

# Local Government Association submission to the Public Contracts Regulations 2015 consultation

13 October 2014



## **1. About the Local Government Association**

- 1.1 The Local Government Association (LGA) is the national voice of local government. We work with councils to support, promote and improve local government.
- 1.2 We are a politically-led, cross party organisation which works on behalf of councils to ensure local government has a strong, credible voice with national government. We aim to influence and set the political agenda on the issues that matter to councils so they are able to deliver local solutions to national problems. The LGA covers every part of England and Wales, supporting local government as the most efficient and accountable part of the public sector.
- 1.3 The LGA welcomes the opportunity to comment on the content of draft Public Contracts Regulations 2015 (the Regulations).

## **2. Summary**

- 2.1 The LGA and councils generally support the freedoms and flexibilities set out in the Public Contracts Regulations (the Regulations).
- 2.2 The LGA would like to make particular representation relating to Part 4 – Below-Threshold Procurements.
- 2.3 The LGA supports enabling more small businesses and voluntary sector organisations to bid successfully for public sector tenders.
- 2.4 However, we are concerned that by including regulations set out in Part 4 the Government is acting outside the principles outlined in the Localism Act 2010 which sets out to remove centrally-set rules about how councils organise themselves and run their affairs in a way that suits local circumstances.
- 2.5 We appreciate that the consultation calls only for comments on technical points relating to the Lord Young reforms but there is no explanation as to what is meant by 'technical points'. We are therefore responding to these reforms under question 1 – general comments.
- 2.6 We believe, for the reasons set out below, that Part 4 of the Regulations go against the principles of Localism, are burdensome, costly and could potentially work against SME's.
- 2.7 We are concerned to find that Cabinet Office have announced (SOPO Newsletter September 2014) that the changes in Part 4 will take place prior to the closure of the consultation period. This is contrary to the Cabinet Office's own guidance on consultation principles which state that decision making should be informed by real discussion with stakeholders.

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### **3. Part 1: General**

- 3.1 The LGA generally supports the drafting of the Regulations set out in Part 1 and welcome the flexibilities that the new Regulations will bring to local authority procurement.
- 3.2 The LGA were particularly pleased to be engaged in the discussions on 'Policy Choices' earlier this year, and pleased that Government has maintained its stated policy of not 'gold-plating' regulations. We are also pleased that some of the regulations, particularly relating to e-procurement, will be implemented at a later date, therefore giving councils time to update their systems and processes.
- 3.3 The LGA is part of and supports the Winterbourne View Joint Improvement Programme. Finding Common Purpose is a project within this team and they have identified a number of issues relating to technical points within the regulations. LGA supports the recommendation that the Public Contracts Regulation s 2015 extend the exemptions and exceptions given to the NHS Commissioners acting under their NHS Regulations, to commissioners for social and health care in Local Authorities.

### **4. Part 4**

- 4.1 Councils and other contracting authorities are already bound by existing EU Directives for 'above threshold' procurements. The corollary of this is that the duties relating to 'below threshold' procurements should be determined by contracting authorities themselves; for councils this would be through their own contract standing orders and follow the general EU principles of transparency, proportionality and equal treatment.
- 4.2 We believe that addition of the Regulations in Part 4 is against the principles of the Localism Act 2010 (ie. that Councils should be empowered to act innovatively and in general terms have the same freedom to act as an individual) and add a further layer of bureaucracy on low value procurements.
- 4.3 The consultation on the Lord Young reforms in September 2013 stated that the reforms would act as a "**deregulatory measure**" to make the procurement process faster, more transparent and less bureaucratic. The LGA members believe that the Regulations as outlined will result in the opposite effect.
- 4.4 The Lord Young consultation also stated that the issues set out were "**not major policy changes**" and the resulting report simply made recommendations. The Government is not under an obligation to act upon Lord Young's recommendations.
- 4.5 The Government appears to have decided to legislate on these recommendations without engaging properly on how to change ways of working through consultation, non-mandatory guidance or other means.
- 4.6 The strength of opposition to these reforms have been made clear to the Government, with representation from the LGA and other bodies, from individual councils and particularly during the pilot EU Directives Awareness training days. Such was the strength of opinion and the disruption caused by this during the awareness training, Cabinet Office chose to remove the Lord Young clauses from the final training offer going forward. Councils have therefore had no proper opportunity to discuss these changes as forming part of legislation.

