

REPORT TO: POLICY & RESOURCES COMMITTEE – 18th May 2015

REPORT ON: PUBLIC PROCUREMENT: A CONSULTATION ON CHANGES TO THE PUBLIC PROCUREMENT RULES IN SCOTLAND

REPORT BY: DIRECTOR OF CORPORATE SERVICES

REPORT NO: 198-2015

1.0 PURPOSE OF REPORT

This report details Dundee City Council's response, to consultation on changes to the Public Procurement Rules in Scotland, in conjunction with all members of Tayside Procurement Consortium.

2.0 RECOMMENDATION

It is recommended that Policy & Resources Committee:-

- Note the content of this report, which is submitted as part of a joint response being provided to Scottish Government by Tayside Procurement Consortium, on behalf of Dundee City Council, Perth & Kinross Council, Angus Council and Tayside Contracts
- To approve the submission of the response on behalf of Dundee City Council

3.0 FINANCIAL IMPLICATIONS

3.1 There are no direct financial implications arising from this report.

4.0 MAIN TEXT

4.1 Background

The consultation paper describes, and seeks views on, changes to the public procurement rules in Scotland. These changes largely arise from three new EU Directives concerned with Public Procurement, Concessions and Utilities contracts and must be implemented into new Scottish Regulations by 18th April 2016. The consultation also considers elements of the Procurement Reform (Scotland) Act 2014.

Some of the changes introduced by the Directives are mandatory and must be implemented by the 18th April 2016 deadline. There are also some elements where the Scottish Government have a choice about whether to, or how best to, implement further change. These discretionary elements, and the Scottish Government's plans to implement these, are the main focus of the consultation document. The consultation paper also discusses elements of the

Act that have yet to be implemented or further described in Scottish Regulations and Guidance.

Together, the Act and the new Directives aim to complement the Scottish Model of Procurement through simplifying, standardising and streamlining procedures for both businesses and public bodies. It will place sustainable and socially responsible purchasing at the heart of the process.

A copy of the consultation paper has been passed to Group Leaders, Bailie Scott, Bailie Borthwick and Councillor Macpherson.

- 4.2 Dundee City Council's Corporate Procurement Manager has reviewed the consultation document in conjunction with Tayside Procurement Consortium's Head of Procurement and, in principle, welcomes the changes that are being proposed. The increased focus on Sustainable Procurement from a Social, Economic and Environmental perspective provides greater ability for Local Authorities to have flexibility in applying these considerations to specific contracts. The proposals contained within this consultation document help build on many of the good practices already developed within Dundee City Council from a sustainable procurement perspective.
- 4.3 Tayside Procurement Consortium's feedback, on behalf of all participating bodies, also seeks for greater guidance to be included to assist public sector procurers in the areas of:
- Fair Employment
 - Employee Relations
 - Environmental performance
 - Proportionate approach to risk
 - Pre-tender Engagement
 - Supplier Self-Cleansing
 - Supplier's conduct in business
 - Community Safety/Serious and Organised Crime

5.0 CONCLUSION

Dundee City Council is supportive of the changes being proposed within the consultation document. Feedback will be provided to Scottish Government in the areas where further guidance is being sought to further enhance/assist those involved in public sector procurement.

6.0 POLICY IMPLICATIONS

This report has been screened for any policy implications in respect of Sustainability, Strategic Environmental Assessment, Anti-Poverty, Equality Impact Assessment and Risk Management. There are no major issues.

7.0 **CONSULTATION**

The Chief Executive and Head of Democratic and Legal Services have been consulted on the terms of this report.

8.0 BACKGROUND PAPERS

None

Marjory M Stewart
Director of Corporate Services

Date: 8th April 2015

Annex B – Respondent Information Form



Public Procurement: A Consultation on Changes to the Public Procurement Rules in Scotland

RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

TAYSIDE PROCUREMENT CONSORTIUM on behalf of ANGUS COUNCIL, DUNDEE CITY COUNCIL, PERTH & KINROSS COUNCIL and TAYSIDE CONTRACTS

Title Mr ☒ Ms ☐ Mrs ☐ Miss ☐ Dr ☐ **Please tick as appropriate**

Surname

Harrow

Forename

Allan

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DUNDEE

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Phone (01302) 834084

Email

allan.harrow@dundeecity.gov.uk

3. Type of Respondent

Please tick as appropriate

Executive Agencies and NDPBs

☐

Local authority

☒

NHS

☐

Other statutory organisation

☐

Representative body for private sector organisations

☐

Representative body for third sector/equality organisations

☐

Representative body for community organisations

☐

Representative body for professionals

☐

Private sector organisation

☐

Third sector/equality organisation

☐

Community group

☐

Academic

☐

Individual

☐

4. Permissions - I am responding as...

Individual

/

Group/Organisation

☐

Please tick as appropriate

☒

- (a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate

☐ Yes ☐ No

- (b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available ☐

or

Yes, make my response available, but not my name and address ☐

or

Yes, make my response and name available, but not my address ☐

- (c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate

☒ Yes ☐ No

- (d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate

☒ Yes

☐ No

Questions

Q1 What are your views about what should be included in this Statutory Guidance? Please explain your answer.

This response is predicated on the assumption that the statutory guidance will address the issues referred to in Section 20 of the Act, namely:

- The approach to consultation in preparation of the strategy.
- The form and content of strategies and reports.
- The approval process for strategies.

(the legislation being permissive and not mandatory).

