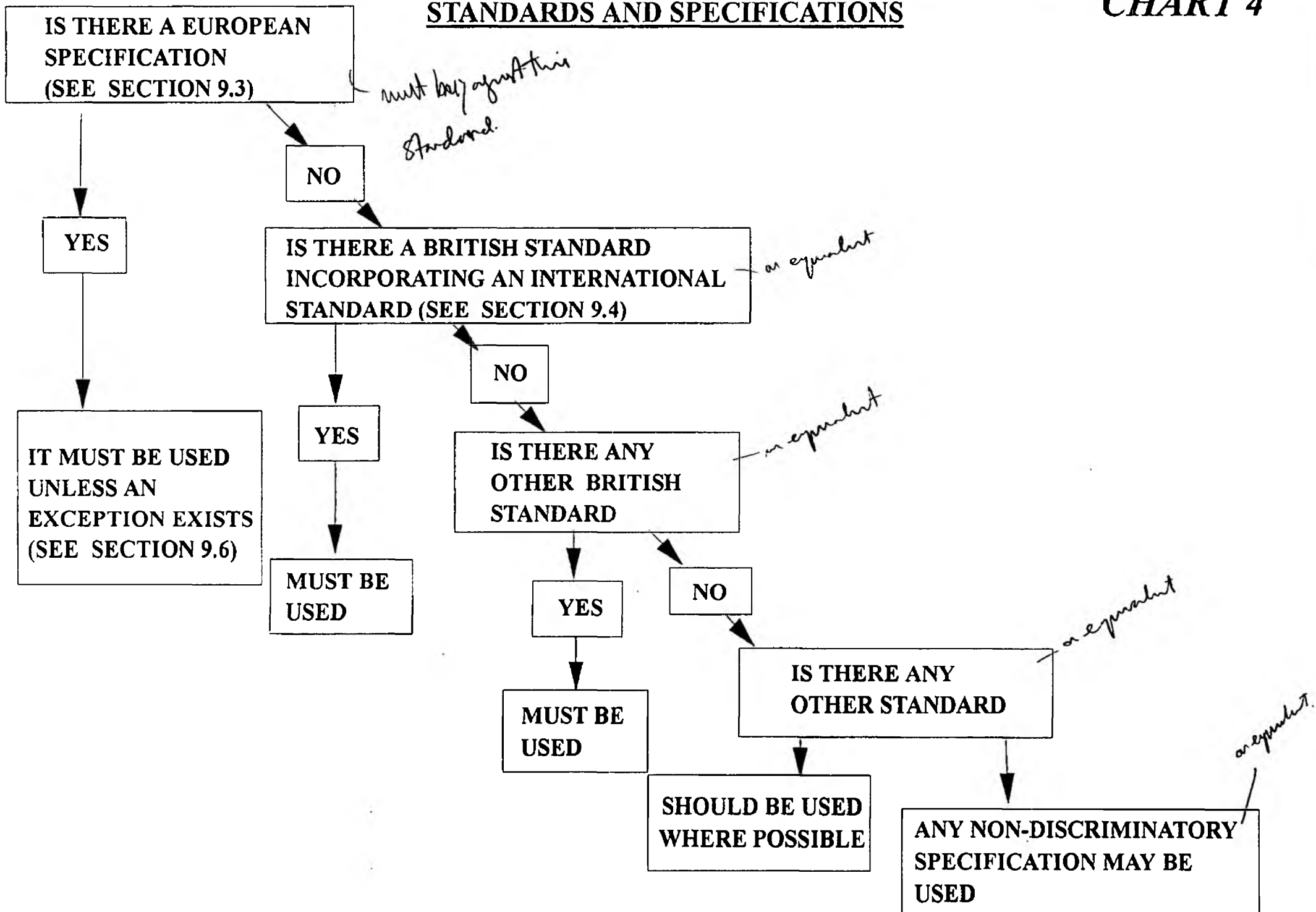
- where there is a mandatory requirement in the UK defining the materials, works or services which must be utilised providing

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<sup>5</sup> Organisations which may be considered "emanations of the state" should carefully consider the implications of the Dundalk Case (European Court of Justice Case 45/87) which stated that equivalent standards must be considered.

## STANDARDS AND SPECIFICATIONS

## *CHART 4*



such requirements are compatible with Community law;

- the European specification does not provide for establishing conformity or such conformity is technically impossible to establish;
- The use of a European specification would lead to the NRA acquiring goods or services incompatible with equipment already in use which would result in disproportionate cost or technical difficulty. This exemption is only available where the NRA has a laid down policy for changing over to the use of European specifications within a set period. The NRA should be particularly careful that if it wishes to use this exemption it has pre-defined what it means by "disproportionate".
- Where the work is of a truly innovative nature for which the European specification would not be appropriate.

Where the NRA uses any of these exemptions it must:

- state in the contract notice the circumstances which were the grounds for the exemption;
- where it is not possible to include the references within the contract notice then

- it must be included in the contract documents;
- in either case the NRA must record the circumstances for the decision and, if requested, shall forward this to the Treasury for onward transmission to the Commission or to the other member States.

10. CHOICE OF AWARD PROCEDURES

10.1 *General*

When awarding contracts the NRA must use the open, restricted or negotiated procedure and must select the procedure to use in accordance with the rules set out below. The Regulations lay down how authorities shall determine which of these procedures to employ.

10.2 *Open Procedure*

Under the open procedure, the Authority places a notice in the Official Journal of the Communities. The notice may contain minimum requirements for taking part in the tendering process. Provided these minimum criteria are met, the Authority must then send a tender to all those who request it. The Authority may reject a tender for the reasons set out below.

10.3 *Restricted Procedure*

Under the restricted procedure, the Authority places a notice in the Official Journal. The notice may



contain minimum requirements for taking part in the tendering process. From amongst those who meet these criteria the Authority can then select a number of tenderers justified by the size of the potential contract and the resources required to carry out the tendering process.

#### 10.4 *Negotiated Procedure*

Under the negotiated procedure, the Authority places a notice in the Official Journal. The notice may contain minimum requirements for taking part in negotiations. The Authority can then select those it wishes to negotiate with from amongst the applicants. The process may include a tender.

#### 10.5 *Which Procedure to Use*

##### 10.5.1 *General*

The Authority must use the open procedure for all supply contracts subject to the rules unless the circumstances indicated below apply.

Where the restricted or negotiated procedures are used, a notice must be prepared justifying the use of the procedure to be employed and indicating:

- (a) the name and address of the Authority;
- (b) the value, quantity and type of the goods to be purchased;

- (c) the number of persons who asked to be selected to tender or to negotiate the contract;
- (d) the number of persons selected to tender or to negotiate the contract;
- (e) the number of persons, if any, who, having sought to be selected to tender or to negotiate, were not so selected and the reasons for not selecting them;
- (f) where the negotiated procedure is used, which of the grounds set out in 10.5.3 or 10.5.4 below constituted the grounds for the use of that procedure.

The report is not sent automatically but must be sent to the Treasury at their request for onward transmission to the Commission.

