EXPLANATORY MEMORANDUM TO

THE LOCAL AUTHORITIES (GOODS AND SERVICES) (PUBLIC BODIES) (ENGLAND) (No. 2) ORDER 2004

2004 No. 2475

1. This explanatory memorandum has been prepared by the Office of the Deputy Prime Minister and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 The effect of the Order to which this Memorandum relates, is to designate *District Surveyors Association Local Authority Building Control Advisory Services Limited* ("LABCAS") as a public body under the *Local Authorities (Goods and Services) Act 1970* ("the 1970 Act"). This will enable local authorities to enter into agreements, which are subject to certain restrictions contained in the Order, to provide services to LABCAS.

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

3.1 None.

4. Legislative Background

4.1 Section 1 of the 1970 Act governs the way in which local authorities and public bodies are allowed to "trade" with each other. It authorises local authorities to enter into agreements with public bodies for the provision by local authorities of goods, materials and administrative, professional and technical services, for the use of vehicles, plant and apparatus, and for carrying out of maintenance in connection with lands and buildings.

4.2 Section 1(5) of the 1970 Act provides a power for the Secretary of State to order that any person(s) appearing to be exercising functions of a public nature shall be a public body for the purposes of this Act.

4.3 Section 1(6) provides that an order under section 1(5) may impose restrictions on the scope of the agreements, which may be entered by the public body so designated in the Order.

5. Extent

5.1 This instrument applies to local authorities in England.

6. European Convention on Human Rights

6.1 Not applicable.

7. Policy background

Project SLAM

7.1 The Ministry of Defence ("MOD") Defence Estates is undertaking a large-scale refurbishment and construction of living accommodation at many of its military establishments nationwide. This work project is known as Project "SLAM" (i.e. "Single Living Accommodation Modernisation"). Following a competitive tender, the MOD has entered into a contract with Bovis Lend Lease to perform the work in relation to the project and Bovis has in turn set up a company called Debut Limited to deliver the project. Debut will be responsible for assembling the supply side of the operation including the system to certify compliance with the technical requirements of the building regulations.

7.2 The MOD's policy is that work done under the project should meet the standards imposed by building regulations made under the *Building Act 1984*. This is even though the regulations do not apply to the MOD by virtue of a Crown exemption (currently under review). In order to meet these standards, the MOD has been using the services of private sector building control firms. In this case, Bovis have chosen to use LABCAS to provide the necessary building control advice. Essentially, these services will comprise the checking of building plans and work on site for conformity with the building regulations. Both Bovis and the MOD have specifically requested that local authorities perform this checking function "due to a number of benefits arising not least security".

LABCAS

7.3 LABCAS's objects are set out in its Memorandum of Association. These provide, amongst other things, that it will facilitate the use of local authority building control officers by any person in connection with compliance and advice about building control regulations in respect of premises which are to be used by a public body. LABCAS will commission building control authorities to provide building control services in the areas in which work on the project is to take place.

7.4 The reason why LABCAS is seeking to be designated as a public body under the 1970 Act is that the MOD have been advised that local authorities could not otherwise provide their building control expertise to LABCAS and receive payment for doing so. Under the new trading powers contained in the *Local Government Act 2003* many authorities (though not all) would be able to provide their building control expertise to LABCAS on a commercial basis, although this was not the case at the time the application was made.

Legislation

7.5 The *Local Authorities (Goods and Services) Act 1970* governs the way in which local authorities are allowed to "trade" with other public bodies. It authorises local authorities to enter into agreement with other local authorities and designated public bodies for the provision by local authorities of goods materials and administrative, professional and technical services for the use of vehicles, plant and apparatus and for carrying out of maintenance. The 1970 Act provides a power for the Secretary of State to order that any person(s) appearing to be

exercising functions of a public nature shall be a public body for the purposes of this Act. The Act is concerned essentially with **public-public** trading.

7.6 The *Local Government Act 2003* provides power for the Secretary of State to make an order enabling best value authorities (with certain exceptions) to trade in any of their ordinary functions. The power to trade conferred by these provisions is only exercisable through a company within the meaning of Part 5 of the Local Government and Housing Act 1989. SI 2004/No1705 *The Local Government (Best Value Authorities) (Power to Trade)(England) Order 2004* which came into force on 29 July 2004 authorises local authorities that have been categorised on the basis of their performance as "excellent", "good", or "fair" to trade in any of their ordinary functions subject to conditions requiring the approval of a business case, and the recovery of any costs, incurred in anything it supplies to a company through which the trading power is exercised. Under section 95(4) of the 2003 Act, the power to trade must be exercised through a company. This is essentially **public-private** trading

Birmingham City Council

7.7 Birmingham City Council, will be one of the main suppliers of local authority building control services to LABCAS, for the purposes of Project SLAM. However, LABCAS will also procure these services from other local authorities as well, depending upon the geographic location of MOD Estates that are involved in Project SLAM. Birmingham's overall performance has been categorised as "weak", although performance in its building control function is rated as "fair". Birmingham cannot therefore make use of the new trading powers under the 2003 Act. The continued availability of the 1970 Act powers mean that notwithstanding the powers in the 2003 Act, the Secretary of State still has the discretion to grant a designation under the 1970 Act, subject to his being satisfied that the body is exercising functions of a public nature. Accordingly the Secretary of State could designate a body which is operating in the area of a local authority categorised as "weak", which would as a consequence enable that authority to trade with that body in circumstances where it would otherwise not have been able to do so.

