



Cabinet Office

Government Response to the Consultation on UK Transposition of new EU Procurement Directives

Public Contracts Regulations 2015

Introduction

1. On 28 March 2014 the new EU Procurement Directives were published in the Official Journal of the EU following adoption by the EU institutions. They came into force on 17 April 2014. The UK and other EU Member States have until 17 April 2016 to transpose the Directives in national implementing regulations. The Government aims to implement these new rules into UK law earlier than this deadline, to take advantage of the new flexibilities as soon as possible.

2. The EU Procurement Directives provide for transparent, fair and competitive procurement across Member States. The new Directives include several wins for the UK Government, following extensive UK lobbying and negotiation in Brussels. These improvements make an important contribution to the Government's strategy for growth, freeing up public procurement markets through simpler, more flexible procurement rules, cutting red tape, and helping UK companies make the most of the EU's single market.

3. The new Directives are:

- a) Directive 2014/24/EU¹ on public procurement, replacing Directive 2004/18/EC, for Public Sector Contracts;
- b) Directive 2014/25/EU² on procurement by entities operating in the water, energy, transport and postal services sectors, replacing Directive 2004/17/EC, for Utilities Contracts; and
- c) Directive 2014/23/EU³ on the award of concession contracts, which does not directly replace any previous directive.

4. The consultation on the draft Public Contracts Regulations 2015 was published by the Government on 19 September 2014 and closed on 17 October 2014. The consultation focused primarily on these regulations to implement the new Public Sector Directive, seeking comments to ascertain whether the draft regulations effectively implement the Directive and do so in the best way. Many of the provisions in the Directive have analogous provisions in the other two Directives. We used the consultation to cover those generic matters applicable to all three Directives. This will allow greater focus on matters unique to the Utilities and Concessions Directives during the consultations on the draft implementing regulations for those Directives.

5. A link to the consultation document was issued directly to a number of known stakeholders and was also made available publicly on the GOV.UK website. This consultation formally concluded a long-running period of continuous UK stakeholder engagement on the new Public Sector Directive, which started in 2011 when the European Commission's own consultations began.

¹ http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0065.01.ENG

² http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0243.01.ENG

³ http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0001.01.ENG

6. The consultation also referred 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 2013⁴, and the new Public Contracts 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.

Responses Received

7. A total of 204 responses were received. Responses came from devolved administrations, central government departments, local government, businesses, procurement organisations, trade unions, professional bodies and trade associations, individuals, the police and the education sector, legal sector and third sector. Table 1 below summarises the split of respondents by category, and Annex A shows the breakdown by consultation question.

TABLE 1: Respondents by Category

Category of respondent	Number of respondents
Business	15
Central Gov Dept	6
Devolved Administrations	1
Education	60
Individual	5
Legal	18
Local Government	47
Police	2
Procurement Organisation	7
Professional Body/Trade Association	20
Third Sector	18
Trade Union	5
Total	204

8. We are grateful to all those stakeholders who responded to the consultation. This document describes the overall results and summarises the key points raised by stakeholders.

Next Steps

9. The consultation has confirmed the Government's proposed positions on the policy choices allowed by the Directive and that the draft implementing regulations

⁴ <https://www.gov.uk/government/consultations/making-public-sector-procurement-more-accessible-to-smes>

effectively implement the Directive, subject to the results described in this document. The Government now intends to implement the new Public Contracts Regulations in early 2015, to take advantage of the new flexibilities as soon as possible.

10. Consultations on the draft implementing regulations for the new Utilities and Concessions Directives will take place during 2015.

Analysis of responses

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

11. There were 76 responses to this question. There was general support for the 'copy-out' approach.

Summary of Consultation Returns

12. Many respondents took the opportunity to welcome the UK's approach to early implementation of the Directive, the copy-out approach, and the helpfulness of alignment between Directive article number and regulation number. A considerable number of drafting suggestions were made by respondents. Most raised issues of detail or interpretation on the legal drafting. Others called for additional provisions or additional exemptions to be included in transposition, to address particular public procurement issues.

Government Response

13. We have considered carefully all of the drafting suggestions received, judging each one on merit and against our overarching principle of avoiding gold-plating or additional regulatory burdens. To give just two specific examples of drafting suggestions we have accepted:

- a) Comments on regulation 73(1) have resulted in a change to paragraph (b) of that provision. This change clarifies the grounds for termination are the mandatory exclusions under regulation 57(1), including those cases where regulation 57(3) is applied; and
- b) Comments on regulation 76(4) (the light touch regime) have resulted in an amendment that is explained in the response to Question 16.

14. Many other specific technical drafting suggestions and comments have been taken into account in our final drafting decisions. We have not added further provisions or exemptions beyond those allowed by the Directive.

Question 2. Transitional Policy: We seek comments on the suggested transitional policy.

15. There were 63 responses to this question. There was widespread support for the proposal that the new rules should only apply to new procurement processes beginning on or after the new Public Contracts Regulations take effect.

Summary of Consultation Returns

16. The proposal to have a transitional policy in keeping with that used in previous transpositions was met with almost universal support. The consistency in approach and clarity this provides was welcomed.

17. One respondent suggested that EU law was unclear on this point, and that it was arguable that the correct criterion for application of some of the new rules should be the date of the alleged breach rather than (as we had proposed) the date on which the procurement had commenced.

Government Response

18. We will implement the proposed transitional policy. Although one respondent invited us to consider the possibility of taking a different approach for certain individual regulations, our approach is comparable to that used in previous transpositions, is supported by other respondents, and has not been contested by the European Commission.

Question 3. Sheltered Workshops: 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.

19. There were 66 responses to this question. All of the replies supported the proposal that the flexibility to reserve contracts for sheltered workshops should continue.

