

**EXPLANATORY MEMORANDUM TO  
THE PUBLIC CONTRACTS REGULATIONS 2015**

**2015 No. 102**

1. This Explanatory Memorandum has been prepared by the Cabinet Office, and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

2.1 The Public Contracts Regulations 2015 implement the new Public Sector Procurement Directive (2014/24/EU) which provides modernised rules for the procurement of goods, services and works above certain thresholds by public authorities. These Regulations also re-enact the relevant provisions of the Remedies Directives (Directive 89/665/EEC as amended by Directive 2007/66/EC), on remedies and review procedures for public procurement, as implemented by the UK in the Public Contracts Regulations 2009.

**3. Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 The Cabinet Office's general approach to drafting Part 2 of the Regulations (and relevant definitions in regulation 2), which transpose Directive 2014/24/EU, has been to use the 'copy-out' technique, where available. So far as was considered practical, the text of these provisions has been conformed to UK standards of legislative structure and drafting. But, on the whole, the Regulations retain the key operative phrases which the Directive uses to express the obligations which are to be imposed on contracting authorities. Where it was absolutely clear what a clumsily worded passage in the Directive was intended to mean, and would be held to mean, the Cabinet Office has rephrased the corresponding passage in the Regulations with greater precision or in a way that would be more readily understood by readers of UK legislation. By contrast, where there was considered to be genuine ambiguity in the Directive, this has usually been reproduced in the Regulations. In considering this aspect of the Regulations, the Cabinet Office invites the Committee to consider the following matters.

3.1.1 The Directive concerns *public* procurement and the obligations which the UK is required to impose in domestic law are, almost exclusively, obligations on 'contracting authorities' as defined in Article 2, paragraph 1, point (1) of the Directive (transposed by the slightly elaborated definition in regulation 2(1) of the Regulations).

3.1.2 In accordance with the extensive case law<sup>1</sup> of the Court of Justice of the EU ("The CJEU") concerning the 'direct effect' of Directives on

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<sup>1</sup> For example, Cases 148/78 *Ratti*, 8/81 *Becker* and C-188/89 *Foster*.

emanations of the State, the Cabinet Office considers that the true meaning of ambiguous provisions in this particular Directive will usually meet the requirements for being directly effective against contracting authorities.

3.1.3 Therefore, any attempt by the Cabinet Office to clarify, in the Regulations, matters which are ambiguous in the Directive, would tend to fail to provide greater legal certainty, and even risk misleading those affected into a *false* sense of security. This is because contracting authorities would continue to be at risk that it may be held, ultimately by the CJEU, that the true interpretation of the Directive required them to proceed in a way which was more onerous, or at least different, from that provided for in the Regulations. In that regard it may be noted that, in accordance with the requirements of the ‘Remedies Directive’ (see paragraph 7.3 below), regulation 89(1) (read with regulation 91) creates a cause of action against contracting authorities not only in respect of breaches of Part 2 of the Regulations, but also in respect of any ‘enforceable EU obligation in the field of public procurement’ where the procurement falls within the scope of Part 2.

3.1.4 Under previous Directives concerning public procurement, the CJEU has developed an extensive body of jurisprudence, often elaborating in very prescriptive detail the implications of provisions which, in the relevant Directive, were expressed in quite vague or imprecise terms. The Cabinet Office considers that reproducing in these Regulations the new Directive’s key operative phrases, even where they are ambiguous or lack the precision that would normally be expected in domestic legislation, will tend to minimise the risk of conflict between the Regulations and future CJEU case law on the interpretation of the new Directive.

3.2 Paragraph 19 of Schedule 6 to this instrument includes corrections of the five instances of defective drafting in the Defence and Security Public Contracts Regulations 2011 (S.I. 2011/1848) that were reported by the Committee in their thirty-first report of session 2010-12<sup>2</sup>: paragraph 19(1) amends regulation 2(2) to replace an inappropriate use of the word “will”; and subparagraphs (3)(b), (6), (7) and (9)(b) remove unnecessary drafting from regulations 3(1), 7(1)(g), 2(1) and 21(10).

#### **4. Legislative Context**

4.1 Public procurement plays an important role in the overall economic performance of the European Union. In Europe, public authorities spend around 18 % of GDP on supplies, works and services. The EU Public Procurement Directives regulate procurement by public authorities, and have

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<sup>2</sup> <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtstatin/214/214.pdf>

been modified several times since their inception in 1971. By guaranteeing transparent and non-discriminatory procedures, these Directives principally aim to ensure that economic operators from across the Single Market benefit fully from the basic freedoms in competing for public contracts.

