



Cabinet Office

## **Consultation Document**

# **UK Transposition of new EU Procurement Directives**

## **Public Contracts Regulations 2015**



## Executive Summary

1. This consultation document concerns the UK implementation of the new package of EU Directives on Public Procurement.
2. Acting on behalf of the Minister for the Cabinet Office the Crown Commercial Service has UK policy responsibility for implementing the new procurement Directives.
3. This document seeks comments on the draft UK implementing regulations, to ascertain whether the draft regulations effectively implement the policy requirements, and whether they do so in the best way.
4. This document focuses primarily on the new Public Sector Directive, and there will be subsequent consultation documents covering the draft implementing regulations for the new Utilities Directive and the new Concessions Directive. Many of the provisions in the Public Sector Directive are analogous to provisions in the other two Directives. We intend to use this consultation to cover those generic matters that are applicable to all three Directives. Consulting on them here will allow greater focus on matters unique to the Utilities and Concessions Directives.
5. The Cabinet Office undertook informal, targeted engagement with a range of interested stakeholders in late 2013, through a series of discussion papers. This helped to inform our proposed policy positions on a relatively small number of policy choices i.e. where the Directive permits some discretion in how or whether Member States implement a particular provision. The draft regulations have been prepared in the light of those proposed policy positions, which also take account of the UK's general approach of maximising flexibility in the rules, deregulating where possible, and avoiding gold-plating. A summary of those proposed policy positions is included in this document.
6. Respondents to this consultation document are invited to consider the draft regulations, and respond to the particular consultation questions listed. Respondents are also welcome to comment more generally on any aspect.
7. This consultation document contains the following key sections:
  - Part 1 sets out the background, scope and general instructions on how to respond;
  - Part 2 introduces the draft regulations and seeks responses on various technical, drafting and other issues;
  - Annex A contains a draft of the Public Contracts Regulations;
  - Annex B summarises the proposed policy positions taking account of ministerial priorities and stakeholder feedback;

- Annex C lists Central Government authorities for the purpose of Schedule 1 to the Regulations; and
- Annex D contains a summary of the Standard Forms required by the new Directive and our suggestions for interim measures.

8. We welcome your input by 17 October 2014. Please direct any responses to: [transposition@cabinet-office.gsi.gov.uk](mailto:transposition@cabinet-office.gsi.gov.uk)

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## Part 1: Background Information and Instructions for Responding

### Introduction

9. The UK Government is committed to reforming UK public procurement processes, to stimulate economic growth. The Government has negotiated successfully in Brussels over the last two years to simplify and modernise the existing framework of EU procurement directives, to make public procurement faster, less costly and enable better value outcomes for Government, industry, and the wider public sector. The UK aims to implement the new Directives earlier than the two years required by the EU, to take advantage of the new flexibilities as soon as possible.

### Purpose

10. This consultation continues the longstanding programme of engaging UK stakeholders in the modernisation process. The purpose of this document is to consult on the draft implementing regulations and to confirm whether they implement the new EU Directives effectively and do so in the best way.

### Background

11. In January 2011 the European Commission published a Green Paper consultation on the modernisation of EU public procurement policy<sup>1</sup>. Cabinet Office, with inputs from various UK stakeholders, coordinated and published the UK's response<sup>2</sup> in July 2011. The Commission concluded that there was an urgent need for a streamlined and flexible set of procurement rules so that Member States can obtain high quality goods and services while delivering value for money for the public purse. The 2004 directives, one for Public Sector Contracts<sup>3</sup> and one for Utilities Contracts<sup>4</sup>, introduced new approaches in an attempt to modernise the rules that existed at that time but experience had shown these added complexity, uncertainty and regulatory burdens.

12. The Commission came forward with draft proposals for modernisation in late 2011. Following 2 years of intensive scrutiny and debate, the European Parliament and the Council adopted three new Directives (Public Sector Contracts, Utilities Contracts, and Concessions Contracts) on 26 February 2014. The Directives were published in the Official Journal of the EU on 28 March 2014 and came into force on

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<sup>1</sup>[http://ec.europa.eu/internal\\_market/publicprocurement/modernising\\_rules/consultations/index\\_en.htm#maincontentSec2](http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/consultations/index_en.htm#maincontentSec2)

<sup>2</sup>[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/61554/0707UKGPpbResponsefinal\\_20\\_2\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61554/0707UKGPpbResponsefinal_20_2_.pdf)

<sup>3</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

<sup>4</sup> Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport, and postal services sectors.

17 April 2014. The UK and other EU Member States have until 17 April 2016 to implement the new Directives in national legislation.

13. The new Directives are:

- a) Directive 2014/24/EU<sup>5</sup> on public procurement, replacing the 2004 Directive for Public Sector Contracts;
- b) Directive 2014/25/EU<sup>6</sup> on procurement by entities operating in the water, energy, transport and postal services sectors, replacing the 2004 Directive for Utilities Contracts; and
- c) Directive 2014/23/EU<sup>7</sup> on the award of concession contracts, which does not directly replace any previous directive.

14. Cabinet Office undertook informal, targeted engagement with a range of interested stakeholders in late 2013, who declared a particular interest in a number of policy choices following [PPN 5/13](#)<sup>8</sup>. This helped to inform our proposed positions on those policy choices i.e. where the directive permits some discretion in how or whether Member States implement a particular provision.

15. The draft regulations have been prepared in the light of those proposed policy positions, which also take account of the UK's general approach of maximising flexibility in the rules, deregulating where possible, and avoiding gold-plating. A summary of those proposed policy positions is included in this document at Annex B.

## Scope of Consultation

16. This consultation applies principally to those jurisdictions to which the current Regulations apply, i.e. England, Wales and Northern Ireland. The Regulations may also cover activity by public bodies exercising reserved functions in Scotland, but decisions will be subject to ongoing discussions with the devolved administrations. The Scottish Government will make its own, separate implementing regulations which will apply to Scottish bodies whose functions do not relate to reserved matters.

17. The consultation seeks comments on the draft UK implementing regulations, to ascertain whether the draft regulations effectively implement the Directive, and whether they do so in the best way.

18. This document focuses primarily on the new Public Sector Directive, and there will be subsequent consultation documents covering the draft implementing regulations for the new Utilities Directive and the new Concessions Directive. Many of the provisions in the Public Sector Directive have analogous provisions in the other two Directives. We intend to use this consultation to cover those generic

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<sup>5</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2014.094.01.0065.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0065.01.ENG)

<sup>6</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2014.094.01.0243.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0243.01.ENG)

<sup>7</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2014.094.01.0001.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0001.01.ENG)

<sup>8</sup> <https://www.gov.uk/government/publications/procurement-policy-note-0513-modernising-eu-procurement-rules>



matters that are applicable to all three Directives. Consulting on them here will allow greater focus on matters unique to the Utilities and Concessions Directives.

## **New measures to increase SME participation in public procurement**

19. This document also refers to new measures, recommended by Lord Young of Graffham, the Prime Minister's Enterprise Advisor. They aim to ensure that small businesses have better access to public sector contracts. These measures were subject to public consultation in 2013<sup>9</sup>, and the new regulations implement the conclusions of the consultation. These are designed to simplify public procurement, increase transparency and reduce bidding costs, enabling better value outcomes for both Government and industry.

## **Copy out**

20. There is only very limited scope for the Government and other UK stakeholders to influence the substantive content of the UK's implementing regulations. Most of the provisions of the Directives are mandatory for Member States to transpose, so we cannot alter the substance in transposition. In addition, the Government's policies on "copy-out" of European Directives (where available) and avoidance of "gold-plating", further limit the extent to which we can deviate from the wording of the Directives when casting the national UK implementing regulations.