Summary of Consultation Returns

20. Some respondents agreed draft regulation 20 implemented this flexibility in an effective way, and were content with the proposed approach of using guidance on how to interpret “disabled persons”, “disadvantaged persons”, “sheltered workshop” and “sheltered employment programme”. But several respondents called for the regulation to go further and to define some or all of these terms. The main theme from these replies was that the terms are fundamental to the use of the reservation and should therefore be defined.

21. One respondent asked whether it would be possible to combine this reservation with the one under regulation 77 for mutuals where, for example, a contracting authority deems there may be both sheltered employment programmes and employee-owned mutuals interested in tendering for a contract to deliver certain services.

22. Two respondents called for the 30% disabled or disadvantaged persons threshold to be restored to the 50% figure that applies under the current regulations. These respondents claimed this would not undermine the spirit of the Directive but would have the welcome effect of increasing opportunities for people who often face complex barriers to finding or keeping work.

23. One respondent called for guidance on what would happen if the number of disabled and disadvantaged workers subsequently falls below the 30% threshold during contract performance and how this would link with regulation 72 (modification of contracts during their term).

24. One respondent, in agreeing the flexibility to reserve contracts should continue, observed that the use of the reservation may impact on the personalisation agenda within local authorities as self-employed disabled people will be unable to bid for these contracts.

Government Response

25. We will continue to provide the flexibility allowed by the Directive for contracts to be reserved for sheltered workshops.

26. It is possible to define “disabled persons” by reference to section 6 of the Equality Act 2010. We are satisfied that this primary legislation definition would reflect what the Directive intends “disabled” to mean (including in Northern Ireland where the Disability Discrimination Act 1995 applies). We will define this term, applying the definition used in the 2010 Act.

27. There is no single or definitive version of “disadvantaged persons” in UK primary legislation. The Directive does not define the term either, but suggests in recital 36 that the group of disadvantaged persons intended to be covered is very broad. If we were to create a definition for these regulations there would therefore be a risk of incorrect transposition. We will provide guidance on how to interpret this term.

28. We have no guidance from the Directive on the meaning of “sheltered workshop” and “sheltered employment programme”. The 2006 regulations define “supported business” and “sheltered employment programme”, but not “sheltered workshop”. Those definitions focus on the requirement that more than 50% of the staff are disabled. The scope of the reservation has been broadened by the 2014 Directive to include “disadvantaged persons” which means the definitions would also need to define this term. Using these definitions from the 2006 regulations would therefore not clarify what those terms mean in the 2014 Directive. We will provide guidance on how to interpret these terms.

29. This reservation and the mutuals reservation under regulation 77 are, in practice, likely to operate independently of each other. It is difficult to see that many procurement opportunities could be reserved so that both sheltered workshops and mutuals could apply for them. Contracting authorities are best placed to decide

within the context of an individual procurement which reservation is the most appropriate in the circumstances.

30. The Directive has reduced the threshold requirement of disabled employees to 30%, setting this in the context of sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons. The UK cannot unilaterally increase the threshold of disabled employees back to the 50% level without risking an inadequate transposition, since the Directive clearly states 30% is the correct threshold for a sheltered workshop or economic operator to benefit from the sheltered workshops reservation.

31. The modification of contracts provision in regulation 72 would be unlikely to apply if a contractor's level of disabled or disadvantaged employees fell below the 30% threshold during contract performance but the contractor remained the same legal person. Contracting authorities do, however, have the freedom to decide whether this should be a termination event under a particular reserved contract.

32. There is nothing in the wording of Article 20 (or recital 36) to suggest the Directive intends the main aim requirement can be satisfied by a disabled or disadvantaged person's own social and professional integration. Changing the wording of regulation 20 on this point to extend the reservation to self-employed persons would put the UK at risk of departing from the Directive's requirements and therefore transposing incorrectly.

Question 4. e-procurement: 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.

33. There were 60 responses to this question. Over a third were from local authorities. Other categories with a significant number of responses included professionals bodies / trade associations; individual businesses; and the legal sector.

34. In line with overall transposition policy, we proposed the most flexible options, to postpone the mandatory e-communications/ e-procurement- related provisions to the latest permissible date, and not to mandate the use of electronic Building Information management (BIM).

Summary of Consultation Returns

35. A large majority of respondents who expressed an overall view agreed with the proposed approach to the proposed choices set out in the consultation document. A small proportion (10%) disagreed with the overall approach. These respondents considered that we should not postpone obligatory e-communication

but oblige authorities to use e-communications from the date of transposition, to reap the benefits of e-procurement straightaway. A small number considered that we should we should implement the option to mandate the use BIM, as use of BIM is already government policy. One respondent was concerned by the postponement of the mandatory electronic form of European Single Procurement Document (ESPD).

36. A number of respondents did not oppose the overall approach, but made specific comments or queries. One respondent was concerned that the Government might choose to impose particular technical standards which would create costs. The same respondent also thought that the Government should identify a list of commonly-used solutions from which authorities should chose. Another respondent considered that we should implement and then mandate a single, central e-procurement solution.

37. A number of respondents suggested that guidance would be desirable or necessary, including requests that guidance should address and explain specific terms in the rules, and should cover the use of advanced electronic signatures.

Government Response

38. We strongly agree that e-procurement is advantageous and should be encouraged as government policy; likewise, Government continues to require the use of BIM as policy. We will continue to work towards these goals, but postponing mandatory adoption of e-procurement gives greater flexibility, allows authorities and suppliers the time to prepare for mandatory usage, and reduces the risk of breach of the new rules.