In addition, we feel that the statutory guidance could also usefully address:

- Although the Act explicitly allows authorities to make joint procurement strategies, it is not presently clear if / how central purchasing bodies and specifically the centres of procurement expertise are expected to lead on such joint strategies for their portfolio of procurement activity. The Act plainly must focus on the legal entities concerned but we think that the guidance should be explicit that the centres of expertise are expected to produce strategies fully complying with the Act and guidance and addressing the procurement activity which they undertake on behalf of their member authorities. This will help ensure that there are strategies covering all procurement activity at all levels across Scotland.
- The relationship between the annual report on performance against the strategy and assessment of the authority's procurement capability. It seems to us that the PCA (or its replacement) is an effective process to both scrutinise the existence of strategies meeting the requirement of the Act and guidance and examine the quality of strategies and ensure the sharing of good practice. It would be helpful if guidance captured this commitment to develop the PCA in this way and made it clear that this should be the Scottish public sector method for examining procurement strategies to avoid double-scrutiny by say Audit Scotland.

Q2 What are your views about what should be included in this Statutory Guidance? Please explain your answer.

As far as the statutory guidance on sustainable procurement is concerned, Tayside Procurement Consortium supports and has been involved in testing of the revised flexible framework and prioritisation

tools. We think that the Scottish Government should commit itself within this statutory guidance to embedding and maintaining these tools within the Procurement Journey (PJ) (and the related PCS-Tender tool) so that all purchasing authorities can be assured that if they follow the PJ, they will be applying current best practice re sustainable procurement.

The guidance also needs to be absolutely clear about what can and cannot be done - the risk of challenge is ever present in public procurement and public bodies will want and need clear and practical guidance to support their procurement decision making.

Q3 What are your views about what should be included in this Statutory Guidance? Please explain your answer.

We note that Scottish Government has committed itself to produce statutory guidance on community benefits which will address:

- Defining the appropriate community benefit through stakeholder engagement.**
- What to say in the contract notice and contract award notice.**
- Circumstances where community benefits would not be relevant or proportionate.**
- Reporting of expected and achieved benefits.**

We think that the Scottish position on community benefits is similar to sustainable procurement more generally (as perhaps it must be given that community benefit is a type / expression of socially / economically sustainable procurement) in that the Scottish position has become fragmented and highly variable in approach from one area / authority to the next. Those Scottish Councils in particular; other public sector organisations and Construction Skills (Client Led Approach) who have led / invested in delivery of community benefits in procurement are to be commended on their approach but there is a danger of a “post code lottery” developing. We recognise always that each authority must be free to determine its own priorities and requirements but, at the same time, there should be a drive to standardise specifications for comparable types of requirement in the interests of deliverability and market certainty.

We welcome Scottish Government’s stronger lead on promoting model approaches and model clauses. Good practice needs to be consolidated, embedded in the PJ and a process for systematic improvement established. We believe that the statutory guidance should commit to this.

We also observe that the £4M threshold for mandatory consideration of community benefits is considered to be very high and we intend to apply it at much lower values of contract. We are sure that will be the

case for most if not all local authorities. Accordingly, it would helpful and appropriate if the guidance explicitly endorsed and encouraged voluntary application of the mandatory statutory approach at lower values of contract, as judged appropriate and proportionate by the public body (and no doubt set out in their procurement strategy).

Q4 We believe that a statutory obligation on public bodies to include relevant clauses in their contracts is the best way to ensure that contractors comply with all relevant laws and collective agreements. This should also ensure that public bodies are able to end contracts where a contractor does not meet these requirements. Do you agree or disagree with this position? Please explain your answer.

Agree ☒ Disagree ☐

We agree that a statutory obligation on public bodies to include relevant clauses in their contracts is the best way to ensure that contractors comply with all relevant laws and collective agreements and that the clauses should also entitle (but not oblige – proportionality must always be allowed for) public bodies to end contracts where a contractor does not meet these requirements. We believe that a standard mandated clause should be provided by Scottish Government. This is on the grounds of simplicity and standardisation of approach by all Scottish public bodies.

Q5 Is there still a case for reserving contracts for supported businesses in Scotland?

Yes ☒ No ☐

We believe that reserved contracts for supported businesses remain an appropriate and relevant tool for the purchasing authority to use where appropriate and relevant. We also agree that it is simplest and best to keep the rules for both higher value contracts and lower value regulated contracts harmonious.

However, we also believe that better use of reservation is required, e.g. use in lots / discrete parts of larger contracts or nominated sub-contracting of lots / parts to supported businesses. We believe that guidance has a role in promoting innovative and bolder use of such approaches.

Q6 Do you think that the definition of a “disadvantaged person” in this context should be “the unemployed, members of disadvantaged minorities or otherwise socially marginalised groups”?

Yes ☐ No ☒

If not, what do you think the definition should be and why?

We think that the definition of a “disadvantaged person” should not be exhaustive and should include “the unemployed, members of disadvantaged minorities or otherwise socially marginalised groups”. Firstly, this is more consistent with the wording of Recital 36 of the Public Procurement Directive (“... *such as* ...”) and, secondly, it leaves scope for innovation and flexibility.

Q7 Our view is that we are not aware of any arguments that currently support reserving contracts for mutual and other non-public sector bodies in Scotland, and we believe this is less of an issue in Scotland. Do you think there are any advantages or disadvantages to applying this provision to the procurement activities of public bodies in Scotland? Please explain your answer.

Advantages ☒ **Disadvantages** ☐

We believe that there is a case for allowing reservation of initial 3 year contracts for public “trusts” (however constituted – common law trusts, companies limited by guarantee, mutuals – co-operatives / industrial and provident societies, community interest companies, Scottish Charitable Incorporated Organisation) which have taken on direct delivery of public services from their parent public bodies. This is common for culture and leisure delivery for Scottish Councils and is being considered more as a vehicle for delivery of social care services.

Initial reservation would support establishment of the new trust body in its trust / charitable / publicly accountable form and achieve stability without having to contend with the additional immediate issue of winning that initial contract from the parent authority on a fully commercial basis.

