



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

# **Briefing for Salford CVS**

## **The new EU procurement rules**

### **September 2014**

Peter Schofield – AGMA Collaborative Procurement Programme Manager  
0161 912 4597  
07814 459668



- **Background**
  - Why the new regs are being introduced
  - The process of making new regs
  - What doesn't change
- **Summary of the Changes**
- **Changes that have relevance to VCOs**
- **Other issues**
  - New National Procurement Strategy
  - Lord Young Reforms

# Why are the new regs being introduced?



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- **Simpler and more flexible, freeing up markets and facilitating growth, in particular allowing:**
  - employee-led organisations/mutuals to gain experience of running public services prior to full and open competition
  - shorter, less burdensome, procurement processes reducing costs to business and barriers to competition
  - more flexibility for authorities to follow best commercial practice to achieve the best procurement outcomes
  - better access to public procurement for SMEs, consistent with non-discrimination and a value for money approach

## The process of making new regs



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- Legislative proposals to change the EU directives by European Commission in Dec 2011
- The new directives were adopted on 28 March 2014 and must be transposed into national law during the next 2 years
- Government preparing to transpose the new rules, through Regulations, earlier than the time allowed
- The rules cover all aspects of procurement
- Presentation is to identify some of the themes key to VCS

## What does not change?



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- No change in the bodies covered by the regulations - “contracting authorities”
- No immediate change to thresholds of application of the directive (but commitment to review by 2019)
- As now authorities must comply with principles of transparency, non-discrimination, equal treatment and proportionality
- The regulations will continue to provide a transparent process aimed at maximising opportunity for suppliers whilst allowing achievement of value for money by authorities

# Quick list of the changes (1)



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- Public-Public Contract exemptions
- Contracts with Defence/Security implications
- Concession Contracts
- Support for developing Mutuals & Enterprises
- Sheltered Workshops
- Light Touch Regime for Social, Health & Other Services
- Market consultation
- Appropriate Scope and Specification
- Environmental & Social Labels
- Electronic Procurement
- Electronic Catalogues
- Dynamic Purchasing Systems

## Quick list of the changes (2)



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- Central Purchasing Bodies
- Frameworks
- Procedures
- Time Limit Changes
- “Urgency”
- Flexibility re timescales
- PIN notices
- Supplier Selection/Exclusion
- Improving Suppliers access to contracts
- Self-Declaration
- Award Criteria
- Dealing with abnormally low tenders

# My take on the “relevant” changes (1)



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- **Public-Public Contract exemptions**
- Contracts with Defence/Security implications
- **Concession Contracts**
- **Support for developing Mutuals & Enterprises**
- Sheltered Workshops
- **Light Touch Regime for Social, Health & Other Services**
- **Market consultation**
- **Appropriate Scope and Specification**
- Environmental & Social Labels
- **Electronic Procurement**
- Electronic Catalogues
- **Dynamic Purchasing Systems**

## My take on the “relevant” changes (2)



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- Central Purchasing Bodies
- Frameworks
- Procedures
- Time Limit Changes
- “Urgency”
- Flexibility re timescales
- PIN notices
- Supplier Selection/Exclusion
- Improving Suppliers access to contracts
- Self-Declaration
- Award Criteria
- Dealing with abnormally low tenders

# Exemptions for 'public-public' contracts



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- **Relevant where Councils share services**
- **'Teckal' case & other cases identified circumstances where a contract between two public bodies can be exempted**
- **The new directive codifies these conditions:**
  - The authority exerts control on the 'supplying authority' similar to that exercised over its own departments and
  - 80% of the activities of the 'supplying authority' are for the 'buying authority' or other bodies controlled by it and
  - There is no direct private capital participation in the 'supplying authority'
  - Participating authorities co-operate to perform public services they must provide, meeting common objectives *and*
  - Co-operation is for public interest reasons only *and*
  - Participating authorities perform less than 20% of the activities on the open market

## Contracts with defence/security implications



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- Regs do not apply to contracts for purposes that are military or 'sensitive' (i.e. involving, requiring and/or containing classified information)
- where essential security interests cannot be protected by less intrusive measures than exemption; or
- for contracts that are declared secret or must be accompanied by special security measures; or
- where application would oblige a Member State to supply information the disclosure of which it considers contrary to its essential security interests