39. Likewise, postponing the mandatory use of e-Certis and the mandatory electronic format for the ESPD does not preclude the use of e-Certis in the interim, and authorities are required to accept the ESPD although it is not yet required to be exclusively in electronic format. But postponement gives authorities and suppliers sufficient time to ensure they are fully conversant with and adapted to the requirements before the deadline for mandatory use. Bearing in mind that the large majority of respondents were generally content with the proposed policy position, we have therefore retained all the postponements and derogations proposed in the consultation.

40. Many authorities are already successfully using one of a number of e-procurement services and “platforms”. It would therefore not be appropriate to impose a single central solution. There is a thriving marketplace for e-procurement services and platforms, and a list of recommended solutions might risk distorting the market. In the absence of a majority demand we have not pursued those suggestions. There is no requirement under the Directive to impose or mandate particular standards or solutions and we have no plans to do so.

41. The Government accepts that guidance and advice to contracting authorities will be appropriate, as with many other matters under the new rules. Crown

Commercial Service will develop this in due course, taking into consideration points identified in the consultation response.

Question 5. e-procurement: 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.

42. There were 42 responses to this question. Nearly half were from local authorities.

Summary of Consultation Returns

43. A large majority of respondents agreed with the proposed approach, that the framework for assessing electronic security risk, should be set out on the face of the regulations. The framework should provide a high level of security principles, under which individual authorities assess the risk and decide the specific security required. No respondents asked that particular topics be added to, or removed from, the framework. However one respondent suggested that not all the matters mentioned in the framework would be applicable in all cases, and the wording should be amended to reflect this.

44. A small number of respondents (around 10%) disagreed in principle with the framework approach, suggesting that the UK should specify or mandate detailed specific security requirements. There were no calls for mandatory use of advanced electronic (digital) signatures. A number of respondents requested guidance.

Government Response

45. As a large majority of respondents supported the proposed approach set out in the consultation draft, this is maintained in the Regulations. Although including detailed security requirements within the Regulations would add a degree of certainty which a few respondents would prefer, to do so would reduce flexibility and authorities' discretion. It would also risk rapid obsolescence if detailed security standards change. References to external security standards and information can be provided more easily in guidance, which can be updated readily as necessary.

46. In light of the consultation response the wording of Regulation 22 will be amended so that contracting authorities are required to have regard to “relevant” matters in the framework; Crown Commercial Service will incorporate guidance on the framework within guidance on the / e-communication / e-procurement provisions as a whole.

Question 6. Central Purchasing Bodies: We welcome comments on the approach or the drafting, and in particular whether the drafting achieves the stated objectives.

47. There were 55 responses to this question. There was widespread support for the approach proposed.

Summary of Consultation Returns

48. All of the replies agreed that the regulations should continue to provide flexibility for contracting authorities to use central purchasing bodies for particular procurements.

49. Respondents agreed these regulations should not mandate that certain procurements must be made by using specific central purchasing bodies. Some respondents do not wish to see use of specific central purchasing bodies mandated in future. Some respondents called on the Government to make a commitment not to do so. And two respondents expressed an expectation that any proposed mandating should be subject to consultation.

50. There is widespread support for not limiting contracting authorities when using central purchasing bodies in other Member States for centralised purchasing activities.

51. One respondent called for guidance on whether private bodies can act as a central purchasing body for the public sector.

Government Response

52. We will continue to provide the flexibility allowed by the Directive (Article 37(1), first and second subparagraphs) for contracting authorities to use central purchasing bodies to procure their requirements.

53. We will not transpose, in these regulations, Article 37(1) third subparagraph of the Directive. But as the Directive allows Member States to decide on whether to mandate the use of specific central purchasing bodies, it would be wrong for the Government to rule out the possibility of doing so in future in the pursuit of better value for money for the taxpayer. Any such proposal would be subject to the Government's Consultation Principles applicable at the time.

54. We will not limit contracting authorities when they use central purchasing bodies in other Member States for centralised purchasing activities. We will transpose Article 39(2), first subparagraph, of the Directive to make it clear that contracting authorities are free to use central purchasing bodies in other Member States.

55. Our interpretation of the Directive is that it is not possible for anything other than a contracting body to act as a central purchasing body. The Directive defines a central purchasing body as a contracting authority providing centralised purchasing activities and, possibly, ancillary purchasing activities. A private provider would not normally fall within the definition of a contracting authority.

Question 7. Conduct of the Procedure: We seek general comments on the approach or the drafting.

56. There were 45 responses to this question. The majority of respondents agreed with the approach set out in the consultation document.

57. The consultation document set out the proposed policy choices in relation to the four options on procedures.

58. These were:

- 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/draft Regulation 32);
- 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)/draft Regulation 48(6));
- c) Allow sub-central authorities to set the timescales for the receipt of tenders (Article 28(4)/draft Regulation 28(7)); and
- d) Not to require contract award notices for call-offs to be sent on a quarterly basis to OJEU.

Summary of Consultation Returns

59. The majority of responses were in agreement with the approach set out in the consultation document. 25 responses stated clearly that they were in agreement with the policy choices. This was particularly strong for local authorities, who were keen to make use of the flexibilities provided by the options, two of which were allowed for sub-central authorities alone. Other respondents restricted their replies to comments on drafting.

60. Two respondents questioned the policy choices. One respondent was concerned that the possibility to use a negotiated procedure, in the very limited circumstances allowed, could be abused. Another respondent questioned the use of

PINs as a call for competition, on the grounds that economic operators might not be aware that this was possible and so they might miss out on opportunities to bid.

61. Although the majority were clearly in favour of not transposing the option to require contract award notices for call-offs to be sent on a quarterly basis, because this would be an extra burden, a couple of local authorities said that this might not be a significant burden, as they already provided transparency on these awards and because of the greater use of automation.

Government Response

62. The Government welcomes the overwhelmingly positive approach of respondents to the flexibilities provided for in the first three options covered by question 7. As a result these options will be provided for. The fourth option will not be transposed, because there the clear majority thought that this would be burdensome.