#### 10.5.2 Use of the Restricted Procedure

Under the Public Supplies Regulations use of the restricted procedure is confined to cases where:

- the cost of using the open procedure would be disproportionate to the value of the goods to be purchased. Where the contract is large enough to be covered by the Regulations it may be difficult to explain continual use of the restricted procedure due to disproportionate cost;
- when the nature of the goods or services demands the use of the restricted procedure. An example of such a case might be where there were known to

Outlet

be a potentially vast number of potential suppliers who could make the use of the open procedure unworkable.

#### 10.5.3 Use of the Negotiated Procedure With a Prior Call

The NRA may use the negotiated procedure in the following cases with a prior call for competition:

1. Where a previous call for competition was discontinued due to irregular tenders, when tenderers failed to meet the minimum financial or technical criteria for being considered or when the tenderer offered variants which were not acceptable under the terms of the Invitation to Tender. Irregular tenders are tenders which do not comply with the technical specification set out by the NRA or where the supplier submits an unacceptable variant offer. Where all of the tenderers who meet the minimum criteria are to be invited again there is no requirement to place a further call for competition.

#### 10.5.4 Use of Negotiated Procedure Without a Prior Call

The negotiated procedure may be used without a prior call for competition in the following circumstances:

- (a) Where there are no tenders following an earlier call for competition and the proposed terms of the contract are substantially unaltered from the terms offered when offers were sought under the open or restricted procedures. Where this clause is used a report must be sent to Treasury for onward transmission to the Commission.
- (b) When the contract is purely for research, experiment or development but not where the supplies are to be purchased or hired to establish their commercial viability nor to recover the research and development costs.
- (c) Where for technical or artistic reasons or for reasons connected with the protection of exclusive rights, the contract may only be executed by only one supplier. In this case the burden of proof would lie upon the NRA to show that only one supplier was able to satisfactorily supply the goods required. STA
- (d) When it is strictly necessary for reasons of extreme urgency to acquire goods within the time limits set out in the Regulations. This exemption from making a call for competition may only be used where the reasons for its use were Emergency

unforeseeable to the Authority. A failure to plan would not be considered an unforeseeable reason.

- (e) Where the contract to be awarded is a supply contract and the goods to be purchased or hired under the contract are required by the authority as a partial replacement for, or addition to, existing goods or an installation when to obtain the goods from a person other than the person who supplied the existing goods or the installations would oblige the authority to acquire goods having different technical characteristics which would result in either:

- incompatibility between the existing goods or installations and the goods to be purchased or hired under the contract, or
- disproportionate technical difficulties in operation and maintenance of the goods or installations;

In the case of this exemption the NRA must have evidence to show that it had reasonably pre-estimated the costs involved in using new equipment to replace that supplied by the original equipment manufacturer. In doing so the Authority may include such items as training costs, the provision of manuals for the new equipment, any time when the machinery is shut down to allow reverse engineering and the costs of any warranties being supplied by the original

equipment manufacturer which would be invalidated by the use of other manufacturers' equipment.

11. ANNUAL NOTICE OF EXPECTED CONTRACTS

Although there is currently no requirement to place such a notice for supply contracts, the notice is required for service contracts and it is certain that the new draft of the Supplies legislation will contain a requirement. It is likely that the Authority will be required to place a notice each year indicating the total value, in each product area, of the goods it is intending to procure over the next 12 months.

12. PUBLISHING A CALL FOR COMPETITION

Calls for competition are made by means of one of the notices listed in Appendix F.

Whilst the notice cannot cover a diverse spread of different contracts the legislation does not prevent the Authority placing one notice covering more than one contract. However, if the Authority does wish a notice to cover more than one contract it should clearly indicate so in the notice.

Notices should be sent by the most appropriate means to the Official Journal at the address below:

Office of Official Publications of the EC

2 Rue Mercier 2985

Luxembourg

Fax: 010 49 00 03

The notice must not contain more than 650 words. The Commission are likely to enforce the use of standard notices which have already been issued upon the public sector in an attempt to reduce delays and reduce translation costs. Examples of completed notices are reproduced at Appendix F.

A record must be kept of all despatches to the Official Journal.

No information may be published before the date of despatch to the Official Journal and no other information may be published but the information sent to the Journal. Similarly no information should be made available to some suppliers that is not made available to others.

13. SELECTION OF TENDERERS OR PARTICIPANTS

The Public Supply Regulations do not contain rules on the numbers of tenderers to be selected. (5-20)  
The Regulations require that the selection should not discriminate between suppliers from different member states.

The criteria for selection should be based on criteria for rejection (ethical conduct) financial and economic standing, technical capacity and supplementary information.

13.1

*Criteria for Rejection of Tenderers*

The Authority may refuse to consider a tender from a supplier or may refuse to put them on a tender list for the following reasons:

- (a) bankruptcy as defined by the Regulation;
- (b) is being wound-up by a Court;
- (c) has been convicted of a criminal offence in relation to the conduct of his business;
- (d) has committed an act of grave misconduct in the conduct of his business or profession;
- (e) has not fulfilled his obligations relating to the payment of tax or social security contributions in any Member State;
- (f) is guilty of serious misrepresentation in supplying information required of him under the regulations;
- (g) where applicable, he is not registered on the professional or trade register of the member State.

When assessing whether suppliers meet the criteria set out in (a), (b) or (c), the Authority must be prepared to accept either an extract from the judicial record

Companies which  
no longer have  
interest in assets  
is mostly companies.  
H. G. S. / webh...  
H. G. S. / webh...



or, where not available, a document issued by the relevant judicial or administrative authority or, when neither of these things are available, a declaration on oath or a solemn declaration made before the competent authorities or before a notary public or a commissioner for oaths. The declaration must be accompanied by a certificate attesting the authenticity of the declaration.

In the case of (e) above, the Authority must accept a certificate issued by the relevant competent authority.

The regulation lists the appropriate trade or professional registers and these are reproduced at Appendix G.

#### 13.2 *Economic and Financial Standing*

When assessing whether a supplier meets the economic and financial criteria demanded the Authority shall only take into account the following information:

- (a) appropriate statements from the suppliers bankers;
- (b) statements of accounts or extracts from the statements of accounts relating to the business of the supplier;
- (c) a statement of the overall turnover of the business of the supplier and the turnover in

respect of goods of a similar type to the goods to be purchased in the three previous financial years of the supplier.

Where this information is not appropriate, the supplier may be required to provide other information to demonstrate their economic and financial standing. Any information to be requested of suppliers must be indicated in the contract notice or in the Invitation to Tender.

Where a supplier has valid reasons for being unable to provide the information which the Authority requires, such as merger preventing the production of three years accounts, the Authority must accept such other information provided as the Authority finds satisfactory such as suitable bankers references or an auditors statement.