## **Consultation Principles**

21. This consultation complies with the Government's Consultation Principles<sup>10</sup>, and formally concludes a long-running period of continuous UK stakeholder engagement that commenced in 2011 when the Commission's own consultations began (see paragraphs 11 and 14 above). A 4 week consultation period is considered appropriate and proportionate given the limited scope and impact of the remaining issues on which to consult.

## **Process**

22. This consultation runs for 4 weeks from 19 September 2014 to 17 October 2014.

23. This consultation document is issued directly to a number of known stakeholders and is also made available publicly on the Cabinet Office Consultations page on the GOV.UK website: [Transposing the 2014 EU Procurement Directives](#).

24. This consultation has 20 specific questions, which are summarised in paragraph 30. Please state clearly in your response which question or questions you

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<sup>9</sup> <https://www.gov.uk/government/consultations/making-public-sector-procurement-more-accessible-to-smes>

<sup>10</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/255180/Consultation-Principles-Oct-2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/255180/Consultation-Principles-Oct-2013.pdf)

are answering. Please direct responses, or any other questions on the consultation, to:

By email:

[transposition@cabinet-office.gsi.gov.uk](mailto:transposition@cabinet-office.gsi.gov.uk)

Or by post:

Crown Commercial Service Helpdesk  
Cabinet Office  
Rosebery Court  
Norwich  
NR7 0HS

Tel: 0345 410 2222

### **Handling of Information**

25. The information you send may need to be passed to colleagues within the Cabinet Office or other Government departments, and may be published in full or in a summary of responses.

26. All information in responses, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004). If you want your response to remain confidential, you should explain why confidentiality is necessary and your request will be acceded to only if it is appropriate in the circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Cabinet Office. Contributions to the consultation will be anonymised if they are quoted.

### **Contact for comments or complaints about the process**

27. Your opinions are valuable. Thank you for taking the time to read this document and respond. If you have comments or complaints about the consultation process itself, please contact the:

Better Regulation Unit  
Cabinet Office  
Rosebery Court  
Norwich  
NR7 0HS

Email:

[bruenquiries@cabinet-office.gsi.gov.uk](mailto:bruenquiries@cabinet-office.gsi.gov.uk)

## Part 2 – Technical Issues and Key Questions

### Introduction

28. This section of the consultation document introduces a number of key issues and questions on which stakeholder feedback will support the UK in making a clear and successful transposition. In particular, it introduces:

- a) The draft Regulations (Annex A) – general feedback is welcome on any aspect of the draft; and
- b) Key issues in the draft Regulations to which stakeholders’ attention is drawn and feedback is specifically requested.

29. We therefore invite stakeholders to consider the issues and questions raised and respond accordingly. Stakeholders are invited not only to offer their views, but also their reasons for coming to that view, as these viewpoints are helpful in addressing the fundamental issues at stake. Below is a list of the headline topics covered, with a summary of the key consultation questions arising under each topic.

### Summary of Consultation Questions

30. The consultation questions are as follows:

Question	Subject
1	<b>Draft Regulations</b> We seek general comments on the drafting of the draft Regulations.
2	<b>Transitional Policy</b> We seek comments on the suggested transitional policy.
3	<b>Sheltered Workshops</b> We welcome comments on whether the draft regulation implements this flexibility in an effective way. We also welcome suggestions on the key issues to be considered in providing guidance on certain terms used in the draft regulation.
4	<b>e-procurement</b> We invite comments as to whether the proposed approach is suitable, bearing in mind policy goals, and stakeholder views to date as discussed in Annex B, or whether there are clear arguments to the contrary.
5	<b>e-procurement</b> We also welcome views as to whether the “framework” is appropriate, bearing in mind that it is intended as a statement of high level security principles, not a detailed guide.
6	<b>Central Purchasing Bodies</b> We welcome comments on the approach or the drafting, and in particular whether the drafting achieves the stated objectives.
7	<b>Conduct of the Procedure</b> We seek general comments on the approach or the drafting.
8	<b>Division of contracts into lots / SME access</b> We invite comments as to whether the proposed approach to the two policy choices is appropriate bearing in mind policy goals and stakeholder views to date, or whether there are clear arguments to the contrary.
9	<b>Division of contracts into lots / SME access</b> We invite comments as to whether the intended approach to explaining the combined lots provisions, ie providing an explanation in supporting guidance, is appropriate.
10	<b>Publication and Transparency</b> We seek general comments on the approach or the drafting.

Question	Subject
11	<b>Forms and Notices</b> We seek comments on the proposed use of current Forms and Notices provided in Annex D.
12	<b>Conflicts of interests, exclusion and related matters</b> We invite comments as to whether the proposed approach is appropriate bearing in mind policy goals and stakeholder views to date, or whether there are clear arguments to the contrary. We also invite comments on whether the mandatory exclusion offences in English law are correctly identified.
13	<b>Subcontracting</b> We welcome comments, particularly on whether these draft regulations achieve the objective of implementing the requirements of the Directive in a minimalistic fashion.
14	<b>Subcontracting</b> We welcome comments on the type of supporting materials needed and key issues to be addressed.
15	<b>Termination of Contracts</b> We welcome comments on whether regulation 73(3) provides an effective deeming provision.
16	<b>Light Touch Regime</b> We welcome comments, particularly on whether these draft regulations achieve the objective of implementing the requirements of the Directive in a minimalistic fashion.
17	<b>Light Touch Regime</b> We envisage that a minimalistic regulatory approach would need to be supported with relevant training aids, policy instructions or guidance, and welcome inputs on the type of supporting materials needed and key issues to be addressed.
18	<b>Remedies and Standstill</b> We seek stakeholders' comments on, but strictly limited to, whether the proposed drafting achieves our objective of sewing the existing remedies rules into the new procurement rules framework in a satisfactory way.
19	<b>New measures to increase SME participation in public procurement</b> Given we have already consulted on the principles of the Lord Young measures, we are only seeking comments specifically on technical points related to the implementation of the measures.
20	<b>Successor entities in Schedule 1</b> Departments are requested to check and confirm that the list is correct or whether it should be amended to take account of successor entities.

## The Draft Regulations

31. We have produced an entirely new version of the Public Contracts Regulations, to replace the existing Public Contracts Regulations 2006.

32. The regulations at Annex A are structured in the following way:

- a) Part 1 and Part 2 transpose the Directive;
- b) Part 3 retransposes the remedies rules implemented in the UK by The Public Contracts (Amendment) Regulations 2009 (SI 2009 No. 2992);
- c) Parts 4 and 5 deliver the Lord Young reforms; and
- d) Part 6 has draft transitional provisions and will be expanded to include consequential amendments that will be needed to other legislation.

**Question 1.** We seek general comments on the drafting of the draft Regulations.

## Transitional Policy

33. The proposed transitional policy is in keeping with that used in previous transpositions, i.e. to apply the new rules only to new procurement processes beginning on or after the new Public Contracts Regulations take effect. It would also seem to be consistent with the approach taken by the European Court of Justice (“ECJ”) in case C-337/98 (Commission v France) to the interpretation of Directive 93/38/EEC (the former Utilities Procurement Directive which similarly did not address explicitly whether it was intended to apply to procurement processes that had already begun before the time by which the Directive was required to be transposed). However, stakeholders’ feedback is sought to confirm this as suitable for the effective conduct of procurement operations or whether stakeholders might prefer any alternative options.