# Concession contracts



- Exclusion for contracts for the right to exploit works or services or that right together with payment (e.g. toll bridges, canteen services, outsourced leisure centres) and operating risk is transferred to the supplier
- This exclusion reflects the agreement at EU level of a new directive to cover such contracts (2014/23/EU) which will be transposed separately and authorities intending to award concession contracts should follow the relevant guidance
- The Concessions Directive provides a relatively light touch regime which will apply to both works and services concessions (the latter are currently exempted from the UK Regulations). The threshold of application of the directive to both works and services concessions contracts will be identical to that for works contracts

# Developing mutuals and social enterprises



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- Certain services contracts (mainly social, health and educational) can be reserved to organisations that:
  - Objective is a public service mission linked to the delivery of these services and
  - reinvests profits to meet this objective and
  - owned/managed on the basis of employee ownership/participatory principles or the active participation of employees, users or stakeholders and
  - not have been awarded a contract for the services concerned by the contracting authority concerned pursuant to this reservation within the past three years
- The duration of the contract to be reserved must not exceed 3 years
- Such 'reserved' contracts must be open to all relevant suppliers with rights under the directive and must be awarded using the procedures in the directive, including a call for competition in OJEU
- The contracts will be awarded using the 'light touch' regime described later

## Reservation of certain contracts for sheltered workshops



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- Any contract may be reserved to organisations that provide sheltered workshops or to suppliers whose main aim is the social and professional integration of disabled or disadvantaged persons. However:
  - The term ‘disadvantaged’ is a new provision and not yet defined
  - The percentage of the workforce that must be represented by those persons is also new – this will reduce from 50% of the workforce to 30%
- Such contracts could also be required “to be performed in the context of sheltered employment programmes”
- Such ‘reserved’ contracts must be open to all relevant suppliers with rights under the directive and must be awarded using the procedures in the directive, including a call for competition in OJEU



- **The distinction between part A and part B services will be abolished thus the normal rules will apply to many former part B services contracts, formerly subject to a very light regime**
- **However some services defined by CPV code in Annex XIV (mainly social and health services) will be subject to a new ‘light touch’ regime to reflect their limited cross-border interest (e.g. they relate to legal services in the context of national law) or are sensitive (e.g. services to the person)**



- **These contracts will only be covered by the directive if their value exceeds 750,000 Euro (a much higher threshold than for other services)**
- **Contracts below this threshold are assumed to be of no cross border interest, so no OJEU advertising is necessary.**
- **However:**
  - The Treaty principles will still apply to the lower value contracts
  - There will still be a requirement, arising from the Lord Young reforms, discussed later, to ensure that the opportunity is accessible in Contracts Finder. This does not necessarily imply formal tendering



- **The directive requires that authorities award contracts for these services in the following way:**
  - Publication in OJEU of a call for competition (either a contract notice or prior information notice - PIN)
  - Publication in OJEU of a contract award notice (or quarterly submission of batches of contract award notices)
  - The directive also requires Member States to establish their own rules for the award of these contracts, within the framework of Treaty obligations



- The UK has prepared a minimalistic approach to avoid unnecessary regulation
- Beyond the new OJEU advertising requirement, the UK's light-touch regime rules will be very flexible
- So authorities will, as now, be able to use the procedures and tools applied in the main rules, or use simpler or otherwise modified techniques, providing they comply with the essential principles of the EU Treaty (i.e. ensuring transparency, equal treatment, non-discrimination etc)

# Preliminary market consultations with suppliers



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- The new rules explicitly allow prior discussions with suppliers and expert bodies prior to starting a procurement procedure both to inform suppliers and to allow the authority to seek advice in the planning and conduct of the procurement procedure
- Government has for some time encouraged this 'pre-market engagement' as the current rules do not prevent such discussions and such engagement is intended to increase the number of SMEs/VCSOs applying for contracts, widening competition and improving value for money
- Care must however be taken to ensure such contact does not distort competition or violate the transparency and non-discrimination principles

# Benefits of preliminary market consultation



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- Helps to manage the market – through stimulating increased competition which can reduce dependency on a limited number of suppliers
- Helps to define the requirement – by informing the business case and helping to identify or develop the contract's requirements.
- Helps to provide a better understanding of the feasibility of the requirement, the best approach, the capacity of the market to deliver and possible risks involved
- Reduces procurement timescales by minimising the dialogue needed during the formal procurement process and minimises the need for complex and costly procedures such as Competitive Dialogue
- Encourages a more responsive market and allows suppliers to ask questions/raise queries at an early stage

# Setting appropriate scope and specification



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- The new directive includes an obligation to include accessibility criteria where the outcome of the contract is to be used by natural persons (except where duly justified)
- There is greater flexibility to include in the specification requirements such as carbon intensity that are related to methods of production/provision of the contract outcome in any stage of the life cycle (provided linked to subject matter and proportionate to value/objectives)