63. Regarding the concerns expressed:

- a) The ability to use a negotiated procedure without a call for competition is already provided for and there is no significant evidence of abuse
- b) Regarding the use of PINs as a call for competition, we will continue our programme of making both purchasers and suppliers fully aware of the new provisions, so that the benefits of such provisions can be fully realised

64. We note the comments that providing transparency about the award of call-offs through quarterly notices might not be overly burdensome in practice and we will keep this under review.

Question 8. Division of contracts into lots / SME access: 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.

65. There were 71 responses to this question. Almost one third were from local authorities. Other sectors which provided significant numbers of responses included professional bodies / trade associations; individual businesses; legal interests; and the third sector. The policy choices proposed were not to mandate division into lots; and to permit authorities to accept bids for “combined lots”.

Summary of Consultation Returns

66. A large majority of respondents supported the approach proposed in principle. A minority of respondents considered that we should be more prescriptive: either to mandate the use of lots, explicitly require authorities to consider division into lots, or specify the list of permissible reasons not to break contracts into lots. One respondent thought there should be specific remedies if authorities do not properly explain reasons not to divide into lots.

67. A few respondents suggested that the regulations should specify the maximum number of lots which any supplier may win; conversely, other explicitly expressed the opposite view. One respondent thought that the number of lots a supplier is allowed to win should be assessed by reference to market share, and one considered that economic modelling might be necessary.

68. One respondent considered that we should transpose Recital 79, (which discusses limiting the number of lots and acceptance of combined lots) into the Regulations. One suggested Cabinet Office should centrally collate information on authorities' use of lots.

Government Response

69. As the large majority of consultation responses agreed with the proposed policy decisions, these are confirmed in the regulations. As authorities are required to provide reasons if they decide not to lot, they will have to consider the possibility of division into lots when planning their procurements and making their procurement decisions. Given the variety of possible circumstances, it could be very difficult in practice to attempt to set out an exhaustive list of the permissible reasons not to lot. The possible variety of circumstances would also make it difficult to limit in the rules the number of lots that one supplier could win. As there was no widespread demand, we have not taken forward those suggestions. If a supplier considers he has been disadvantaged by an authorities failure to provide reasons for not dividing a contract into lots he could pursue action under the existing remedies regime.

70. Other matters raised by respondents can be addressed in guidance and advice, along with advice on combined lots.

71. The Government does not currently intend to centrally collate figures on authorities' lotting decisions; however as authorities are required to provide reasons for their decisions, it would in principle be possible to do so in future if found to be desirable.

Question 9. Division of contracts into lots / SME access: We invite comments as to whether the intended approach to explaining the combined lots provisions, ie providing an explanation in supporting guidance, is appropriate.

72. There were 68 responses to this question. Approximately one third were from local authorities. Other sectors which provided significant numbers of responses included professional bodies / trade associations; individual businesses; legal interests; and the third sector.

Summary of Consultation Returns

73. The large majority of respondents agreed with the proposed approach set out in the consultation. There were a number of comments that decisions, permutations, and explanations for suppliers on combined lots could be potentially highly complex, and respondents were keen to see clear and detailed guidance from the Crown Commercial Service

74. A small number of respondents considered that guidance should be binding, or should offer a strong steer towards use of lots. A few respondents asked that Crown Commercial Service should offer guidance on the commercial and operational substance of the decision as to whether and how to divide into lots or to accept combined lots (above and beyond guidance on compliance with the lotting provisions in Regulations).

Government Response

75. As supported by most respondents, Crown Commercial Service will explain the combined lots provisions in guidance and advice. Initial guidance will concentrate on the correct processes and procedures when applying the lotting requirements as this is directly related to the transposition and implementation of the Directive. This guidance can cover the content of Recital 79.

76. Crown Commercial Service will consider further in due course the possibility of guidance on the approach to lotting and combined lots as affected by the requirement being procured and by the market in question. However, lotting decisions and justifications for those decisions must remain the responsibility of the authority undertaking the procurement. Moreover, centrally-produced advice and guidance will not reasonably be able to cover all the possible circumstances and details.

Question 10. Publication and Transparency: We seek general comments on the approach or the drafting.

77. There were 45 responses to this question.

Summary of Consultation Returns

78. There were no policy choices in the publication and transparency sub-section of the Directive, Articles 48 to 55. The majority of respondents agreed with the drafting of the regulations. Substantial comments on drafting within the regulations were received from one respondent, and comments on the drafting of the Directive from another.

79. Four respondents raised a concern that contracting authorities would not be prepared for the requirement to have the procurement documents ready for the date of publication of the contract notice. Another respondent asked for further guidance on what comprised procurement documentation, particularly on competitive dialogue, innovation and competitive with negotiation procedures.

80. A number of respondents suggested that guidance would be desirable or necessary, including requests that guidance should provide further detail on specific regulations and what is meant by 'received in good time'.

Government Response

81. We have taken the comments on drafting into consideration in the amendment of the Regulations.

82. We have implemented an extensive embedding programme across the public sector to raise awareness of significant differences between the current regulations and the new ones. The requirement for procurement documentation to be available via an 'unrestricted and full direct access free of charge' from the date of publication of the notice was raised at the sessions. It is best practice and part of Government's lean procurement process to have procurement documents available before the contract notice is published. Guidance from the European Commission is that provided that the access to a site is free of charge and available to all, a hyperlink can be included in the Contract Notice that leads to contracting authorities own website or national website such as Contract Finder.

83. We accept that guidance and advice to contracting authorities will be appropriate. Crown Commercial Service will develop this in due course, taking into consideration points identified in the consultation responses.