- 4.2 The Directives currently in force in UK law were published in 2004, one applying to the public sector<sup>3</sup> and another applying to the utilities sector<sup>4</sup>. These directives contain detailed procedural rules for the award of contracts with values exceeding certain financial thresholds. Provisions on legal review procedures and the remedies that are available when the rules are breached are contained in two separate directives, collectively known as the Remedies Directives (one applying to the public sector, one to the utilities sector, both of which were heavily amended and expanded by a later directive in 2007)<sup>5</sup>.
- 4.3 The Procurement Directives and the Remedies Directives are currently implemented in national law through one catch-all set of regulations for each of the two sectors: The Public Contracts Regulations 2006 (SI 2006 No 5) and the Utilities Contracts Regulations 2006 (SI 2006 No 6).
- 4.4 In January 2011 the European Commission published a Green Paper consultation on the modernisation of EU public procurement policy<sup>6</sup>. Cabinet Office, with inputs from various UK stakeholders, coordinated and published the UK's response<sup>7</sup> in July 2011. The Commission concluded that there was an urgent need for a streamlined and flexible set of procurement rules so that Member States can obtain high quality goods and services while delivering value for money for the public purse. The current 2004 directives, one for Public Sector Contracts<sup>8</sup> and one for Utilities Contracts<sup>9</sup>, had introduced new approaches in an attempt to modernise the rules that existed at that time but experience had shown these added complexity, uncertainty and regulatory burdens.

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<sup>3</sup> Directive 2004/18/EC

<sup>4</sup> Directive 2004/17/EC

<sup>5</sup> Directive 89/665/EC (public sector); Directive 92/13/EEC (utilities sector); Directive 2007/66/EC (amending both the public sector and utilities sector remedies directives)

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

<sup>7</sup>

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

<sup>8</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

<sup>9</sup> Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport, and postal services sectors.

- 4.5 The Commission came forward with draft proposals for modernisation in late 2011, through three new directives, covering public sector contracts, utilities sector contracts, and concessions contracts<sup>10</sup>.
- 4.6 Cabinet Office submitted an Explanatory Memorandum on 17 January 2012 relating to: 18966/11 “Proposal for a Directive Of The European Parliament And Of The Council On Public Procurement” and 18964/11 “Proposal For A Directive Of The European Parliament And Of The Council On Procurement By Entities Operating In The Water, Energy, Transport And Postal Services Sectors” (the “utilities” proposal). Cabinet Office also submitted an Explanatory Memorandum on 17 January 2012 on 18960/11 “Proposal For A Directive Of The European Parliament And Of The Council On The Award Of Concession Contracts”. The Commons European Scrutiny Committee recommended a Reasoned Opinion on subsidiarity (Report No 57 Session 2010/2012); the Reasoned Opinion motion was debated and agreed by the House of Commons on 6 March (Hansard 6 March 2012 Columns 749-767). European Scrutiny Committee cleared these as legally and politically important in report 12 on 17 June 2013, following correspondence between the Chairman and Cabinet Office Ministers.
- 4.7 The Lords Select Committee on the EU sifted these Explanatory Memoranda to sub-committee B (Sift 1454 Session 10/12) and cleared them on 28 May 2012 following correspondence between Lords Roper and Boswell and the Minister for the Cabinet Office.
- 4.8 Following intensive scrutiny and debate between the EU Council, Commission and European Parliament, a package of three new Procurement Directives was published in the Official Journal of the EU on 28 March 2014 and came into force on 17 April 2014. The UK and other EU Member States have 2 years from this latter date (i.e. by 17 April 2016) in which to implement the new directives in national legislation.
- 4.9 The three new Directives are:
- a) Directive 2014/24/EU<sup>11</sup> on public procurement, replacing the 2004 Directive for Public Sector Contracts;
  - b) Directive 2014/25/EU<sup>12</sup> on procurement by entities operating in the water, energy, transport and postal services sectors, replacing the 2004 Directive for Utilities Contracts;
  - c) Directive 2014/23/EU<sup>13</sup> on the award of concession contracts.
- 4.10 The instrument that this memorandum accompanies is the first of three instruments, each of which implements one of the three new Procurement

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<sup>10</sup> Concessions are a particular type of contract where part of the reward for the supplier lies in being granted rights to exploit the thing being created, eg a car park built on local authority-owned land

<sup>11</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2014.094.01.0065.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0065.01.ENG)

<sup>12</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2014.094.01.0243.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0243.01.ENG)

<sup>13</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2014.094.01.0001.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0001.01.ENG)

Directives. The Government aims to implement the Public Sector Directive as quickly as possible, to realise soonest the economic benefits from the new and improved procurement rules. The other two new procurement directives will be implemented in due course, through separate implementing Regulations and explained in separate Explanatory Memoranda.

