

Procurement Reform Bill – Consultation

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FOREWORD



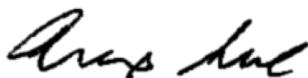
It is right at this time of challenging financial conditions that we take every opportunity that we can to enable sustainable economic growth, not only looking at what we can do now, but by making the right decisions that will serve the people of Scotland well for the future.

That is why this Government is working towards introducing a Procurement Reform Bill to the Scottish Parliament next year. And, as part of this process, I am delighted to launch this consultation. This will provide the formal platform to ensure that what goes forward to Holyrood to begin its legislative passage will best represent the interests of the procurement community and beyond. In doing so, it will also seek to enhance the significant improvements in procurement reform already achieved in Scotland.

It is well documented that the origins of public procurement reform date back to 2006, when John McClelland set the public sector in Scotland on a journey of improvement in all aspects of procurement performance. And, much has been said and written about the improvements made and the value that effective and efficient procurement contributes to the economy. One which commits over £9 billion of spend annually. However, this is not a time to look back. But the right time to look forward to what more can be achieved in Scotland. And whether you are directly or indirectly involved in procurement or have an interest in how public money is being spent or invested through procurement-related activity to come forward and speak out.

Scotland is already held in high regard for its innovative approach to procurement reform. I believe that we will illustrate again through this Bill that we are continuing to lead the way by providing a Scottish solution for the future that will earn European and world-wide respect in the years that follow.

This consultation is an opportunity unlike any other for procurement and those involved in procurement to consider the broad spectrum of issues and considerations before and ahead of us. It provides an opportunity for procurement to reflect on what has been good and what has been bad. And, then set it right. That is why, I ask as many of you as possible, to enter the debate to ensure that the end-product – the Bill – is forged from the meaningful and collective ore of your views and opinions. Your contribution large or small – let's have it. And with this, help shape procurement reform, its supporting processes, systems and tools as we advance further into the 21st Century.

A handwritten signature in black ink, appearing to read 'Alex Neil'.

Alex Neil, MSP

Cabinet Secretary for Infrastructure and Capital Investment

August 2012

EXECUTIVE SUMMARY

1. Public sector spending on goods and services across Scotland amounts to over £9 billion per year. Good public procurement is a vital contributor to growing the economy and done well it can be an effective lever in supporting delivery of the Government's priorities whether that is job creation, infrastructure development, strengthening our communities or supporting our transition to a low carbon economy.
2. Individual procurement processes will differ depending on the value and type of procurement, but purchasing the right goods and services, at the right time and for the right price, can significantly influence the quality of service that public bodies deliver.
3. It is important that public services are outcomes based and person centred, and these principles apply to procurement as much as any other aspect of public service. Indeed, procurement is an area where process directly affects outcome.
4. In order to realise the full potential of procurement, we need to ensure that the legal and policy frameworks for public procurement in Scotland are transparent, responsive and fit for purpose. And that procurement professionals in Scotland not only have access to the right tools and processes, but that they also have the right skills and capabilities to do their job effectively.
5. That is why the Bill should not be viewed in isolation but as part of the Government's continued reform of public procurement in Scotland. We have made significant steps forward, however there is more to do. To do more so that public sector spend is used to best effect. To do more to ensure that improvements are applied consistently, proportionately and transparently across the public sector. To do more to ensure competitive neutrality between suppliers of public services, and so that doing business with the public sector in Scotland becomes as easy as it can be.
6. This Bill will establish a national legislative framework for sustainable public procurement that supports Scotland's economic growth by delivering economic, social and environmental benefits, supporting innovation and promoting processes and systems which are transparent, streamlined, standardised, proportionate, fair and business-friendly.
7. This consultation paper covers a wide range of issues in relation to the procurement process. It is by ensuring these issues are addressed that we can maximise the ability for procurement to support effective policy development and service delivery.
8. There is a lot to consider and that is why the consultation document has been organised into six parts. Please respond to any or all of the parts where you feel you have a contribution to make, and you can do this by using the respondent form.