**Question 2.** We seek stakeholders’ comments on the suggested transitional policy.

## Reserved Contracts for Sheltered Workshops

34. In line with the position discussed in Annex B, paragraphs B8 and B9, draft regulation 20 implements Article 20 of the Public Sector Directive. The approach involves copying out the flexibility to reserve contracts for sheltered workshops. We will provide separate guidance on how to interpret ‘disabled persons’, ‘disadvantaged persons’, ‘sheltered workshop’, and ‘sheltered employment programme’. Defining these in the regulations would mean departing from the Government’s policy on copy-out, and there is a risk that our definitions will not align with what the ECJ may hold these terms to mean in the future.

**Question 3.** We welcome comments on whether the draft regulation implements this flexibility in an effective way. We also welcome suggestions on the key issues to be considered in providing guidance on the terms discussed above.

## Electronic (“e”) communication and e-procurement choices

35. In line with the position discussed in Annex B, paragraphs B10 to B15, the provisions in Article 22(4) allowing mandation of building information electronic modelling tools (BIM) are not transposed. The “Framework” referred to in Article 22(6)(b) and (c) is set out at Regulation 22(18) and 22(19). The second paragraph of Article 36(1) on mandatory use of electronic catalogues is not transposed in Regulation 36. Provisions enabling postponement of mandatory e-communications, mandatory electronic European Single Procurement Document, and mandatory recourse to e-certis, in Article 90(2), (3) and (5), and are transposed in Regulation 1(3) and Regulation 114(2).

**Question 4.** We invite comments as to whether the proposed approach set out above is suitable, bearing in mind policy goals, and stakeholder views to date as discussed in Annex B below, or whether there are clear arguments to the contrary.

**Question 5.** We also welcome views as to whether the “framework” is appropriate, bearing in mind that it is intended as a statement of high level security principles, not a detailed guide. Readers will note that this “framework” does not refer-out to other legislation, policies or guidance; this is a deliberate decision.

### Central Purchasing Bodies

36. In line with the position discussed in Annex B, paragraphs B18 to B23, draft regulations 37 and 39 implement Articles 37 and 39 respectively of the Public Sector Directive. The approach is to:

- a) Continue to provide the flexibility allowed by Article 37(1), first and second subparagraphs, for contracting authorities to use central purchasing bodies to procure their requirements;
- b) Not transpose, in these Regulations, Article 37(1) third subparagraph; and
- c) Transpose Article 39(2), first subparagraph, to make it clear that contracting authorities are free to use central purchasing bodies in other Member States.

**Question 6.** We welcome comments on the approach or the drafting, and in particular whether the drafting achieves these objectives.

### Conduct of the Procedure

37. In line with the position discussed in Annex B, paragraphs B16 and B17, these draft regulations are based on the corresponding Articles 40 to 45 and 47 of the Public Sector Directive and relevant Annexes.

**Question 7.** We seek general comments on the approach or the drafting.

### Division of contracts into lots / SME access

38. In line with the position discussed in Annex B, paragraphs B24 to B27, we propose, taking stakeholder views into account, that the provisions in Article 46(4) should not be transposed in Regulation 46. The provision allowing combined lots in Article 46(3) is implemented in Regulation 46(6). As noted in Annex B of this consultation document, we understand that this provision allows authorities to accept “combined” bids for a combination of lots which might differ from the sum of a bidder’s individual bids for the lots in that combination. We intend to explain this interpretation further in forthcoming guidance.

**Question 8.** We invite comments as to whether the proposed approach to the two policy choices is appropriate bearing in mind policy goals and stakeholder views to date, or whether there are clear arguments to the contrary.

**Question 9.** We invite comments as to whether the intended approach to explaining the combined lots provisions, i.e. providing an explanation in supporting guidance, is appropriate.

### Publication and Transparency

39. Regulations 50 to 55 are based on the obligations laid down in the corresponding articles of the Public Sector Directive.

40. Regulations 48 to 51 require the use of official EU Notices and Forms. The detail of what is required in each Notice and Form will be copied out in separate Schedules.

**Question 10.** We seek general comments on the approach or the drafting.

### Standard Forms and Notices

41. In line with the position discussed in Annex B, paragraphs B28 to B33, the European Commission has noted the UK's early transposition plans and has signalled its intention to make the standard Forms and Notices ready for use by Autumn 2014 and consequently ready in good time for UK transposition. If however there should be any delay to the Commission's plans for making the forms, the main workaround plans are:

- a) To engage with the Commission to ensure they fully understand our plans; and
- b) Utilising the current Forms and Notices in the interim period until the new forms are available. The majority of additional information required on the Forms and Notices will be added to free text boxes. Where new Forms and Notices are required existing ones will have to be adapted to include the information. See Annex D for the current suggestions. Guidance will be drafted for each Form mentioned in the Regulations and a checklist provided for contracting authorities, utilities and contracting entities to ensure consistency of form filling across the sectors.

**Question 11.** We seek comments on the proposed use of current Forms and Notices provided in Annex D.

## Conflicts of interests, exclusion and related matters

42. In line with the position discussed in Annex B, paragraphs B34 to B39, Article 24, covering conflicts of interest, is transposed at Regulation 24. We have not elaborated the requirement on authorities to prevent, identify and remedy conflicts of interest. We intend to issue guidance on this matter in due course.

43. Regulation 57 covers exclusion, taking stakeholder views into account. The relevant mandatory exclusion offences in the laws of England and Wales and Northern Ireland are identified at Regulation 57(1)(a)-(k). As exclusion for specific relevant offences is obligatory for five years (in the absence of self-cleaning), it is seen as desirable for certainty to identify the specific relevant offences in the laws of England and Wales and Northern Ireland in the Regulations. Similar identification is less crucial for exclusion for non-payment of tax as the Directive does not set out specific European tax offences which have to be interpreted in UK law. And ending of exclusion for non-payment is achieved by paying, or a binding agreement to pay, outstanding obligations, which encourages certainty. Specific identification is also less relevant for discretionary exclusion criteria as these criteria do not identify specific EU laws, and there is no obligation to exclude. (We may offer additional guidance on these matters in due course).

44. Regulation 57(4) does not make exclusion mandatory for breach of tax obligations short of final judgement. Regulations 57(6) and (7) allow mandatory exclusion to be disregarded where disproportionate, or for overriding public-interest reasons; Regulation 57(8) allows authorities discretion over exclusion for the circumstances specified therein. Regulations 57 (11) and (12) specify duration of exclusion at five years and three years for “mandatory” and “discretionary” exclusion respectively.

**Question 12.** We invite comments as to whether the proposed approach set out above is appropriate bearing in mind policy goals and stakeholder views to date, or whether there are clear arguments to the contrary. We also invite comments on whether the mandatory exclusion offences in English law are correctly identified.

## Sub-contracting

45. In line with the position discussed in Annex B, paragraphs B42 to B51, draft regulation 71 implements Article 71 of the Public Sector Directive. The Regulations have been drafted to maintain the flexibility provided in the Directive and to reduce bureaucracy. The approach involves:

- a) Allowing contracting authorities the flexibility to choose the level of detail they require about subcontractors depending on whether or not the specific contract would benefit from it;
- b) Allowing a level of discretion for contracting authorities to examine the grounds for exclusion of the sub-contractors; and



- c) Allowing contracting authorities the flexibility to include facilities for direct payment if the characteristics of the required solution would benefit from it and based on the individual circumstances of the sub-contractors.

