

London Heads of Procurement Network

Submission to the Public Contracts Regulations 2015 consultation

1. This paper sets out comments on the content of the draft Public Contract Regulations 2015 in response to the Consultation document on the draft UK implementing regulations.
2. The comments set out below are from the London Heads of Procurement Network (LHOPN). LHOPN is a forum that enables Heads of Procurement in London to share information, develop initiatives, discuss and debate key issues affecting public sector procurement. The comments set out are, therefore, from a significant representative body of procurement professionals.
3. London local government recognises the important role of procurement in supporting the continued delivery of high quality, value-for-money services to local residents, particularly in the current public finance environment. London local authorities spend approximately £9 billion each year on a diverse range of goods and services. This represents approximately 15 per cent of all local government third party expenditure. These figures are significant and highlight not only the important role procurement can play in supporting the government's deficit reduction programme, but also in supporting local, regional and national economic growth.
4. The LHOPN generally supports the freedoms and flexibilities set out in the Public Contracts Regulations (the Regulations). However we have concerns about the approach the Government is taking to implementation of the Lord Young reforms. This Consultation calls only for comments on technical points relating to the Lord Young reforms; we do not consider that there has been sufficient opportunity to debate the implementation of the Lord Young reforms and that further consideration needs to be given to the implications of these. In particular we are concerned that the good work that local government has undertaken in driving forward a 'SME friendly' agenda, evidenced by the high percentage of work awarded to SMEs, is not undermined by an approach that, in our opinion, has not been fully debated.
5. Responses to the questions set out in the Consultation are provided below.

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

The London Heads of Procurement Network (LHOPN) generally view the drafting and language of the draft Regulations as more user friendly and easier to follow than the Public Contracts Regulations 2006. The structure of the Regulations in terms of separating Procedures and Techniques makes sense to a degree. Local authorities note that the Cabinet Office has adopted a principle of “Copy out” and not to “gold-plate” the proposed Regulations. LHOPN accept this principle as a means of relating the terminology used in the Articles contained in the Directive with its equivalent in the Regulations. The EU Directive contains 138 recitals that set out its purpose. Some of the information contained in the recitals have not been transposed into the Articles and hence because of the Copy-out policy are absent to the draft Regulations.

In advance of the adoption of the Regulations LHOPN would urge the Cabinet Office to consider enhancing the clarity of concepts to provide the inclusion of provisions contained in the recitals for a greater degree of legal certainty so as to afford procurement officers with clear guidance and prevent misinterpretation and ambiguity which may arise from cross referencing.

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

LHOPN agree with the transition policy and that new procedures should apply only to procurement commenced under the new procedure. The approach to apply the new rules only to new procurement processes beginning on or after the new Public Contracts Regulations take effect is viewed as being suitable for the effective conduct of procurement operations.

Q.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.

Whilst the general policy is to copy-out there are certain instances where this is not appropriate. Supportive guidance would be helpful in terms how to interpret ‘disabled persons’, ‘disadvantaged persons’, ‘sheltered workshop’, and ‘sheltered employment programme’ as this has always been a cause for confusion and ambiguity. As it is deemed sensible to copy out to prevent misalignment with future ECJ case law/guidance, LHOPN asks the Government to consider a halfway house approach to at least try and remove some ambiguity with some robust guidance which is always nonetheless subject to ECJ.

Q.4 Electronic (“e”) communication and e-procurement choices: We invite comments as to whether the proposed approach set out above is suitable, bearing in mind policy goals, and stakeholder views to date as discussed in Annex B below, or whether there are clear arguments to the contrary.

LHOPN agree that the proposed approach is suitable and provides a flexible approach to e procurement in the draft Regulations.

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

LHOPN generally support the proposed approach as being suitable and offers certain aspects of flexibility in relation to e procurement noted in the draft Regulations. However we have some concern around the use of the term framework as being unhelpful in the current context.

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

LHOPN welcome the approach outlined in the draft Regulations and believe the objectives offers room for flexibility on the use of Central Purchasing Bodies.

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

There is a general agreement across LHOPN that that the provision of following are deemed to be welcome:

- **Option 1:** The award of contracts by negotiation without a call for competition should be transposed into the new Regulations. It reflects the current arrangements contained in the 2006 Regulations (as amended).
- **Options 2 and 3:** The provision to provide flexibility to London boroughs and other sub-central contracting authorities is welcome.
- **Option 4:** Whilst it is noted that comments received to earlier consultations in 2013 opposed the requirement to publish call-offs from framework agreements (even on a quarterly basis) in OJEU, the previous consultation did not include the Lord Young recommendation. Most of London’s local authorities already operate a transparency policy on expenditure; this is in light of the new Regulations requiring London’s boroughs to publish contract awards on the Contract Finder database. In moving to electronic procurement and tendering systems the uploading of information on a quarterly basis to OJEU would lead to government data being more open. Although it may need to be established if the administrative burden forecast becomes evident.