Q8 Should the rules about labels which apply to contracts that are EU regulated procurements also apply to lower value regulated procurement contracts covered by the Act? Please explain your answer.

Yes ☒ **No** ☐

We agree that public bodies should be empowered to require that the works, goods or services which we buy have been given a label which certifies that these meet specific environmental, social or other characteristics and we should be able to ask for this in technical specifications, award criteria or contract conditions, always allowing for equivalency. We agree that this should apply equally to higher value contracts and lower value regulated contracts, keeping the rules harmonious.

The Tayside Procurement Consortium partners wish to maximise the value from our public procurement in also achieving environmental and social objectives, fairly related to what we are buying. We think that the current regime puts unnecessary barriers in the way of

purchasing fairly and ethically traded goods, even where we do so proportionately.

Guidance and central leadership on identification / accreditation of recognised labelling (e.g. FSC / PESC for sustainably sourced timber; Fairtrade and others for ethical sourcing standards) will remain important for labelling to be well used by public authorities.

The reference to technical specifications is necessary to address uncertainty from European Court of Justice case law (the “*North Holland*” case) over whether or not fair trade compliance can be a specification issue as opposed to just a contract award criteria / evaluation issue.

Q9 Do you think we should align the rules on technical specifications for all regulated procurements, including those lower value procurements regulated by the Act? Please explain your answer.

Yes ☒ No ☐

We agree that is simpler and better for both purchasing bodies and suppliers to have the same rules on technical specifications applying equally to higher value contracts and lower value regulated contracts, keeping the rules harmonious. We see nothing in the EU rules on technical specification that unduly restricts good procurement practice.

Q10 We believe that contracts should not be awarded on the basis of price or cost alone? Do you agree or disagree? Please explain why.

Agree ☐ Disagree ☐ Neither Agree nor Disagree ☒

First of all, we agree that it is important to balance cost, quality and sustainability to get the best value for money for public procurement; we endorse the Scottish Model of Procurement to that extent. However, we consider that it is possible for non-complex and/or low value procurement to specify on a mandatory basis the required degree of quality and sustainability to achieve fit for purpose works, goods or services with evaluation of tenders thereby restricted to price / whole life cost alone. This is within the legitimate range of judgement for an authority in terms of achieving best value, i.e. what it judges to be the optimum balance of cost and quality (incl. sustainability).

Secondly, we also recognise that the Act only applies to lower value regulated procurements for goods and services worth more than £50,000 and works worth more than £2 million.

We therefore recognise that because the Act does not apply to goods / service contracts below £50,000 then it will remain permissible for authorities to choose price / cost alone for awarding sub-£50K, quotation value contracts for the supply of goods / services.

However, we would go further and say that, on the grounds of simplification and proportionality for bidders and the bidding process, it is actively desirable to consider lowest price / cost as the legitimate default approach for sub-£50K value contracts with price / quality only applied at that value where necessary.

As far as construction / works is concerned, we tend towards the view that anything over £500K or perhaps £1M in value ought to have quality evaluated rather than just specified.

We invite Scottish Government to reconsider the statement in the consultation paper that contracts should never be awarded on the basis of lowest price or lowest cost alone. It is said to derive from application of the principle of balancing cost, quality and sustainability to get the best value. We have set out above why appropriately applied lowest price evaluation can support the “improving supplier access to public contracts” and “maximising efficiency” pillars of the Scottish Procurement Model. Provided the evaluation / award approach is properly analysed and the case for it achieving best value in the given case is set out in the sourcing strategy for the contract, we feel that this level of judgement is best left with the purchasing authority.

If precluding lowest price is to be final policy, we believe that should at least take account of nature of commodity rather than a blanket approach – e.g. we recognise that direct / personal social care services should always be awarded on a price / quality evaluation basis (even for sub-£50K value contracts).

Q11 We believe that public bodies should retain discretion to split requirements into smaller lots and to award more than one lot to the same bidder. Do you agree or disagree with this? Please explain your answer.

Agree ☒ Disagree ☐

The decision to split into lots should be driven primarily by the extent to which this step will allow better SME access to the contract opportunity. This requires market analysis as part of the sourcing strategy and may change over time. It is appropriate therefore not to prescribe splitting into lots by commodity type – that decision should be contract-specific and driven by the current state of the market.

However, there is an opportunity for Scottish Government to go further in supporting guidance and drive good practice by Scottish public authorities, with the objective that the lotting strategy approach of Scottish public authorities is “best in class”:

- Guide authorities what that market analysis should contain / look like – specifically, what is the current make-up of the relevant market (local / regional - Cat C / C1, regional / national – Cats A & B) and, for regional or national analysis, are SMEs supplying locally, regionally or nationally?
- In terms of SMEs currently supplying to the relevant public authority(ies) and what is the scope for growth, i.e. how many other SMEs are actively supplying that commodity but not to the public sector (again, locally, regionally or nationally as the case may be)?
- Consider supporting / promoting an analysis tool on a national collective basis, like Spikes Cavell’s “Grow Local”, which substantially assist this kind of analysis. Through guidance, however, ensure that authorities also understand that this data analysis is a starting point only and pre-tender market engagement with a representative sample of suppliers and drilling into the data will also be required to help us understand e.g. current barriers to participation (actual or perceived), actual local activity with e.g. branch offices masked by invoicing HQ addresses.

Q12 To avoid creating unnecessary confusion, we believe that public bodies should have the discretion to decide whether to request additional information about sub-contractors. What are your views about this?

We agree that seeking this information as a matter of course on all projects could be counter-productive and inefficient on large projects, impacting on both public authorities and suppliers and slowing the overall procurement process down / making it more costly.