46. We will issue guidance to contracting authorities on the types of procurements where selecting these options would be considered beneficial.

**Question 13.** We welcome comments, particularly on whether these draft regulations achieve the objective of implementing the requirements of the Directive in a minimalistic fashion.

**Question 14.** We welcome comments on the type of supporting materials needed and key issues to be addressed.

### Termination of Contracts

47. In line with the position discussed in Annex B, paragraphs B52 and B53, draft regulation 73 implements Article 73 of the Public Sector Directive in accordance with our proposed policy position. Regulation 73(1) requires contracting authorities to include a condition in contracts allowing, but not obliging, them to terminate if any of the three grounds for termination are found to apply. Regulation 73(3) includes a deeming provision for contracts that would only apply where an individual contract does not itself include termination provisions complying with regulation 73(1). This reduces the risk of legal challenge on the basis of either a failure by a contracting authority to insert a termination provision, or to any alleged failure by the UK to “ensure” as required by the Directive.

**Question 15.** We welcome comments on whether regulation 73(3) provides an effective deeming provision.

### Light Touch Regime

48. In line with the position discussed in Annex B, paragraphs B54 to B57, draft regulations 74-77 implement the corresponding Articles 74-77 of the Public Sector Directive. These take into account both the considerable flexibility offered by the Directive in terms of what “national rules” to put in place, and our proposed policy position to adopt a minimalistic approach. The approach involves:

- a) Making this UK-specific light touch rules regime to meet the obligation on Member States in Article 76(1) to “put national rules in place”;
- b) Copying-out those aspects that are mandatory for transposition (ie the bulk of Articles 74 and 75);

- c) Broad UK-specific provisions to ensure that all permissions, flexibilities and exemptions in the main regimes (Public Sector and Utilities) are allowed under the Light-Touch Regime (see regulation 76(4));
- d) A provision to require that timescales for responding to adverts and tenders be “reasonable and proportionate”, without imposing a statutory minimum time limit, thereby preserving the current flexibility on time limits in the Part B Services regime. See regulation 76(5); and
- e) Copying-out the flexibility to reserve contracts for certain services (Article 77).

49. From 18 April 2016 in England, the light-touch regime for health and social services will still sit alongside health sector specific requirements (currently contained in the NHS Procurement, Patient Choice and Competition Regulations (PCCR) 2013), in the same way that the Part B Services regime currently does. To ensure consistency with the general requirements in regulation 3 of the existing PCCR 2013 Regulations, namely the prohibition on favouring types of provider, the “mutual reservation” set out in Article 77 of the Directive will not apply to healthcare commissioning in England. Until 18 April 2016 in England, commissioners of clinical healthcare services must continue to follow the existing Part B service regime and the PCCR 2013. Implementation has been delayed to allow healthcare commissioners time to adapt to the new requirements of the light-touch regime. Practical guidance and support for commissioners will be published in due course.

**Question 16.** We welcome comments, particularly on whether these draft regulations achieve the objective of implementing the requirements of the Directive in a minimalistic fashion.

**Question 17.** We envisage that a minimalistic regulatory approach would need to be supported with relevant training aids, policy instructions or guidance, and welcome inputs on the type of supporting materials needed and key issues to be addressed.

## Governance

50. In the Public Sector Directive, Articles 83(1)-83(5), 85 and 86 cover various obligations on the Member State itself to provide certain functions and information. No corresponding regulations on contracting authorities are necessary, so none have been drafted.

51. Articles 83(6) and 84 cover obligations on contracting authorities for keeping records of completed procurements and these obligations are transposed by the draft regulations 83 and 84.

### Remedies and Standstill

52. Part 3 of the Regulations derives from the Remedies Directive implemented by the UK in 2009. These Regulations are not part of the transposition of the new package of procurement Directives, and UK remedies policy is not being reopened during this consultation process. The standstill and remedies regulations have simply been moved from the existing UK procurement regulations into the proposed new regulations, with adjustments that are necessary or appropriate to mesh with the changed main regulations/Directive, together with some minor drafting or technical improvements. The format of the provisions about giving information has been particularly affected, as the general requirements derived from the new Public Sector Directive have been separated out (in regulation 55) from those derived from the Remedies Directive (regulation 86 about standstill notices), requiring us to take a view on which elements of detail to preserve. We also intend to make it clearer that remedies may be invoked, not just by suppliers from the EU, European Economic Area (EEA) and relevant World Trade Organisation Government Procurement Agreement (GPA) states, but also where covered by relevant bilateral treaties. The draft includes some text (which will need to be expanded) to address this.

**Question 18.** We seek stakeholders' comments on, but strictly limited to, whether the proposed drafting achieves our objective of sewing the existing remedies rules into the new procurement rules framework in a satisfactory way.

### New measures to increase SME participation in public procurement

53. Lord Young's report, 'Growing Your Business' (published May 2013) recommended a number of key reforms to open up all public sector procurement opportunities to streamline procurement for the whole public sector and remove barriers for SMEs. These reforms will be implemented in these Regulations. The reforms implemented in the Regulations are:

- a) Abolishing PQQs for contracts below the EU threshold, and a standardised PQQ to be used for contracts above the EU threshold (where a PQQ is needed) (see regulations 107 and 110);
- b) A requirement that 30 day payment terms are passed down the supply chain through a standard clause, and a requirement to report on late payment of invoices (see regulation 112); and
- c) Mandating that all public sector contract opportunities are accessible on Contracts Finder and publishing a contract award notice on Contracts Finder, which will indicate if spend is with a small business or Voluntary Community and Social Enterprise (VCSE) (see regulations 105, 106, and 108).

54. Government accepted these recommendations and carried out a public consultation on the principles of these reforms in September 2013<sup>11</sup>. The responses confirmed support and Government announced its intention to legislate on the measures in the “Small Business: Great Ambition” publication<sup>12</sup> on 6<sup>th</sup> December 2013.

**Question 19.** Given we have already consulted on the principles of the Lord Young measures, we are only seeking comments specifically on technical points related to the implementation of the measures.

### Schedule 1

55. The purpose of Schedule 1 is to identify those Central Government authorities whose procurements will be governed by the regulations where their value is equal to or greater than the threshold in Article 4(b) and, where relevant, Article 4(c)<sup>13</sup> of the Public Sector Directive.

56. Annex 1 to the Public Sector Directive lists the contracting authorities in the United Kingdom that are considered to be Central Government authorities and it is proposed to reproduce that list in Schedule 1. However, in some respects the United Kingdom list at Annex 1 has not been updated to reflect the creation of successor entities, which are included within the definition of “central government authorities” in Article 2(1)(2) of the Public Sector Directive.

57. We are consulting to obtain confirmation of any successor entities that should be listed in Schedule 1 to the regulations in accordance with Article 2(1)(2) of and Annex 1 to the Public Sector Directive.

58. We have reproduced the United Kingdom list at Annex C to this consultation document.

**Question 20.** Departments are requested to check and confirm that the list is correct or whether it should be amended to take account of successor entities.

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<sup>11</sup> <https://www.gov.uk/government/consultations/making-public-sector-procurement-more-accessible-to-smes>

<sup>12</sup> <https://www.gov.uk/government/publications/small-business-commitment/small-business-great-ambition>

<sup>13</sup> Article 4(c) also applies to Central Government defence authorities whose procurements involve contracts not covered by Annex III to the Directive.