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

84. There were 53 responses to this question.

Summary of Consultation Returns

85. Whilst all respondents would prefer the standard forms and notices to be ready for use when the regulations come into force the majority accepted that the options provided at Annex B to the consultation document provided a workable solution providing guidance was available.

86. A number of respondents raised concerns that the use of current forms, and in particular free text boxes would lead to challenges and breach of the Directives.

87. A couple of respondents have a concern over the requirement for publication of values on the Forms and Notices, particularly for medicines.

88. A number of respondents proposed alternative Forms and Notices to provide the information including the use of the VEAT for proposed modification of contracts and the Contract Award Notice for modifications already in place.

Government Response

89. The European Commission is aware of the proposed timescales for transposition of the Directives within England, Wales and Northern Ireland, and has had sight of the options if the new Forms and Notices are not available. We are currently working with e-Senders to ensure either the new Forms and Notices are available or that guidance will be consistent and widely available.

90. We will develop the guidance in due course, taking into consideration points identified in the consultation responses.

Question 12. Conflicts of interests, exclusion and related matters: 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.

91. There were 60 responses to this question. One third of the responses came from local authorities. Other sectors well-represented included trade bodies / professional organisations, individual businesses, and legal interests.

Summary of Consultation Returns

92. A large majority of respondents specifically agreed with the proposed approach, and some others commented on specific points without querying the overall approach.

93. There were a number of detailed comments on the exclusionary provisions from the legal sector. These: pointed out certain errors in our elaboration of relevant UK laws; queried whether the list of mandatory exclusion offences in UK law fully transposed the Directive; or queried whether the geographical coverage of exclusionary grounds was complete.

94. A few respondents, including trade union interests, considered that the mandatory exclusion provisions should be widened to include breaches of employment law, health and safety law, and other misdeeds. A few also considered that we should centrally-decide adequacy of self-cleaning and ending of exclusion.

95. A number of respondents commented on or queried various points or potential ambiguities, (for example whether and when a conviction of parent or sister companies might attract exclusion). There was also request for guidance and clarification on various matters including: self-cleaning; assessment of supplier poor performance; conflicts of interest; interpretation of terms such as “persistent and significant”, “sufficiently plausible indications”; conflicts of interest; overriding public interest; and others.

96. A small number of respondents requested that the UK implement wider measures such as a central register of excluded suppliers and public records of exclusionary decisions. However these are policy requests out of scope of the transposition of the Directive and of the current consultation.

Government Response

97. In light of respondents’ comments we have amended the regulations to include “passive” corruption, to explicitly cover terrorist offences, and to cover relevant offences outside the EU and EEA. We have also corrected some specific errors in references to UK legislation. Notwithstanding comments, we have retained certain offences under superseded law, in case of “legacy” convictions which might still be relevant.

98. Certain offences not attracting mandatory exclusion would potentially fall within the grounds for discretionary exclusion, or the provisions of Regulation 56(2). As only a few respondents requested we require such offences to be subject to mandatory exclusion, we propose to maintain the maximum flexibility for authorities to make their own decisions. Likewise we have maintained the provision for individual authorities to decide upon self cleaning.

99. We recognise that the Directive contains a number of somewhat imprecise terms, which are carried into the UK transposing Regulations. However, as the European Commission has pointed out, this reflects the potentially wide range of circumstances in which exclusionary decisions may arise or have to be decided. It would be difficult to elaborate these whilst achieving both legal certainty and sufficient flexibility. Furthermore some of these terms or matters not spelt out in the Directive (including the application of exclusion where exclusion grounds apply to other group companies) also exist in the current rules, without causing known

systemic problems. Crown Commercial Service therefore considers that these are best addressed in guidance, which gives greater flexibility. Crown Commercial Service will take into account specific points raised by respondents when developing guidance and advice.

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

100. There were 62 responses to this question. All of the respondents agreed that the Regulations achieve the objective of implementing the requirements of the Directive in a minimalistic fashion.

Summary of Consultation Returns

101. Three respondents commented that in order to comply with Article 18(2) 'appropriate action' would be to make it a mandatory requirement to exclude sub-contractors when there are grounds including violation of Article 18(2). The Regulations do not transpose Article 18(2) into the Regulations so for consistency Article 71 (1) has not been transposed.

102. Three respondents considered that the UK government should introduce a system of joint and several liability applicable to both contractors and their subcontractors. In particular that the exclusion criteria should also apply to subcontractors breaching article 18(2).

103. A number of respondents raised concern over direct payments and the position such payments may have in contract law.

Government Response

104. We will use administrative measures to implement the obligation in Article 18(2) of the Directive to take "appropriate measures" to ensure suppliers comply with various social, environmental and labour law obligations. We consider administrative measures are appropriate because they represent a reasonable balance between reflecting the requirements of the Directive and maintaining a suitably flexible approach. Imposing duties through regulations will remove that flexibility. These administrative measures will provide contracting authorities with guidance on the appropriate times to request and verify whether there are grounds for exclusion of subcontractors, and guidance making it policy mirror obligations in contract clauses, backed up by a standard contract condition.

105. We consider that the issue of joint and several liability is not a matter for these Regulations but it will be considered further as part of domestic commercial policy.

106. We consider that as there are already facilities available for direct payments to subcontractors via project bank accounts and similar financial models that specific provision is not required to be transposed in the regulations. We will consider the legal position of direct payments outside project bank accounts and bank facilitated models for future commercial policy.

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

107. There were 58 responses to this question, with almost a third of the responses coming from Local Authorities.

Summary of Consultation Returns

108. The majority of respondents commenting on this question expressed a preference for guidance to include standard clauses and wording that could be inserted in invitations to tenders. The topics requested for guidance include when to request subcontractors details, how far the supply chain should be checked and contact details requested, and when a direct payment mechanism would be appropriate.

Government Response

109. We will produce guidance to address, in appropriate terms, the subjects and types of guidance requested in the responses.