# Setting appropriate scope and specification



- The directive recognises the potential benefits of dividing contracts into lots, in order to assist access by SMEs/VCSOs
- Subject to consultation it is not proposed to require authorities to divide contracts into lots
- However, where it is decided not to 'lot' the contract the authority must indicate why in the contract notice or in its report on each contract (which can be requested by the Commission or by national monitoring authorities)
- Authorities will also be given the flexibility to award more than one lot for a contract to the same supplier

# Using environmental and social labels



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- Social/environmental labels are permitted as part of specification, award criteria or terms and conditions as proof of compliance with a requirement with specific characteristics that are linked to the subject matter of the contract (e.g. working conditions of the employees producing coffee to be supplied to the authority)
- However, suppliers must be allowed to offer compliance with equivalent labels or offer other proofs (e.g. technical dossiers) where the label cannot be obtained within the relevant time limits
- Labels must also, as now, meet certain conditions such as being based on transparent and non-discriminatory criteria and awarded by a body independent of the supplier applying for the label

# Use of electronic procurement



- Current EU rules already allow/encourage electronic communication: the new directive mandates electronic methods in parts of the award process (and mandates safeguards on interoperability and data integrity)
- Electronic OJEU notification and electronic availability of procurement documents to suppliers from date of notice publication will be mandatory from when the regulations come into force
- Authorities must in due course allow electronic submission of tenders and requests to participate but to allow authorities and suppliers to adapt to the new requirements this will be deferred
  - for most authorities until October 2018
  - for Central Purchasing Bodies until April 2017

# Use of electronic procurement



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- The directive does not normally require electronic processing/evaluation of tenders or during post award period
- Oral communication is permitted provided it does not affect essential elements of procurement e.g. tender documents and provided a record is kept of decisions made
- Other methods of communication are permitted for sensitive information or where special equipment/file formats are required or where information is so confidential that generally available tools cannot be used

# Electronic catalogues



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- Tenders can be sought by authorities in catalogue form provided the OJEU call for competition makes this clear and also specifies the required technical format, equipment, connection requirements etc.
- Where multi-supplier frameworks have been concluded on the basis of catalogues the reopening of competition for a particular contract may be achieved by seeking resubmission of the catalogues
- Alternatively the framework might allow the award of the contract by comparing the information already submitted
  - Note that suppliers must be allowed each time to verify that the information used for the comparison is accurate

## Setting up a dynamic purchasing system (DPS)



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- Like a framework in that an authority may use it to award contracts by competition between those suppliers appointed to the system in response to an OJEU call for competition – unlike a framework in that new suppliers can be added to a DPS over its duration
- The duration of the DPS should be indicated in the OJEU notice. The current 4-year limit is removed
- A modified version of the restricted procedure must be used set up this entirely electronic system, rather than the open procedure as is the case now.

# Setting up a dynamic purchasing system (DPS)



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- When establishing a DPS, the minimum time limit for receipt of requests to participate is 30 days from despatch of the OJEU contract notice – note that tenders are not sought at this stage.
- No ‘award notice’ is needed for a DPS (the notice will continue to be available in OJEU during the lifetime of the DPS). The authority must however notify OJEU if the DPS has been terminated or its duration altered

# Making call-off contracts from a DPS



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- The UK has secured a major simplification: the old EU rules required an OJEU notice for DPS call-offs of any value, which was unnecessarily burdensome and made DPS unattractive.
- In the new rules, the process is much simpler. Once a DPS is established the authority must allow a supplier to apply to join it at any time - a decision to admit it must generally be made within 10 days (or within 15 days where verification is needed or additional documentation needs to be assessed)

# Making call-off contracts from a DPS



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- To award a contract the authority must seek tenders from all suppliers admitted to the DPS (or to an appropriate category within it) - minimum time limit for receipt of tenders is 10 days
- The contract must be awarded on the basis of the award criteria in the OJEU notice, where appropriate formulated more precisely in the invitation to tender
- Notices for each contract awarded under the DPS must be sent to OJEU within 30 days (although these can be grouped in quarterly batches)

## Central purchasing bodies (CPBs)



- It is proposed to continue to give flexibility to authorities to award supplies and services contracts to CPBs acting as wholesalers
- It is also proposed that authorities may continue to award supplies, services or works contracts using dynamic purchasing systems (DPS) or frameworks operated by a CPB
- Authorities must comply with the directive when awarding a contract under a DPS operated by a CPB, or determining which supplier should perform a task under a framework