## **Annex A Public Contracts Regulations**

A1. Please follow the link below to the Cabinet Office Consultations page to access the Draft Public Contracts Regulations 2015 and the supporting document Technical Note to the Draft Public Contracts Regulations 2015.

A2. [Transposing the 2014 EU Procurement Directives](#)

## Annex B Policy Choices

### Introduction

B1. The Directives permit a limited number of choices to be made on whether or how to transpose particular provisions. The purpose of this section of the consultation is to explain those choices and the decisions we propose to take on them.

B2. The policy proposals covered below have been informed by feedback provided during a period of informal, targeted engagement with stakeholders actively interested in these issues (as described in the background section in Part 1 of the consultation document) . Where we propose to implement, we seek views on whether the corresponding draft regulations implement the proposed decision effectively and do so in the best way.

B3. Unless indicated otherwise, where a choice covers the Utilities and /or Concessions Directives as well as the Public Sector Directive, references to contracting authorities should be understood to also cover contracting entities.

### Social, Environmental and Labour Law

**B4. Policy choice. What “appropriate measures” should the UK take to ensure suppliers comply with social/environmental/labour laws (Article 18(2) of the Public Sector Directive, Article 36(2) of the Utilities Directive, and Article 30(3) of the Concessions Directive).**

B5. The choice is between regulatory measures, administrative measures, or a combination of the two. A compelling case for regulation has not emerged from stakeholder views received to date. **Instead, compelling arguments against regulation have been made by a significant number of stakeholders. Our proposed policy position, informed by these views, is that administrative measures are appropriate and are consistent with the Government’s policy on avoidance of gold-plating.** These could take the form of guidance making it policy to mirror these obligations in contract clauses, backed up by a standard contract condition.

### Group participation of economic operators

**B6. Policy choice. Whether, and if so how, the UK should establish standard terms for how groups of economic operators meet requirements for financial standing and technical capacity (Article 19(2) of the Public Sector Directive, Article 37(2) of the Utilities Directive, and Article 26(2) of the Concessions Directive).**

B7. Stakeholder feedback is that there is no compelling case for implementing this policy choice, and no evidence of a problem that needs solving. Stakeholder feedback also revealed there is not a need at this time for administrative measures,

but we will keep this under review. **Taking these views into account, our proposed policy position is that this choice should not be implemented.** This is consistent with the Government’s policy on avoidance of gold-plating.

### **Reserved Contracts for Sheltered Workshops**

**B8. Policy choice. Whether to allow contracts to be reserved for sheltered workshops (Article 20 of the Public Sector Directive, Article 38 of the Utilities Directive, and Article 24 of the Concessions Directive).**

B9. Taking into account stakeholder feedback to date, our proposed policy position is that there continues to be a need for this flexibility, allowing contracts to be reserved for sheltered workshops that meet the disabled or disadvantaged persons threshold. The draft UK regulations provide this flexibility.

### **Electronic (“e”) communication and e-procurement choices**

**B10. Policy choices related to e-procurement and e-communications were whether the Regulations should:**

- a) Centrally set the level of security in e-communications, or leave this to each contracting authority within a centrally-set “framework”(in Article 22(6)(b) of the Public Sector Directive, Article 40(6)(b) of the Utilities Directive);**
- b) Centrally specify the level of risk requiring the use of advanced electronic signatures (Article 22(6)(c) of the Public Sector Directive, Article 40(6)(c) of the Utilities Directive);**
- c) Postpone requirements for electronic communication to the extent permissible (Article 90(2) of the Public Sector Directive, Article 106(2) of the Utilities Directive);**
- d) Postpone the requirement on contracting authorities to have recourse to “e-certis” to the extent permissible (Article 90.5, of the Public Sector Directive, not applicable to the Utilities Directive);**
- e) Mandate the use of electronic catalogues in some procurements (Article 36(1) of the Public Sector Directive, Article 54(1) of the Utilities Directive); and**
- f) Mandate the use of “building information electronic modelling” (BIM) for works contracts (Article 22(4) of the Public Sector Directive, Article 40(4) of the Utilities Directive).**

**B11. The choices above do not apply to the Concessions Directive. The policy choices related to concessions were whether the Regulations should:**

- a) **Mandate the means of communication and information exchange in concession award procedures, or leave the choice to individual concession-awarding authorities and utilities (Article 29(1)); and**
- b) **Mandate the use of electronic means of communications (beyond those made obligatory in Articles 33(2) and 34)(Article 29(1)).**

B12. After taking into consideration various stakeholder views, the proposed policy positions are in Regulations 22, 36, and 114 of the draft Public Contract Regulations (discussed further in Part 2 of this consultation document).

B13. In line with overall transposition policy, we prefer the more flexible option and least onerous obligation in each case. A majority of stakeholders to date share this view. We should not centrally set the levels of security, or the circumstances in which electronic signatures should be used, but leave this to each authority or entity, under a succinct high-level framework provided by the Crown Commercial Service.

B14. Use of electronic catalogues should not be centrally-mandated. We should postpone mandatory full e-communications, mandatory use of “e-certis,” and mandatory electronic format for the European Single Procurement Document to the maximum permissible under the Directive. Informed by views of stakeholders, we consider that BIM should not be made a legal requirement.

B15. With respect to the two choices in the Concessions Directive, our proposed policy position is that the choice of communication should be left to individual concession-awarding bodies, and we should not make mandatory the use of electronic communications. This is consistent with the views of stakeholders.

## Procedures

B16. **The policy choices covered were whether the Regulations should:**

- a) **Implement the option to allow contracting authorities to award public contracts by negotiated procedure without a call for competition (Article 32 of the Public Sector Directive);**
- b) **Allow sub-central contracting authorities to use a PIN as a call for competition, where the contract is awarded by restricted procedure or competitive procedure with negotiation (Article 48(2));**
- c) **Allow sub-central authorities to set the timescales for the receipt of tenders (Article 28(4)); and**
- d) **Require contract award notices for call-offs to be sent on a quarterly basis to OJEU (Article 50(2) of the Public Sector Directive, Article 70 of the Utilities Directive).**



B17. Stakeholder feedback confirmed unanimously that the first option should be transposed as this was a practical necessity. Transposing this option would also reflect the position in the current Regulations. The majority of responses were also in favour of providing for the flexibilities for sub-central authorities in the second and third choices and these have been transposed in the draft Regulations. To implement the fourth choice would have required a further change to provide that contract notices for call-offs should be sent to OJEU in the first place. **A clear majority of responses were opposed to this because of the additional administrative burden involved and so our proposed policy position is that this should not be transposed.**

### Central purchasing bodies

**B18. Policy choice. Whether to provide that contracting authorities may use central purchasing bodies to procure their requirements (Article 37(1) of the Public Sector Directive and Article 55(1) of the Utilities Directive).**

B19. Taking into account stakeholder feedback to date, our proposed policy position is that there continues to be a need for this flexibility that enables use of central purchasing bodies for particular procurements. The draft UK regulations provide this flexibility.

**B20. Policy choice. Whether to mandate that certain procurements must be made by using specific central purchasing bodies (Article 37(1) of the Public Sector Directive and Article 55(1) of the Utilities Directive).**

B21. Any such mandate will be done through separate mandating regulations made under section 2(2) of the European Communities Act 1972.

**B22. Policy choice. Whether to limit contracting authorities when using central purchasing bodies in other Member States for centralised purchasing activities (Article 39(2) of the Public Sector Directive and Article 57(2) of the Utilities Directive).**

B23. Our proposed policy position, informed by stakeholder feedback to date, is that contracting authorities should not be limited in this way. It has the potential to harm value for money. The draft UK regulations do not transpose this provision.

