

The Highland Council

12 March 2015

Agenda Item	19
Report No	HC/7/15

Response to the Scottish Government Consultation on Implementing the EU Public Procurement Directive 2014 and the Procurement Reform (Scotland) Act 2014

Report by Director of Finance

Summary

This report presents a suggested response from the Council to the above consultation which is required by 31 March 2015.

1. Background

- 1.1 The Scottish Government has two years from 1 April 2014 to implement three new Directives in Scotland, which are the Public Procurement Directive, the Utilities Directive, and the Concessions Directive. Most relevant to the Council is the Public Procurement Directive.
- 1.2 The Scottish Government wishes to synchronise this with its implementation of the Procurement Reform (Scotland) Act and introduce a single set of new Regulations under a Commencement Order in December 2015.
- 1.3 The Scottish Government has launched a formal consultation posing 63 questions aiming to gain stakeholders' views of its proposals. It is important that the Council takes part in this debate as the outcome will directly affect the Council's freedoms and abilities to pursue its aims such as sustainable and shared service based procurement.

2. Discussion

- 2.1 Much of what the Directive and the Act will require public bodies to do, and the options the Council has to include or exclude other matters on which the Government is consulting are aligned with the Council's existing aims.
- 2.2 The duty of sustainable procurement, the duty to consult those who will be affected by procurement decisions, the duty to consider the use of the smallest lots possible in any contract or framework, and the aspiration to simplify procurement work are all positive steps.
- 2.3 Care will need to be taken however in terms of the extent to which those first three measures are used. Any consultation exercise will inevitably extend the length of time any procurement project will take. Likewise where the Council introduces requirements for businesses to describe how they will deliver environmental, social, and economic benefits through their contracts, this will add a degree of complexity which businesses will find challenging and which they may perceive as increasing not lessening the degree of bureaucracy they are subject to. Again, it will also add to the length of time they need to

produce solutions to these requirements

- 2.4 The suggested responses below are based on the Council's support for sustainable procurement and greater engagement with service users, SMEs and the Third Sector. They are tempered by the need for clarity, consistency, simplicity and openness and seek an approach which will allow new duties to be applied appropriately and proportionately

3. Implications

- 3.1 Resource - the pre-competition stage of significant procurements could be substantially lengthened due to the need to engage in greater consultation and take greater account of sustainability factors and the use of small lots.
- 3.2 Legal – the new statutes will place additional complexity on procurement activity, however its extent will not become clear until the final form of the regulations is known.
- 3.3 Risk - the freedom and ability of businesses and others interested in providing services, works, and supplies to the Council to challenge its procurement decisions will be considerably enhanced.
- 3.4 Climate Change/Carbon Clever - there will be an enhanced duty to take environmental issues into account.
- 3.5 There are no Equalities, Gaelic or Rural implications.

Recommendation

That the Council approves the draft response to the consultation.

Designation: Director of Finance

Date: 2 March 2015

Author: Ashley Gould, Head of Procurement

Background Papers: Scottish Procurement Policy Note (SPPN) 2/ 2015 -

Consultation on changes to the public procurement rules in Scotland

<http://www.gov.scot/Topics/Government/Procurement/policy/SPPNSSPANS/policy-notes/2015/SPPN22015>

Annex A Proposed Responses to the Consultation Questions

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

The statutory guidance should be used to set out clear minimum standards on what is to be reported and when but should only amplify the requirements of the Act and not add to or complicate what is already there and set out in this consultation. It needs to ensure consistency across the public sector in order to establish accurate reporting and transparency but should not impose a disproportionate burden on public bodies.

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

As above

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

As above

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.

This is unlikely to be very effective because if a contractor is willing to break the law in a way that could actually result in prosecution, it seems unlikely that they would be particularly concerned about breach of a contractual term. It is also unclear how these would be policed within existing resources. It would afford contracting authorities some certainty in terms of their rights to terminate in those circumstances and could be helpful in that sense.

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

Yes

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

This seems reasonable

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.

The aim here also seems to be to give support to social enterprises and on that basis the right to reserve such contracts to this type of organisation may be useful as long as the contracting authority could justify it. The effective requirement to change the service provider every three years would however counteract any benefit they may derive from doing so

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, the principles of transparency and equal treatment should require the same standards to be applied. Also failing to do so would introduce a lack of consistency which would be confusing and unhelpful.

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. The rules only reflect best practice in the production of specifications which should be used at all levels.

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: whilst this appears to be relatively rare, the public sector still has a poor reputation for making procurement decisions on this basis so this measure would help to dispel that notion

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.

This should remain discretionary although public bodies should be required to explain their lotting strategies in each project. This should remain optional because not all markets lend themselves to a small lots approach, an example being mains gas or electricity.

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?

Agreed because public bodies themselves are best placed to decide on a case by case basis what information they need. Guidance should be issued however on keeping this to a minimum

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?