# Minor changes to rules for frameworks



- The new directive makes it explicit that only authorities clearly identified in the OJEU notice may use a framework to award contracts and that contracts awarded under frameworks may exceed the length of the framework itself
- Where a framework allows the authority a choice between applying the terms of the framework or re-opening competition within the framework the choice must be made by applying objective criteria set out in the procurement documents for the framework (e.g. quantity, value or characteristics of the works/supplies/services involved)
- The new directive makes it clear that authorities take legal responsibility for applying the rules set by a Central Purchasing Body when using their frameworks to award contracts



- Five main procedures involving competition rather than four:
  - The open procedure
  - The restricted procedure
  - The competitive procedure with negotiation (similar to the existing negotiated procedure)
  - The competitive dialogue procedure
  - The innovation partnerships procedure (a new procedure)
- Note that the directive makes no significant changes to the situations where contracts may be negotiated without competition, which are deliberately very limited

# Choice of procedures



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- The directive recognises the contribution that negotiation can make to the achievement of value for money in certain circumstances
- It also provides a greater opportunity for authorities to seek better value through negotiation, by setting out broader justifications for its use
- These justifications apply equally to competitive dialogue and the competitive procedure with negotiation

# Choosing a procedure with negotiation



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- Where needs cannot be met without adaptation of readily available solutions (new justification)
- Where the contract includes design or innovative solutions (new justification)
- Where the requirement is complex in nature, in its legal and financial make-up or because of its risks (extended version of the current justification for competitive dialogue)
- Where the technical specifications cannot be established with sufficient precision (as current negotiated procedure with a call for competition)
- In the case of unacceptable/irregular tenders (as current negotiated procedure with a call for competition)

# Changes to existing procedures



- No changes to open and restricted procedures (except in respect of time limits, see later)
- Competitive dialogue explicitly allows negotiation with the preferred bidder (provided changes not material)
- Competitive procedure with negotiation now described more clearly:
  - authority must indicate (and cannot change) minimum requirements and award criteria
  - authority must negotiate with those suppliers submitting initial offers (unless it reserves the right to accept tenders without further negotiation)
  - authority must seek a final tender from suppliers following completion of the negotiations

# Innovation partnerships



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- New procedure allowing authorities to encourage suppliers to develop works, supplies or services not currently available on the market, through long term partnerships
- Awarded to one or more suppliers using the competitive procedure with negotiation – authority must disclose required selection information and minimum requirements for tenders as well as award criteria
- Procedure may be constructed in phases to match the research/innovation process – authority could reserve right to terminate process or reduce the number of partners
- Authority must make clear the position on property rights and must not disclose suppliers' confidential information without agreement

# Revised OJEU notices



- The new directive introduces some new forms (e.g. PIN as a call for competition), all of which must be sent electronically
- It also requires some additional information to be provided on existing forms such as the contract award notice, where statistics on the number of SMEs tendering, number of tenders received electronically etc will be gathered
- The Commission is working to amend/supplement the existing standard forms but it is possible this will not be complete by the time the UK implements the directive
- The Cabinet Office is working with the Commission to agree that the existing forms may be used initially by taking advantage of free text boxes

# Negotiation without prior OJEU publication



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- As now this is allowed only in certain circumstances. Subject to formal consultation it is proposed to maintain this flexibility. Justifications include:
  - no tenders/suitable tenders or requests to participate
  - only one supplier could apply for artistic/technical/exclusive rights reasons (in the last two cases provided no reasonable alternative exists and that the absence of competition is not the result of an artificial narrowing of the requirement)
  - extreme urgency from events unforeseeable by the authority, mean the time limits for competitive procedures cannot be complied with. The extreme urgency of the need must not be attributable to the authority.
  - products involved are manufactured purely for the purpose of research, experimentation, study or development

# Availability of procurement documents



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- New requirement that all procurement documentation must be available via Internet from date of publication of the contract notice (date of invitation to confirm interest where PIN is used as call for competition)
- Exceptions only for:
  - substantiated urgency (accelerated procedures)
  - where practical limitations arise from specific file formats, tools, equipment or the need for physical/scale models
  - where the authority needs to place limits on the confidential information involved
- If the documentation is not available five days must be added to the minimum response times for suppliers set out in the directive (except in the case of 'substantiated' urgency)

# Shorter minimum time limits for responses to adverts/tenders



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- Unnecessarily long time limits can increase the costs of procurement and deter suppliers from taking part
- The new rules include minimum time limits around 30% shorter than at present. These can be shortened further in certain cases (see later).
- However when setting time limits authorities must as now take into account the complexity of the contract and the time required for suppliers to respond.
- In all cases, a notice of contract award must be sent to OJEU within 30 days of conclusion of the framework or contract