Question 15. Termination of Contracts: We welcome comments on whether regulation 73(3) provides an effective deeming provision.

110. There were 54 responses to this question. The majority of respondents agreed regulation 73(3) provides an effective deeming provision.

Summary of Consultation Returns

111. Only one respondent questioned the need for the deeming provision. All other respondents either agreed it was effective or, in some cases, raised issues for further consideration as summarised below.

112. One respondent asked us to consider if termination should be on reasonable notice, if a notice period should be specified, and if the power of termination should be exercisable only within a specified period from the date when the contracting authority becomes aware that one of the specified grounds for termination applies.

113. Some respondents called for:

- a) Confirmation that the right to terminate will not apply to contracts made prior to the date on which the new regulations come into effect;
- b) The Court to have powers for determining matters relating to termination;
- c) Elaboration on how the provision would work in practice (e.g. the mechanics, compensation, and consequences in the supply chain);
- d) An element of materiality to be inserted in the provision; and
- e) Model contract clauses to be provided by Cabinet Office, together with guidance on application.

114. Other issues raised were possible complications with the deeming provision when contracting with non-UK companies, and concern that the requirement under regulation 73 conflicts with one of the remedies provisions in Part 3 of the regulations.

Government Response

115. We will include the deeming provision as regulation 73(3), amended to provide for reasonable notice of termination to be given. We will confirm in the transitional provisions (regulation 117) that the right to terminate will only apply to contracts where the procurement procedure has taken place under the new regulations.

116. We do not wish to reduce flexibility for contracting authorities and suppliers to agree contract conditions for termination that go beyond those required by regulation 73 and which reflect the specific circumstances of individual contracts. We have therefore decided not to specify in the regulations:

- a) a notice period;
- b) a period within which the power to terminate must be exercised; or
- c) how the provision will work in practice.

117. We consider Court powers are not matters for regulation. Differences between contracting parties are best dealt with through contractual terms, including the dispute procedure as provided for in the terminated contract.

118. We consider an element of materiality is not appropriate. The contracting authority has the right to terminate but is not obliged to do so. The decision whether to exercise the right, or not, rests with the contracting authority.

119. We will provide model contract clauses and guidance on application of the provision.

120. We do not consider the deeming provision will cause complications when contracting with non-UK companies. UK contracting authorities will be subject to these regulations when conducting a procurement, including those cases where the supplier is a non-UK company. The applicable law will be specified in each contract.

121. We do not agree there is conflict with the remedies provisions. Regulation 73 only applies in the narrow context of the three grounds for termination specified. Regulation 98(2)(d) applies in the wider context of a breach by a contracting authority of the duty owed in accordance with regulation 89 or 90.

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

122. This question had a total of 126 responses, including identical responses from 54 special schools. There was widespread support for the proposed approach taken to the draft regulations and the light-touch approach used. Many respondents expressly supported the approach to early implementation. One respondent preferred a highly prescriptive regime.

123. Contracting Authorities in local and central government were consistently supportive with the approach proposed. Law firms tended to support the approach but made various technical comments on the drafting of the regulations, which will be considered but not detailed in the consultation response. Many respondents were keen for guidance/support (the separate consultation question 17 addressed this directly).

Summary of Consultation Returns

124. A small number of key themes emerged.

Delayed transposition for NHS-funded healthcare services

125. The 54 responses from special schools, and 3 representative organisations in the same sector, called for the proposed “carve-out” that provided for the procurement of healthcare contracts to stay on the current rules for Part B Services contracts until the transposition deadline of April 2016, to be broadened to include education and social care services. A few respondents in other sectors such as local government and healthcare requested a broader carve-out so to recognise the special circumstances in those sectors as well as NHS-funded healthcare.

126. The main arguments for a broader-carve-out included: the duty of care for “services to the person” applies to other services than NHS-funded healthcare, so these deserve the same flexibilities; concerns about the potential difficulties of commissioning joined-up services eg for health and social care, and general concerns about possible scope for confusion amongst buyers and suppliers, when two different procurement rules regimes apply at the same time to different services. There were also some general concerns about stakeholders’ readiness for the change. Various anecdotal problems with procurement in marketplaces covered by these rules were cited.

Mutuals

127. The “mutuals reservation” (Regulation 77) attracted a mixture of positive and negative comments, though most stakeholders did not comment on this explicitly. Three trade unions and a joint response from representatives of the special schools sector opposed the implementation, citing concerns around perceived privatisation of services and possible market distortion. A few respondents were concerned that the wording of the mutuals reservation will allow private sector organisations to morph their own characteristics to bid for reserved contracts. A few respondents objected to the disapplication of the mutuals reservation in some types of NHS-commissioned healthcare contracts, being unhelpful for new mutuals in that sector. A few respondents wanted the reserved contracts provision to be 5 years rather than 3. Responses from the mutuals and social enterprise sectors tended to welcome the provisions.

MEAT vs Lowest Price

128. Most respondents did not comment on this area specifically but supported the proposed regulations overall and the flexibilities offered by it. A few respondents including Trade Unions and the voluntary sector wanted to ban lowest price award criteria in LTR contracts (contrary to our proposed policy choice), arguing that MEAT should be mandatory in service contracts where quality is paramount eg health, education and social care. Some respondents reaffirmed their support on the proposed policy choice not to ban lowest price and the general approach of ensuring maximum flexibility

User Choice in Award Criteria

129. Several commentators sought guidance on how user choice can form part of the award criteria in LTR contracts - this was felt to be imperative in procuring services to the person (education / care / health).