- 4.11 The instrument contains a number of ambulatory references to EU legislation, which will give effect in UK law to technical updates to relevant EU legislation, respecting the principle of “copy out” by avoiding inadvertent gold plating while ensuring that UK legislation will remain up to date as technical changes are made at EU level. These references appear in regulations:
- a) 2(1), which sets out the definitions of ‘common technical specification,’ ‘CPV’ (the Common Procurement Vocabulary) and ‘European Technical Assessment’ by reference to the relevant EU regulations;
  - b) 5(3), which sets the threshold amounts for the purposes of the Regulations by reference to the Public Sector Directive. These thresholds are routinely revised every 2 years by the Commission in accordance with article 6 of that Directive, to reflect fluctuations in currency exchange rates;
  - c) 8(2), which sets out the definition of ‘public communications network’ and ‘electronic communications service’ by reference to the relevant EU Directive;
  - d) 10, which cross-refers to technical definitions in various directives which set out the scope of exemptions from the regulations for certain public service contracts;
  - e) 13(2), which refers to the relevant threshold amounts as amended from time to time in the Public Sector Directive, as discussed in point (b) above;
  - f) 22(17)(c), which refers to the definition of advanced electronic signatures in the relevant EU Directive;
  - g) 56(2), which refers to Annex X in the Public Sector Directive, which lists international environmental, social and labour law provisions breach of which will permit a contracting authority to exclude a tenderer from bidding for a contract; and
  - h) 68(6), which refers to a list in the Public Sector Directive of legislative acts setting out common methods for life-cycle costing.
- 4.12 A transposition note is attached as an Annex to this Explanatory Memorandum.

## **5. Territorial Extent and Application**

- 5.1 This instrument applies to England, Wales and Northern Ireland. The only provision of this instrument that applies to Scotland is paragraph 19 of Schedule 6, which makes some amendments to the Defence and Security Public Contracts Regulations 2011, including corrections arising from a previous report of the Joint Committee on Statutory Instruments (see paragraph 3.2 above).
- 5.2 Part 4 of the instrument does not apply to public bodies in Wales or Northern Ireland whose functions are wholly or mainly devolved functions in those jurisdictions. This recognises the fact that these Devolved Administrations already have their own arrangements in place for ensuring smaller businesses have better access to public sector contracts which reflect the particular circumstances of devolved procurement matters in those areas.

## **6. European Convention on Human Rights**

- 6.1 Francis Maude, Minister for the Cabinet Office, has made the following statement regarding Human Rights: In our view the provisions of The Public Contracts Regulations 2015 are compatible with the Convention rights.

## **7. Policy background**

- *What is being done and why*

- 7.1 The Government is committed to a strategy of reforming UK public procurement processes, to stimulate economic growth. The Government has negotiated successfully in Brussels over the last two years to simplify and modernise the existing framework of EU procurement directives, to make public procurement faster, less costly and enable better value outcomes for government and industry. The Government aims to implement the new public sector and utilities sector directives earlier than the two years required by the EU, to take advantage of the new flexibilities as soon as possible, and has prioritised the Public Sector Procurement Directive for transposition in early 2015, reflecting the potential economic benefits that are most significant.
- 7.2 This instrument is needed to implement the legal provisions contained in the new Public Sector Procurement Directive. This new Directive modernises and simplifies the procurement rules that apply to contracts awarded by public sector authorities.
- 7.3 Part 3 of this instrument re-transposes the public sector Remedies Directive, which covers review procedures and remedies available for breaches of the procurement rules; this is only necessary because this instrument replaces the Public Contracts Regulations 2006 (as amended), which transposed both the

2004 Public Sector Procurement Directive and the Remedies Directive. The general approach has been to move the existing remedies rules from the 2006 Regulations<sup>14</sup> into this instrument, with only comparatively minor amendments, including adjustments necessary to mesh with the new Regulations overall and some minor drafting improvements. However, we have taken the opportunity to provide for the remedies to be available not only to economic operators from non-EEA countries where covered by the WTO Agreement on Government Procurement (which the 2006 Regulations did) but also to those from other third countries where required by any other international agreement by which the EU is bound.

- 7.4 Part 4 of this instrument implements the Government's domestic procurement policy to make public sector procurement more accessible to smaller businesses. This Part does not implement EU obligations. The regulations to implement this policy, are included in this instrument (rather than a separate, freestanding instrument) for convenience and simplicity, this instrument being the main vehicle for imposing regulations on public authorities in respect of public procurement procedures. These regulations address the Government's commitment to making public procurement more accessible to SMEs through: Ensuring advertised contract opportunities and award notices are accessible in one place, on the national Contracts Finder Portal; eliminating Pre Qualification Questionnaires for low value procurements and providing guidance to standardise Pre Qualification Questionnaires for high value contracts; and requiring that 30 day payment terms are flowed down the public sector supply chain, and that performance on late payment of invoices is reported on.
- 7.5 Implementation of the new Public Sector Procurement Directive is mandatory, though certain aspects of the provisions permit Member States some flexibility in deciding how, or in some cases whether, to implement them. There are also some policy issues to consider where the Directive is silent and so there is further flexibility in determining the method of implementation in this regard.
- 7.6 The underlying purpose and rationale of the procurement rules has not changed: public contracts within the scope of the rules still need to be awarded transparently, ensuring equal treatment of suppliers and must respect a number of detailed procedural requirements. However, in respect of the detailed procedures, the changes in procurement policy and practice and the extent of the textual amendments, are substantial.
- 7.7 The most significant changes include:
- 7.7.1 Significant improvements to the procedural rules. Procurers will have more freedom than before to negotiate with suppliers. Statutory minimum time limits for suppliers responding to adverts and tenders have been reduced, enabling simpler procurements to be delivered more quickly. A new "Innovation Partnership" procedure allows more