# The Prior Information Notice and time limits



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- In some procedures it is possible for authorities to reduce the minimum time limits where a suitable PIN has been published
- A PIN would be 'suitable' where all the following apply:
  - The PIN was not itself intended to represent a call for competition (see later)
  - The PIN was published no more than 12 months and no less than 35 days before the date of dispatch to OJEU of the contract notice
  - The PIN includes certain brief information about the type and value of the contract, to the extent that it was available to the authority at the time of its dispatch to OJEU

## Minimum time limits – open procedure



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- Normally a minimum of 35 days for receipt of tenders (30 days if electronic tenders permitted)
- If preceded by suitable Prior Information Notice (PIN) minimum 15 days
- If urgent (whether or not suitable PIN published) minimum 15 days

# Minimum time limits – restricted procedure



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- Minimum of 30 days for requests to participate
  - If preceded by suitable Prior Information Notice (PIN) minimum time to submit requests is 15 days
- Minimum of 30 days to submit tenders (25 days if electronic tendering permitted)
  - If preceded by suitable Prior Information Notice (PIN) minimum time to submit tenders is 10 days
- If urgent (whether or not suitable PIN published) minimum time to submit requests is 15 days, minimum time to submit tenders is 10 days

## Minimum time limits – competitive procedure with negotiation and innovation partnerships



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- Minimum of 30 days for requests to participate
  - If preceded by suitable Prior Information Notice (PIN) minimum time to submit requests is 15 days
- Minimum of 30 days to submit initial tenders (25 days where electronic tendering permitted)
  - If preceded by suitable Prior Information Notice (PIN) minimum time to submit initial tenders is 10 days
- If urgent (whether or not suitable PIN published) minimum time to submit requests is 15 days, minimum time to submit initial tenders is 10 days

## Minimum time limits – competitive dialogue



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- Minimum of 30 days for requests to participate
  - No provision for time reduction following Prior Information Notice (PIN)
- No explicit time limits for submission of initial/subsequent tenders or time limit implications of PIN publication
- No provision for acceleration

- Accelerated time limits are permitted where the requirement is ‘urgent’
  - “Where a state of urgency duly substantiated by the contracting authorities renders impracticable the [normal] time limit...”
- The reason for urgency must be disclosed in the contract notice
- Note that the directive makes it clear that the authority need not prove that the urgency is brought about by events unforeseeable by and not attributable to the authority
  - this is the stricter test for justification of the use of negotiation without any call for competition in OJEU

## Additional flexibility for sub-central authorities



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- Subject to formal consultation it is intended to allow authorities other than central government (so-called sub-central authorities) to:
  - vary, in agreement with tenderers, the standard minimum time limit for tendering in the restricted procedure only to allow shorter times where appropriate (in the absence of agreement the time limit must be no less than 10 days)
  - use the PIN notice itself as a call for competition (removing the need for a contract notice)
  - suppliers must express their interest in one or a number of contracts referred to in the PIN and the authority must subsequently invite those operators to confirm their interest

### **PIN must:**

- refer specifically to the supplies, works or services that will be the subject of the contract(s) to be awarded
- indicate that the contract will be awarded by restricted or competitive procedure with negotiation without further publication of a contract notice and invite interested suppliers to express their interest in writing
- contain specific information about the contract, similar to that required in the standard contract notice form
- have been sent for publication between 35 days and 12 months prior to the date on which the authority subsequently invites responders to the PIN to confirm their continuing interest.

## Selecting suppliers and seeking tenders - principles



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- As now the directive provides a number of stages in assessing whether a supplier should be allowed to tender for a contract
  - Reasons for exclusion – mandatory (e.g. criminal conviction) and those at authority's discretion (e.g. bankruptcy)
  - Minimum capacity levels (financial and technical)
  - Criteria for reducing the number of suppliers to be invited to tender (not permitted in open procedures)
- In open procedures, authorities may assess tenders in advance of checking capability (only the 'winning' supplier need supply proofs)
- Authorities may allow suppliers to supplement or clarify their submissions (subject to preserving equal treatment in order to allow correction of errors etc.)