We do think however that there is an opportunity for improved practice and standardisation of approach on this across the Scottish public sector and to the benefit of suppliers in terms of clarity, consistency and process simplification. Scottish Government should issue guidance on (a) in what circumstances public purchasing bodies should seek sub-contracting information, (b) what information they should seek, (c) at what point(s) in the process they should seek it and (d) what they should do with it, including with whom they should share it.

For example on contracts where community benefits are being sought per Section 24 of the Act, we think that it is legitimate & necessary to seek intended sub-contracting information, by trade / product / service and value, from bidders as part of their tender submission. This allows the purchasing authority to evaluate the extent to which a community

benefit can be offered by the main contractor supporting opportunity of access by local (amongst other) bidders to those “unfilled” sub-contracting opportunities.

If Scottish Government agrees, that is the kind of good practice which could be promoted and standardised by guidance.

Q13 The Directives also make clear that public bodies are responsible for obtaining any information about sub-contractors from the main contractor. There is an option to transfer this obligation (to deliver the information) to the main contractor. We do not plan to transfer that obligation to the main contractor. What are your views about this?

We agree that it sensibly goes along with the decision not to mandate when public authorities seek sub-contracting information then Scottish Government should likewise not mandate sub-contracting information to be provided by the main contractor.

Q14 We believe that we should not apply similar provisions on sub-contracting to contracts covered by the Act, as we do not think this would be proportionate. Do you agree or disagree with this?

Agree ☒ Disagree ☐

We believe that it is desirable to keep the rules harmonised for higher value contracts and lower value regulated contracts wherever possible and there is no overriding reason not to keep the rules the same on this matter.

Q15 We believe that similar payment terms for sub-contractors, as for main contractors, is a good thing and there are some measures underway, or in place, to address this. We also believe that direct payments to sub-contractors could be complicated and could mean public bodies assuming some responsibilities that should arguably remain with the main contractor. In light of this, we believe that public bodies should be able to make direct payments to sub-contractors only where the contract allows this to happen and parties agree. Do you agree or disagree?

Agree ☐ Disagree ☒

Direct payment to sub-contracts is fraught with difficulty and potential risk transfer back to public authorities as stated in the consultation paper.

The power to make direct payments only with contract provision and all party agreement (assuming that public authorities’ entitlement to agree or not is absolutely within their discretion / commercial judgement and is not subject to challenge or complaint to e.g. the Single Point of enquiry or the Scottish Public Services Ombudsman) is

unobjectionable in principle but seems unworkable in practice. The consultation paper refers to this being “only in circumstances where it has been written into the contract and where the sub-contractor asks for this facility”. In practice, the sub-contractor will only be able ask for this post award. So, writing it in to the contract would have to be by contract variation. If this materially changes the risk profile, as seems inevitable, the public authority will be concerned about potential challenge on the grounds that, if this facility was offered upfront, an unsuccessful bidder could have different pricing from its sub-contractors.

The upshot is that the circumstances where this option would actually be used seem almost unforeseeable. On the basis that that inclusion of the option signals the wrong approach (i.e. the solution to prompt and reliable payment of sub-contractors in public contracts should be by the other modes referred to in the consultation paper) then we think that Scottish Government should re-consider including this option at all. Although we entirely support the premise that public sector should show leadership on standards of corporate social responsibility in Scottish commerce, it has to be recognised that we cannot solve all our problems with commerce in Scotland through public procurement

Q16 Do you think that the same rules on selection criteria should apply to lower value regulated contracts as to higher value EU regulated public contracts? In particular, should the same rules apply on:

- The use of turnover as a selection criterion?
- The right of a public body to assume that a business does not have the professional ability needed for the performance of a specific contract, if that business has a conflict of interest which might mean that it is less able to deliver the contract?

Please explain your answer.

Yes ☒ No ☐

Initial observation – the yes / no selection for this question is poorly framed because it asks 2 questions but only offers 1 yes / no option. As it happens, our answer is “yes” to both.

We believe that it is desirable to keep the rules harmonised for higher value contracts and lower value regulated contracts wherever possible and there is no overriding reason not to keep the rules the same on this matter.

However, we also believe that the existing policy guidance on this set out in [SPPN 02/2012](#) (i.e. that turnover should never be used on its

own for assessment of a bidder's economic and financial standing) is correct and we would recommend that Scottish Government maintains and reinforces this policy stance notwithstanding the new legislation.

Q17 Do you agree or disagree that public bodies should retain the flexibility to decide for themselves the basis upon which groups of businesses will be able to meet tests of economic and financial standing and technical and professional ability that will be necessary to perform a particular contract or should there be national standards? Please explain your answer.

Agree ☒ Disagree ☐

Consortium bidding is relatively uncommon and the standards to be applied are best tailored to the particular requirement – standardisation is not required and offers no real benefit to either the public purchasing organisation or the supplier.

Q18 Should the list of criminal convictions which may result in exclusion from bidding be the same for all regulated contracts, regardless of value? Please explain your answer.

Yes ☒ No ☐

We believe that it is desirable to keep the rules harmonised for higher value contracts and lower value regulated contracts wherever possible and there is no overriding reason not to keep the rules the same on this matter.

Q19 Should public bodies be required to exclude a business from bidding for lower value regulated contracts if it, or someone who holds a senior position in it, has been convicted of any of the offences on the list?

Yes ☒ No ☐

We believe that it is desirable to keep the rules harmonised for higher value contracts and lower value regulated contracts wherever possible and there is no overriding reason not to keep the rules the same on this matter.

Q20 Should public bodies retain the discretion to decide whether or not to exclude a business from bidding for a contract where the body can demonstrate by appropriate means, short of a court, tribunal or administrative decision, that the business has breached its obligations to do with paying tax or social security contributions?

Yes ☐ No ☒

We agree with the position set out in the consultation for reasons of simplicity, certainty and consistency.