### Division of contracts into lots / SME access

**B24. The main policy choices are how the UK should implement the provisions concerning the division of contracts into “lots”. The choices are whether:**

- a) **Authorities and entities (Utilities) should be obliged to divide contracts into lots, or should this decision be left to each authority per procurement (Article 46(4) of the Public Sector**

**Directive, Article 65(4) of the Utilities Directive, not applicable to the Concessions Directive); and**

- b) Authorities and entities should be allowed to accept bids for combined lots (provided that the permissible combinations are advised to bidders in the procurement documents) (Article 46(3) of the Public Sector Directive, Article 65(3) of the Utilities Directive).**

**B25. After taking into consideration stakeholders' views, our proposed policy positions are in Regulation 46.**

B26. Whilst division of contracts can encourage SME access, we consider that the decision on whether or not to divide into lots, and if so the number and types of lots, should be left to the discretion of each contracting authority or entity case-by-case. This better allows contracting authorities and entities to ensure their procurement reflects the specific circumstances of each requirement. If and where authorities / entities decide not to divide into lots they will be required to explain their decision in the procurement documents or report. This should encourage authorities and entities to actively consider the possibility of lotting.

B27. We have also taken the view that bids for combined lots should be allowed. This will help to achieve the best value for money. Read in conjunction with the relevant recital 79 in the Directive we understand that this provision allows contracting authorities or entities to award a single contract to cover several lots instead of awarding a contract lot-by-lot if the tender put forward for a combination of lots, taken as a whole, would fulfil the award criteria better than the tenders if evaluated on a lot by lot basis. In order to exercise this freedom the contracting authority or entity will need to make it clear in the procurement documents that it reserves the possibility of awarding on this basis and indicates the lots that may be combined.

### **Standard Forms and Notices**

B28. The 2004 Directive requires procurers to submit certain basic pieces of information about contract opportunities and awards, for publishing at EU level, for transparency, statistical and monitoring reasons. The Directive specifies the information obligations in some detail, but does not contain the actual forms: standard forms are made by the Commission via a separate regulation, which are then published on the SIMAP website. There are currently 19 standard forms on SIMAP.

B29. Annex V of the Public Sector Directive lists specific information required, in a similar way to the 2004 Directive, but there are some new features that are not covered by the existing forms, so a revised set of forms will need to be produced in due course. The European Commission has responsibility for creating these standard forms for all EU languages. Normally the Commission makes the new forms available shortly before the expiry of the transposition deadline (2 years) – as the UK is preparing to implement the Directive early this presents certain challenges in how the UK can meet the new information requirements during the period when

the new UK Regulations are in force, but the new forms have not yet become available.

B30. For some of the standard forms the information required by the new Directive is almost the same as current Directive. However there are a number of forms where significant additional information is needed and others where there are no current equivalents. The UK will be pressing in Brussels for the new forms to be made available at the earliest opportunity, but workarounds will be necessary if this does not happen in time. E-Senders play a large role in the completion of online templates and discussions will take place with them with the objective of the e-Senders:

- a) Amending their templates to request the information in a format the OJEU will publish whilst making completion of the templates user friendly; and
- b) Publicising and disseminating the central guidance.

B31. The Cabinet Office considered stakeholders' views on the potential options for providing the new information required by the new Directive during the (possible) interim period until the new forms are drafted. The key issues/options were:

- a) How to handle new information requirements for notices where there **is an existing form that can be adapted;**
- b) How to handle new information requirements where there **is no existing form; and**
- c) What type of guidance would be required to encourage consistent practice, to aid bidders and gain maximum benefit from the new flexibility.

B32. All stakeholders accepted the use of the free format text on existing Forms to provide the new information required. Alternative existing Forms were suggested by some stakeholders to handle new information requirements. Stakeholders also highlighted the need to liaise with the EU and e-Senders. These suggestions (Annex D) will be considered in the final plans, alongside responses to this consultation.

B33. Commentators confirmed the need for central guidance to ensure consistency across the public sector and utilities, and suggested formats for the guidance.

## Conflicts of interests, exclusion and related matters

**B34. The choices are how the UK should implement the options on exclusion of economic operators from public procurement for various offences, failures and misdeeds, including whether to:**

- a) Mandate exclusion for certain offences failure or misdeeds, or leave to the discretion of authorities (Article 57(2), 57(4) and 57(5) of the Public Sector Directive, Article 80(1)<sup>14</sup> of the Utilities Directive, Article 38(5), 38(7) and 38(8) of Concessions Directive);**
- b) Allow possible derogation from mandatory exclusion for overriding reasons or where exclusion would be disproportionate (Article 57(3) of the Public Sector Directive, Article 80(1) of the Utilities Directive, Article 38(6) of the Concessions Directive);**
- c) Prohibit exclusion of economic operators in certain cases, or leave to discretion of authorities (Article 57(4) of the Public Sector Directive, Article 80(1) of the Utilities Directive, Article 38(7)(b) of the Concessions Directive);**
- d) Elaborate the grounds for (mandatory) exclusion (Article 57(1) of the Public Sector Directive, Article 80(1) of the Utilities Directive, Article 38(4) of the Concessions Directive);**
- e) Elaborate the requirement to avoid conflict of interest (Article 24 of the Public Sector Directive, Article 42 of the Utilities Directive, Article 35 of the Concessions Directive); and**
- f) To decide the duration of both mandatory and discretionary exclusion (Article 57(7) of the Public Sector Directive, Article 80(1) of the Utilities Directive, Article 39(10) of the Concessions Directive).**

**B35. After taking into consideration various stakeholder views, our proposed policy positions are in draft Regulation 24 and Regulation 57 (discussed further in Part 2 of this consultation document).**

B36. The rules require the exclusion of economic operators for certain specified offences, and allow exclusion of economic operators for other misdeeds or causes; however, Member States have the option to mandate some otherwise-discretionary exclusions. We consider that a flexible implementation is desirable, maintaining maximum permissible discretion for contracting authorities in deciding whether to exclude, or whether to exercise any options not to exclude. As in the current rules, we intend to allow mandatory exclusion to be disregarded where necessary for overriding public interest reasons.

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<sup>14</sup> Article 80 (1) of Utilities Directive refers to the relevant Part of Article 57 in the Public Sector Directive).

B37. Taking into account stakeholders' views to date, we consider that the "default" exclusion should be three years and five years for discretionary and mandatory exclusion respectively, the maximum permitted in the Directive. This is consistent with the UK's wish to exclude economic operators for improper behaviour. (Contracting authorities will be allowed to disregard exclusion if an economic operator demonstrates it has successfully "self-cleaned").

B38. We have taken the view that we should elaborate the offences in UK national law which attract mandatory exclusion, as certainty is desirable where a contracting authority is *compelled* to exclude an economic operator. However no need has been identified to elaborate the requirement on contracting authorities or entities to effectively prevent, identify, and remedy conflicts of interest to avoid distortion of competition and ensure equal treatment of economic operators. These fundamental aims can be addressed in guidance.

B39. In both the Utilities and Concessions Directives any of the exclusionary provisions, and the conflict of interest provisions, are only obligatory for those utilities which are also contracting authorities.