# Mandatory exclusions



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- As now suppliers must be excluded from contracts if convicted of offences related to organised crime, corruption, fraud, money laundering,
- New obligations will be introduced to exclude suppliers for convictions for terrorist, child labour and human trafficking related offences
- There will be new obligation to exclude a supplier which has been subject of a binding legal decision which found a breach of legal obligations to pay tax or social security obligations (except where disproportionate, e.g. only minor amounts involved)
  - Note however that an authority may also use its discretion to exclude a supplier where it can demonstrate the supplier's non-payment of taxes/social security contributions where no binding legal decision has been taken (see later slide)

# Discretionary exclusions



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- As now, at the authority's discretion, a supplier may be excluded if grave professional misconduct can be demonstrated (including any conviction related to its business) which affects the supplier's integrity or where the supplier is guilty of serious misrepresentation
- There are also a number of new exclusions, e.g. where:
  - the authority can demonstrate violations of social, labour or environmental conventions listed in Annex X to the directive e.g. ILO Convention 29 on Forced Labour
  - there are 'plausible indications' of agreements aimed at distorting competition
  - there are conflicts of interest, including those arising from prior involvement of the supplier in preparation of the procedure (e.g. specifications) that cannot be remedied by less intrusive measures (e.g. 'Chinese walls')

# Discretionary exclusions



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- A supplier may also be excluded where
  - there are 'significant or persistent' deficiencies in performance of a contract or concession for an authority or utility body that led to early termination of the contract or other sanctions
  - supplier has tried to unduly influence the authority/seek confidential information (e.g. canvassing)
  - supplier has negligently provided misleading information
  - the authority can demonstrate the supplier's non-payment of taxes/social security contributions where no binding legal decision has been taken (see earlier mandatory exclusions slide)

## Application of mandatory and discretionary exclusions



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- Suppliers must not be excluded if they have provided sufficient evidence of reform (e.g. payment of compensation, changes in organisation/personnel) – ‘self cleaning’
- The maximum period of exclusion allowed is 5 years from the exclusion event in the case of mandatory exclusions or 3 years if exclusion is discretionary
- Exclusions can be applied after the selection stage. Supplier could be excluded if necessary evidence (e.g. of conviction) arises at any part of the procedure (e.g. at the stage where tenders are being evaluated)

# Conflicts of interest



- The directive requires that Member States take ‘appropriate measures’ against conflicts of interest in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all suppliers.
- Subject to formal consultation, this obligation will be met by the provision of appropriate guidance to authorities.
- This guidance will cover situations where staff members of the authority or of a procurement service provider acting on its behalf may have a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

# Improving suppliers' access to contracts



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- Minimum requirements for economic and technical capacity – authorities must ensure these are related to and proportionate to the contract
- Where turnover used as a measure of financial capacity this must not exceed twice the value of the contract except in justified cases (e.g. where high risk) – reasons must be declared in procurement documents or authority's reports
- Authorities must disclose in notice or invitation to confirm interest (where PIN is call for competition) the objective rules and criteria to be used to determine whether suppliers meet minimum capacity and to be used to reduce further the number to be invited to tender. Minimum/maximum numbers to be invited to tender must be disclosed – minimum 5 (restricted) and 3 competitive with negotiation and competitive dialogue

# Collecting information for selection



- Suppliers may submit 'self-declarations' in relation to capacity/exclusion requirements (proof to be provided by the winning tenderer only)
- Some of these proofs are available in national databases, which are linked to the EU database 'e-Certis'. This will in due course be EU authorities' primary source of certain forms of documentary evidence of capacity (e.g. certificates)
- Subject to formal consultation it is proposed to defer compulsory use by authorities of e-Certis until 2018
- It is also proposed, subject to formal consultation, not to implement the option to establish standard terms for determining whether groups of suppliers meet various selection criteria.

# Collecting information for selection



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- Commission to develop a standard 'European Single Procurement Document' for completion which a supplier could use to submit standard information, to be used for a number of procurement opportunities
- Lord Young reforms will limit the questions that authorities may ask in pre-qualification questionnaires

# Award Criteria



- The award of the contract must be based solely on the ‘most economically advantageous tender’, however this includes price; cost (including life cycle costs); and the best price/quality ratio (= value for money)
- The directive sets out some rules for costs that may be included in a life cycle approach (e.g. environmental externalities provided their monetary value can be determined and verified)
- There is, as now, no exhaustive list of award criteria but these must be linked to the subject matter of the contract. Examples given in the directive explicitly include social as well as environmental aspects. Amongst other examples are quality, accessibility, design for all users, and innovative characteristics

- Award criteria are considered to be ‘linked to the subject matter’ of a contract where they relate in any respect to the works/supplies/services in question at any stage of their life cycle including
  - the process of production of goods (e.g. no toxic chemicals)
  - the provision of services (e.g. energy efficiency of machines)
  - trading (e.g. the use of ‘fair trade’ products in the contract)
- Note: award criteria must be contract-specific rather than aimed at assessing the corporate policy of the tenderer (e.g. It would be wrong to award extra points to a supplier that supplied fair trade products to all its customers)