- 4.7 The LGA launched a new national procurement strategy for local government in July setting out how councils should be simplifying processes in order to engage with a wide supplier base, whilst at the same time using procurement to grow their local economies. We have already gained much support for the strategy and believe that a sector-led improvement approach on this issue is the way forward. Likewise, the LGA continues to encourage the sharing of best practice within the sector, so that local authorities can learn from each other's experiences as to what works well when it comes to effective and efficient procurement.
- 4.8 The arguments against mandating the use of Contracts Finder have already been set out, but for clarity we summarise them here:
- 4.8.1 The LGA are very concerned that the Government is intending to mandate the use of a single online portal (Contracts Finder) to advertise all contract opportunities. Mandatory use of Contracts Finder, and national advertising of all contract opportunities will undermine local government's ability to take into account social value and stimulate local economic growth and could actually disadvantage local SMEs.
  - 4.8.2 It would also undermine the investment local authorities have made in their own local and regional portals that advertise procurement opportunities in order to help their local economies grow. There may also be a further development cost for councils to make the link to the Contracts Finder portal when implemented.
  - 4.8.3 Any move to a more centralised approach would negate these efforts.
- 4.9 The arguments against abolition of a two stage process for any procurement under the EU Threshold have already been set out, but for clarity we summarise them here:
- 4.9.1 Councils sometimes need to use pre-qualification questionnaires (PQQs) in lower value procurements to deselect suppliers, particularly where a large supply chain exists (for example in construction or ICT sectors) or where they may be issues of safeguarding and tendering a smaller number of suppliers reduces the potential risks for vulnerable people. (eg building or facilities management contracts relating to women's refuges). If councils are not able to use a two stage process to deselect, they will then be required to evaluate full tenders from all bidders. This will increase the cost and resource burden of evaluation for councils but more importantly will increase the burden on suppliers to bid. In addition to evaluating many more full tenders, councils will need to provide feedback to more bidders, placing a further burden on resources. These Regulations run counter to the Government's aim of ensuring a 'timely and efficient' procurement process.
  - 4.9.2 Although we agree that public sector procurement processes would benefit from simplification for small businesses, social enterprises and voluntary and community organisations, we do not believe abolition of PQQ's would be the solution. There is no evidence to suggest that the use of PQQs has limited the number of contracts awarded to SMEs by local government; in fact, local government awards 47 per cent of spend with SMEs compared with central government which awards 12 per cent after having abolished PQQ.

- 4.9.3 The DCLG Select Committee agreed with LGA on this point suggesting that “Contrary to the Government’s approach, we do not support removal of PQQs entirely since they can provide a cost-effective means of pre-selecting viable tenderers. We do not accept that in certain circumstances, particularly low cost procurement, it may be advantageous to have no PQQ but this should be left to the discretion of individual councils”.
- 4.9.4 Clause 107 sets out the thresholds under which contracting authorities will not be allowed to run a two stage process, this currently equates to £111,676 for Central Government and £172,514. Councils are therefore subject to further administrative burdens at a much higher threshold.
- 4.9.5 In some circumstances, PQQs can be a way of enabling SMEs to express interest in a contract without having to go to the expense of submitting a full tender. There is a possibility that a ban on PQQs would inhibit SMEs in bidding because of the expense and risk of submitting full bids, which is more easily borne by larger enterprises. The legislation could therefore have the opposite effect to that intended.
- 4.9.6 We understand there are to be discussions shortly, on expiration of the Government Procurement Agreement (GPA) in relation to raising the threshold for OJEU procurements. If this action is taken it means that even more procurements will be subject to the single-stage process.
- 4.10 If both of these reforms are implemented, national advertising through Contracts Finder will likely increase the total number of bids councils receive, yet councils will have no opportunity to deselect following the abolition of PQQs. The administrative burden of councils will be substantially increased.
- 4.11 We would like confirmation that council funding for increased burdens has been considered given the additional resources that will be needed in the preparation and evaluation stages of tenders should these reforms be implemented.
- 4.12 Guidance issued by the Minister for the Cabinet Office or the Secretary of State is not currently mandatory for all contracting authorities, including councils. By implementing a further duty on councils to have regard to guidance, particularly without councils having any means to consult on the guidance, procurement processes will become less efficient and effective.