#### Tender assessment

B40. **The policy choices covered were whether the Regulations should:**

- a) **Prevent contracting authorities, when using the open procedure, from examining tenders before looking at whether the selection criteria were met or whether there were grounds for exclusion (Article 56(2) of the Public Sector Directive, Article 76(7) of the Utilities Directive);**
- b) **Allow contracting authorities to ask for incomplete or erroneous information to be supplemented (Article 56(3) of the Public Sector Directive, Article 76(4) of the Utilities Directive); and**
- c) **Restrict the use of price only or cost only as the sole award criterion (Article 67(2) of the Public Sector Directive, Article 82(2) of the Utilities Directive).**

B41. An overwhelming majority of stakeholders wanted to keep the flexibility to decide how they examined tenders and, based on these views, our proposed policy position is that the first option should not be implemented. The view of stakeholders was similarly clear cut on the need to be able to ask for incorrect or incomplete information to be corrected or supplemented. As a result, we propose to provide for this option. A very clear majority did not want a restriction to be placed on using price only or cost only as the sole award criterion. It was considered that these criteria should be available to use for the award of contracts for off-the-shelf products. **Accordingly, based on these views, our proposed policy position is not to introduce this restriction.**

## Sub-contracting

**B42. Policy choice. Whether it should be compulsory for contracting authorities to ask bidders to indicate in their proposals any share of the contract they may intend to subcontract to third parties and the details of any proposed subcontractors (Article 71 of the Public Sector Directive, Article 81 of the Utilities Directive, and Article 42 of the Concessions Directive).**

B43. Stakeholder feedback confirmed that this should remain an option that contracting authorities could include in their procurements if and when required, but should not be mandated by the UK Regulations. This is consistent with UK strategy of reducing the complexity of the procurement rules and allowing for flexibility.

**B44. Policy choice. Whether the main contractor should be directly obliged to provide information about its subcontractors and supply chain (Article 71 of the Public Sector Directive, Article 81 of the Utilities Directive, and Article 42 of the Concessions Directive).**

B45. Feedback received from the majority of stakeholders was that to maintain flexibility of the process this should remain an option that contracting authorities could use where warranted on a case by case basis but should not be mandated by the UK Regulations. The proposed policy position on both these choices is to leave it to the individual contracting authorities to make the decision per procurement, based on the individual circumstances and requirements of each case.

**B46. Policy choice. Whether the basic requirement (being the requirement for the main contractors on works contracts or contracts for services to be provided at a facility under direct oversight of the contracting authorities to provide contact information of subcontractors to the contracting authority) should be extended to a wider scope of contract or a wider scope of subcontractors (ie further down the supply chain). (Article 71 of the Public Sector Directive, Article 81 of the Utilities Directive, and Article 42 of the Concessions Directive.)**

B47. In line with overall transposition policy to maintain flexibility we prefer to leave it to contracting authorities to include clauses in the contract with the main contractor to give effect to the basic requirement. The majority of stakeholders share this view.

**B48. Policy choice. Whether contracting authorities should be required to verify whether there are mandatory or discretionary grounds for exclusion of any subcontractors and, if such verification is undertaken and the response shows that there are discretionary grounds for exclusion, whether contracting authorities should be obliged to require that the main contractor find a replacement subcontractor. (Article 71 of the Public Sector Directive, Article 81 of the Utilities Directive, and Article 42 of the Concessions Directive.)**

B49. The majority of stakeholder feedback confirmed that this should remain as an option for contracting authorities to enforce via procurement and contract

documentation where proportionate and necessary, but should not be mandated by the UK Regulations.

**B50. Policy choice. For Public Sector and Utilities only: Whether or not to provide for direct payment of subcontractors; and whether subcontractors should receive direct payments without it being necessary for them to request such direct payment (Article 71 of the Public Sector Directive and Article 81 of the Utilities Directive).**

B51. The majority of stakeholders argued that direct payment should remain as an option for contracts and supply chains where they were warranted, but not mandated. Some commentators did favour including direct payments, with no requirement to request them, in the Regulations to ensure subcontractors received payment in a timely manner. However, alternative measures are included separately in the Regulations to ensure payments are provided in a timely manner that does not increase the burden on Contracting Authorities.

### Termination of Contracts

**B52. Policy choice. How to ensure that contracting authorities are able to terminate contracts in certain circumstances (Article 73 of the Public Sector Directive, Article 90 of the Utilities Directive, and Article 44 of the Concessions Directive).**

B53. Our proposed policy position, informed by stakeholder feedback to date, is that the UK regulations should specify that contracting authorities must include a contract condition allowing them to terminate if any of the three grounds for termination apply. The three grounds are where the contract has been subject to a substantial modification that constitutes a new award, where it is discovered after contract award that the contractor should have been excluded on mandatory exclusion grounds, and where the ECJ has declared a serious infringement by the contracting authority of its obligations, meaning the contract should not have been awarded. Our proposed policy position, again informed by stakeholder feedback to date, is that the UK regulations should provide a deeming provision to ensure the possibility to terminate is available in all cases.

### Light Touch Regime

**B54. Policy choice. What “national rules” to put in place to give effect to the new light-touch regime (the Directive requires the UK to put in place national rules, but leaves considerable discretion to what those rules should be). (Articles 74-77 of the Public Sector Directive; Articles 91-94 of the Utilities Directive).**

B55. The vast majority of stakeholders confirmed the need for a minimalistic approach to implementation, to maximise flexibility. This is consistent with both the Government’s policies on use of copy-out and avoidance of gold-plating, and the UK strategy of making the procurement rules simpler and more flexible. Taking these views into account, our proposed policy position is that the draft UK regulations for

the light touch regime should consequently be prepared using a light-touch approach.

**B56. Policy choice. Whether or not to mandate “MEAT” (Most Economically Advantageous Tender) as the mandatory basis to award contracts under the Light Touch Regime (Article 76(2) of the Public Sector Directive; Article 93(2) of the Utilities Directive).**

B57. Stakeholder feedback confirmed the volume and balance of arguments was not in favour of mandating MEAT. This is consistent with Government policy on taking a minimalistic approach to implementation, and not regulating where not required. Whilst some commentators favoured mandating MEAT, for instance because they perceive MEAT is normally the more appropriate basis to award contracts valued above the Light Touch Regime threshold, our proposed policy position is that these matters can adequately be covered in policy and guidance.



## Annex C Central Government authorities for the purpose of Schedule 1 of the Regulations

UNITED KINGDOM<sup>15</sup>

Cabinet Office

Office of the Parliamentary Counsel

Central Office of Information

Charity Commission

Crown Estate Commissioners (Vote Expenditure Only)

Crown Prosecution Service

Department for Business, Enterprise and Regulatory Reform

Competition Commission

Gas and Electricity Consumers' Council

Office of Manpower Economics

Department for Children, Schools and Families

Department of Communities and Local Government

Rent Assessment Panels

Department for Culture, Media and Sport

British Library

British Museum

Commission for Architecture and the Built Environment

The Gambling Commission

Historic Buildings and Monuments Commission for England (English Heritage)

Imperial War Museum

Museums, Libraries and Archives Council

National Gallery

National Maritime Museum

National Portrait Gallery

Natural History Museum

Science Museum

Tate Gallery

Victoria and Albert Museum

Wallace Collection

Department for Environment, Food and Rural Affairs

Agricultural Dwelling House Advisory Committees

Agricultural Land Tribunals

Agricultural Wages Board and Committees

Cattle Breeding Centre

Countryside Agency

Plant Variety Rights Office

Royal Botanic Gardens, Kew

Royal Commission on Environmental Pollution

Department of Health

Dental Practice Board

National Health Service Strategic Health Authorities

NHS Trusts

Prescription Pricing Authority

Department for Innovation, Universities and Skills

Higher Education Funding Council for England

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<sup>15</sup> The list of UK Central Government Authorities can be found at pages L94/193 to L94/197 (Official Journal page number reference) on the following link:

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN>

National Weights and Measures Laboratory  
 Patent Office  
 Department for International Development  
 Department of the Procurator General and Treasury Solicitor  
     Legal Secretariat to the Law Officers  
 Department for Transport  
     Maritime and Coastguard Agency  
 Department for Work and Pensions  
     Disability Living Allowance Advisory Board  
     Independent Tribunal Service  
     Medical Boards and Examining Medical Officers (War Pensions)  
     Occupational Pensions Regulatory Authority  
     Regional Medical Service  
     Social Security Advisory Committee  
 Export Credits Guarantee Department  
 Foreign and Commonwealth Office  
     Wilton Park Conference Centre  
 Government Actuary's Department  
 Government Communications Headquarters  
 Home Office  
     HM Inspectorate of Constabulary  
 House of Commons  
 House of Lords  
 Ministry of Defence  
     Defence Equipment & Support  
     Meteorological Office  
 Ministry of Justice  
     Boundary Commission for England  
     Combined Tax Tribunal  
     Council on Tribunals  
     Court of Appeal — Criminal  
     Employment Appeals Tribunal  
     Employment Tribunals  
     HMCS Regions, Crown, County and Combined Courts (England and Wales)  
     Immigration Appellate Authorities  
     Immigration Adjudicators  
     Immigration Appeals Tribunal  
     Lands Tribunal  
     Law Commission  
     Legal Aid Fund (England and Wales)  
     Office of the Social Security Commissioners  
     Parole Board and Local Review Committees  
     Pensions Appeal Tribunals  
     Public Trust Office  
     Supreme Court Group (England and Wales)  
     Transport Tribunal  
 The National Archives  
 National Audit Office  
 National Savings and Investments  
 National School of Government  
 Northern Ireland Assembly Commission  
 Northern Ireland Court Service  
     Coroners Courts  
     County Courts  
     Court of Appeal and High Court of Justice in Northern Ireland

Crown Court  
 Enforcement of Judgements Office  
 Legal Aid Fund  
 Magistrates' Courts  
 Pensions Appeals Tribunals  
 Northern Ireland, Department for Employment and Learning  
 Northern Ireland, Department for Regional Development  
 Northern Ireland, Department for Social Development  
 Northern Ireland, Department of Agriculture and Rural Development  
 Northern Ireland, Department of Culture, Arts and Leisure  
 Northern Ireland, Department of Education  
 Northern Ireland, Department of Enterprise, Trade and Investment  
 Northern Ireland, Department of the Environment  
 Northern Ireland, Department of Finance and Personnel  
 Northern Ireland, Department of Health, Social Services and Public Safety  
 Northern Ireland, Office of the First Minister and Deputy First Minister  
 Northern Ireland Office  
     Crown Solicitor's Office  
     Department of the Director of Public Prosecutions for Northern Ireland  
     Forensic Science Laboratory of Northern Ireland  
     Office of the Chief Electoral Officer for Northern Ireland  
     Police Service of Northern Ireland  
     Probation Board for Northern Ireland  
     State Pathologist Service  
 Office of Fair Trading  
 Office for National Statistics  
     National Health Service Central Register  
 Office of the Parliamentary Commissioner for Administration and Health Service  
 Commissioners  
 Paymaster General's Office  
 Postal Business of the Post Office  
 Privy Council Office  
 Public Record Office  
 HM Revenue and Customs  
     The Revenue and Customs Prosecutions Office  
 Royal Hospital, Chelsea  
 Royal Mint  
 Rural Payments Agency  
 Scotland, Auditor-General  
 Scotland, Crown Office and Procurator Fiscal Service  
 Scotland, General Register Office  
 Scotland, Queen's and Lord Treasurer's Remembrancer  
 Scotland, Registers of Scotland  
 The Scotland Office  
 The Scottish Ministers  
     Architecture and Design Scotland  
     Crofters Commission  
     Deer Commission for Scotland  
     Lands Tribunal for Scotland  
     National Galleries of Scotland  
     National Library of Scotland  
     National Museums of Scotland  
     Royal Botanic Garden, Edinburgh  
     Royal Commission on the Ancient and Historical Monuments of Scotland  
     Scottish Further and Higher Education Funding Council

Scottish Law Commission  
Community Health Partnerships  
Special Health Boards  
Health Boards  
The Office of the Accountant of Court  
High Court of Justiciary  
Court of Session  
HM Inspectorate of Constabulary  
Parole Board for Scotland  
Pensions Appeal Tribunals  
Scottish Land Court  
Sheriff Courts  
Scottish Police Services Authority  
Office of the Social Security Commissioners  
The Private Rented Housing Panel and Private Rented Housing Committees  
Keeper of the Records of Scotland  
The Scottish Parliamentary Body Corporate  
HM Treasury  
Office of Government Commerce  
United Kingdom Debt Management Office  
The Wales Office (Office of the Secretary of State for Wales)  
The Welsh Ministers  
Higher Education Funding Council for Wales  
Local Government Boundary Commission for Wales  
The Royal Commission on the Ancient and Historical Monuments of Wales  
Valuation Tribunals (Wales)  
Welsh National Health Service Trusts and Local Health Boards  
Welsh Rent Assessment Panels

## Annex D Summary of Forms for New Directive and Suggestions for Interim Measures

### Public Sector Directive

Existing Form	Reference for New Information Requirement	New information requirement (i.e. Missing field(s) on existing forms)	Suggestion
Prior Information Notice (PIN)	Annex V, Part B 1	NUTS code	Use standard contract notice and use text boxes as explanation
PIN call for competition	Annex V, Part B II, Art48(2)	New Form	Use Contract Award Notice and use text boxes as explanation for additional information
Contract Notice	Annex V, Part C, Art 49	Minor changes to reflect new procedures, NUTS and e-procurement	Use existing contract notice and use text boxes as explanation. For Innovation Partnership procedures tick the negotiated or competitive dialogue box, and explain in Additional Information that using the innovation partnership procedure
Contract Award	Annex V ,Part D, Art 50	Changes required to reflect light touch, add procedures, additional stats on SME, MS and electronic procurement, status winner.	Use existing contract notice and use text boxes as explanation
Design Contest	Annex V ,Part E, Art 79(1)	NUTS code	Use existing Design Contest Form and add NUTS code to free text box
Design award	Annex V ,Part F, Art 79(2)	Criteria applied, number SMEs, status of winner and date of Jury decision to be added	Use standard contract notice and use text boxes as explanation

<b>New Form</b>	<b>Reference for New Information Requirement</b>	<b>New information requirement (i.e. Missing field(s) on existing forms)</b>	<b>Suggestion</b>
Buyer Profile	Annex V Part A	NUTS codes	Use standard form and add NUTS code to free text box
Modifications to contract	Annex V ,Part G, Art 72 (1)	New form	Use existing contract award notice or potentially VEAT Notice and use text boxes for additional information
Notices Social & Specific Services	Annex V ,Part H, Art 75 (1)	New form	Use existing contract notice and use text boxes as explanation
PIN Social & Specific Services	Annex V ,Part I, Art 75 (1)	New form	Use existing contract notice and use text boxes as explanation
Award Social & Specific Services	Annex V ,Part J, Art 75 (2)	New form	Use existing contract award notice and use text boxes as explanation