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<sup>14</sup> As heavily amended in 2009 by S.I. 2009/2992 to transpose the 2007 amending Remedies Directive, and then further amended by S.I.2011/2053).

scope for more innovative ideas, whereby the supplier essentially bids to enter into a partnership with the authority, to develop a new product or service. Poor performance under previous public contracts is explicitly permitted as a ground for exclusion.

- 7.7.2 The introduction of a new light-touch regime for contracts for certain social and health and some other services, replacing the former distinction between Part A and Part B Services. The new scheme necessitates advertising of relevant contracts above a threshold of EUR 750,000 and requires Member States to impose national procedural rules for these contracts of its own design, respecting the different approaches of Member States to such contracts. The regulations also provide for new flexibility to limit competition for certain services contracts, to encourage certain organisations such as fledgling social enterprises and mutuals to bid for government contracts.
- 7.7.3 Electronic procurement techniques have been encouraged and enhanced. The rules on Dynamic Purchasing Systems have been simplified; electronic catalogues and electronic auctions are provided for; and electronic communications will be introduced in phases, becoming mandatory for most procurements within 4.5 years of the directive's transposition.
- 7.7.4 There are improved rules on social and environmental aspects, making it clear that: social aspects can now also be taken into account in certain circumstances: buyers can require certification/labels or other equivalent evidence of social/environmental characteristics, further facilitating procurement of contracts with social/environmental objectives; and refer to factors directly linked to the production process
- 7.7.5 There are various improved safeguards from corruption, including: requirements that authorities take appropriate measures to effectively remedy and prevent conflicts of interests arising during procurement procedures; time limits regulating the period that suppliers can be excluded from procurement by contracting authorities (eg where convicted for corruption); and self-cleaning measures, for suppliers that have cleaned up their bad practices
- 7.7.6 Various innovations to enhance SME participation: Buyers will be encouraged to break contracts into lots to facilitate SME participation, but there is discretion not to do so where appropriate; A turnover cap has been introduced, whereby buyers will not be able to set company turnover requirements at more than two times contract value; A much simpler process of assessing bidders' credentials, involving greater use of supplier self-declarations, and where only the winning bidder should have to submit various certificates and documents to prove their status.



- 7.7.7 The new rules encourage and allow preliminary market consultation between buyers and suppliers, which should facilitate better specifications, better outcomes and shorter procurement times.
- 7.7.8 The full life-cycle of costings can be taken into account when awarding contracts; this could encourage more sustainable and/or better value procurements which may save money over the long term but appear more costly on the initial purchase price
- 7.8 These changes support UK Government priorities of economic growth and deficit reduction by making the public procurement process faster, less costly, and more effective for business and procurers alike.
- 7.9 For public authorities, this means being able to run procurement exercises faster, with less red tape, and more focus on getting the right supplier and the best tender. And for suppliers, the process of bidding for public contracts should be quicker, less costly, and less bureaucratic, enabling suppliers to compete more effectively.

## **8. Consultation outcome**

- 8.1 Cabinet Office has maintained a longstanding programme of involving stakeholders in the rule-modernisation process, since the publication of the original European legislative proposals in 2011. The results of this process informed the Government's negotiating strategies and more recently the national implementation plans
- 8.2 Cabinet Office used a two-stage process to inform its decision-making on the implementation of the Public Sector Procurement Directive:
  - 8.2.1 In the first stage, Cabinet Office engaged with a number of actively interested stakeholders in late 2013, who declared, following the publication of an official communication<sup>15</sup>, a particular interest in a number of policy choices. Cabinet Office issued discussion papers to these stakeholders. The response to these discussion papers helped to inform initial thinking on those policy choices ie where the directive permits some discretion in how or whether Member States implement a particular provision.
  - 8.2.2 In the second stage, a formal public consultation took place from 19 September 2014 to 17 October 2014, seeking feedback on the proposed draft implementing regulations. This consultation set out the outcomes

