MINISTRY OF DEFENCE

UK Implementation of the Defence and Security Directive

MOD response to the second public consultation

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MOD SUMMARY RESPONSE DOCUMENT ON THE CONSULTATION ON THE IMPLEMENTATION OF:

DIRECTIVE 2009/81/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 13 July 2009

on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC

PART 1

BACKGROUND AND APPROACH

Purpose

1. This document summarises the results of the second public consultation on the transposition of 2009/81/EC (the "New Directive") of the European Parliament and of the Council**,** amending Council Directives 2004/17/EC (the "Utilities Directive") and 2004/18/EC (the "Classic Directive"). It describes the overall results of the second consultation, summarises key points raised by stakeholders and where appropriate indicates the conclusions reached by the Ministry of Defence ("MOD").

Background

2. The New Directive was adopted by the EU Council of Ministers and the European Commission on 13 July 2009. It was published in the Official Journal of the European Union (OJEU) on 20 August 2009 and must be implemented by Member States by 21 August 2011.

3. The New Directive establishes new procurement rules specifically adapted to meet the concerns of Member States regarding the sensitive nature of procurements in the defence and security sectors. It was adopted following a successful proposal by the EU Commission to address concerns by Member States that the existing Classic and Utilities Directives do not always permit the purchase of military or sensitive security capability as effectively as they could, or deal explicitly with key issues such as security of information.

4. The New Directive is largely based on the Classic Directive. Its scope also extends to contracting entities to which the Utilities Directive applies if they procure equipment, works or services which are for security purposes and involve, require or contain classified information.

5. The New Directive also introduces a number of provisions concerning the award of public contracts in the defence and security fields which are either new, or are adaptations of the provisions which already exist in the Classic Directive, in particular:

a. The default procedures are the negotiated procedure with prior publication of contract notice and the restricted procedure. The competitive dialogue procedure can be used for particularly complex contracts where the default procedures are not sufficient;

b. Specific provisions on security of information aim to ensure that sensitive information may remain protected against unauthorised access;

c. Special clauses on security of supply are intended to afford contracting authorities/entities with greater certainty that equipment, works or services can be delivered, in particular in times of crisis or armed conflict;

d. Particular rules on sub-contracting allow contracting authorities/entities to require prime contractors to award sub-contracts using the specific rules in the New Directive in certain circumstances.

Scope

6. MOD had responsibility for coordinating the transposition of the New Directive in the jurisdictions of England, Wales, Scotland and Northern Ireland, so the consultation exercises were primarily aimed at consultees in those jurisdictions. MOD also supported personnel responsible for transposition work in Gibraltar.

Approach

7. Although the implementation of the New Directive is mandatory, the UK had a measure of flexibility in its implementation as some elements are optional. In general, MOD followed the approach taken in the Public Contracts Regulations 2006 ("PCR 2006") when transposing those elements of the New Directive which are broadly the same as the Classic Directive, including the optional elements. We consulted on this approach during the two rounds of public consultation.

8. The first consultation ran for 12 weeks from December 2009 to March 2010 and introduced MOD's proposed approach to implementation, highlighted the main new provisions and, where there were choices to be made in relation to those new provisions, sought stakeholder feedback. This enabled MOD to gauge preferences and inform decisions on the policy approach.

9. The responses from the first consultation were summarised in the Second Consultation Document along with the resulting policy outcomes. The second consultation provided stakeholders the opportunity to comment further on MOD's approach to implementation, the draft New Regulations, the draft Impact Assessment and on a number of specific questions. This consultation again ran for 12 weeks, from December 2010 to March 2011.

10. The new Defence and Security Public Contracts Regulations 2011 (the "New Regulations") will take effect on 21 August 2011. The implementing regulations will amend the existing PCR 2006, Public Contracts (Scotland) Regulations 2006 (PCSR 2006), Utilities Contracts Regulations 2006 (UCR 2006) and Utilities Contracts (Scotland) Regulations 2006 (UCSR 2006), so as to make it clear that certain procurements which previously fell within the scope of those regulations are now covered by the New Regulations.