# Award Criteria



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- The new directive confirms that award criteria can include the organisation, qualification and experience of staff to perform the contract (where this significantly impacts the supplier's level of performance)
- Criteria should be structured such that the information in tenders can be verified effectively against the criteria
- As now the contract notice or ITT must disclose the relative weighting of each of the award criteria (including the use weighting or range of weighting or, exceptionally, ranking)

# Challenging abnormally low tenders



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- Authorities will be required to seek explanations from suppliers that submit a tender which ‘appears’ to be abnormally low
- Examples of ‘explanations’ that could be accepted include the economics of the method of construction to be used and the technical solutions chosen. The authority may reject the tender where the evidence supplied is not satisfactory
- If the authority has established that the low price is the result of a breach of social and environmental law listed in Annex X the authority shall reject the tender
- If it is discovered that the low price is the result of State Aid the authority may reject the tender if the supplier is unable to prove that the aid is compatible with the rules of the EU Treaty

# Contract conditions



- Greater clarity that conditions for performing contracts can include ‘special’ conditions in particular those relating to innovation, or environmental, social or employment related considerations.
- Subject to formal consultation it is proposed to issue guidance, together with a standard contract condition, to allow authorities to ensure that suppliers comply with international legal obligations in relation to social/environmental/labour laws referred to in Annex X to the directive
- The directive makes it clear that all conditions must be linked to the subject matter of the contract (as is the case with criteria for contract award)
- The conditions could thus not relate to actions by the supplier unrelated to that contract (e.g. employment conditions of the supplier’s workforce on contracts for other customers)

# Sub-contractors



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- Where it has verified that one of the conditions of mandatory exclusion applies to a sub-contractor (e.g. breach of labour laws) the authority shall require its substitution
- Under Lord Young reforms, the government's intention is that authorities must include a clause in all new contracts (including frameworks, and call-offs from frameworks), whether or not they are covered by the EU directives, that mandates payment within 30 days (of an undisputed invoice) all the way down the supply chain.

# Changes to contracts/frameworks



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- A contract/framework may change without re-advertisement in OJEU where:
  - minor changes that do not affect its nature and not exceed the relevant threshold and not exceed 10% (services/supplies) or 15% (works) of the initial value
  - minor changes that do not affect its nature and are explicitly provided for in review or option clauses in the procurement documents

# Changes to contracts/frameworks



- A contract/framework may change without re-advertisement in OJEU where:
  - additional works, services or supplies that ‘have become necessary’ where a change of supplier would not be practicable (for economic, technical or interoperability reasons) or involve substantial inconvenience/duplication of costs (limited to 50% of original contract price)
  - the change that arises is unforeseeable by a ‘diligent’ authority, provided these changes do not affect its nature or exceed 50% of the price of the original contract
  - in these two cases the authority must publish in OJEU a ‘Notice of modifications of a contract during its term’

# Changes to contracts/frameworks



- A contract/framework may change without re-advertisement in OJEU where certain corporate changes have occurred in the supplier linked to merger, takeover or insolvency or the modification is not ‘substantial’ i.e. would not
  - have led to other suppliers participating, becoming qualified or having an offer accepted if known initially
  - have changed the economic balance in favour of the supplier
  - have extended the contract/framework ‘considerably’

# Termination of contracts



- Authorities must include in contracts a condition that allows, but does not require, termination where
  - the contract has been ‘substantially’ modified, constituting a new award or
  - the Court of Justice of the European Union has decided that the contract should not have been awarded because the authority committed a serious breach of its obligations or
  - the supplier should have been excluded on mandatory exclusion grounds (e.g. as a result of conviction for corruption)
- The regulations will also include a ‘deeming’ provision to ensure the obligation is complied with

# Growing business – the Lord Young reforms



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- The Government has accepted recommendations from a review headed by Lord Young, aimed at helping business to grow
- Some of these reforms are aimed at opening up the public sector procurement to allow SMEs in particular to grow their business
- These will be implemented using the new regulations
- Some of these changes apply to all contracts, some only to contracts below the EU thresholds

# Improving access to public contracts



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- For contracts below EU thresholds all contracting authorities (with the exception of defence or clinical commissioning contracts) must ensure that all opportunities valued at over £10,000 (central government) and £25,000 (other authorities) are published on Contracts Finder. This does not necessarily imply that a formal tender process will be used.