Guidance should make it clear however that if the business awarded the contract is subsequently during the course of the contract found by a court, tribunal or administrative decision to have breached its obligations to do with paying tax or social security then purchasing authority's terms and conditions of contract should require declaration of this material change of circumstances by the contractor and allow (but not oblige) the authority to terminate the contract on those grounds without penalty.

The same may be said of all mandatory exclusion grounds and any material misrepresentation by the contractor in the PQQ and/or the Tender Documents.

Q21 Should public bodies be given the discretion not to exclude a business which has breached its obligations to do with paying tax or social security contributions, and where this has been established by a court, tribunal or administrative decision, if it would be disproportionate to do so?

Yes ☒ No ☐

We do not agree with the reason stated in the consultation paper – it is legally defensible to remove proportionality from the equation on this if the Scottish government exercises its policy choice in that way – but we still believe that proportionality should be part of the decision-making process when it comes to exclusion for tax or social security failures.

Q22 Should public bodies also have the discretion to exclude a business from bidding for lower value regulated contracts if it has breached its obligations in relation to the payment of tax?

Yes ☒ No ☐

We believe that it is desirable to keep the rules harmonised for higher value contracts and lower value regulated contracts wherever possible and there is no overriding reason not to keep the rules the same on this matter.

Q23 Should public bodies retain the discretion to decide whether or not to exclude a business which is bankrupt, or is in insolvency proceedings from bidding? Please explain your answer – in particular, if you think that public bodies should have

discretion in these situations, do you think that discretion should apply in every circumstance?

Yes ☒ No ☐

The circumstances of a business's insolvency can vary enormously from one case to the next so flexibility on the part of the purchasing authority should be retained.

Q24 Should the same rules apply to EU regulated contracts and to lower value regulated contracts? Please explain your answer.

Yes ☒ No ☐

We believe that it is desirable to keep the rules harmonised for higher value contracts and lower value regulated contracts wherever possible and there is no overriding reason not to keep the rules the same on this matter.

Q25 Should a public body be allowed not to exclude a business with disqualifying criminal convictions, or which has breached its obligations to pay tax or social security, in exceptional circumstances? Please explain your answer.

Yes ☒ No ☐

On overriding public interest grounds – guidance on how the authority should approach that potentially very difficult question would be highly desirable.

Q26 Should the same rules apply to EU regulated contracts and to lower value regulated contracts? Please explain your answer.

Yes ☒ No ☐

We believe that it is desirable to keep the rules harmonised for higher value contracts and lower value regulated contracts wherever possible and there is no overriding reason not to keep the rules the same on this matter.

Q27 Should the law allow public bodies the discretion to decide whether or not to exclude bidders in situations where there is evidence of a breach of environmental, social and labour law obligations, grave professional misconduct, distortion of competition, a conflict of interest, a significant failure to perform in an earlier contract, or a security risk (in the case of defence and security concessions)? Please explain your answer.

Yes ☒ No ☐

EU Public Procurement Directives have historically made these non-mandatory exclusion grounds because they do not always / necessarily strike to the heart of the relationship between the purchasing authority and the supplier, although they more often will than not. This rationale has not changed so the treatment as exclusion grounds should not change.

Q28 Should the same rules apply to EU regulated contracts and to lower value regulated contracts? Please explain your answer.

Yes ☒ No ☐

We believe that it is desirable to keep the rules harmonised for higher value contracts and lower value regulated contracts wherever possible and there is no overriding reason not to keep the rules the same on this matter.

Q29 Do you agree or disagree with our proposed maximum periods of exclusion? Please explain your answer.

Agree ☒ Disagree ☐

The stipulation of maximum exclusion periods is welcome; the maximums of:

- **five years from the date of conviction, in the case of criminal offences, and**
 - **three years from the date of the relevant event in most cases**
- seem appropriate to us in striking the right balance between sending a strong ethical message to businesses wishing to win public contracts in Scotland and, bearing in mind that the authority can shorten the exclusion period, proportionality / flexibility.**

Q30 Should the same rules apply to EU regulated contracts and to lower value regulated contracts? Please explain your answer.

Yes ☒ No ☐

We believe that it is desirable to keep the rules harmonised for higher value contracts and lower value regulated contracts wherever possible and there is no overriding reason not to keep the rules the same on this matter.

Q31 Should public bodies be required to check that sub-contractors do not fail any of the exclusion criteria?

Yes ☐ No ☒

We do not believe that public bodies should be required to make this check for the undue burden / effective administration reasons given. We consider that the enabling provision in Article 71 of the Public Procurement Directive is sufficient for those cases where the public body chooses to do so. To mandate it would have a cost impact in terms of compliance and may require the employment of more procurement officers to manage this function.

We do also consider however that it still may be practicable to lead good public purchasing practice by developing and promoting Scottish standards of contractual provision on public contract main contractors obliging them manage their supply chain effectively and in line with required public sector standards. For example, the main contractor could be contractually required to (within one month of the date of award of the sub-contract) cascade down (no lower than tier 2 on the grounds of proportionality and cost):

- (i) a sub-contractor PQQ declaration regarding mandatory and discretionary exclusion grounds to its sub-contractors;**
- (ii) report any failures to the public body for consideration;**
- (iii) stipulate in its sub-contracts that the sub-contractor must declare any material change in circumstances during the course of the sub-contract which would result in a change to its declarations if asked then;**
- (iv) stipulate in its sub-contracts that the main contractor is entitled (but not obliged) to terminate the sub-contract without penalty on the grounds of failure on any of the sub-contractor PQQ mandatory / discretionary grounds at any time during the currency of the sub-contract or due to material misrepresentation by the sub-contractor in the sub-contractor PQQ and/or the Sub-Contract Documents; and**
- (v) oblige the main contractor to terminate the sub-contract on the grounds of failure on any of the sub-contractor PQQ mandatory / discretionary grounds at any time during the currency of the sub-contract or due to material misrepresentation by the sub-contractor in the sub-contractor PQQ and/or the Sub-Contract Documents where required to do so by the public authority, reserving the main contractor's entitlement to an extension of time in performance of the Contract and/or a reasonable adjustment to the Contract price due to the disruption to performance of the Contract directly attributable to termination of the sub-contract and sourcing of a replacement sub-contractor (provided that the main contractor acted with all due diligence, etc.)**

This is not something to be simply drafted and imposed however its

successful introduction would require cross-sector and contractor dialogue. There may well be compliance costs for contractors and we'd want to enter into any such arrangements with our eyes open.