There seems little benefit in making this change and the information a public body required could become more difficult to obtain.

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

Agree

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 subcontractors 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

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.

The same standards should apply because of the intention behind this part to minimise use of turnover figures in selection. If it were not applied the situation could arise in which greater difficulties are met by businesses interested in lower value contracts than are experienced by those interested in high value ones.

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.

This should remain with public bodies because they will be aware in each case of the unique risk profile of the project in hand and therefore what standards should be applied. Public bodies should however be required to justify the standards imposed.

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. If an offence is serious enough to render a contractor unsuitable for the award of a contract and payment of public money, the value of that contract does not seem relevant

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

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

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

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

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. Whilst it is difficult to envisage a situation in which a public body would make an award of contract in such circumstances, there seems no reason for removing their ability to make a decision based on their own assessments of risk.

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

Yes. Inconsistency of standards would be confusing.

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.

Currently there is a list of convictions which oblige public bodies to exclude businesses from tendering opportunities, and a discretionary approach to the treatment of businesses which have breached their obligations to pay tax or social security, and there seems no reason for this to change, so the response to the first part of the question is no and to the second part, yes.

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

Yes. Inconsistency of standards would be confusing and contradictory.

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, though the evidence must be clear and the bidder must have the opportunity to challenge it. Significant failures to perform an earlier contract must continue to be evidenced by a clear contractual sanction having been imposed by a public body in recent times as currently

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

Yes. Inconsistency of standards would be confusing and contradictory.

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

Agree because indefinite exclusion is disproportionate and at odds with the concept of criminal convictions being “spent”

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

Yes. Inconsistency of standards would be confusing and contradictory.

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

No.

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

All of the issues addressed in this section should be clarified in statutory guidance so that businesses will be able to understand what is required and will see a consistency of approach regardless of which public body they are dealing with.

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. The proposals seem to clarify what is required in a light-touch regime and to make it more transparent

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.

As per question 10, agree: whilst this appears to be relatively rare, the public sector still has a poor reputation for making procurement decisions on this basis so this measure would help to dispel that notion

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

All of the issues addressed in this section should be clarified in statutory guidance so that businesses will be able to understand what is required and will see a consistency of approach regardless of which public body they are dealing with.

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.

Yes, but public bodies must explain that the PIN is the call for competition and make it clear that expressions of interest must be submitted in response, and that such a response will be taken by a public body as a request to participate. This is because in these circumstances, there is only one opportunity to request participation.

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.

Yes. Inconsistency of standards would be confusing and contradictory.

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.

They should be permitted to do so, but where the reason given is that there is only one source of supply, public bodies must be required to prove it and to demonstrate what steps they have taken to establish that this is actually the case. This is because it is often put forward as an excuse for avoiding competition and is usually not true.

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.

Yes. Inconsistency of standards would be confusing and contradictory.

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 but only as long as all bidders agree. Whilst it seems illogical to allow bidders less time to produce a tender than it usually takes to produce a specification, set selection and award criteria, and draft a contract, it is apparent from e-tendering systems that many bidders do not bother to open ITTs until quite close to the deadline for submissions.

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 as it can save a substantial amount of time when a large number of tenders are received.

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, as has been clarified by recent CJEU case law. They should not however be obliged to do so, and must ensure that they can demonstrate the same treatment of all bids.

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.

Disagree. This would introduce inconsistency of standards would be confusing and contradictory, and give no certainty in regulated contracts.

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. If it is already being pursued by another means, there seems to be little benefit in duplicating that here.

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 because this seems to permit public bodies more flexibility than the alternative

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 because a rapid adoption of this change would be challenging for many businesses and for some parts of public bodies particularly in care and construction.

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

Agree but only in the same timescales as set out above.

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 because some contracts will not lend themselves to the use of catalogues and public bodies will readily be able to determine which ones they are: as such legislation is not required.

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 because a rapid adoption of this change would be challenging for many businesses and for some parts of public bodies particularly in care and construction.

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.

Disagree. Public bodies should already be well enough organised to avoid asking for the same information twice.

Q51 Do you agree or disagree that we should defer the obligation on public bodies to use e-Certis until October 2018? Agree because a rapid adoption of this change would be challenging for many businesses

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

Agree because having to publish an award notice for every low value call-off would be disproportionately burdensome

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

Yes. They will be much more usable under the new Directive and offer greater flexibility than frameworks.

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

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?

Yes

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 that they should not be required to use central purchasing bodies

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 though in reality it will have no real effect because they are largely unknown to public bodies and therefore are unlikely to be used.

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 because it is consistent with the approach in place now and makes the most of existing expertise and resources

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. Starting again from nothing would just be a waste of resources.

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

Yes

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

Yes

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

No

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?

This seems reasonable.