References

11. In this response document we use the term "New Directive" to refer to Directive 2009/81/EC, "Classic Directive" for Directive 2004/18/EC[1], "Utilities Directive" for Directive 2004/17/EC[2] and "Remedies Directives" for Directive 89/665/EEC and Directive 92/13/EEC, as amended by Directive 2007/66/EC[3].

12. For convenience, we also use the term "UK Regulations" to mean the PCR 2006, the Public Contracts (Scotland) Regulations 2006 (PCSR 2006), the Utilities Contracts Regulations 2006 (UCR 2006), and the Utilities Contracts (Scotland) Regulations 2006 (UCSR 2006); and the term "New Regulations" to refer to the implementing regulations for the New Directive.

[1] 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
http:// eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:134:0114:0240:EN:PDF

[2] 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.
http:// eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:134:0001:0113:EN:PDF

[3] Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness
of review procedures concerning the award of public contracts
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:335:0031:0046:EN:PDF

PART 2 - SUMMARY OF RESULTS FROM THE SECOND CONSULTATION

Purpose

13. This section of the document summarises the results of the second public consultation on the transposition of the New Directive. It describes the overall results of the consultation, summarises key points raised by stakeholders and where appropriate indicates the conclusions reached by MOD.

Overview

14. The second public consultation ran for 12 weeks, between December 20010 and March 2011 with over 30 stakeholders specifically targeted including representative groups from industry and government. The second consultation elicited a lower number of responses than the first consultation. However, this can be explained by the action taken to capture the views of other government departments (OGDs) during the preview consultation that took place across government before the second public consultation. Furthermore, MOD has been in dialogue with a number of stakeholders throughout the process.

15. Feedback was analysed in spring/summer 2011 and whilst there were no changes to the overall policy outcomes it has helped to inform implementation decisions leading to further amendments to the draft New Regulations.

16. The text that follows runs through the outcomes from the second consultation: Part 2A deals with general comments arising out of any aspect of the draft New Regulations as requested in Box 1 of the second Consultation; and Part 2B deals with responses to the other more specific key questions raised.

17. This analysis concentrates predominately on the significant issues arising from the comments made and presents them in terms of the key issues and arguments, without attempting to cover all the individual subtleties. It does not attempt to cover all of the minor points offered by respondents. However, all points have been carefully considered.

PART 2A – Draft Regulations - Policy Outcomes and Supporting Evidence

18. Review (*New)* – Regulation 2

18.1. A review clause has been added as a new regulation 2 in the New Regulations to enable the New Regulations to be reviewed every five years in accordance with Better Regulation policy.

19. Identical/Similar provisions of the New Directive

19.1. **Policy Outcome: No change following the second public consultation. In general the implementing regulations implement the New Directive provisions which are substantively the same as corresponding provisions in the Classic Directive and the Remedies Directives, both in respect of mandatory and optional provisions, in the same way as the PCR 2006.**

19.2. The New Directive is based on the Classic Directive and the Remedies Directives. The Classic Directive and the Remedies Directives are transposed into UK law as the current PCR 2006. For reasons of legal certainty and ease of use by contracting authorities/entities, MOD has implemented identical/similar provisions in substantively the same way as the PCR 2006, both in respect of mandatory and optional provisions, taking into account the law of Scotland and Northern Ireland, where necessary. There were no objections from stakeholders to this general approach.

19.3. The only instance where MOD has diverted from the approach referred to in 19.2 is in relation to Article 55(5). Article 55(5) relates to the requirement that economic operators notify contracting authorities/entities of their intention to bring proceedings (for which see further below at paragraph 31.1). It should be noted that the transposition of Article 56(5) (which relates to the test to be applied by the courts when deciding whether to grant interim measures in interlocutory hearings) is different from the treatment in the PCR 2006, because of what MOD consider to be material differences in the wording of the underlying directives (for which see further at paragraphs 32.1 and 32.2 below).

