

**EXPLANATORY MEMORANDUM TO
THE LOCAL GOVERNMENT (EXCLUSION OF NON-COMMERCIAL
CONSIDERATIONS) (ENGLAND) ORDER 2022**

2022 No. 741

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Levelling Up, Housing and Communities (DLUHC) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 The purpose of this Order is to enable best value authorities and parish councils in England, if they so wish, to terminate proposed or subsisting public supply or works contracts either where the country or territory of origin of supplies to the contractor is the Russian Federation or Republic of Belarus or where the location of the business activities or interests of a contractor is the Russian Federation or the Republic of Belarus. For the purposes of this Order, contractors includes suppliers and subcontractors.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales.
4.2 The territorial application of this instrument is England.

5. European Convention on Human Rights

- 5.1 The Local Government Minister at DLUHC, Kemi Badenoch MP, has made the following statement regarding Human Rights:
5.2 “In my view the provisions of the Local Government (Exclusion of Non-Commercial Considerations) (England) Order 2022 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 Section 17(1) of the Local Government Act 1988 (the 1988 Act) imposes a duty on public authorities as defined by Schedule 2 to the Act to refrain from taking non-commercial matters into consideration when making decisions on proposed or subsisting contracts. Matters which are considered to be non-commercial are specified in section 17(5) of the 1988 Act.
6.2 The authorities in England to which this section applies include county councils, district councils, London borough councils, and parish councils.
6.3 Section 17(3) of the 1988 Act sets out the type of contracts which fall under this duty. These are public supply or works contracts, which are defined as contracts for the supply of goods or materials, for the supply of services or for the execution of works.

- 6.4 Section 17(4) specifies the type of actions by public bodies which are regulated by this duty. These include:
- the inclusion or exclusion of persons from any list of persons approved for the purposes of public supply or works contracts with the authority, or any list of persons from whom tenders for such contracts may be invited;
 - in relation to a proposed public supply or works contract with the authority -
 - the inclusion or exclusion of persons from the group of persons from whom tenders are invited,
 - the accepting or not accepting of submission of tenders for the contract,
 - the selecting of persons with whom to enter into the contract, or
 - the giving or withholding approval for, or the selecting or nominating, persons to be subcontractors for the purposes of the contract; and
 - in relation to a subsisting public supply or works contract with the authority -
 - the giving or withholding approval for, or the selecting or nominating, persons to be subcontractors for the purposes of the contract, or the termination of the contract.
- 6.5 Section 17(5) of the 1988 Act prohibits public authorities as defined by Schedule 2 to the Act from taking into consideration certain non-commercial matters when making decisions concerning public supply or works contracts. The specified non-commercial matters include at section 17(5)(e) the country or territory of origin of supplies to, or the location in any country or territory of the business activities or interests of, contractors.
- 6.6 Section 17(7) of the 1988 Act prohibits public authorities as defined by Schedule 2 to the Act from taking into consideration certain non-commercial matters when making decisions concerning suppliers, subcontractors and associated bodies of either the contractor or their subcontractors and suppliers.
- 6.7 Section 19(1) and (2) of the Local Government Act 1999 (the 1999 Act) provides that the Secretary of State may by order provide that specified matters can cease to be considered as non-commercial matters for the purposes of section 17 of the 1988 Act, for either all or some ‘relevant authorities’ as defined by section 19(5) of the 1999 Act, which include public authorities subject to section 17 of the 1988 Act, such as best value authorities and parish councils to which this Order applies.
- 6.8 In terms of wider procurement regulations, these are contained in the Public Contracts Regulations 2015 (PCR), the Concession Contracts Regulations 2016 (CCR) and the Utilities Contracts Regulations 2016 (UCR). This Order does not alter or amend any of the provisions in these regulations which apply to all contracting authorities, including those subject to section 17 of the 1988 Act.

7. Policy background

What is being done and why?

- 7.1 The invasion of Ukraine by Russia in February 2022 has been met with unprecedented global condemnation. The United Kingdom and our international partners are united in support for Ukraine. The Government is providing a range of economic,

humanitarian and defensive military assistance to Ukraine, and is imposing sanctions on Russia and Belarus.