### 13.3 *Technical Capacity*

When assessing whether a supplier meets the technical criteria demanded the Authority shall only take into account the following information:

- (a) a list of deliveries of goods of a similar type during the last three years, specifying in each case the date of delivery, the consideration received and the identity of the purchaser accompanied by a certificate issued or countersigned by the purchaser confirming details

*Previous  
expected*

of the sale except when the purchaser was not an organisation covered by the regulations when the supplier may attest the details of the purchase;

*facilities*

(b) a description of a suppliers technical facilities, measures for ensuring quality and study and research facilities appropriate to the goods required;

*QA/QC*

(c) an indication of the technicians or technical bodies who would be involved with the production of the goods to be purchased with particular emphasis on quality control whether independent or not;

*BS 5750 / NAMAR*

*Product*

(d) samples, descriptions and photographs of the goods to be purchased with certification of the authenticity of these items;

*BS 5750  
NAMAR*

(e) certification by official quality control institutes or agencies of recognised competence attesting that the goods to be purchased or hired conform to the standards and technical specifications identified by the Authority;

*used independent  
Certification  
(cf. local  
Dunkle)*

(f) where the goods to be purchased are complex or are required for a special purpose, a check, carried out by the NRA or by a competent official

body on its behalf on the production capacity of the supplier and of the suppliers' study and research facilities and quality control measures.

The Authority must indicate the information required in the contract notice. The Authority may require supplementary information to that indicated above concerning the criteria for rejection, economic and financial standing and technical capacity of suppliers or to clarify such information provided it relates to the matters specified in the items above.

*Selection.  
The content must be  
available if not published.*

13.4 **Confidentiality**

The supplier may reasonably impose a requirement on the Authority to keep confidential information it makes available.

14. **TENDERING PROCEDURES AND TIMESCALES**

The legislation lays down minimum timescales for certain stages of the awarding of contracts in order to give all suppliers equal chance. These rules vary according to the award procedure selected.

The Authority must send a notice to the Official Journal indicating that it intends to award a contract as soon as possible after forming that intention.

14.1 **Open Procedure**

The last date for receipt of tenders shall be fixed at not less than 52 days from the date of despatch of the notice to the Official Journal and that date must be indicated in the notice. If it is necessary for tenderers to be given an opportunity to inspect the site or documents relating to the contract documents then the minimum period must be extended to allow such inspection.

The Authority must send the contract documents within four working days of the receipt of a request provided:

- the documents are requested by the date specified in the notice and
- any fee specified in the notice has accompanied the request

Additional information which may be reasonably requested by the supplier must be provided so that the Authority has sufficient time to supply the information no later than 6 days before the date specified in the notice as the final date for the return of tenders.

#### 14.2

##### Restricted Procedure

Under normal circumstances, the Authority must allow a minimum of 37 days from the date of despatch of the

notice to the Official Journal for suppliers to request selection onto the tender list.

Under normal circumstances, the Authority must allow a minimum of 40 days from the time it sends out the Invitation to Tender for the return of completed tenders. Where it is necessary for the suppliers to be given an opportunity to inspect the site or documents relating to the contract documents then the minimum period must be extended to allow such inspection.

Additional information which may be reasonably requested by the supplier must be provided so that the Authority has sufficient time to supply the information no later than 6 days before the date specified in the notice as the final date for the return of tenders.

Where the time limits indicated above cannot be met for reasons of urgency, the Authority may substitute the following time limits:

For receipt of request to be selected	15 days
From I.T.T. to tender return date	10 days
For additional information	4 days

In these cases the Authority must send the I.T.T. by the most rapid means available. In most cases this would be by fax.

The invitation to tender shall be sent by letter, telegram, telex, fax or telephone but in the last four cases it must be confirmed by letter. The letter of invitation must be sent simultaneously to all suppliers selected to tender with the contract documents.

The Authority cannot refuse to consider an application to be selected to tender made by any means provided it is confirmed by letter without delay.

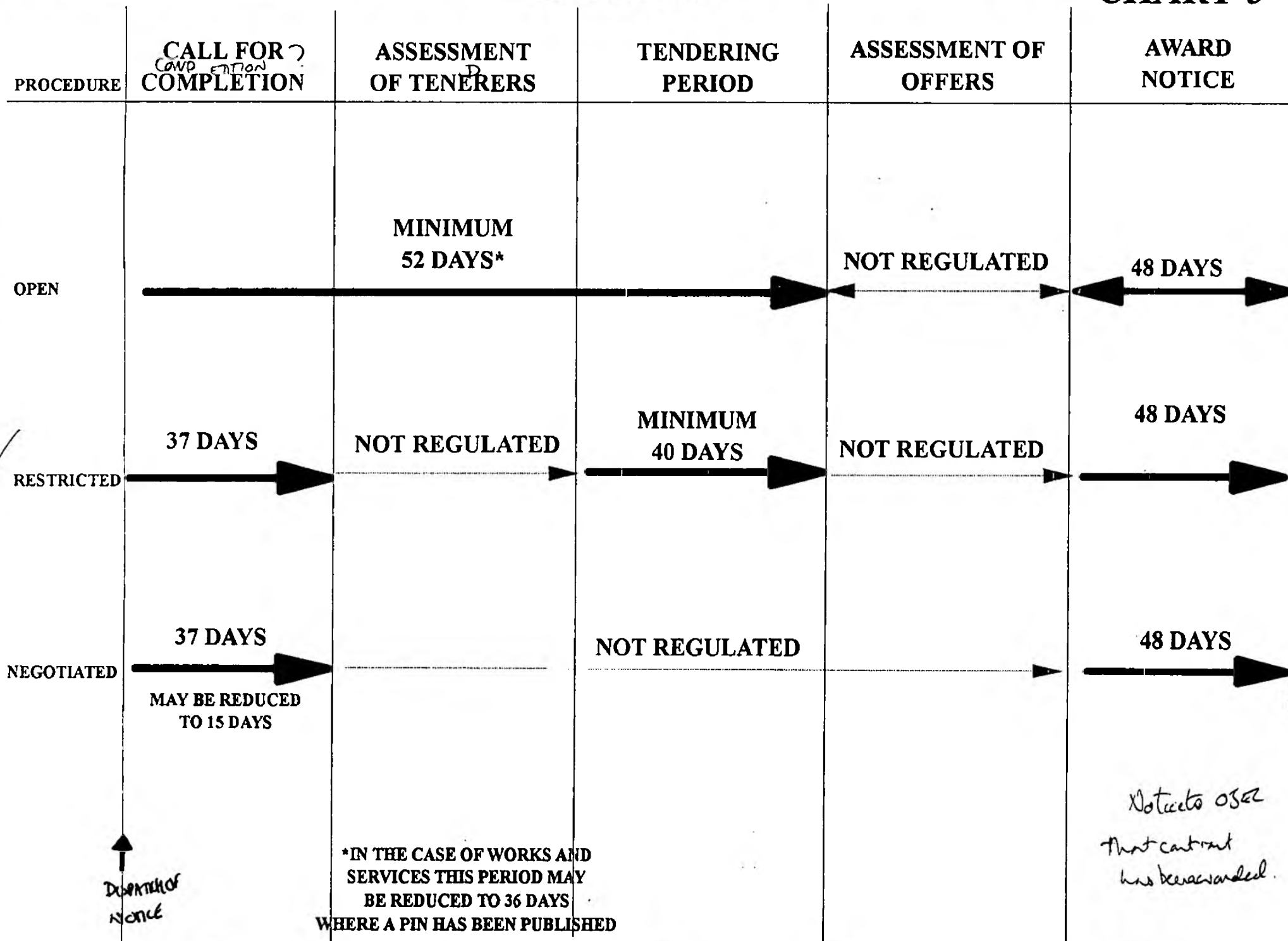
14.3      **Negotiated Procedure**

Under normal circumstances, the Authority must allow a minimum of 37 days from the date of despatch of the notice to the Official Journal for suppliers to request participation in the negotiations.