19.4. One stakeholder commented on a selected number of instances where the New Regulations use wording from the PCR 2006 rather than replicating the different wording from the New Directive. These comments were considered and where appropriate the New Directive text has been used.

19.5. MOD has agreed with the Cabinet Office and the Scottish Government consequential amendments to the UK Regulations arising from transposition.

19.6. There was also a suggestion that incorporating relevant Directive Recitals into the implementing regulations would help to bring clarity. Generally, incorporation of Directive Recital text into the implementing regulations would not be appropriate as it does not have the same status as a substantive provision and is intended as a guide for interpretation. However, MOD has used Directive Recital text where appropriate to inform development of the New Regulations and policy guidance.

19.7. The MOD will continue to work jointly with the Cabinet Office and Scottish Government on implementation of any consequential amendments to the New Regulations required as a result of amendments to the UK Regulations. This process is underway in the context of amendments in light of the judgment in the Uniplex Case (for which see further at paragraph 26.5).

20. Definitions – Article 1

Definition of Crisis

20.1. **Policy Outcome: No change following the second public consultation. The Secretary of State shall have the authority to deem a crisis as impending. The New Regulations shall not explicitly allow such a declaration to be made by Ministers of the Devolved Administrations.**

20.2. The definition of crisis states that the Secretary of State would deem a crisis as impending. It is left open for any individual Secretary of State to make this decision but they would only ever exercise this power within his/her portfolio of responsibility. Under the *Carltona* principle[4], the decision is unlikely to be taken by the Secretary of State but by an official in the department.

20.3. The ability to deem that a crisis is impending has a very limited practical effect. It merely allows the award of the main contract using the non-competitive negotiated procedure, or the award of a sub-contract without the publication of a sub-contract notice.

20.4. Some stakeholders suggested that Ministers of devolved administrations should have the ability to deem a crisis as impending. In particular one stakeholder pointed to the Civil Contingencies Act 2004 which does allow "in relation to Scotland, the Scottish Ministers" to specify an event as an emergency.

20.5. Whilst the Civil Contingencies Act 2004 does confer some powers specifically onto the Ministers of devolved administrations, deeming a crisis as impending in the context of the New Regulations is a matter reserved for central Government. Ministers of devolved administrations cannot exercise any statutory powers in this area. Therefore, MOD has not amended the definition of "Crisis".

Definition of Classified Information

20.6. **Policy Outcome: No change following the second public consultation. Transpose the definition of "classified information" based on the definition in the New Directive, noting in guidance only that this will apply to information or material classified "RESTRICTED" or above in the UK.**

[4] The Carltona principle means that, in the UK, the acts of government departmental officials are synonymous with the actions of the Minister in charge of that department. The point was established in Carltona Ltd v. Commissioners of Works.

20.7. "Classified information" is defined in Article 1 as "any information or material, regardless of form, nature or mode of transmission thereof, to which a certain level of security classification or protection has been attributed, and which, in the interests of national security and in accordance with the laws, regulations or administrative provisions in force in the Member State concerned, requires protection against any misappropriation, destruction, removal, disclosure, loss or access by any unauthorised individual, or any other type of compromise". MOD proposed wording in the draft Regulations that sought to clarify this definition including, for example, reference to the government protective marking system ("GPMS") set out in HMG Security Policy Framework. This elicited a number of opposing views. As a result, and after consulting appropriate security experts, MOD has considered that the best approach is to revert as closely as possible to the wording of the New Directive and to cover any remaining issues in supporting guidance.

20.8. One stakeholder commented that the protective marking of "PROTECT" needed to be excluded. The UK marking "PROTECT" is a sub-national security related marking that may be applied to information. Although the definition of "classified information" does not explicitly refer to any specific level of classification or protection, it requires the information to be protected in the interests of national security. Since the PROTECT marking is not for national security purposes it does not fall within the definition of classified information and does not need to be expressly excluded from the definition of classified information.