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<sup>15</sup> <https://www.gov.uk/government/publications/procurement-policy-note-0513-modernising-eu-procurement-rules>

of the earlier stakeholder engagement exercise on the policy choices, and consulted on the proposed approach and several specific questions. A consultation of 4 weeks on these regulations was considered to be appropriate and proportionate and consistent with the Government's policy on consultations, given the limited scope and impact of the remaining issues on which to consult. There was only very limited scope for the Government and other stakeholders to influence the substantive content of the implementing regulations. Most of the provisions of the Directive are mandatory for Member States to transpose, so their substance cannot be altered in transposition. Furthermore, these regulations only directly affect a small sector of stakeholders overall i.e. the procurement functions of public sector authorities. They do not place any requirements on the general public, on business, or on other parts of the public sector.

- 8.2.3 The formal consultation resulted in 204 responses from a range of stakeholders including government departments, local authorities, purchasing organisations, business and industry groups, trade unions, law firms, the voluntary sector and a small number of individuals.
- 8.2.4 The consultation reaffirmed the provisional outcomes of the earlier stakeholder engagement exercise, and confirmed that the Government's proposed approach and draft regulations are fit for purpose to implement the directive.
- 8.2.5 Other notable outcomes from consultation activity include:
  - 8.2.5.1 A common view that the new directive improves on the previous rules, confirming the general rationale for the Government's proposed early implementation plans
  - 8.2.5.2 That the approach of "copy-out" helpfully ensures consistency between the wording of the directive and the national implementing regulations
  - 8.2.5.3 Many detailed drafting suggestions were received, all of which have been considered and some accepted
  - 8.2.5.4 Policy choices, ie where the directive permits one or more options, should be made in line with the Government's proposed approach of rule-simplification and ensuring flexibility for procurers, not impose new burdens on practitioners or "gold-plate" the directive without sufficient evidence to necessitate it. This includes choosing not to ban the possibility for contract award criteria to be based on lowest price; not imposing new obligations on sub-contractors; and ensuring that all authorities and all suppliers, (including those have yet to fully use e-communications), have adequate time to prepare for the transition to mandatory electronic communications.

- 8.2.5.5 Implementing the obligation to design a scheme of national regulations for the new “light-touch” regime covering social, health and certain other service contracts, in an appropriately light-touch manner.
- 8.2.5.6 Procurement by NHS England or Clinical Commissioning Groups of NHS healthcare services should not be subject to the new rules until the transposition deadline of April 2016, to allow service commissioners the necessary time to adapt. Such procurements will continue to be governed by the existing regulations until that time.
- 8.3 The full analysis of consultation responses has been undertaken and has informed the drafting of this instrument as described above. This analysis has been published on the GOV.UK website at:  
<https://www.gov.uk/government/consultations/transposing-the-2014-eu-procurement-directives>
- 8.4 Cabinet Office used a separate two-stage process to inform its decision-making on the implementation of the Government’s domestic policy on making public procurement more accessible to smaller businesses. A consultation paper was published by the Government on 19 September 2013. The consultation ran for four weeks to 17 October 2013. The consultation document was issued directly to a number of known stakeholders and was also made publicly available on the GOV.UK website. Responses were received from 155 organisations representing a broad range of suppliers, industry bodies and procuring authorities, and there was support for the reforms overall. The results of that consultation were published on 7 December 2013 at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/264101/LY\\_Cons\\_response3final.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264101/LY_Cons_response3final.pdf)
- 8.5 The second stage, to consult on the draft regulations to implement that policy, was undertaken as part of the consultation discussed at para 8.2.2 above. Whilst responses from some procuring authorities raised concerns in relation to some of the reforms, overall the response demonstrated support from the majority, and this second consultation reaffirmed the provisional outcomes of the earlier engagement exercise. It is therefore concluded that the Government’s proposed approach and draft regulations are fit for purpose to implement the policy.
- 8.6 A consultation of 4 weeks on this subset of the regulations was considered to be appropriate and proportionate and consistent with the Government’s policy on consultations. This policy and the accompanying regulations focus on a small set of new requirements that only directly affect a small sector of stakeholders overall i.e. the procurement functions of public sector authorities. They do not place any requirements on the general public, on business, or on other parts of the public sector. The requirements are minor changes to existing practices around the publication of contract opportunities, use of pre qualification questionnaires, and prompt payment, and they are not complex in nature.

## **9. Guidance**

- 9.1 The Government has developed a blended learning package to support the transition to the new rules. Face to face training was rolled out during 2014 to 4000 public procurement practitioners, free of charge. A handbook covering the main rule changes and supporting Q&A was published with the detailed training slides at the following web-page: <https://www.gov.uk/transposing-eu-procurement-directives>. A free e-learning package has been developed for launch in early 2015. Further, subject specific guidance is also being developed and will be released in due course.