Where this time limit is not practicable, the Authority may reduce it to a minimum of 15 days in which case the Authority must send the invitations to negotiate by the most rapid means available; in most cases this would be by fax.

The Authority cannot refuse to consider an application to be selected to participate made by any means provided it is confirmed by letter without delay.

15.      **AWARD OF CONTRACT**





*Assessing Offers*

The legislation allows two means of assessing offers:

- the lowest price
- the most economically advantageous offer.

Where the NRA uses the most economically advantageous offer it must state all of the criteria which it intends to use in assessing offers in the contract documents or in the call for competition published in the Official Journal. Where possible these should be placed in descending order of importance. Where the distinction between the criteria is narrow, it may be advisable to group the criteria into different bands reflecting their importance in the assessment process.

The assessment of the most economically advantageous offer may be based on any objective criteria which the NRA may wish to lay down. Examples of such criteria include the financial and economic standing of the company and their technical capacity to carry out the work.

The method by which tenders are to be assessed is left to the discretion of the authority but it is likely that NRA will need to justify decisions taken at the time the procurement decision is made. These records must be kept for a minimum of four years.

In assessing offers the Authority does not need to apply a rigid or mechanistic formula but can use properly justified judgements that reflect expert opinion in the within the organisation provided it is objective and reasonable with supporting documentation.

15.2 *Two-Envelope System*

Advice has been sought on the use of the two-envelope system of tendering. This system is believed by the Commission and the UK Treasury to be unlawful within the terms set out in the legislation and should not be used. OH!

15.3 *Variant Offers*

There is no provision dealing with variant offers in the Public Supplies Regulations but the NRA can assume that they are allowable provided it obeys the rules under the Public Works Regulations and Public Services Directive and provided it does not discriminate in deciding whether to accept or reject variants.

15.4 *Abnormally Low Offers*

Where an offer, or part of an offer, appears abnormally low it may be rejected but only after asking the supplier or contractor for an explanation as to the reasons for the low offer. The NRA may ask for a response to this request within a reasonable

time. Where the NRA bases the award on the lowest price it must take into consideration any explanations offered before awarding the contract. If it awards the contract on the basis of the most economically advantageous offer it must take any explanations into account when assessing which offer is most economically advantageous. Such explanations may indicate relevant economic factors which indicate that the supplier was justified in offering an abnormally low offer.

An offer may be rejected if the abnormally low price is the consequence of state aid which has not been subject to notification to the Commission or the Commission's approval. The Authority must have consulted the supplier or contractor to determine if the state aid has been notified. Where the tender is rejected for such a reason a report must be sent to the Treasury for onward transmission to the Commission.

#### 15.5 *In-House Offers*

The Regulation indicates that where one part of a authority invites an offer from another part of the authority in competition with outside bodies then the offer from the in-house supplier must be assessed against the same criteria as the external bids.

If the authority wishes to give advantage to the in-house offer it should clearly indicate in the contract documents that there will be an in-house bidder and that the criteria for assessment will include the full economic cost to the authority of awarding the contract and that this may include redundancy and other costs. Where one part of the authority is a separate legal entity to the part awarding the contract the offer must be then assessed against the criteria laid down and awarded to the most economically advantageous bid. Where the it is not split into separate legal entities the NRA cannot be forced to award a contract but it would be expected that any market testing would be carried out on fair and objective criteria and that the authority must be prepared to place a contract externally if it willing to invite offers and put suppliers and contractors to the cost of tendering.

*Advise a tender to say that there is an in-house bidder.*

#### 15.6

##### *Contract Award Notice*

A contract award notice must be sent for each contract to which the Regulations apply after considering the exclusions from the rules. The notice must be despatched within 48 days of contract award.

The NRA may indicate to the Commission that certain information is confidential and should not be published for reasons connected with law enforcement,

would be contrary to the public interest, would prejudice legitimate commercial interests or would prejudice fair competition.

15.7 *Debriefing Suppliers*

Where the NRA is prepared to debrief unsuccessful suppliers about their performance on a particular contract it should follow rules which they lay down to avoid charges of complicity or of discrimination. These rules should state whether the Authority is prepared to debrief all suppliers who request the facility or the system by which it will decide which suppliers are able to be debriefed.

In any debriefing of suppliers or contractors the NRA should be careful not to give information to one person which will help them to secure a later contract unless this information is freely available to all who request it.

15.8 *Contract Price Adjustment Formulae*

Many organisations operate contract price adjustment formulae which are used to compare the offers from different suppliers or contractors where the project or work is expected to last a number of years. These formulae are permissible under the Regulations so long as the effect is not to discriminate in favour of or against particular suppliers or contractors.

15.9 *Post Tender Negotiation*

Although the Regulation does not refer specifically to the subject of post-tender negotiation it is known that the Regulations were not designed to prevent post tender negotiation in the following circumstances:

- where the negotiations are to clarify the content of offers or are intended to achieve economic objectives which do not involve discrimination;
- where the Authority has started using the negotiated procedure and uses a tender as part of that process.

It is clear that the NRA will have to be cautious to operate on the basis of strictly laid down procedures and full records where post tender negotiation involves changing the relative positions of the tenderers. Where an authority believes that the lowest price offered is substantially above current market prices they may continue to negotiate with the lowest

tenderer to see if there are areas where the price could be improved.

The Treasury have taken a broad view of the meaning of the term clarification within the Council minute and believe that the Authority would be able to carry on post-tender negotiation provided it did not distort competition.

16. Other Issues

16.1 *Obtaining Quotations and Budget Pricing*

Many organisations ask particular suppliers for an estimate to be used in preparing their internal estimates for the cost of a supply, service or works contract. Very often these prices are obtained before the authority is certain that it is to go ahead with the work. Where the NRA wishes to carry on obtaining budget prices from suitable suppliers it should ensure that it does so in such a way that the future tendering or negotiating process is not undermined.

Each case will be different but there are some basic rules which the NRA should attempt to follow in obtaining estimates.

- there should, wherever possible, be more than one supplier asked to provide a budget price
- any information which is made available to those suppliers providing the budget price should be

- made available to all suppliers or contractors involved in the tendering or negotiating process
- the person asked for a budget price cannot be offered a guaranteed place on the tender list
  - the NRA should not make available more information than is necessary to obtain the budget price especially as the supplier asked is likely to have the information very much earlier than other applicants.

16.2      *Strategic Arrangements and Partnership Sourcing*

Partnership sourcing is not dealt with in the Regulations but it is unlikely that long term relationships would be permissible unless the justification for such a relationship is clear, is based on economic criteria and does not discriminate. Certainly attempts at forming evergreen contracts or at extending existing arrangements with suppliers would be unlawful.