21. Confidentiality obligations of contracting authorities / entities – Article 6

21.1. **Policy Outcome: No change following the second public consultation. Transpose Article 6 using text consistent with Article 6 of the Classic Directive amended to take into consideration the effect of recent case law.**

21.2. Article 6 of the New Directive sets out the obligations that contracting authorities/entities have in protecting confidential information provided to it by economic operators. This Article is substantially similar to Article 6 of the Classic Directive. However, Article 6 of the New Directive includes the additional phrase "in particular legislation regarding access to information" and "subject to contractually acquired rights". Two stakeholders suggested there may be a conflict between the wording of the Regulation 10 of the New Regulations and the Freedom of Information (FOI) Act and one added that MOD's approach to transposition was not consistent with PCR 2006.

21.3. MOD has reviewed the wording of the draft New Regulations published as part of the second public consultation in light of the comments received and recent case law[5]. MOD does not consider that there is a conflict with the FOI Act. As for consistency of approach, following consultation with the Cabinet Office the wording of the New Regulations have been amended. MOD has reverted to the existing PCR 2006 wording whilst incorporating the new additional operative wording from the New Directive so that regulation 10(1) provides that: "Subject to the provisions of these Regulations and in accordance with the law of any part of the United Kingdom to which the contracting authority is subject, and subject to contractually acquired rights, a contracting authority shall not disclose information forwarded to it by an economic operator which the economic operator has reasonably designated as confidential".

[5] Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council & Ors [2010] EWCA Civ 1214 (29 October 2010), para 140

22. **Use of exclusions – Article 11**

22.1. **Policy Outcome: No change to outcome following second consultation. Not to transpose as to do so may risk gold-plating**.

22.2. MOD did not seek or receive comments during the first public consultation on this provision which provides that contracts excluded by Articles 12 and 13 of the New Directive cannot be used simply to avoid the requirements of the New Directive.

22.3. Following the second public consultation one stakeholder group requested the introduction of Article 11 into Regulation 6 (now Regulation 7). MOD considers that this Article does not need to be transposed. Article 11 states that none of the rules, procedures, programmes, agreements, arrangements or contracts referred to in section 3 (exclusions) may be used to circumvent the Directive. MOD believes that this means that the exclusions should not be used improperly. However, this is not what the New Directive says and to transpose a sensible provision would risk gold-plating. MOD believes this is not necessary in any case as improper use of the exclusions would breach the New Regulations and the New Directive.

23. **Framework agreements – Article 29**

23.1. **Policy outcome: No change following the second public consultation. To transpose in accordance with the New Directive to allow framework agreements to last a maximum of seven years, with the possibility of an extension in exceptional circumstances.**

23.2. Stakeholders welcomed the extension of framework agreements to seven years. One stakeholder requested further definition within the New Regulations of “in exceptional circumstances” and suggested that guidance on framework agreements should contain a non-exhaustive list of the circumstances where a term greater that 7 years is justified and suggested that “economic benefits” should be considered as an exceptional circumstance.

23.3. As the New Regulations already define the circumstances in accordance with the exact wording of the New Directive, MOD considers that there is no need for further justification of “in exceptional circumstances”. While it would be impractical to produce a “non-exhaustive list” the guidance will endeavour to include examples where the duration of a framework agreement can be extended drawing on the circumstances cited in the recitals of the New Directive. MOD has asked the stakeholder to assist in providing examples. The MOD has considered the comment regarding “economic benefits” and does not believe that value for money alone is strong enough justification to constitute an ‘exceptional circumstance’.