## **10. Impact**

- 10.1 This instrument only regulates the public sector. It does not regulate or deregulate business, or concern the regulation of business. Better regulation requirements do not apply and so an impact assessment is not required.
- 10.2 A UK impact assessment was required when the European Commission proposed the new procurement directive (relating to Parts 1 & 2 of this instrument), which remains valid and is attached.

## **11. Regulating small business**

- 11.1 The legislation imposes procedural obligations on the public sector, not the business sector, so small businesses are not directly affected. Moreover, the modifications in this instrument set out to improve and simplify the public procurement process, which should be of general benefit to small business, and many of the modifications have been designed with the specific intention of encouraging SMEs to participate.

## **12. Monitoring & review**

- 12.1 The intended outcomes of this instrument are:
- 12.1.1 To implement the new Public Sector Procurement Directive in national law, by early 2015 to enable soonest possible realisation of the economic benefits from the new improved rules regime;
- 12.1.2 To re-enact the already-implemented Remedies Directives in the same national instrument as the new Public Sector Procurement Directive;

- 12.1.3 To implement the Government's domestic procurement reforms to improve transparency of information and procurement practice to make public procurement more accessible to smaller businesses.
- 12.2 The European Commission is required to review the economic effects on the internal market, in particular in terms of factors such as the cross-border award of contracts and transaction costs, resulting from the application of the thresholds set in Article 4 and report thereon to the European Parliament and the Council by 18 April 2019.
- 12.3 The European Commission is currently orchestrating a review of the Remedies Directives. The Government is involved and will engage in any subsequent EU proposals to modify these directives.

### **13. Contact**

Barry Sharp at the Cabinet Office (Tel 07824 334136 or email [barry.sharp@crownccommercial.gov.uk](mailto:barry.sharp@crownccommercial.gov.uk)) can answer any queries regarding the instrument.

**The Rt Hon Francis Maude MP**  
**Minister for the Cabinet Office**

## TRANSPOSITION NOTE

Transposition note for: Directive 2014/24/EU of 26 February 2014 on public procurement (the Directive) and repealing Directive 2004/18/EC

These Regulations do what is necessary to implement the Directive.

The main elements of the Directive implemented in these Regulations are as follows:

<b>Article</b>		<b>Copy out (yes/no)</b>	<b>National Provision</b>
Article 1	Subject-matter and scope	No	N/A
Article 2	Definitions	No	Regulation 2
Article 3	Mixed procurement	Yes	Regulation 4
Article 4	Threshold amounts	Yes	Regulation 5
Article 5	Methods for calculating the estimated value of procurement	Yes	Regulation 6
Article 6	Revision of the thresholds and of the list of central government authorities	No	Regulation 5(4)
Article 7	Contracts in the water, energy, transport and postal services sectors	Yes	Regulation 7
Article 8	Specific exclusions in the field of electronic communications	Yes	Regulation 8
Article 9	Public contracts awarded and design contests organised pursuant to international rules	Yes	Regulation 9
Article 10	Specific exclusions for service contracts	Yes	Regulation 10
Article 11	Service contracts awarded on the basis of an exclusive right	Yes	Regulation 11
Article 12	Public contracts between entities within the public sector	Yes	Regulation 12
Article 13	Contracts subsidised by contracting authorities	Yes	Regulation 13
Article 14	Research and development services	Yes	Regulation 14
Article 15	Defence and security	Yes	Regulation 15
Article 16	Mixed procurement involving defence or security aspects	Yes	Regulation 16
Article 17	Public contracts and design contests involving defence or security aspects which are awarded or organised pursuant to international rules	Yes	Regulation 17

<b>Article</b>		<b>Copy out (yes/no)</b>	<b>National Provision</b>
Article 18	Principles of procurement	Article 18(1) – Yes Article 18(2) – No	Regulation 18
Article 19	Economic operators	Yes, except Article 19(2), second subparagraph, last sentence.	Regulation 19
Article 20	Reserved contracts	Yes	Regulation 20
Article 21	Confidentiality	Yes	Regulation 21
Article 22	Rules applicable to communication	No	Regulation 22
Article 23	Nomenclatures	Article 23(1) – Yes Article 23(2) – No	Regulation 23
Article 24	Conflicts of interests	Yes	Regulation 24
Article 25	Conditions relating to the GPA and other international agreements	Yes	Regulation 25
Article 26	Choice of procedures	Yes	Regulation 26
Article 27	Open procedure	Yes	Regulation 27
Article 28	Restricted procedure	Yes	Regulation 28
Article 29	Competitive procedure with negotiation	Yes	Regulation 29
Article 30	Competitive dialogue	Yes	Regulation 30
Article 31	Innovation Partnership	Yes	Regulation 31
Article 32	Use of the negotiated procedure without prior publication	Yes	Regulation 32
Article 33	Framework agreements	Yes	Regulation 33
Article 34	Dynamic purchasing systems	Yes	Regulation 34
Article 35	Electronic auctions	Yes	Regulation 35
Article 36	Electronic catalogues	Yes	Regulation 36
Article 37	Centralised purchasing activities and central purchasing bodies	Yes, except Article 37(1), third subparagraph.	Regulation 37
Article 38	Occasional joint procurement	Yes	Regulation 38
Article 39	Procurement involving contracting authorities from different Member States	Yes, except Article 39(2), second subparagraph.	Regulation 39
Article 40	Preliminary market consultations	Yes	Regulation 40