There is a need / public expectation for public purchasing to pay more attention to its supply chain and Scottish Government (or a Centre of expertise on its behalf for the whole public sector) leading, developing and issuing good practice guidance to this effect would help to address that required improvement.

Q32 What are your views about what should be included in this Statutory Guidance? Please explain your answer.

We think that the following issues of approach in the guidance should be committed to by Scottish Government:

- The guidance will only be statutory for lower value regulated contracts and the distinction should be explicit but it should be made as relevant as possible too for EU regulated contracts as non-statutory good practice guidance on the grounds of simplicity and standardisation for suppliers' and public bodies' benefit.
- The statutory guidance should not be static but should be developed as issues arise. It should directly succeed and update the very successful and effective SPPN series and, like SPPNs, be issued in a series of subject-specific parts – for ease of reference and updating.
- Where the guidance addresses supplier selection issues it should always be accompanied contemporaneously by an update to the sPQQ reflecting that good practice approach. Where it addresses contract award issues it should be accompanied by model award criteria wording / contract clauses on the same basis.

The consultation paper lists the following standards and values which could be set out as expected from buyers and suppliers in public contracting and comments are offered on whether or not these are suitable for coverage in the guidance:

- Fair employment – agreed
- Environmental performance – agreed
- Proportionate approach to risk – agreed
- Pre-Tender Engagement – agreed
- Supplier Self-cleansing – agreed

We think that environmental performance should be subsumed within a wider value commitment on both sides to Maximising Sustainability – environmentally, socially / ethically and economically.

The consultation paper lists the following issues likely to be addressed in the statutory guidance on the following more specific

contract approach issues and comments are offered on whether or not these are suitable for coverage in the guidance:

- Employee relations – agreed, noting that this subsumes Living Wage commitment, avoiding inappropriate use of agency staff / zero hours contracts, etc. In terms of proportionality, we think that the guidance should offer commodity-specific advice, e.g. recognising a higher standard for making enquiry of a business for care / health services than say office stationery.
- Supplier's Conduct in business – agreed. Corporate social responsibility behaviours should be equated with / subsumed within Maximising Sustainability – environmentally, socially / ethically and economically.

Reference is made there however to “exploiting assets in illegal settlements”, as was pointed out in response to SPPN 4/2014, no recognition or reference was made in this to local government's special position in relation to the UK legal prohibition on taking into account “non-commercial” matters in contract consideration. Local government in the biggest single public purchasing sector in Scotland. We do not agree with this approach if public sector is truly to work in partnership to the same ends and must not be repeated into the statutory guidance.

We think that the following subjects could / should be addressed as well:

- Ethical Purchasing – update the now very dated SPPN 02/2005 on fair trade and ethical purchasing, better encourage pursuit of fairly traded options and use of labels etc. per Directive Article 43, Section 15(5) of the Act.
- Community Safety / Serious Organised Crime – promote public sector good practice in Information Sharing protocols and “Non-SOCO Declaration” currently being led by Police Scotland with local government in particular but needing central co-ordination and defragmentation.
- Supplier financial evaluation and insurance requirements – give SPPN 02/2012 statutory guidance status.
- There are many more areas which would benefit from statutory guidance and central co-ordination: community benefits in procurement – technical aspects like specifications, common standards and reporting / tracking; supplier business continuity / disaster recovery planning – risk assessment with suppliers and best practice approaches; equalities in procurement (development of SPPN 8/2012); private sponsorship of public bodies / services / events -v- public procurement – achieving transparent probity. Not all can be addressed at once but they all merit attention. At the same time, thus far Scottish procurement policy development appears to have been somewhat reactive to the “issue of the day” and un-prioritised. As has been referred to above, there is a cost impact of

increased compliance burden at all levels of procurement and “clean slate” of statutory guidance on policy offers an opportunity to focus on what is really important in terms of delivering the greatest public benefit.

Q33 We expect to apply only limited rules to contracts for social and other specific services to the person. These will require compliance with the basic Treaty Principles and publication of contract opportunity and award notices as described in this section. Do you agree or disagree that these rules will be sufficient for an effective light-touch regime? Please explain your answer.

Agree ☒ **Disagree** ☐

We agree that the limited light-touch rules are sufficient for social care services. The key factor should be the quality of the service required to meet the needs of the supported individual as stated. Putting in place an effective Self Directed Support framework agreement for example would benefit from more flexibility around admission to the contract and variation of scope than the full rules allow for.

Q34 We believe that contracts should not be awarded on the basis of price or cost alone? Do you agree or disagree with this position? Please explain why.

Agree ☐ **Disagree** ☐ **Neither Agree nor Disagree** ☒

Please see our response to Question 10 above.

Q35 What are your views about what should be included in this Statutory Guidance? Please explain your answer

The statutory guidance should set out a good practice model for all steps of the procurement process, reflecting the key aspects of the full regime but highlighting the flexibilities that exist. This should directly succeed and update upon the existing joint guidance on procurement of care and support referred to in SPPN 8/2010.

This should also be built into the Procurement Journey to continue to offer a single, comprehensive source of best practice approach for all kinds of public procurement in Scotland.