24. **Personal situation of the candidate or tenderer – Article 39**

24.1. **Policy Outcome: No change following the second public consultation. New Regulations have been updated to incorporate agreed changes to be made to the PCR and PCSR.**

24.2. In transposing the policy outcome to set out the domestic offences to give effect to the criteria for mandatory rejection of economic operators, MOD has: a) retained the current wording set out in the PCR 2006; b) introduced updated offences in consultation with the Cabinet Office

including those introduced by the Bribery Act 2010; c) included those offences specific to the New Directive; d) included offences specific to both Scotland and Northern Ireland.

24.3. One stakeholder objected to the fact that the draft New Regulations contained the additional wording "or its directors or any other person who has the powers of representation, decision or control of the economic operator". This wording formed part of the transposition of identical wording in the Classic Directive into the PCR 2006. Therefore, in keeping with paragraph 19, MOD has decided to replicate the wording of PCR 2006.

25. Rules applicable to sub-contracting - Articles 50-54

25.1. **Policy outcome: No change following the second public consultation. No amendments to draft New Regulations required as a result of the second consultation.**

25.2. A number of comments were received in respect of the remedies provisions in the New Regulations. Where MOD asked a specific question in the second consultation document relating to the remedies provisions, the responses and analysis are contained in part 2B. Other issues raised are dealt with below.

25.3. One stakeholder questioned the application of the full provisions of Part 7 of the New Regulations to certain sub-contractors. These were "Named members of a team or consortium that has been formed (formally or informally) for the purposes of responding to a particular bid, or bids of a particular type; those provided by ongoing suppliers in the ordinary course of business; and those provided by sub-contractors that would be engaged to provide inputs for the purpose of responding to a specific tender (but are not named members of a consortium or suppliers in the ordinary course of business)". The stakeholder suggested that the first two of these groups should not be subject to the full provisions of Part 7 of the Regulation.

25.4. With respect to the first of these groups, "Named members of a team or consortium…of a particular type" is equivalent to "groups of undertakings which have been formed to obtain the contract, and undertakings related to them", as stated in Regulation 37(7)(b). This means that they are not third parties and therefore MOD agrees with the stakeholder that they are not subject to the provisions of Part 7 of the New Regulations. With respect to the second and third categories, they are captured by the definition of "third parties" and therefore are subject to the provisions of Part 7.

25.5. They commented further that contracting authorities/entities should take care so the selection or deselection of sub-contractors does not leave the successful tenderer commercially exposed or result in significant parts of the contract not being completed or material changes being made to the contract after its award.

25.6. One stakeholder suggested the accompanying guidance should stress the importance of the need for contracting authorities/entities to balance the need for oversight of sub-contracts awarded with the increased time and cost incurred by both contracting authorities/entities and tenderers in applying these provisions and that the use of Article 21(3) should be limited.

25.7. MOD notes the comments and advises that the accompanying government guidance sets out that the provisions of Article 21(3) should only be applied on a case by case basis where it is appropriate to do so as described in the guidance documents, taking into account such factors as time and cost involved in applying the provisions of Article 21(3) to those concerned. Furthermore,

the guidance states that contracting authorities should take care not to leave an economic operator exposed or risk material changes to the contract following the selection or de-selection of sub-contractors.

25.8. One stakeholder suggested that Regulation 44(3) should be deleted as the second paragraph of Article 53 would only have relevance where MOD had transposed the optional requirement at Article 21(4). MOD notes the comments. However, Regulation 44(3) is a transposition of Article 53 which is a mandatory provision and therefore must be transposed. It also has relevance in the context of a sub-contract competition under Article 21(3).

26. Rules to be applied to review procedures Articles 55-64

26.1. **Policy outcome: No change following the second public consultation.**

26.2. A number of comments were received in respect of the remedies provisions in the New Regulations. Where MOD asked a specific question in the second consultation document relating to the remedies provisions, the responses and analysis are contained in part 2B. Other issues raised are dealt with below.