Where the NRA does have a strategic relationship with a particular supplier or contractor this may be permissible if the original arrangement was a contract placed through the rules and was awarded in the knowledge that it would be a long term arrangement of anything up to 10 years or beyond in exceptional circumstances.



17        Statistical Reports and Records

17.1      *Bi-annual Report*

The Authority must prepare a report to be submitted to the Treasury by 31st July 1993 and every second year thereafter a report specifying in relation to each public supply contract awarded by it during the previous year:

- (a) the value (estimated if necessary) of the consideration given or to be given under the contract
- (b) whether the open, restricted or negotiated procedure was used
- (c) if the negotiated procedure was used, under which provision was this permissible
- (d) The type of goods to be purchased or hired under the contract
- (e) the nationality of the person to whom the contract was awarded.

17.2      *Ad-Hoc Reports*

The Authority must be able to supply the Treasury with reports on any particular contract whether individually covered by the legislation or not. These reports will be for onward transmission to the Commission.

## PART III

### 18. PUBLIC WORKS CONTRACTS

The Public Works Regulations (S.I. 1991/2680) lay down rules for all contracts for works. You should refer to Section 6 to determine which contracts are classified as works. Not all contracts are covered, some contracts are exempt because they fall below the financial thresholds.

#### 18.1 *The Thresholds*

The threshold levels for works contracts, excluding V.A.T., is:

ECU 5,000,000                      (£3,530,000)

The value of the thresholds is fixed in European Currency Units (ECU) and the exchange rate is published every two years and applies for the following two years. The revisions take place on 1st January of each even year (i.e. 1st January 1994). The UK Regulations refer to the consideration payable under any contract.

The Authority must not deliberately split up contracts or use special methods of calculating their value with the intention of avoiding the rules.

18.2      *Consideration*

SEE 7.2

18.3      *Determining Which Contracts Exceed the Thresholds*

18.3.1    *Individual Contracts*

Any contract for works which is expected to be individually above the threshold will be subject to the rules.

18.3.2    *Contracts Related to a Work*

A work is defined in the regulation as being "the outcome of any works contracts which is sufficient of itself to fulfil an economic and technical function". Any works contracts to achieve such a function should therefore be aggregated to see if the total anticipated value exceeds the threshold. An example of such a work would be a major flood defence project where a number of separate works contracts are awarded to complete the whole scheme.

Additionally it is necessary to add the value of any free issues which are made available to the contractor when assessing the total value of the works contracts. Such free issues may include the estimated value of equipment loaned to the contractor, the value of materials to be included in the works and the value of

site services which are issued free to the contractor. The NRA must estimate the value of these supplies and services at the time it would normally place a notice in the Official Journal.

Whilst all contracts must be aggregated when assessing the total value against the threshold, small contracts may then be excluded from following detailed rules provided two tests are met:

- the value of the contract is less than ECU1 million (£700,000)
- the total value of the contracts excluded does not exceed 20% of the overall value of the work

Where supply or service which are not necessary for the execution of the works are bought against a works contract and the value of the works does not exceed the works threshold then a second test must be applied. The value of the supplies or services which are not necessary for the execution of the works must be tested against the supplies or services threshold. If this threshold is exceeded then the whole contract must be classed as a supplies or services contract.

### 18.3.3 Projects

Projects may contain elements of supply, services and works which may be awarded as one or several different contracts. In a large project there will be a need to look at the contracts to be awarded separately. Works contracts will need to be aggregated together to see if the total value of the work exceeds the threshold. Supply or service contracts awarded separately should be dealt with under the supply or service Regulations.

### 18.3.4 Contingencies

SEE 7.3.3.6.

### 18.3.5 Variations

SEE 7.3.3.7

## 19. OTHER PROCUREMENT METHODS

### 19.1 Framework Agreements

Although framework agreements generally relate to schedules of rates in the works area the rules are the same as those indicated in 8.1.

### 19.2 Using Price Lists

SEE 8.2

## 20. TECHNICAL SPECIFICATIONS AND STANDARDS

SEE 9.

21. CHOICE OF AWARD PROCEDURES

21.1 *General*

21.2 *Open Procedure*

SEE 10.2

21.3 *Restricted Procedure*

SEE 10.3

21.4 *Negotiated Procedure*

SEE 10.4

21.5 *Which Procedure to Use*

The Authority must use the open or restricted procedure for all contracts subject to the rules unless the circumstances indicated below apply.

There is no requirement to prepare a report similar to that in 10.5.1 in cases where the restricted procedure is used but where the negotiated procedure is employed it shall prepare a report indicating such a fact. This must be sent to the Treasury on request for onward transmission to the Commission.

21.5.1 *Use of the Restricted Procedure*

Under the Public Works Regulations there are no restrictions on the use of the restricted procedure.

#### 21.5.2 Use of the Negotiated Procedure

The Public Works Regulations do not require the publication of a notice of a call for competition with the exception of (a) below but such a notice is available where the Authority wishes to use it.

The negotiated procedure is restricted to the following instances:

- (a) Where a previous call for competition was discontinued due to irregular tenders, when tenderers failed to meet the minimum financial or technical criteria for being considered or when the tenderer offered variants which were not acceptable under the terms of the Invitation to Tender. The negotiated procedure may only be used in these cases where the contract conditions are substantially unaltered from those used in the previous open or restricted procedure. The Authority must make a further call for competition if it does not intend to ask all the contractors previously invited to tender to do so again.
- (b) When the contract is purely for research, experiment or development but not where the supplies are to be purchased or hired to establish their commercial viability nor to recover the research and development costs.

- (c) where, in exceptional circumstances, the nature of the goods or services to be provided does not allow for prior overall pricing.
- (d) In the absence of suitable tenders following a call for competition under the open or restricted procedure. The negotiated procedure may only be used in these cases where the contract conditions are substantially unaltered from those used in the previous open or restricted procedure.
- (e) When for technical or artistic reasons or for reasons connected with the protection of exclusive rights the contract can only be executed by a particular supplier or contractor. In these cases the NRA would have to have sound reasons justifying the use of the procedure as other contractors may deny that only one contractor could do the work.
- (f) When it is strictly necessary for reasons of extreme urgency the time limits set out in the Regulations cannot be met. This exemption from making a call for competition may only be used where the reasons for its use were unforeseeable to the Authority. A failure to plan would not be considered an unforeseeable reason.
- (g) when the contract to be awarded is a works contract and the NRA wants a person who has entered into a works contract with them to carry out additional works which through unforeseen



circumstances were not included in the project initially considered or in the original works contract and -

- such works cannot for technical or economic reasons be carried out separately from the works carried out under the original works contract without great inconvenience to the NRA or
- such works can be carried out separately from the works carried out under the original works contract but are strictly necessary to the later stages of that contract.

This provision cannot be used where the total value of the contracts given for the additional works exceeds 50% of the value of the consideration payable under the original contract including the value of free issues.

(h) when the contract to be awarded is a works contract and the NRA wishes the person who has entered into a works contract with it to replicate the works and which is in relation to the same project as the first contract but only where:

- the original contract was awarded following a call for competition

- when the original contract was awarded the NRA stated that it might award a further contract without a call for competition
- when determining the value for deciding whether the Regulations applied the NRA treated the contract as if it were certain to be awarded and included an amount for it.