- 7.2 On 28 March 2022 the Government called on central government departments, executive agencies and non-departmental public bodies to consider terminating contracts where a Russian or Belarusian prime contractor is identified, in accordance with the terms of the contract, if an alternative supplier can be sourced in line with value for money, affordability and with minimal disruption to public services. It also set out that these authorities may also want to consider whether there are Russian and Belarusian subcontractors (being relied on to deliver the contract) in such supply chains, providing a proportionate, risk-based approach is taken. This is set out in the Cabinet Office Procurement Policy Note – Contracts with Suppliers from Russia and Belarus (PPN 01/2022).
- 7.3 This Order enables best value authorities and parish councils to take comparable action to that set out in PPN 01/2022.
- 7.4 The policy will not enable these bodies to instigate their own unofficial, municipal foreign or defence policies – but will not prevent them from undertaking their own divestment measures where these align with official government sanctions – as in this case.
- 7.5 As independent bodies it is for each individual public authority to which this Order applies to make their own decisions concerning their contract portfolio. This is in line with PPN 01/2022 which does not mandate action but sets out that decisions on whether or not to terminate a relevant contract lie with individual contracting authorities.

Explanations

What did any law do before the changes to be made by this instrument?

- 7.6 Section 17(1) of the 1988 Act sets out that it is the duty of every public authority, to which the section applies, to exercise functions related to its public supply or works contracts without reference to non-commercial matters (as specified in section 17(5)). These non-commercial matters include at section 17(5)(e) the country or territory of origin of supplies to, or the location in any country or territory of the business activities or interests of, contractors.
- 7.7 Section 17(5)(e) therefore operates to prevent those public authorities from taking into consideration the country or territory of origin of supplies to, or the location in any country or territory of the business activities or interests of, contractors, when determining whether to enter into or terminate public supply or works contracts, such as those with Russian or Belarusian prime contractors, or subcontractors or suppliers.

Why is it being changed?

- 7.8 The United Kingdom condemns the invasion of Ukraine by Russia. This Order forms part of the Government's response which also includes economic, humanitarian and defensive military assistance to Ukraine, and imposing sanctions on Russia and Belarus.

What will it now do?

- 7.9 The Order enables best value authorities and parish councils in England, if they so wish, to take into consideration the country or territory of origin of entities with which

they have public supply or works contracts where the country or territory of origin of the contractor is the Russian Federation or Republic of Belarus or where the location of the business activities or interests of a contractor is the Russian Federation or the Republic of Belarus.

- 7.10 The Order also enables best value authorities and parish councils in England, if they so wish, to take into consideration the country or territory of origin of entities of proposed contractors (and therefore decline to consider such contractors) where the country or territory of origin of the contractor is the Russian Federation or Republic of Belarus or where the location of the business activities or interests of a contractor is the Russian Federation or the Republic of Belarus. The obligations placed on contracting authorities by the Public Contracts Regulations 2015 remain unaltered. Therefore, careful attention must be given to entities registered in the UK (or a country to which the UK has a relevant international agreement) but controlled by entities in Russia or Belarus during new procurements. Authorities should not automatically exclude these entities from new procurement exercises, as the non-discrimination, equal treatment and remedy provisions contained within the Public Contracts Regulations 2015 apply. Contracting authorities may, however, consider terminating existing contracts with such entities.
- 7.11 As is the case for central government departments and other bodies, as set out in PPN 01/2022, it is the Government's intention that an authority to which this Order applies should only consider terminating a relevant existing contract if: a) there are suitable, commercially acceptable termination provisions contained in the contract; b) an assessment has been made as to the criticality of the contract and the availability and affordability of alternative providers; and c) an assessment has been made of the financial and other implications of termination and these have been mitigated. Therefore the Government is of the view that decisions to terminate such contracts by these authorities should be made in accordance with the terms of the contract, and only where an alternative supplier can be sourced in line with value for money, affordability and with minimal disruption to public services.
- 7.12 As is also the case for central government departments and other bodies as set out in PPN 01/2022, it is the Government's intention that authorities to which this Order applies may decline to consider new procurement bids from entities which are constituted or organised under the law of Russia or Belarus, or whose "Persons of Significant Control" information states Russia or Belarus as the place of residency.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 There is no requirement for consolidation as this instrument does not amend other legislation.

10. Consultation outcome

- 10.1 DLUHC has engaged with local authorities in England, as well as the Local Government Association (LGA) and National Association of Local Councils (NALC), on the nature of this Order, and has used the LGA's group of impacted councils as a consultation forum. This engagement has included surveying the exposure of local

authorities to Russian and Belarusian prime contractors. DLUHC carried out targeted follow-up engagement with those councils which noted exposure, including to canvass the likely reception to these measures. This was positively received, with those engaged commenting that the policy provides the desired flexibility, as it does not place new obligations on best value authorities or parish councils.