26.3. MOD proposed to implement provisions which are identical or similar to the remedies provisions contained in the PCR 2006 in the same way and having regard to the PCSR 2006. Given that those remedies provisions were incorporated into the PCR 2006 by way of amendment in 2009 and were the subject of consultation at that stage, it is felt that this approach is appropriate and will assist in providing certainty and ease the use of the provisions in the New Regulations.

26.4. One stakeholder raised concerns as part of the response to the second consultation document over the capability of the courts to amend specifications. This concern was noted. However, Article 56(1)(a) specifically provides for the courts to remove discriminatory technical, economic or financial specifications in the ITT, contract documents or any other document relating to the contract award procedure. It should be noted that such removal would necessarily involve amendment to these specifications.

26.5. Paragraphs (2) and (3) of Regulation 52 of the New Regulations relating to general time limits for starting proceedings had been intentionally left blank. It was intended that MOD would await the results of the Cabinet Office's consultation on the amendments on proposed amendments to the PCR 2006 [6] in light of the judgment in the Uniplex case[7]. As that process is still ongoing, MOD has decided to take an interim approach to transposition by making the minimum amendments necessary to comply with the Uniplex judgment with the intention of making any further amendments it considers may be necessary once the Cabinet Office's consultation process has been completed.

[6] Consultation on taking account of the Uniplex Case (C-406/08)
http://www.ogc.gov.uk/whats_new_notification_of_consultation.asp

[7] Case C-406/08 Uniplex (UK) Ltd v NHS Business Services Authority

PART 2B - ANALYSIS OF COMMENTS ON SPECIFIC QUESTIONS

27. The Second Consultation Document also presented stakeholders with six further specific policy questions via Text Boxes 2 through to 7:

a. Box 2 sought comments on the absence of a clause similar to the Article 30 exemption of the Utilities Directive;

b. Boxes 3 and 4 sought comments on MOD's proposed intention not to transpose Article 21(4) and on the approach to transposition of Article 52(4);

c. Boxes 5 and 6 sought comments on transposition of Articles 55(5) and 56(5); and

d. Box 7 sought comments on MOD's approach not to monetise the Impact Assessment.

28. Box 2 – Scope - Article 2

28.1. **Policy Outcome: No change following the second public consultation. Not to include a provision similar to Article 30 of the Utilities Directive.**

28.2. Responses to the First Public Consultation referred to the fact that, although the New Directive will apply to bodies which fall within the ambit of the Utilities Directive the exemption provided under Article 30 of the Utilities Directive has not been repeated in the New Directive. This means that bodies which benefit from the Article 30 exemption, and are not currently regulated by the Utilities regime, will fall within the scope of the New Directive and will be obliged to follow the procedures set out in the New Directive in so far as they are dealing with sensitive contracts which involve, require or contain classified information. This means that some private sector utility companies will fall within the scope of the New Directive and will be obliged to compete their sensitive contracts (if they have any) unless such contracts are capable of benefiting from an exemption under the provisions of the New Directive.

28.3. All stakeholders who responded to this question were content with the policy of not adopting an Article 30 type provision.

29. Box 3 – Sub-contracting – Article 21(4)

29.1. **Policy Outcome: No change following the second public consultation. Not to transpose Article 21(4).**

29.2. Article 21 of the New Directive is substantially different to its equivalent Article 25 of the Classic Directive. Article 21(4) is an optional provision which permits Member States to transpose as an option the ability to mandate a level of sub-contracting to third parties, up to a maximum of 30% of the contract value. MOD proposed not to implement this provision.

29.3. Industry was in support of MOD's policy decision not to transpose this provision. However, one stakeholder group expressed a preference for the provisions of Article 21(4) to be transposed into the UK Regulations as an option for contracting authorities/entities.