This provision may only be employed where the procedure for the award of the new works contract is begun within 3 years of the original contract being entered into.

22. PRIOR INFORMATION NOTICE

The Authority must send to the Official Journal a notice giving the information requested in the notice listed in Part A of Schedule 2 of the Regulations. This information must be sent as soon as possible after the Authority decides to seek offers in relation to a proposed public works contract.

23. PUBLISHING A CALL FOR COMPETITION

SEE 12.

24.

SELECTION OF TENDERERS OR PARTICIPANTS

The Authority must make the selection of the persons to be invited to submit offers based upon the following:

- criteria for rejection
- economic and financial standing
- technical capacity
- supplementary information

Under the Public Works rules those invited to tender should number between 5 and 20 but the range must take into account the nature of the contract and the range must be stated in the contract documents. The number must be sufficient to ensure competition.

24.1

*Criteria for Rejection of Contractors*

SEE 13.1 and 23.3

24.2

*Assessing Economic and Financial Standing*

SEE 13.2 and 23.3.

24.3

*Assessing Technical Capacity*

When selecting tenderers or participants in negotiation the Authority should only take the following items into consideration:

- (a) a list of the contractors professional and educational qualifications or of the qualifications of their managerial staff;

24.4 *Supplementary Information*

The Authority may require supplementary information or clarification of the information produced provided that the information relates to the matters set out in Section 23.

24.5 *Official Lists*

Where a member State operates an official list of qualified contractors, the Authority may not request details set out in 13.1 above except in the case of 13.1(e) or in 13(2)b and c.

25. TENDERING PROCEDURES AND TIMESCALES

The legislation lays down minimum timescales for certain stages of the awarding of contracts in order to give all contractors equal chance. These rules vary according to the award procedure selected.

The Authority must send a notice to the Official Journal indicating that it intends to award a contract as soon as possible after forming that intention.

25.1 *Open Procedure*

The last date for receipt of tenders shall be fixed at not less than 52 days from the date of despatch of the notice to the Official Journal and that date must be indicated in the notice. If it is necessary for tenderers to be given an opportunity to inspect the site or documents relating to the contract documents

then the minimum period must be extended to allow such inspection.

Where the Authority has published a prior information notice (see Section 21) it may reduce the 52 period above to 36 days.

The Authority must send the contract documents within six working days of the receipt of a request provided:

- the documents are requested by the date specified in the notice and
- any fee specified in the notice has accompanied the request

Additional information which may be reasonably requested by the supplier must be provided so that the Authority has sufficient time to supply the information no later than 6 days before the date specified in the notice as the final date for the return of tenders.

## 25.2

### *Restricted Procedure*

SEE 14.2 WITH THE FOLLOWING ADDITION

The invitation to tender shall be accompanied by the contract documents or the address for requesting them. Invites must be issued simultaneously and in writing and shall include the following information:

- (a) address to which requests for the contract documents or any further information must be sent, the final date for making such a request and the terms of the fee which may be charged for supplying that material;
- (b) the final date for receipt of tenders, the address to which they must be sent and the language or languages in which they must be drawn up;
- (c) a reference to the contract notice published in the Official Journal
- (d) an indication of the information to be included with the tender which the Authority may require to determine that the contractor meet the minimum requirements or which will be used in the tenderer selection process;
- (e) the criteria for the award of the contract if this was not published in the contract notice.

25.3 *Negotiated Procedure*

SEE 14.3

26 AWARD OF CONTRACT

26.1 *Assessing Offers*

SEE 15.1 ABOVE

26.2 *Two-Envelope System*

SEE 15.2 ABOVE

26.7      *Debriefing Suppliers*

SEE 15.7 ABOVE

26.8      *Contract Price Adjustment Formulae*

SEE 15.8 ABOVE

26.9      *Post Tender Negotiation*

SEE 15.9 ABOVE WITH THE FOLLOWING ADDITION.

When dealing with Bills of Quantities in relation to a proposed works contract the NRA may find areas where it believes that the prices are high and areas where it believes the prices are below its expectation. The Regulations would not prevent negotiation with the contractor to address these variations where there was no consequential effect on relative ranking of tenderers.

Employment contracts are exempt from the rules although this exemption would not cover contracts with employment agencies, for example.

27.3.12 *Telecommunications*

Contracts for voice telephony, telex, radiotelephony, paging and satellite services are specifically exempt from the legislation.

27.4 *Two-Tier Application*

Unlike either the Public Works or Public Supply rules, the Public Services legislation makes use of two tiers of application. Under the this system, items included in Annex 1A of the legislation are considered "Priority" services subject to full coverage whereas items listed in Annex 1B "Residual" services are not considered suitable for full coverage and are covered merely by a reporting requirement. A full list of the two levels of coverage is provided at Annex I.

The provisions which apply to the residual services are of some importance to the Authority. These include having the same technical rules to follow as items in the priority rules and having to publish a contract award notice for each contract which would have otherwise been subject to the full rules.



Where a service contract has elements of both priority and residual services its classification will be dependent upon the part which has the greater value.

28. OTHER PROCUREMENT METHODS

SEE 8.

29. TECHNICAL SPECIFICATIONS

SEE 9.

30. CHOICE OF AWARD PROCEDURES

30.1 - 30.4 SEE 10.1 - 10.4

30.5 *General*

The rules do not restrict the right of the Authority to use either the restricted or open procedures but the use of the negotiated procedure is restricted. The negotiated procedure can be used with or without a prior call for competition depending upon the circumstances.

30.5.1 *Negotiated Procedure With a Prior Call*

The NRA may use the negotiated procedure in the following cases with a prior call for competition:

1. Where a previous call for competition was discontinued due to irregular tenders, when

tenderers failed to meet the minimum financial or technical criteria for being considered or when the tenderer offered variants which were not acceptable under the terms of the Invitation to Tender. Where all of the tenderers who meet the minimum criteria are to be invited again there is no requirement to place a further call for competition.

2. In exceptional cases, when the nature of the contract or the risks do not permit prior overall pricing.
3. Where the nature of the services, particularly intellectual services and/or financial and banking services is such that contract specifications cannot be established with sufficient precision to allow the open or restricted procedures to produce the best tenders.

30.5.2 *Negotiated Procedure Without a Prior Call*

The negotiated procedure may be used without a prior call for competition in the following circumstances:

- (a) Where there are no tenders following an earlier call for competition and the proposed terms of the contract are substantially unaltered from the terms offered when offers were sought under the open or restricted procedures. Where this clause

is used a report must be sent to Treasury for onward transmission to the Commission.

- (b) Where for technical or artistic reasons or for reasons connected with the protection of exclusive rights, the contract may only be executed by only one supplier. In this case the burden of proof would lie upon the NRA to show that only one supplier was able to satisfactorily supply the services required.
- (c) where the contract follows a design contest and must, under the rules applying, be awarded to the successful candidate or candidates. In the case of more than one winner, all the winners shall be invited to participate in negotiations.
- (d) When it is strictly necessary for reasons of extreme urgency to acquire goods within the time limits set out in the Regulations. This exemption from making a call for competition may only be used where the reasons for its use were unforeseeable to the Authority and were not attributable to the Authority. A failure to plan sufficiently would not be considered an unforeseeable reason.