11. Guidance

- 11.1 The Order enables relevant best value authorities and parish councils to take comparable action to central government departments, executive agencies and non-departmental public bodies, as set out in PPN 01/2022. Associated guidance is available at <https://www.gov.uk/government/publications/procurement-policy-note-0122-contracts-with-suppliers-from-russia-and-belarus> and will be updated to ensure the Government provides appropriate guidance to best value authorities and parish councils at the point at which the provisions of this Order come into force.

12. Impact

- 12.1 The impact on business is dependent on whether the country or territory of origin of a contractor (or sub-contractor or supplier) is the Russian Federation or Republic of Belarus, or whether the location of the business activities or interests of a contractor (or subcontractor or supplier) is the Russian Federation or the Republic of Belarus, and whether the relevant authority has decided to terminate a proposed or subsisting public supply or works contract with such entities. Such impact is the intent of the Order and is in step with Government policy in its response to the invasion of Ukraine. It is also akin to the action taken in PPN 01/2022. There is no impact on charities or the voluntary sector. It is possible that a UK business could be impacted by this provision, where such a contractor employs subcontractors/suppliers which are in scope of this Order. DLUHC's surveying of councils to date has not identified the extent of exposure to Russia/Belarus in the supply chains of prime contractors, but it is anticipated that this is minimal. This Order places no obligation on a best value authority or parish council to terminate any commercial relationship, and the PPN 01/2022 is clear that where such subcontractors are identified the authority should begin to understand the impact on their supply chain and discuss with the prime contractor their links to Russia/Belarus in the first instance.
- 12.2 The impact on the public sector is that best value authorities and parish councils may choose to scrutinise and terminate existing contracts, or decline to consider bids from prospective suppliers, should they so wish, in accordance with the Order. The Order places no new obligations on such authorities in this regard.
- 12.3 A full Regulatory Impact Assessment has not been prepared for this instrument as it amends provision in connection with procurement, which is a non-regulatory provision under section 22(4)(b) of the Small Business, Enterprise and Employment Act 2015.

13. Regulating small business

- 13.1 The purpose of this Order is to provide best value authorities and parish councils, when exercising their functions in relation to proposed or subsisting contracts, with the necessary flexibility to take into consideration certain non-commercial considerations, namely if supplies to a contractor originate in Russia or Belarus or the contractor has business activity or interests in Russia or Belarus, as set out in article

3(1)(a) and (b) of the Order. Any guidance and communications will be explicit that the intention is solely for contracts with such entities to be considered, and that the provisions do not extend to small businesses which are constituted and organised by the UK or another state (excluding Russia or Belarus) which lawfully operate in the UK and are owned by those of Russian or Belarusian heritage who lawfully reside in the UK, but with no control or significant oversight by an entity based in Russia or Belarus. As such, it is not intended that there will be an impact on United Kingdom small businesses.

14. Monitoring & review

- 14.1 The objective of this Order is to provide best value authorities and parish councils with the necessary flexibility to take into consideration a contractor's Russian or Belarusian links to the extent set out in article 3(1)(a) and (b) of the Order, when exercising their functions in relation to proposed or subsisting contracts. The success of this approach will be monitored through close engagement with local authority leaders, local authority officers, who have been encouraged to engage with DLUHC officials, as well as the LGA and NALC. Furthermore, the LGA coordinates a group of impacted councils that meets with Government regularly and this forum will be used to consider the application of the new provisions. Whilst this Order does not implement any new obligations on best value authorities or parish councils, Local Authority leaders have been informed that the Government stands ready to engage with any authority which has concerns about its financial position, service delivery or where it may be facing pressures that it cannot take steps to manage locally. The application of these measures will be considered in light of any approach received from Local Authority leaders.
- 14.2 The instrument does not include a statutory review clause. The Government will review the arrangements established in this Order in line with any future updates to PPN 01/22 on central contracting authorities' contracts with suppliers from Russia and Belarus.
- 14.3 As part of that process, and should it deem it desirable to do so, the Government will consider making an order under section 19(3A)(b) of the 1999 Act, to allow for the Local Government (Exclusion of Non-Commercial Considerations) (England) Order 2022 to cease to apply and ensure transitional provisions are in place.

15. Contact

- 15.1 The Commercial Policy Team at the Department for Levelling Up, Housing and Communities can be contacted with any queries regarding the instrument, at the following address: LGCommercial@levellingup.gov.uk.
- 15.2 The Deputy Director for Local Government Commercial Policy and Capability, at the Department for Levelling Up, Housing and Communities can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Kemi Badenoch MP at the Department for Levelling Up, Housing and Communities can confirm that this Explanatory Memorandum meets the required standard.