EXPLANATORY MEMORANDUM TO

THE CONTRACTING OUT (HIGHWAY FUNCTIONS) ORDER 2009

2009 No. [DRAFT]

1. This explanatory memorandum has been prepared by the Department for Transport and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

This Order will enable local authorities and the Secretary of State to operate the statutory highway functions listed in the Order on a contracted out basis. These functions include highway maintenance and street works functions. Street works are works carried out by, or on behalf of, undertakers operating under a statutory right e.g. gas, water, electricity and telecommunication companies or under a New Roads and Street Works Act 1991 section 50 licence, in or under a street maintained at the public expense.

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

Article 4(9) of the Order revokes article 3 (contracting out of highways functions) of the Transport for London (Best Value) (Contracting Out of Investment and Highway Functions) Order 2006. Nevertheless, article 4(10) expressly saves anything done, or having effect as if done, (which includes contracts), under article 3 of the 2006 Order.

4. Legislative Context

4.1 Sections 69 and 70 of the Deregulation and Contracting Out Act 1994 ("DCOA") enable a contracting out order to be made. This can provide for the statutory functions of both the Secretary of State and local authorities to be exercised by, or by employees of, such person (if any) as may be authorised to do so by the Secretary of State or the local authority whose function it is.

4.2 This order takes into account the fact that certain functions are excluded from section 69 and 70 by section 71 DCOA. Such orders are subject to the affirmative procedure by virtue of section 77(2) of that Act.

4.3 Subject to minor transitional provisions and the saving of a pre-existing amendment to section 6(8) to the Highways Act 1980, the Order replaces, with modifications the following:

- The Contracting Out (Highway Functions) Order 1995 No. 1986 (which dealt with functions of the Secretary of State);
- The Local Authorities (Contracting Out of Highway Functions) Order 1999, No. 2106;

- The Local Authorities (Contracting Out of Highway Functions) (England) Order 2001 No. 4061;

- Article 3 of the Transport for London (Best Value) (Contracting Out of Investment and Highway Functions) Order 2006.

4.4 Currently, Transport for London (TfL) has contracted out highway functions through article 3 of the Transport for London (Best Value) (Contracting Out of Investment and Highways Functions) Order 2006. This was done due to TFL not being defined as a local authority by s79 of the DCOA.

4.5 The commencement of s239 of the Local Authority and Public Heath Act 2007 enabled TfL to be included in the definition of a local authority in s70 of the DCOA. This now means that TfL is able to contract out any function that a local authority can.

5. Territorial Extent and Application

This instrument applies to England and Wales

6. European Convention on Human Rights

The Parliamentary Under Secretary of State Paul Clark has made the following statement regarding Human Rights:

In my view the provisions of the Contracting Out (Highway Functions) Order 2009 are compatible with the Convention rights.

7. Policy background

What is being done and why

7.1 The services provided by local highway authorities have a significant impact on the quality of life for all road users. It is vital that these services are delivered to a high standard, and in ways that are responsive to the needs of their users. Everyone expects highway functions, including road maintenance and street works, to be delivered effectively.

7.2 Local authorities are under an obligation to seek continuous improvement in the way they carry out their functions, having regard to efficiency, effectiveness and economy; thereby providing best value. In doing this they should review and challenge the way services are provided. The Government recognises that securing lasting improvements frequently requires the involvement of others, working in partnership with local authorities. To enable the partner organisations to carry out a statutory function without reference to the relevant authority, the function must be subject to a contracting out order.

7.3 Likewise, the Secretary of State has responsibility for services and wants to deliver these in a way which provides best value. It is considered that the provisions of the Order relating to the Secretary of State enables this to be delivered.

7.4 If a function is included in a contracting out order it does not mean that it has to be contracted out. It simply provides the Secretary of State or a local authority with the option of contracting out the said function.

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7.5 Some of the functions included in the existing orders have been repealed and replaced. Therefore a new contracting out order needs to be made so these functions can be continued to be operated on a contracting out basis.

7.6 The Order contains the functions that are still in force from the existing orders. The Order also includes new or amended street works functions that have been introduced since the earlier Orders came into force, including those which came into effect on 1st April 2008, such as the revised noticing regulations for street works. This will ensure that the amended or additional functions may be delivered on a contracted out basis. The Order covers highway functions of the Secretary of State (carried out in practice by the Highways Agency), a number of local highway authority functions and a small number of more general local authority functions.

8 Consultation outcome

8.1 Ministers approved a shorter consultation of 6 weeks as a large proportion of the functions in the new Order replicate what is in the existing orders (this is where the functions have not been amended). In addition some of the amended functions are not markedly different from the existing functions. Therefore it was seen that this order gave effect to existing government policy on contracting out street works functions.

8.2 Overall, there was substantial agreement to the functions being included in the order. Respondents signalled by a substantial majority in their replies to each of the eleven questions related to the functions included in the Order that they agreed with the proposals. A summary of the responses and the Government response to the consultation was published on 8 September and can be found at: http://www.dft.gov.uk/consultations/closed/contractingout/response

8.3 The majority of the concerns raised in response to the consultation were from statutory undertakers. These focused on the manner in which some local authorities contract out functions, (mainly charges for unreasonably prolonged occupation of the highway and inspection of works), rather than the principle of contracting out. While the Government understands that poorly managed contracts may cause conflicts of interest and also result in the contractor using fee charging powers excessively, it does consider that a partner organisation can operate these functions in such a manner that these issues will not arise. It is for local authorities to manage their contracts properly.

8.4 In addition, these views were not universally held by all statutory undertakers; three out of seven undertakers did not raise these concerns. Therefore, the Government decided to include these functions in the Order.

9. Guidance

This Order only affects two groups; authorities and statutory undertakers, both of which are represented by Highway Authorities Utilities Committee (HAUC (UK)).The Department for Transport will notify HAUC (UK) who will then notify their members. HAUC (UK) was set up to provide Government with advice on Street works legislation and also act as a point of contact for the dissemination of information.

10. Impact

10.1 The impact on business, charities or voluntary bodies is none.

10.2 The impact on the public sector is none.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

The legislation does not apply to small business.

12. Monitoring & review

The success criteria for this order is that existing contracting out arrangements are not disrupted by the legislative changes and that local authorities feel that sufficient functions are included in the orders to enable them to develop viable new contracts. As mentioned above in paragraph 9 HAUC UK provides advice to Government on all legislation effecting street works including this order, and the Government intends to use existing HAUC(UK) advisory process to review the effectiveness of this Order.

13. Contact

Elizabeth Godden at the Department for Transport, Traffic Management Division. Tel: 020 7944 3624 or e-mail: Elizabeth.godden@dft.gsi.gov.uk can answer any queries regarding the instrument.