29.4. MOD considered that if implemented, this provision would have a different effect on each tenderer. Tenderers who have existing in-house capabilities or established supply chain arrangements may be disadvantaged by this provision which could result in difficulties for contracting authorities/entities who are under a legal duty to ensure equal treatment and non-discrimination for all tenderers. Some suppliers might also find it difficult to sub-contract 30% of contracts if they do not have significant procurement departments. Other suppliers might find it difficult to maintain the critical mass necessary to sustain their business operations if they have to sub-contract 30% of contracts. Article 21(4) could also have a disproportionate effect on SMEs. As successful tenderers they would be obliged to sub-contract 30% of the work which they would otherwise have retained. Furthermore, implementing Article 21(4) would increase the regulatory burden on UK industry, particularly on SMEs.

29.5. After considering the stakeholders' comments, MOD has decided not to transpose Article 21(4) into the New Regulations.

30. Box 4 – Thresholds and rules on advertising (sub-contracts) – Article 52(4)

30.1. **Policy Outcome: No change following the second public consultation. To transpose the principles of Article 28 as engaged by Article 52(4) in the context of sub-contracting as Regulation 43.**

30.2. Article 52(4) deals with the circumstances where award of a sub-contract does not require a sub-contract notice to be published, by reference to the principles of Article 28. Article 28 provides the circumstances where the main contract does not need to be advertised by the contracting authority. Regulation 43 clarifies exactly how the principles of Article 28 are to be interpreted in the context of sub-contracting. Stakeholders were asked to consider this approach, and the usefulness and clarity of the rules in Regulation 43.

30.3. In general the stakeholders said it was helpful that the New Regulations have stated in full the relevant parts of Article 28.

30.4. One stakeholder commented that the New Regulations did "not reflect a correct transposition of Article 52(4)" and requested the deletion of Regulations 43(2) – (5) stating that Article 52(4) "is concerned only with the circumstances where a sub-contract notice is required". This was not upheld as Regulation 43 deals with the circumstances where publication of a sub-contract notice is not required. Regulations 43(2)-(5) detail certain qualifications to these circumstances.

31. Box 5 – Scope and availability of procedures - Article 55(5)

31.1. **Policy Outcome: No change following the second public consultation. To reintroduce the requirement for a pre-litigation notice**.

31.2. MOD has transposed Article 55(5) as new Regulation 52(3) as the provisions of Article 55(5) may prove useful to contracting authorities/entities and suppliers alike in preventing proceedings being commenced and costs being incurred, especially in light of the automatic stay

provisions under Article 56(3). MOD is aware that this approach differs from that taken in the transposition of the most recent Remedies Directive.

31.3. Consultees were urged to comment on MOD's approach to the transposition of Article 55(5), not only in the context of the New Regulations, but in the wider context of procurement proceedings, as this will assist the Cabinet Office in considering whether to restore the requirement in the PCR 2006 and UCR 2006.

31.4. Stakeholders commented that they were content with MOD's approach to transpose Article 55(5) and that the approach taken in Regulation 52(3) seemed reasonable. One stakeholder commented further to say "It appears consistent with current contracting rules and associated case – law in the area." They further commented that taking a similar approach with the PCR 2006 and UCR 2006 also "seems reasonable". MOD has informed the Cabinet Office of the responses received.

32. Box 6 – Requirements for review Procedures – Article 56 (5)

Policy outcome: No change following the second public consultation. To transpose Article 56(5) to include particular wording relating to defence or security interests.

32.1. MOD has transposed Article 56(5) on the basis that, if an interim order is sought, the Courts must take into account the probable consequences of interim measures for all interests likely to be harmed as well as the public interest and in particular defence or security interests.

32.2. The approach set out above differs from the approach taken in transposition of the Remedies Directives. However, although MOD has sought to transpose the remedies-related aspects of the New Directive in a similar way to the Remedies Directives where possible in order to provide legal certainty and consistency, the provisions of Article 56(5) of the New Directive specifically provide that defence and security interests may be taken into particular account and it was felt appropriate to reflect this in the New Regulations.