Q.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.

LHOPN support that the general approach to the two policy choices is appropriate. With officers rarely having the time to entertain such a detailed narrative in reports, the documenting involved in deciding whether to use lots and to what extent could be viewed as a cause for concern.

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

As above LHOPN generally agree that the proposed approach to the two policy choices is appropriate. On reading the supporting guidance of the policies LHOPN noted that Recital 79 goes into greater details than Article 46 and this is reflected in the copy-out and draft Regulation 46. This is viewed as another example of where the Regulations should be enhanced although this may be construed as applying gold plating.

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

Regulation 50(4) sets out that London's local authorities will not have to publish Contract Award Notices in OJEU where there has been a call-off from a framework agreement. With the move to e-tendering systems there is the likelihood that all mini-competitions will be undertaken using them. In light of this possible move London's local authorities seek clarification regarding the term 'Contracting authorities shall ... offer unrestricted and full direct access ... to the procurement documents'.

There is the case of possible further development cost for London boroughs in making the link to the Contracts Finder portal when implemented. In a majority of cases these portals require Potential Providers to register and obtain a log-in prior to accessing tender documentation – LHOPN queries if this would be deemed satisfactory?

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

LHOPN have concerns as to whether that this can be viewed as a workable solution. Future guidance in terms of new forms should also be backed up with potential training opportunities from CCS depending on the complexity of the forms. Trying to adapt forms by using free-text fields is considered a recipe for disaster. The Regulations should be enacted when the European Commission has made the necessary changes to the SIMAP website and pressure put on the Commission to complete the upgrade at the earliest possible convenience.

Q.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.

LHOPN recognises that it is imperative to have a detailed understanding of Regulation 24(3) a definition of "relevant staff members" is given. Regulation 24(3) should be underpinned by robust and comprehensive information capturing those who may have an influence in or over the ultimate award decision including local elected councillors or ex-officio appointments to quangos - such as hospital and PCT Boards, school governors (who may or may not also be elected councillors), etc.

Q.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.

LHOPN generally support the proposed draft regulations achieve the objective of implementing the requirements of the Directive in a minimalistic fashion.

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

LHOPN recognises that it is imperative to be prudent for levels of sub-contracting to be reviewed at a local level and the Regulations seem to reflect this. Reservations are held by the London boroughs around making direct payments to sub-contractors.

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

L HOPN generally supports the proposed drafting in regulation 73(3) generally provides an effective deeming provision.

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

LHOPN generally agree with the proposed light touch regime for Schedule 3 procurements

Q.17 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.

LHOPN generally agree with the proposals although there are areas that seem to lack many parameters, which will only become evident through testing and use. LHOPN are concerned the information given in relation to being “reasonable and proportionate” could cause ambiguity and misinterpretation around the requirement of response timescales for adverts and tenders.

Q.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.

LHOPN believe that the proposed drafting is reasonable and achieve the objective of sewing the existing remedies rules into the new procurement rules framework in a satisfactory way.

Q.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.

LHOPN is concerned that this Consultation calls only for comments on technical points relating to the Lord Young reforms; there is concern around the explanation as to what is

meant by 'technical points' and the removal of a filtering process and making all below threshold procurements open to all who respond.

Whilst the measures may attract micro and small businesses for supplies and services below the £173,000 threshold the concern is that with the use of e-tendering systems there will be no control over who will download the tender documents and submit qualified bids.

Clarification is required regarding how due diligence, legal and financial capacities and technical and professional abilities to perform the contract to be awarded is to be tested for those contracts below EU thresholds. There has been no recognition that local government already spends significant sums with SMEs, far more than central Government. It is likely that in the absence of some filtering process London's local authorities will be inundated with tenders or quotations as the effective method of control has been removed.

Whilst the intention is to attract SMEs for low value contracts, the Consultation fails to address the issue of procurement opportunities above the £173k threshold. There is a new threshold for the Annex XIV/Schedule 3 Services (thought to be in the region of £600k) and works contracts where the EU threshold is in the region of £4.5m.

With reference to de minimus procurements for Schedule 3 Services that fall between the £173k and £600k thresholds LHOPN will want to ensure that the providers have sufficient experience to provide the proposed services. With reference to Works procurements that are de minimus, London boroughs undertaking large capital schemes may wish to ensure that the tender list is manageable and proportionate to the project. One way of ensuring that this happens is through the use of some form of vetting procedure.

There are two options:

- (a) Allow London boroughs to continue to pre-qualify bidders based upon past performance
- (b) And/or mandate, in certain circumstances the use of national databases, such as Constructionline.

In a time of austerity when London local authorities need to demonstrate efficiency, effectiveness and value for money the approach being proposed under Part 4 may lead to additional burdens at a time when resources are limited.

Q.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.

No comments on this point.