Regulations 76(3)&(4)

130. Several stakeholders suggested Regulation 76(4) is contradictory to Regulation 76(3) and could lead to uncertainty and confusion. One commentator thought that whilst Regulation 76(4) gave helpful cover for the contracting authority to make changes to the published plans where appropriate, there needed to be

further elaboration in the regulations as to how the relevant participants are informed. We concluded such a provision would be a useful addition to the final implementing regulations.

Government Response

131. The need to defer transposition for certain clinical commissioning services (when contracted by NHS England or Clinical Commissioning Groups) until April 2016 arises from a unique set of circumstances where two sets of procurement regulations apply to these services i.e. the Procurement, Competition and Patient Choice Regulations 2013 (PCCR), and the Public Contracts Regulations. The delay will give the national bodies in the English health sector time to work with commissioners and other key stakeholders, to ensure they are fully prepared for the implementation of the new Regulations which will sit alongside the PCCR from April 2016. Other Contracting Authorities (e.g. local authorities) are not subject to these additional, domestic regulations, and therefore will need to follow the new rules for the Light-Touch Regime (and will be able to use the “mutual reservation” in Regulation 77 at their discretion) in compliance with the new Public Contracts Regulations (2015) as soon as they come into force. Concerns around the scope for potential confusion are acknowledged, and will be addressed through the development of practical advice and support.

132. The implementation of the proposed Regulation 77 regarding reserved contracts for certain services is a strategic Government priority to support the mutuals programme. There is no scope to deviate from the main provisions in the Directive (e.g. by changing 3 years to 5 years contract duration). A number of drafting suggestions have also been considered.

133. With respect to the application of the reservation to NHS-funded healthcare contracts, the Government will reflect further on this as part of the further work undertaken by the national bodies in the English health sector with commissioners, as referenced above. The Government will set out a conclusive way forward on this issue by July 2015.

134. Taking account of the range of views and reflecting on the majority preference of stakeholders involved in the earlier feedback on the policy choice of MEAT versus lowest price, we conclude that there is not a sufficiently strong evidence base to justify gold-plating through banning use of the lowest price award criterion. However, there is sufficient opinion to warrant addressing the matter clearly in guidance, and stress the importance of MEAT criteria when awarding contracts where service quality is paramount e.g. services to the person.

135. Requests for guidance are being considered on how to take into account “user choice” when awarding contracts.

136. Regulations 76(3) & 76(4) have been reviewed in the light of feedback. To explain, these Regulations are a necessary part of the Government’s implementation particularly in respect of the obligation in the Directive to implement “national rules”

for the light-touch regime. They are extremely light-touch in requiring procurers (at 76(3)) to conform with the general ground-rules set out in the published notice advertising the contract, and 76(4) is simply necessary to provide the necessary flexibility for exceptional circumstances where deviation from 76(3) is permissible (such as where all participants are agreeable that the time-limits originally contained in the notice need to be extended for reasons that emerged since publication). CO considers that these provisions flow naturally from the Treaty and should not necessitate any change in procurement practice. Regulation 76(4) has been modified to ensure that participants are informed of any change to the published procedure.

Question 17. Light Touch Regime: 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.

137. Cabinet Office received 47 responses to question 17. Furthermore, several stakeholders responding to Question 16 (on the proposed rules in the light-touch regime) also asked for guidance on particular points. Most requestors of guidance are contracting authorities, as expected being the main users of the regulations. A small number of legal and business sector representatives also commented.

Summary of Consultation Returns

138. Most respondents were enthusiastic about the need for guidance and support. Some respondents added that support should be made available for bidders as well as contracting authorities. A wide range of possible formats was suggested, including desk aids, face-to-face training, e-learning, policy instructions and guidance.

139. A small number of respondents cautioned against using detailed guidance, referring back to the objective of the light-touch regime (LTR), and that consequently any guidance should be similarly light-touch to preserve flexibility and avoid the potential for the guidance to end up being perceived as a further level of requirements that effectively “gold-plates” the requirements in the regulations.

140. A number of specific suggestions were made for guidance on particular topics. Some of the key themes included:

- a) Several respondents were concerned about use of award criteria for social, education, and healthcare contracts, stressing the need for emphasis on the quality of service in these sectors. They sought guidance on how user choice can form part of the award criteria in LTR contracts - this was felt to be imperative in procuring services to the person (eg education / care / health). Clarification was also requested on whether the aggregation rules apply to personal care contracts

- b) Several respondents wanted guidance on how the reserved contracts [Article 77] provisions could be applied in practice.
- c) Several respondents asked for example(s) of a compliant procedure under LTR
- d) Two requests for a thorough exposition of all CPV codes covered by LTR ie not just major headings ending 000. This was cited as being problematic in deciding whether a contract is under the main rules or LTR.
- e) A few respondents requested guidance on using selection and award criteria in this regime
- f) Two respondents asked for clarity on the split between some legal services being exempt and others being covered under LTR.

Government Response

141. Crown Commercial Service (an Executive Agency of the Cabinet Office) has developed a blended learning package to support the transition to the new rules. Face to face training was rolled out during the summer of 2014 to 4,000 public procurement practitioners, during which Crown Commercial Service captured a large number of frequently asked questions from delegates attending the training.

142. The training programme was supported by the release of several publications including a handbook covering the main rule changes, Q&A briefing, and the detailed training slides. These materials are available at <https://www.gov.uk/transposing-eu-procurement-directives>

143. An e-learning package and further, subject specific materials are also being developed and will be released in due course. The many detailed suggestions for coverage of guidance received both during the above training sessions and those received through this consultation exercise will be considered in the casting of the final materials.

Question 18. Remedies and Standstill: 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.

144. There were 48 responses to this question. Around two thirds of these respondents were contracting authorities, including two utilities and two universities. The remainder were mostly the legal sector and some business sector representatives.