32.3. The responses from most stakeholders have been positive stating that they "would fully support this approach" and "the inclusion of Regulation 56(2) [now Regulation 57(2)] seems consistent with current procurement practice…".

32.4. Although certain concerns were raised by another government department with regard to MOD's proposal relating to the basis on which the Court would deal with any interim application in light of the American Cyanamid Case[8] those objections were subsequently withdrawn following discussion.

[8] [American Cyanamid Co v Ethicom Limited [1975] AC396]

33. **Box 7 – Impact Assessment**

33.1. **Outcome: Minor change following the second public consultation. MOD's Impact Assessment will be non-monetised beyond basic familiarisation costs to UK Industry .**

33.2. MOD sought views from stakeholders on its inability to monetise the Impact Assessment (IA).

33.3. The business impacts are uncertain for a number of reasons, and the outcomes cannot therefore be estimated, quantified or monetised. Contracting authorities/entities should benefit overall and there should be net positive effects on the UK economy as a whole. The reasons for this assessment are, in brief: a regime which is tailored to procurement in the defence and security sectors; greater competition which should benefit UK contracting authorities/entities through more competitive and innovative tenders; and competitive and innovative UK economic operators should benefit through increased opportunities in wider EU markets.

33.4. Additional regulated competition across the EU should benefit contracting authorities/entities in terms of them being offered more competitive prices, better availability of superior products and greater innovation (whether in terms of production processes or product capabilities). Due to the number of variables (including equipment scope and volume procurements) it is not possible, with any certainty, to forecast the precise benefits.

33.5. In all these instances there is a great range of variables which results in a lack of precision and makes quantifying the impact impractical as any figures produced will be subject to unacceptable levels of uncertainty. Consequently, impacts cannot be forecast or monetised. We have now included some basic familiarisation costs to UK Industry based on information provided by them during the first consultation.

33.6. The majority of stakeholders did not raise any objections to MOD's approach. One stakeholder suggested that the IA against Article 21(3) would "bring in focus some of the sub-contracting issues", the IA may benefit from the inclusion of an impact grading and "monetisation will substantially benefit the argument which could be achieved through scenario analysis".

33.7. One stakeholder commented that with respect to Article 12 it is not clear if the implementation of the New Directive will cause any material change and therefore the impact for that element should be summarised as neutral. MOD has agreed and amended the IA accordingly

33.8. The IA provided as part of the document set for the second public consultation did contain a section on Article 21(3). Article 21(3) is a mandatory provision and must be transposed. However, there are no preconditions in its use. MOD will transpose this Article as an option to be used by contracting authorities/entities. In doing so procurers will assess each procurement on a case-by-case basis and make their decision as to whether or not to use Article 21(3) (Regulation 37(3) in the New Regulations) in accordance with the published sub-contracting guidance. It is impractical to monetise the effect of Article 21(3) as it is unknown to what extent and in what circumstance the provision will be used.

33.9. The IA explains the factors that will have an impact on overall cost. The extent to which these factors will affect cost (both positive and negative) will vary depending on the individual procurement. It is therefore impractical to implement an impact grading system.

33.10. MOD had considered running a series of scenarios to analysis the impact. MOD contracts vary hugely in terms of contract value and complexity and therefore for a study to be truly representative it would have to analyse a large number of individual examples. It was decided that the cost associated with running such an analysis would be disproportionate to the value of the findings.

34. CONCLUSION

34.1. The second consultation elicited a lower number of responses than the first consultation. This was not unexpected because most of the OGD comments received as part of the first public consultation were debated in the cross government preview consultation.

34.2. While the responses received from this second public consultation have been carefully considered they have not required MOD to change any of its policy decisions. However, the comments have been extremely helpful in finalising key implementation decisions and in preparing the New Regulations and supporting papers.

34.3. MOD is very grateful to all those who participated, in particular industry, who as part of their response provided very detailed comments on the draft New Regulations and greatly assisted in the development of policy and guidance.