Q36 Should provision be made for the use of a Prior Information Notice by non-central authorities (where they choose) as the call for competition in restricted procedures and competitive procedure with negotiation? Please explain your answer.

Agree ☒ Disagree ☐

This would be helpful in terms of improved efficiency.

On a technical basis, it would be helpful if the Public Contracts Scotland system was adapted to allow (voluntarily) the addition of closing dates to PINs and “Future Opportunity Notices” to support this change.

Q37 Do you agree or disagree that this provision should also apply to lower value regulated contracts, that is, those that are below European regulated thresholds and are regulated by the Act? Please explain your answer.

Agree ☒ Disagree ☐

We believe that it is desirable to keep the rules harmonised for higher value contracts and lower value regulated contracts wherever possible and there is no overriding reason not to keep the rules the same on this matter.

Q38 Do you agree or disagree that public bodies should be permitted to award a contract without competition in the circumstances permitted by the Directives? Please explain why.

Agree ☒ Disagree ☐

This is a continuation of existing practice and is occasionally

necessary, subject to care being taken and full justification being applied and professionally verified.

Q39 Do you agree or disagree that public bodies should also be permitted to award lower value regulated contracts in similar situations? Please explain why.

Agree ☒ Disagree ☐

We believe that it is desirable to keep the rules harmonised for higher value contracts and lower value regulated contracts wherever possible and there is no overriding reason not to keep the rules the same on this matter.

Q40 Do you agree or disagree that all non-central authorities using the restricted procedure should be able to set the time limit for the receipt of tenders by agreement with candidates? Please explain why.

Agree ☒ Disagree ☐

If all parties agree, this is surely unobjectionable.

Q41 When using the open procedure, should public bodies retain the flexibility to determine whether to evaluate bids before evaluating qualification and exclusion criteria? Please explain your answer.

Yes ☒ No ☐

For the reason stated in the consultation paper, it is more efficient to be able to only have to check the eligibility and qualification pass / fail for the winning bid.

Q42 Should public bodies be allowed to ask for supplementary or missing information and to ask a company to provide clarification of their bid?

Yes ☒ No ☐

Properly conducted correction of missing / clarification is essential to allow for proper bid evaluation – the consequence of prohibiting this would be rejection of otherwise good value bids. This is contrary to the public interest.

Q43 Do you agree or disagree that the rules in the Directives about modifying contracts should not apply to contracts under the Act? Please explain why.

Agree ☐ Disagree ☒

We believe that it is desirable to keep the rules harmonised for higher value contracts and lower value regulated contracts wherever possible. The question here is whether there is an overriding reason not to keep the rules the same on this matter. The reason stated in the consultation paper is the perceived restrictive nature of the rules on contract variation / modification. This is not accepted – we find it difficult to envisage real situations where a contract variation (irrespective of original contract value) would be merited but precluded under the Article 72 rules as opposed to re-tendering a new opportunity allowing more transparency, greater assurance of value for money for the public purse and an opportunity for innovation. The absence of clearer rules on contract variations is a problem at present in EU regulated procurements, the absence of comparable clarity in contracts regulated by the Act would be likely to cause the same problems but just at those lower values.

Q44 We believe we should continue to progress the work plan from the Construction Review report, rather than requiring the use of BIM or similar in works contracts and design contests. Do you agree or disagree? Please explain your answer.

Agree ☒ Disagree ☐

We agree with the reasons given in the consultation document.

Q45 Do you agree or disagree that we should establish an overall confidentiality and security framework which individual public bodies would use to inform their own approach to the security handling of electronic communication? Please explain your answer.

Agree ☒ Disagree ☐

We agree with the reasons given in the consultation document.

Q46 Do you agree or disagree that we should maximise the time available to implement fully electronic procurement processes and defer the requirement for full electronic communication for the maximum permissible time?

Agree ☒ Disagree ☐

We agree with the reasons given in the consultation document.

Q47 Do you agree or disagree that all communications about concession contracts in a procurement exercise should be by electronic means?

Agree ☐ Disagree ☒

There should be an opt-out allowing the procuring authority discretion to have other communications by non-electronic means where it would be disproportionate (in the opinion of the authority) to do otherwise; that decision and the reasons for it to be communicated in the concession notice. As is recognised in the consultation document, not all concession contracts will be high value and the rules should accommodate a lighter-touch approach in those circumstances.

Q48 Do you think that public bodies should retain the flexibility to decide when the use of electronic catalogues is appropriate? Please explain your answer.

Yes ☒ No ☐

This is a contract / commodity and market-preparedness issue so flexibility must be allowed for.

Q49 Do you agree or disagree that we should defer the requirement to provide the European Single Procurement Document in electronic form only until 18 April 2018? Please explain your answer.

Agree ☒ Disagree ☐

As set out in the consultation document and for the same reasons as for Question 46.

Q50 Do you agree or disagree that we should defer until 18 October 2018 the provision that says businesses should not have to submit supporting documents where the public body awarding the contract holds these? Please explain your answer.

Agree ☒ Disagree ☐

Related to Question 49 and we believe that we can apply this approach anyway at present on a voluntary basis by agreement amongst all parties without the formal rule change.

Q51 Do you agree or disagree that we should defer the obligation on public bodies to use e-Certis until October 2018?

Agree ☒ Disagree ☐

As set out in the consultation document and for the same reasons as for Question 46.

Q52 Do you agree or disagree that we adopt this option for utilities contracts?
Please explain your answer.

Agree ☐ Disagree ☐

We are not able to comment on this question as we do not award utilities contracts.

Q53 Do you think that dynamic purchasing systems should be available as a tool for purchasers in respect of regulated procurements?

Yes ☒ No ☐

This is an additional potentially valuable tool in public bodies' procurement toolbox and can only be helpful.

Q54 Do you think that the same rules which apply in Article 34 of the Public Procurement Directive should be extended to lower value regulated procurements under the Act?