Summary of Consultation Returns

145. The majority of respondents confirmed an affirmative answer to the question posed i.e. they were content the proposed drafting does achieve the objective of sewing the existing remedies rules into the new procurement rules framework in a satisfactory way. The relatively quiet response may also be indicative that, as we would expect, stakeholders do not consider this area to be a contentious issue. Most respondents did not elaborate significantly further than to confirm their support.

146. A few thematic points arose.

- a) A few respondents made comments and questions about the extent to which standstill and remedies apply to the light touch regime. One concern was that the position was not clear, while another was that a remedies regime did not apply, but should do. In particular, two respondents queried whether situations where sub-central authorities use a PIN instead of a contract notice would be subject to the ineffectiveness remedy, as this was not clear from the draft regulations.
- b) Various questions were asked on other aspects, for example about disclosure of award criteria and sub-criteria in LTR contracts.
- c) Two construction/engineering sector representatives wanted an addition to the regulations so that the courts could award losses or damages to subcontractors as well as main contractor(s) where the procuring authority had breached the procurement rules leading to a declaration of ineffectiveness.
- d) Some legal commentators offered drafting suggestions on points of detail. One legal commentator suggested a number of improvements that could be made to the remedies regime, on time limits and the extent to which remedies rules should apply to contracts not fully covered by the EU procurement rules eg below-threshold contacts.

Government Response

147. The consultation confirms that the proposed drafting achieves the objective of sewing the existing remedies rules into the new procurement rules framework in a satisfactory way. Comments on the drafting have been considered. Requests for clarification about certain aspects of the interplay between the remedies rules and the new main procurement rules will be considered in the casting of relevant guidance. Suggestions that would necessitate a review of remedies policy, whilst out of the immediate scope of this consultation exercise, can be considered in the future as part of the European Commission's review of the Remedies Directive and any subsequent amendments thereof.

Question 19. New measures to increase SME participation in public procurement: 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.

148. There were 89 responses to this question covering public sector, private sector, trade bodies and individuals.

149. Comments or views on technical implementation rather than the policy choices were sought, as the policy choices had already been the subject of an open consultation in September 2013, and had been adopted as Government policy in Small Business: Great Ambition, published on 7 December 2013.

Summary of Consultation Returns

150. Over two thirds of respondents were either supportive or provided neutral comments and observations about the measures. There were some concerns raised by a number of contracting authorities that the elimination of PQQs below EU threshold, and the requirement to advertise on Contracts Finder would increase workloads.

Government Response

151. These same concerns over workload were also raised in the previous consultation in September 2013, and we will aim to consider these issues carefully in the guidance which supports the implementation of these measures. We also received some helpful views on a range of points relating to the technical aspects of the drafting, in particular, regulation 106, which we have addressed and which will enhance clarity.

Question 20. Successor entities in Schedule 1: Departments are requested to check and confirm that the list is correct or whether it should be amended to take account of successor entities.

152. The list of central government authorities in Schedule 1 will be revised to take account of responses to the consultation and to update the names of government departments where applicable.

Other Responses

Social, Environmental and Labour Law

153. There were 7 responses to the proposal that this policy choice should be implemented by administrative measures. No comments were made by the other 197 respondents.

Summary of Consultation Returns

154. Five respondents claimed that use of administrative measures is inadequate and that the regulations should oblige contracting authorities to include clauses in contracts requiring compliance with these laws.

155. One respondent questioned whether guidance would be enough, legally, to implement this obligation.

156. One respondent commented they had no objection to the proposal, although they would have preferred to see regulatory measures introduced in this area.

Government Response

157. We will continue to use administrative measures to implement the obligation in Article 18(2) of the Directive to take “appropriate measures” to ensure suppliers comply with various social, environmental and labour law obligations. The Directive allows the UK, and other Member States, to choose the measures that will apply nationally, as long as they are appropriate. We consider administrative measures are appropriate because they represent a reasonable balance between reflecting the requirements of the Directive and maintaining a suitably flexible approach. Imposing duties through regulations will remove that flexibility. Maintaining this approach also reflects the Government’s Guiding Principles for EU legislation which seek, wherever possible, to implement through the use of alternatives to regulation. These administrative measures will take the form of guidance making it policy to mirror these obligations in contract clauses, backed up by a standard contract condition.

158. We will keep this decision under review.

General comments

159. There were 16 responses with general comments.

Annex A Additional breakdown of responses

Sector	Question																				General Comments
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	
Business	9	6	5	6	4	6	3	8	8	5	5	7	5	3	5	8	5	6	9	0	1
Central Gov Dept	2	4	3	4	4	3	1	4	4	2	2	4	4	4	3	3	3	3	3	3	2
Devolved Administrations	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	0
Education	1	3	3	3	2	3	2	4	3	2	3	4	2	1	3	57	1	3	3	0	1
Individual	1	1	1	1		1	1	1	1	1	1	1	1	1	0	1	1	1	2	0	3
Legal	10	9	8	6	4	7	6	9	9	3	6	7	9	10	8	9	4	7	8	4	0
Local Government	28	26	27	22	19	23	23	24	23	22	22	20	19	19	22	23	17	18	42	3	3
Police	1	1	1	1	1	1	1	1	1	1	2	1	2	2	3	1	1	1	1	0	1
Procurement Organisation	2	4	4	4	2	2	2	2	3	4	5	3	8	7	5	3	3	2	3	1	2
Professional Body/Trade Association	9	6	6	9	5	6	3	11	10	2	5	10	5	6	2	8	4	5	12	0	1
Third Sector	8	2	6	2	0	1	2	6	5	0	1	1	3	2	1	8	6	1	5	1	2
Trade Union	4	0	1	1	0	1	0	0	0	2	0	1	3	2	1	4	1	0	0	0	0
Total	76	63	66	60	42	55	45	71	68	45	53	60	62	58	54	126	47	48	89	13	16