<b>Article</b>		<b>Copy out (yes/no)</b>	<b>National Provision</b>
Article 41	Prior involvement of candidates or tenderers	Yes	Regulation 41
Article 42	Technical specifications	No	Regulation 42
Article 43	Labels	Yes	Regulation 43
Article 44	Test reports, certification and other means of proof	Yes	Regulation 44
Article 45	Variants	Yes	Regulation 45
Article 46	Division of contracts into lots	Yes	Regulation 46
Article 47	Setting time limits	Yes	Regulation 47
Article 48	Prior information notices	Yes	Regulation 48
Article 49	Contract notices	Yes	Regulation 49
Article 50	Contract award notices	Yes	Regulation 50
Article 51	Form and manner of publication of notices	Yes	Regulation 51
Article 52	Publication at national level	No	Regulation 52
Article 53	Electronic availability of procurement documents	Yes	Regulation 53
Article 54	Invitations to candidates	No	Regulation 54
Article 55	Informing candidates and tenderers	Yes	Regulation 55
Article 56	General principles	Yes	Regulation 56
Article 57	Exclusion grounds	No	Regulation 57
Article 58	Selection criteria	Yes	Regulation 58
Article 59	European Single Procurement Document	Yes	Regulation 59
Article 60	Means of proof	No	Regulation 60
Article 61	Online repository of certificates (e-Certis)	Yes	Regulation 61
Article 62	Quality assurance standards and environmental management standards	Yes	Regulation 62
Article 63	Reliance on the capacities of other entities	Yes	Regulation 63
Article 64	Official lists of approved economic operators and certification by bodies established under public or private law	No	Regulation 64
Article 65	Reduction of the number of otherwise qualified candidates to be invited to participate	Yes	Regulation 65
Article 66	Reduction of the number of tenders and solutions	Yes	Regulation 66
Article 67	Contract award criteria	Yes	Regulation 67
Article 68	Life-cycle costing	Yes	Regulation 68



<b>Article</b>		<b>Copy out (yes/no)</b>	<b>National Provision</b>
Article 69	Abnormally low tenders	Yes	Regulation 69
Article 70	Conditions for performance of contracts	Yes	Regulation 70
Article 71	Subcontracting	No	Regulation 71
Article 72	Modification of contracts during their term	Yes	Regulation 72
Article 73	Termination of contracts	Yes	Regulation 73
Article 74	Award of contracts for social and other specific services	Yes	Regulation 74
Article 75	Publication of notices	Yes	Regulation 75
Article 76	Principles of awarding contracts	No	Regulation 76
Article 77	Reserved contracts for certain services	Yes – In Part	Regulation 77
Article 78	Scope	Yes	Regulation 78
Article 79	Notices	Yes	Regulation 79
Article 80	Rules on the organisation of design contests and the selection of participants	Yes	Regulation 80
Article 81	Composition of the jury	Yes	Regulation 81
Article 82	Decisions of the jury	Yes	Regulation 82
Article 83(6)	Enforcement	Yes	Regulation 83
Article 84	Individual reports on procedures for the award of contracts	Yes – in Part	Regulation 84
Article 85(1) &(2)	National reporting and statistical information	Yes – In Part	Regulation 84(6)
Article 86:	Administrative cooperation	N/A	N/A
Article 87	Exercise of the delegation of powers	N/A	N/A
Article 88	Urgency procedure	N/A	N/A
Article 89	Committee procedure	N/A	N/A
Article 90	Transposition and transitional provisions	N/A	N/A
Article 91	Repeals	N/A	N/A
Article 92	Review	N/A	N/A
Article 93	Entry into force	N/A	N/A
Article 94:	Addressees	N/A	N/A
ANNEX I	CENTRAL GOVERNMENT AUTHORITIES	No	Schedule 1
ANNEX II	LIST OF THE ACTIVITIES REFERRED TO IN POINT 6(A) OF ARTICLE 2(1)	Yes	Schedule 2