Yes ☒ No ☐

We believe that it is desirable to keep the rules harmonised for higher value contracts and lower value regulated contracts wherever possible and there is no overriding reason not to keep the rules the same on this matter.

Q55 Do you agree or disagree that we should continue to allow public bodies in Scotland to use central purchasing bodies as described in this section?

Agree ☒ Disagree ☐

As set out in the consultation paper, CPB are essential to the public procurement collaboration agenda and deliver efficiency and value to the public purse.

Q56 Do you agree or disagree that we should not require the use of central purchasing bodies for particular types of procurement, thereby allowing public bodies to exercise discretion as to when, and which, central purchasing body to use?

Agree ☒ Disagree ☐

Mandating the use of some CPB contracts could be counter-productive as set out in the consultation paper. Each authority has a duty to deliver best value and some of that may be based on local factors. There is no need for this step at present since the vast majority of Scottish public bodies collaborate voluntarily because they see the value in doing so.

Q57 Do you agree or disagree that we should not restrict access by Scottish public bodies to European centralised purchasing activities? Please explain your answer.

Agree ☒ Disagree ☐

Logically and ethically this is an extension of the argument set out at Q 56.

Q58 Do you agree or disagree that the monitoring and enforcement body for Scotland should be the Scottish Ministers, acting through the existing Single Point of Enquiry? Please explain your answer.

Agree ☒ Disagree ☐

This is a logical extension of the role of the SPoE.

Q59 Do you agree or disagree that we should simply copy the provisions on applications to the court from the existing 2012 Regulations? Please explain your answer.

Agree ☒ Disagree ☐

Although remedies are controversial and are beloved by neither public purchasing bodies (who say they are too disruptive of tendering processes, too uncertain, too slow, too expensive) and suppliers (who also say they are too uncertain, too slow, too expensive, effective remedies provisions are necessary to give the rules, both EU and under the Act, teeth and to drive compliance. The “Remedies Directive” provisions are now well known to all parties regularly involved in public tendering and provide effective remedies to suppliers with a degree of balance towards maintaining effective public tendering. For example, despite dire predictions when the Remedies Directive was first implemented in 2009, automatic suspension on legal challenge has not been a death-blow to public tendering and the vast majority of interim suspensions have been lifted reasonably swiftly on application to the Court.

The only 2 issues we would take with the implementation of the Remedies Directive are:

- 1. Some oddly complex interplay between the judicial review process and the Remedies Directive rules on legal challenge thrown up by the widely reported “Pyramid Joinery” Court of Session case. These should be reviewed by the relevant Court of Session Rules Panel in the light too of the new Act (see below re our comment on the process for legal challenges under the Act).**
- 2. the right to raise the challenge in the supplier’s local Sheriff Court. On the rare occasion that this has been attempted, the case has been remitted to the Court of Session on the grounds that Court is the appropriate forum to hear that kind of case, given its technicality and complexity. We think that this is a failed approach which should be reviewed and, if not used, removed. More investigation is required into procurement remedies and their effectiveness (see also our response to Q60 below).**

It’s not clear from the consultation how legal challenge processes under the Act are envisaged to work. This needs attention and should be harmonised with the EU rules challenge process.

Q60 Do you think there is a need for a review body which sits beneath the national courts?

Yes ☐ No ☒

Court procedures are often criticised for being too uncertain, too slow and too expensive. What is overlooked however are the reasons for this, namely the delivery of justice to the parties over all other considerations. Any challenge to a procurement process must involve questions of quite technical and difficult law concerning application of the EU Directives as implemented by domestic Regulations and principles deriving from the Treaties of the Functioning European Union. Courts are established to deal with just this kind of issue via highly trained and experienced judges and an established courts administration. The consultation paper states that a new tribunal is “potentially quicker and less expensive than court process” but cites no evidence for that statement at all. The only evidence offered is that during the consultation on the Act and during the Parliamentary scrutiny process, many stakeholders asked for a different approach to be taken on remedies in Scotland. In particular, the Infrastructure and Capital Investment Committee’s Stage 1 Report said “....given the evidence heard in relation to remedies, the Committee also supports the establishment of a tribunal or ombudsman....” A new tribunal would require a new, separate administration to support it. It remains to be seen how expert the tribunal arbiters would be to determine the technical and difficult legal questions involved in procurement

challenges. What of other options not mentioned, such as having dedicated, specially experienced / qualified commercial judges in the Court of Session who will deal with public procurement challenges? As far as administrative review is concerned, such as through a specialised ombudsman, that would only meet suppliers' demands of the ombudsman had all the required powers of contract suspension and award of money for legal wrongs committed that courts have.

If a review body is proposed, we believe that this should be the subject of separate consultation based upon a properly costed options appraisal.

Q61 If so, do you think the review body should be established as a tribunal within the Scottish tribunals system?

Yes ☐ No ☒

Please see our response to Question 60 above.

Q62 Or do you think it should take some other form, for example, a Scottish Procurement Ombudsman?

Yes ☐ No ☒

Please see our response to Question 60 above.

Q63 What is your view of the Scottish Government's position to broadly endorse the principles of open contracting and commitment to work with civil society and wider stakeholder groups to improve transparency in its procurement practices as part of its continuing programme of procurement reform?

We welcome and endorse Scottish Government's approach. Consulting with civil society, e.g. through the community planning function is particularly relevant to personal care and health provision. Indeed, it is just an extension on a strategic basis of what we should be doing already anyway in terms of strategic commissioning re co-design and wide stakeholder involvement in requirement-setting and specification for those kind of services. It is also relevant to address locally strategic procurement / commissioning issues such as third sector involvement and resources shift. It will not be relevant for all services for all contracting but, if well used, it is a powerful community planning tool.