(e) when the contract to be awarded is a services contract and the NRA wants a person who has entered into a previously awarded services contract with them to carry out additional services which through unforeseen circumstances were not included in the project initially considered or in the original services contract and -

- such services cannot for technical or economic reasons be carried out separately from the services carried out under the original contract without great inconvenience to the NRA or
- such services can be carried out separately from the services carried out under the original contract but are strictly necessary to the later stages of that contract.

This provision cannot be used where the total value of the contracts given for the additional services exceeds 50% of the value of the consideration payable under the original contract.

(f) when the NRA wishes the person who has entered into a previous contract with it to replicate the services provided in a new contract but only where:

- the original contract was awarded following a call for competition;
- when the original contract was awarded the NRA stated that it might award a further contract without a call for competition under the negotiated procedure;
- when determining the value for deciding whether the Regulations applied the NRA treated the contract as if it were certain to be awarded and included an amount for it.

This provision may only be employed where the procedure for the award of the new services contract is begun within 3 years of the original contract being entered into.

31. PRIOR INFORMATION NOTICE

For service contracts, a notice must be placed each year for each of the categories listed in Annex XXXX where the aggregate of the contracts covered by the legislation exceeds 750,000 ECU (£530,000). The notice should state the tendering procedures which will be employed and whether it will be the subject of a design contest.

32. PUBLISHING A CALL FOR COMPETITION

SEE 12.

33. SELECTION OF TENDERERS OR PARTICIPANTS

The Authority must make the selection of the persons to be invited to submit offers under the requirements of the regulations concerning:

- criteria for rejection
- economic and financial standing
- technical capacity
- supplementary information

Under the Public Services Directive those invited to tender should number between 5 and 20 but the range must take into account the nature of the contract and the range must be stated in the contract documents. The number must be sufficient to ensure competition.

The Authority must advise any candidate not selected of the reasons for his failure to be selected within 15 days of receiving a request for such information.

33.1 *Criteria for Rejection of Tenderers*

SEE 13.1

33.2 *Economic and Financial Standing*

The Authority may use the following to check the financial standing of service providers:

- (a) statements from a bank or evidence of profession indemnity insurance;
- (b) evidence or extracts from the service providers balance sheets where these are available;

- (c) a statement of overall turnover and relevant turnover in the areas in which the Authority may contract.

The Authority must state in the contract notice or in the invitation to tender which references are to be produced. Where a service provider is unable to produce a document requested by the Authority they may produce a document acceptable to the Authority as an alternative.

### 33.3 *Technical Capacity*

- (a) A service provider shall be evaluated on the basis of his skills, efficiency, experience and reliability.
- (b) a list of the service providers professional and educational qualifications or of the qualifications of their managerial staff;
- (b) list of the services performed over the last 3 years including certificates of satisfactory performance for the most important services, the value of the contracts, when and where the services were carried out.
- (c) an indication of the technicians or technical bodies involved whether or not belonging directly to the service provider, especially those responsible for quality control;

- (d) a statement of the contractors annual average manpower and number of managerial staff over the previous 3 years;
- (e) a statement of the tools, plant or technical equipment which the contractor may call upon for carrying out the work under the contract,
- (f) a description of the service providers measures for ensuring quality and his study and research facilities
- (g) where the contract involves the provision of complex services an on-the-spot check carried out by the Authority or our agent
- (h) an indication of the services the service provider may sub-contract

The Authority must indicate in the contract notice or the invitation to tender which references it will require.

Where the Authority requests independent quality standards they must base such requests on EN29000 (BS5750) and shall recognise equivalent standards. Where a service provider has no possibility of obtaining EN29000 or of obtaining it within the required timescales, the Authority must accept other evidence of quality assurance.

#### 33.4

#### *Confidentiality*



The Authority must limit requests for information to items relevant to the particular contract and the service provider shall have the right to protect their legitimate commercially confidential information.

The Authority must specify in the contract notice which of the above details it requires.

33.5 *No Contract Awarded*

Where the Authority decides not to award a contract following a call for competition, it must inform those candidates who request them in writing of the reasons on which the Authority decided not to award the contract.

34 DESIGN CONTESTS

Design contests are contests which enable the Authority to acquire services selected by a jury after being put out to competition with or without prizes. The areas envisaged for the use of design contests include civil engineering, architecture and data processing.

34.1 *Thresholds*

The rules on design contests apply when the expected value of the services contracts to be awarded exceed 200,000 ECU or the total of the prizes and payments to competitors exceeds 200,000 ECU.

34.2 *Rules of the Contest*

The rules of the design contest must be sent to all interested in participating. Entrants may not be limited by reference to the territory or part of a Member State nor may the Authority insist on participants being natural or legal persons.

Where the number of participants is limited, selection shall be made on the basis of clear and non-discriminatory criteria which are laid down. The number selected must be sufficient to ensure genuine competition which, in general terms, means a minimum of 3 candidates and an advisable minimum of 5.

34.3 *Jury*

The jury must be natural persons who are independent of the participants. Where a professional qualification is required of participants then at least a third of the jury members must have the same qualification. The jury must be autonomous and shall reach its decision on the basis of projects submitted anonymously and according to the criteria laid down in advance and published in the Official Journal.

35 TENDERING PROCEDURES AND TIMESCALES

SEE 26 ABOVE.

35.1 *Open Procedure*

SEE 26.1 ABOVE

35.2 *Restricted Procedure*

SEE 26.2 ABOVE

35.3 *Negotiated Procedure*

SEE 26.3 ABOVE

36 AWARD OF CONTRACT

36.1 *Assessing Offers*

SEE 15.1 ABOVE

36.2 *Two-Envelope System*

SEE 15.2 ABOVE

36.3 *Variant Offers*

The Services Directive contains no mention of variant offers because it is believed that services will rarely be defined as strictly as supplies or works. Variants are therefore presumed to be acceptable and there are no rules on laying down special rules for the receipt of tenders involving variants.

36.4 *Abnormally Low Offers*

SEE 15.4 ABOVE

36.5 *In-House Offers*

The text of the Public Supplies and Public Works Regulations is stricter than the Directives they enact on in-house offers. In neither Directive are in-house offers mentioned. It is believed that the UK Government will take a similarly strict line with services and you are therefore advised to see section 15.5 above.

36.6      *Contract Award Notices*  
SEE 15.6 ABOVE.

36.7      *Debriefing Suppliers*  
SEE 15.7 ABOVE

36.8      *Contract Price Adjustment Formulae*  
SEE 15.8 ABOVE

36.9      *Post Tender Negotiation*  
SEE 15.9 ABOVE

37        OTHER ISSUES  
SEE SECTION 16 ABOVE

38        RECORDS AND STATISTICS  
Provisions are likely to be similar to Section 17 above but the dates will be different from those indicated.