'Public Body'

7.8 In order to be designated as a public body, an applicant needs to be a person who appears to the Secretary of State to be exercising functions of a public nature. The core activity of LABCAS is according to the company's objects and provided in its Memorandum of Association:

- To provide building control services in cases where premises are to be used or are being used by a public body operating on a not for profit basis.

The 'public nature' aspect of the work of LABCAS relates to its mission to check on conformity of plans and work with the standards of Building Regulations in the interests of health and safety. Any body exercising functions of a public nature should also represent Best Value to the local community. The Government believes that this is likely to be so in that the fee income earned will be used to improve participating local authorities' statutory building control services. The provision of services to LABCAS will also

present an opportunity for local authority building control staff to improve their skills and should help the MOD achieve value for money for the taxpayer in the "SLAM" project.

Decision to Designate

7.9 In this case the Secretary of State is satisfied that the applicant is a person who appears to him to be exercising functions of a public nature. He is satisfied that without a designation under the 1970 Act, Birmingham City Council, and other authorities categorised as “weak or “poor”, would not be able to enter into a trading arrangement with LABCAS. He has decided to exercise his discretion in favour of an Order under the 1970 Act, because the scope of the LABCAS trading agreements involving local authorities are of a limited nature.

Restrictions

7.10 Where restrictions on agreements are specified in orders made under the 1970 Act, these usually relate, first, to the area of the designated authority and secondly, to the services to be provided. ODPM considers that the agreements which LABCAS may enter into with local authorities should be restricted to:

(i) the supply of any administrative, professional or technical building control services by a local authority

This defines the range of services that local authorities may provide to LABCAS. Agreements that can be entered into by a designated public body can be for all or any of the purposes set out in subsections (a) to (d) of section 1(1) of the 1970 Act. The relevant purpose in this case falls within subsection (b).

(ii) the provision of services to the MOD or to a person undertaking building work or associated consultancy services on behalf of the MOD, in connection with Project SLAM

The local authority building control services provided to LABCAS are restricted to Project SLAM purposes only.

(iii) the provision of services where building work on the project is undertaken in England and Wales

LABCAS is restricted to receiving services from local authorities in England for Project SLAM work taking place in England and Wales.

Objection from ACAI

7.11 ODPM received a formal objection to the grant of designation to LABCAS from the Association of Consultant Approved Inspectors (“ACAI”) based on concerns about local authorities competing with Approved Inspectors. The ACAI expressed concern at the idea of local authorities competing with private suppliers in the supply of a discretionary service. However, any designation of a body under the 1970 Act is likely to involve a potential loss of business for private sector suppliers. There is no implication in any such designation that

there are no satisfactory private sector suppliers. Within the normal operation of the market, local authorities are unlikely to benefit from the designation of an organisation under the 1970 Act if they fail to offer a service that is at least as satisfactory as that of private sector competitors.

7.12 The Order designates LABCAS as a public body for the purposes of the application of the 1970 Act in England. This means that local authorities in England may enter into agreements with LABCAS for the provision by those authorities of building control services. The Order does not designate LABCAS as a public body for the purposes of the application of the 1970 Act in Wales. This means that Welsh local authorities are not authorised under the 1970 Act to provide building control services to LABCAS until a similar designation has been made for Wales. The position in Scotland is governed by separate legislation.

8. Impact

8.1 A Regulatory Impact Assessment is attached to this Memorandum.

8.2 ODPM fully considered impacts on public services through considering the first Stage of the Public Services Threshold Test, and concluded that the cost impact on the public sector is not thought likely to be significant. The powers granted by the Instrument are enabling powers and local authorities are not required to use them. For those that do, there may be costs associated with setting up the necessary operation, although these are likely to be marginal to their existing costs and are likely to be offset by revenue from providing these services. It is possible that some authorities may undertake discretionary work at the expense of core building control activity. In ODPM's view, local authorities should be trusted to ensure that the provision of non statutory building control services is not at the expense of the quality of the service they provide to those engaging them for statutory building control.

9. Contact

9.1 Melvin Hughes at the Office of the Deputy Prime Minister Tel: 020-7944-4147 or e-mail: melvin.hughes@odpm.gsi.gov.uk can answer any queries regarding the Order.