# Improving access to public contracts



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- For contracts below EU thresholds all contracting authorities (with the exception of defence or clinical commissioning contracts) must not use pre-qualification questionnaires
- Instead, authorities may seek information on suitability through publishing minimum standards/asking limited suitability questions in contract notices or tender documents
  - provided the responses are not used to narrow down the list of candidates to invite to tender

# Improving access to public contracts



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- For contracts below EU thresholds all contracting authorities (with the exception of defence or clinical commissioning contracts) must publish a note on Contracts Finder providing details of contracts awarded on a quarterly basis, with information on whether the contractor is an SME or VCSE (Voluntary, Community or Social Enterprise)

# Improving access to public contracts



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- For contracts below EU thresholds all contracting authorities (with the exception of defence or clinical commissioning contracts) must have regard to guidance to be published by the Crown Commercial Service when awarding such contracts
- Note that for local authorities, the Department of Communities and Local Government will also issue a code of practice recommending advertising on Contracts Finder of details of contracts over £10,000 and details of those awarded over £5,000. This reflects their view that more transparency is needed for local authority contracts - see [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/266815/Transparency\\_Code\\_Government\\_Response.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/266815/Transparency_Code_Government_Response.pdf)

## Selecting suppliers for public contracts above and below EU thresholds



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- Cabinet Office will issue guidance on the selection of suppliers for supplies, works or services contracts below and above EU thresholds that all contracting authorities must have regard to (with the exception of defence or clinical commissioning contracts)
- The guidance will cover the use of pre-qualification questionnaires (above EU threshold only), in particular the need to avoid questions which are burdensome, excessive or disproportionate
- The guidance will include a core PQQ template and may include optional questions specific to specific areas

## Selecting suppliers for public contracts above and below EU thresholds



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- All contracting authorities are required by the Late Payment of Commercial Debts (Interest ) Act 1998 to pay contractors within 30 days of receipt of a valid and undisputed invoice. Where they fail to pay then they are liable to pay interest
- Authorities will in future be required to publish, on their local website or portal, details of cases where they fail to pay within 30 days, including interest paid or liable.
- All contracting authorities will also be required to include a clause in the terms and conditions of all new contracts mandating payment of invoices in 30 days all through the supply chain (i.e. all sub-contracting layers)



### ■ **Public Services (Social Value) Act 2012**

*“An Act to require public authorities to have regard to economic, social and environmental well-being in connection with public services contracts; and for connected purposes.”*

- In force since 31<sup>st</sup> January 2013
- Consider at pre-procurement stage:
  - How the procurement might improve the social, environmental and economic well being of the relevant area
  - How they might act to secure that improvement
  - To consider the need to consult
- Act applies only to services (not goods or works)
- Act intended to encourage innovation

# Other developments – 2014 NPS



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

- [www.lg-procurement.org.uk](http://www.lg-procurement.org.uk)
- **Procurement's role is "Strategic" but not always recognised as such**
- **Strategic Vision for Local Government Procurement:**
  - Commitment from the top in each Council (Executive and Senior Managers)
  - More efficient use of the sector's resources
  - Speaking with a single cohesive voice nationally
  - Exerting influence right across the public sector



- **Suppliers are central to the vision**
  - Problem solving, innovating, unlocking savings
- **NAG as a catalyst**
  - Stakeholders from all regions
  - NPS was developed through the NAG
  - Links with SOPO
  - Provides the “single cohesive voice”
- **PBOs as delivery partners**
  - Tactical delivery of Frameworks



- **1. Making savings**
  - Dealing with “significant financial pressures”
  - Using spending power wisely and strategically
  - Setting targets for procurement & contract management
- **2. Supporting Local Economies**
  - Maximise economic, social & environmental benefits
  - Social Value Act duties
  - Remove barriers faced by SMEs and VCSEs



- **3. Demonstrating Leadership**
  - Commitment from the top – appoint a Councillor Champion
  - Recognise procurement as a driver of Council policy – delivering strategic outcomes
  - Stronger engagement and alignment of commissioners and procurers
  - Equip staff with knowledge, training and practical skills to derive maximum benefit from procurement
  - Be more influential with suppliers by taking a more commercial approach to procurement



- **4. Modernising Procurement**
  - Commercialisation and income generation
  - Encouraging supplier innovation
  - e-procurement to increase productivity & efficiency
  - e-invoicing to streamline admin & improve supplier liquidity
  - Take advantage of new EU Directives – quicker, simpler, more cost effective processes

# Any Questions?



**AGMA**  
ASSOCIATION OF  
GREATER MANCHESTER  
AUTHORITIES