	<b>Article</b>	<b>Copy out (yes/no)</b>	<b>National Provision</b>
ANNEX III	LIST OF PRODUCTS REFERRED TO IN ARTICLE 4(b) WITH REGARD TO CONTRACTS AWARDED BY CONTRACTING AUTHORITIES IN THE FIELD OF DEFENCE	Yes	Schedule 4
ANNEX IV	REQUIREMENTS RELATING TO TOOLS AND DEVICES FOR THE ELECTRONIC RECEIPT OF TENDERS, REQUESTS FOR PARTICIPATION AS WELL AS PLANS AND PROJECTS IN CONTESTS	Yes	Regulation 22(16)
ANNEX V	<p>INFORMATION TO BE INCLUDED IN NOTICES</p> <p>ANNEX V: INFORMATION TO BE INCLUDED IN NOTICES</p> <ul style="list-style-type: none"> <li>• Part A: INFORMATION TO BE INCLUDED IN NOTICES OF THE PUBLICATION OF A PRIOR INFORMATION NOTICE ON A BUYER PROFILE</li> <li>• Part B: INFORMATION TO BE INCLUDED IN PRIOR INFORMATION NOTICES (as referred to in Article 48)</li> <li>• Part C: INFORMATION TO BE INCLUDED IN CONTRACT NOTICES (as referred to in Article 49)</li> <li>• Part D: INFORMATION TO BE INCLUDED IN CONTRACT AWARD NOTICES (as referred to in Article 50)</li> <li>• Part E: INFORMATION TO BE INCLUDED IN DESIGN CONTEST NOTICES (as referred to in Article 79(1))</li> <li>• Part F: INFORMATION TO BE INCLUDED IN NOTICES OF THE RESULTS OF A CONTEST (as referred to in Article 79(2))</li> <li>• Part G: INFORMATION TO BE INCLUDED IN NOTICES OF MODIFICATIONS OF A CONTRACT DURING ITS TERM (as referred to in Article 72(1))</li> </ul>	Yes	<p>The following regulations cross-refer to Annex V</p> <ul style="list-style-type: none"> <li>• Regulation 27(4)(a)</li> <li>• Regulation 28(6)(a)</li> <li>• Regulation 29(6)(a)</li> <li>• Regulation 48(2)</li> <li>• Regulation 48(4)(a)</li> <li>• Regulation 48(5)(c)</li> <li>• Regulation 75(1)(a)</li> <li>• Regulation 75(1)(b)(ii)</li> <li>• Regulation 75(3)</li> <li>• Regulation 79(2)(a)</li> <li>• Regulation 79(4)</li> </ul>

	<b>Article</b>	<b>Copy out (yes/no)</b>	<b>National Provision</b>
	<ul style="list-style-type: none"> <li>• Part H: INFORMATION TO BE INCLUDED IN CONTRACT NOTICES CONCERNING CONTRACTS FOR SOCIAL AND OTHER SPECIFIC SERVICES (as referred to in Article 75(1))</li> <li>• Part I: INFORMATION TO BE INCLUDED IN PRIOR INFORMATION NOTICES FOR SOCIAL AND OTHER SPECIFIC SERVICES (as referred to in Article 75(1))</li> <li>• Part J: INFORMATION TO BE INCLUDED IN CONTRACT AWARD NOTICES CONCERNING CONTRACTS FOR SOCIAL AND OTHER SPECIFIC SERVICES (as referred to in Article 75(2))</li> </ul>		
ANNEX VI	INFORMATION TO BE INCLUDED IN THE PROCUREMENT DOCUMENTS RELATING TO ELECTRONIC AUCTIONS (ARTICLE 35(4))	Yes	Regulation 35(8)
ANNEX VII	DEFINITION OF CERTAIN TECHNICAL SPECIFICATIONS	Yes	Regulation 2 and Regulation 42
ANNEX VIII	FEATURES CONCERNING PUBLICATION	Yes	Regulation 51 and Regulation 52
ANNEX IX	CONTENTS OF THE INVITATIONS TO SUBMIT A TENDER, PARTICIPATE IN THE DIALOGUE OR TO CONFIRM INTEREST PROVIDED FOR UNDER ARTICLE 54	Yes	Regulation 54
ANNEX X	LIST OF INTERNATIONAL SOCIAL AND ENVIRONMENTAL CONVENTIONS REFERRED TO IN ARTICLE 18(2).	N/A	N/A
ANNEX XI	REGISTERS	Yes	Schedule 5
ANNEX XII	MEANS OF PROOF OF SELECTION CRITERIA	Yes	Regulation 60(9)
ANNEX XIII	LIST OF EU LEGISLATION REFERRED TO IN ARTICLE 68(3)	Yes	N/A

<b>Article</b>		<b>Copy out (yes/no)</b>	<b>National Provision</b>
ANNEX XIV	SERVICES REFERRED TO IN ARTICLE 74	Yes	Schedule 3
ANNEX XV	CORRELATION TABLE	N/A	N/A