APPENDIX A

PROCEDURE FOR DEALING WITH INJUNCTIONS

See P/N

## APPENDIX B

### CONTRACTS EXCLUDED FROM THE REGULATIONS

The following general exemptions exist for the reasons indicated below:

- (a) For contracts which are classified as secret by the Minister or where the performance of the contract would be accompanied by special security measures. This exemption should not be used unless agreement has been reached with the Government department most closely associated with the contract.
- (b) Where an international agreement exists:
  - between the UK and a non-EC state and the agreement is for joint implementation or exploitation of a joint project to which the contract relates
  - where the agreement relates to the stationing of troops
  - in accordance with the contract award procedures of an organisation of which only states are members. An example of such an organisation is the United Nations.
- (c) For public service contracts awarded to an entity which is itself a contracting authority on the basis of an exclusive right under national law provided it is compatible with Community law.

# APPENDIX C

## WORKS CONTRACTS

### LIST OF PROFESSIONAL ACTIVITIES AS SET OUT IN THE GENERAL INDUSTRIAL CLASSIFICATION OF ECONOMIC ACTIVITIES WITHIN THE EUROPEAN COMMUNITIES

Classes	Groups	Subgroups and items	Description
50			BUILDING AND CIVIL ENGINEERING
	500		General building and civil engineering work (without any particular specification) and demolition work
		500.1	General building and civil engineering work (without any particular specification)
		500.2	Demolition work
	501		Construction of flats, office blocks, hospitals and other buildings, both residential and non-residential
		501.1	General building contractors
		501.2	Roofings
		501.3	Construction of chimneys, kilns and furnaces
		501.4	Water-proofing and damp-proofing
		501.5	Restoration and maintenance of outside walls (repointing, cleaning, etc.)
		501.6	Erection and dismantlement of scaffolding
		501.7	Other specialized activities relating to construction work (including carpentry)
	502		Civil engineering: construction of roads, bridges, railways, etc.
		502.1	General civil engineering work
		502.2	Earth-moving (navvying)
		502.3	Construction of bridges, tunnels and shafts; drillings
		502.4	Hydraulic engineering (rivers, canals, harbours, flows, locks and dams)
		502.5	Road-building (including specialized construction of airports and runways)
		502.6	Specialized construction work relating to water (i.e. to irrigation land drainage, water supply, sewage disposal, sewerage, etc.)
		502.7	Specialized activities in other areas of civil engineering
	503		Installation (fittings and fixtures)
		503.1	General installation work
		503.2	Gas fitting and plumbing, and the installation of sanitary equipment
		503.3	Installation of heating and ventilating apparatus (central heating, air-conditioning, ventilation)
		503.4	Sound and heat insulation; insulation against vibration
		503.5	Electrical fittings
		503.6	Installation of aerials, lightning conductors, telephones, etc.
	504		Building completion work
		504.1	General building completion work
		504.2	Plastering
		504.3	Joinery, primarily engaged in the after assembly and/or installation (including the laying of parquet flooring)
		504.4	Painting, glazing and paper-hanging
		504.5	Tiling and otherwise covering floors and walls
		504.6	Other building completion work (putting in fireplaces, etc.)

SERVICES CONTRACTS

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ANNEX 1A — *Canceled by full rules*

Services within the meaning of Article 8

Category No	Subject	CPC Reference No
1.	Maintenance and repair services	6112, 6122, 633, 886
2.	Land transport services <sup>(1)</sup> , including armoured car services, and courier services, except transport of mail	712 (except 71235), 7512, 87304
3.	Air transport services of passengers and freight, except transport of mail	73 (except 7321)
4.	Transport of mail by land <sup>(1)</sup> and by air	71235, 7321
5.	Telecommunications services <sup>(2)</sup>	752
6.	Financial services (a) Insurance services (b) Banking and investment services <sup>(3)</sup>	ex 81 812, 814
7.	Computer and related services	84
8.	R&D services <sup>(4)</sup>	85
9.	Accounting, auditing and book-keeping services	862
10.	Market research and public opinion polling services	864
11.	Management consultant services <sup>(1)</sup> and related services	865, 866
12.	Architectural services; engineering services and integrated engineering services; urban planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services	867
13.	Advertising services	871
14.	Building-cleaning services and property management services	874 82201 to 82206
15.	Publishing and printing services on a fee or contract basis	88442
16.	Sewage and refuse disposal services; sanitation and similar services	94

<sup>(1)</sup> Except for rail transport services covered by Category 18.<sup>(2)</sup> Except voice telephony, telex, radiotelephony, paging and satellite services.<sup>(3)</sup> Except contracts for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, and central bank services.<sup>(4)</sup> Except research and development service contracts other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs on condition that the service provided is wholly remunerated by the contracting authority.<sup>(5)</sup> Except arbitration and conciliation services.



## ANNEX I B

## Services within the meaning of Article 9

Category No	Subject	CPC Reference No
17.	Hotel and restaurant services	64
18.	Rail transport services	711
19.	Water transport services	72
20.	Supporting and auxiliary transport services	74
21.	Legal services	861
22.	Personnel placement and supply services	872
23.	Investigation and security services, except armoured car services	873 (except 87304)
24.	Education and vocational education services	92
25.	Health and social services	93
26.	Recreational, cultural and sporting services	96
27.	Other services	

- covered by rules on technical specifications
- covered by reporting rules

## APPENDIX E

### USEFUL ADDRESSES

#### Address for Notices

Office for Official Publications of the EC

2 Rue Mercier, 2985

Luxembourg

Fax: 49 00 03 or 49 57 19

#### Standards Information

British Standards Institute

2 Park Street

London W1A 2BS

Tel: 071 629 9000

For CEN, CENELEC and ETSI contact BSI.

## APPENDIX G

### TRADE AND PROFESSIONAL REGISTERS

The following are the official professional or trade registers referred to in the Works and Services Regulations.

#### Belgium

Registre du commerce/Handelsregister

#### Denmark

Erhvervs- and Selskabsstyrelsen

#### France

Registre du commerce or the Répertoire des métiers

#### Germany

Handelsregister or Handwerksrolle

#### Greece

No register exists - must be treated as registered if certified as having as having declared on oath before a notary public that he exercises the profession of public works contractor or service provider.

#### Ireland

No such register exists but applicants must be treated as registered if they are established in Ireland and registered with the Registrar of Friendly Societies or is certified as having declared on oath that he is carrying on the business in the trade in question at a specific place and under a specific trade name.

## APPENDIX H

### REGULATIONS AND DIRECTIVES

#### REGULATIONS

The UK Government has implemented the public procurement directives through the use of Statutory Instruments under Section 2(2) of the European Communities Act (1972). There are two Regulations which affect the NRA.

- The Public Supply Contracts Regulations (1991) SI 1991 No 2679
- The Public Works Contracts Regulations (1991) SI 1991 No 2680

#### DIRECTIVES

##### Supply

Council Directive 77/62/EEC as amended by Directives 80/767/EEC and 88/295/EEC.

##### Works

Council Directive 71/305/EEC as amended by Directive 89/440/EEC.

##### Services

Council Directive 92/50/EEC.