Part I Public procurement processes are transparent, streamlined, proportionate, standardised and business-friendly

9. To achieve value for money in procurement it is important that contract opportunities are transparent and easily understood by those wishing to do business with the public sector. Whilst there are specific rules on some higher value contracts and rules that apply to particular types of contract award procedure, there is not a general rule that obliges public bodies to conduct procurement in an effective and proportionate manner. That is why we propose to introduce a new general duty on public bodies to conduct procurement in an effective and proportionate manner.

10. Though we have made great strides in recent years, feedback from those doing business with the public sector suggests there is more to be done to simplify processes. We propose to use the Bill to prohibit charges being levied for the issue of tender documents, to standardise the prequalification process for public contracts, and ensure that suppliers receive de-brief information in situations not covered by 2012 regulations.

Part II Making it easier for business, particularly newer businesses, SMEs and the third sector, to access public contract opportunities and sub-contracting requirements

11. As the largest purchaser in the Scottish Economy, it is vitally important that the public sector leads by example and ensures that size is not a barrier to accessing and competing effectively for public sector contracts.

12. We propose that before starting a procurement process, a public body should consider and act to facilitate newer businesses, SME and Third Sector access as part of their procurement strategy for every requirement. This will ensure a uniform approach across the public sector in Scotland. And it will help encourage a mixed range of suppliers in order to help develop and stimulate a varied and competitive marketplace.

13. We propose to use the Bill to make it a requirement that public bodies use a single online portal to advertise and award all public contracts above a given threshold. This will ensure there is a one stop shop for suppliers seeking to do business with the Scottish public sector.

14. Increasing transparency within supply chains for major contracts and capital infrastructure programmes across Scotland will be another key feature within the Bill. At present, there is no single place where businesses can access sub-contracting opportunities related to public contracts in Scotland. The Bill will provide an opportunity to consider making it a requirement to advertise sub-contract opportunities connected with all major public contracts on Public Contracts Scotland and we are keen to get your views on this.

15. There is presently no requirement for public bodies to publish contract documentation proactively, although the Scottish Government publishes details of any individual transactions over £25,000 on its website. The consultation will seek your views on this topic as well as any practical implications.

Part III Smarter use of public procurement to encourage innovation and growth

16. While the reform of public procurement in Scotland has increased awareness of procurement innovation, it is a commonly held perception that the value of innovation in procurement as an enabler of sustainable economic growth is yet to be fully utilised. The consultation seek views on how we might use public procurement to encourage innovation and growth to help businesses develop and commercialise new or novel goods, services and works for internal and international markets; and on stimulating new business opportunities and inward investment facilities to provide new, sustainable products and services for the public sector.

17. One measure that could be included in the Bill to help promote innovation in procurement is a statutory requirement that purchasers must permit the submission of variant bids. The consultation will invite your views on this.

Part IV Taking account of social and environmental sustainability issues through public procurement

18. The actions of the public sector have a huge impact on society, the economy and the environment and in no area is this more obvious than how we spend public funds. The consultation seeks your views on placing an overarching duty on public bodies to act in a way that promotes economic, social and environmental well-being through procurement activity. The consultation also explores the use of community benefits clauses, including using major public contracts to promote jobs and training opportunities, and whether we use provisions to promote greater use of supported businesses by the public sector.

Part V Dealing with inappropriate conduct and poor performing suppliers

19. High quality public procurement is not only dependent on good practice by purchasers but on suppliers too. Suppliers to the public sector play a vital part in delivering high quality, cost-effective goods works and services, and by maintaining the highest possible business ethics and standards. We propose to use the Bill to introduce provisions which will allow public bodies in Scotland to address poor performing suppliers and inappropriate conduct, both in relation to the delivery of contracts and business standards and behaviour.

Part VI Application and compliance

20. We need to consider the application of the Bill in relation to the types of contract and categories of public body to which general provisions will apply. We also need to ensure that it provides appropriate measures to promote compliance with its provisions. Measures to promote compliance must be effective, while avoiding unnecessary costs and risks for all those concerned.

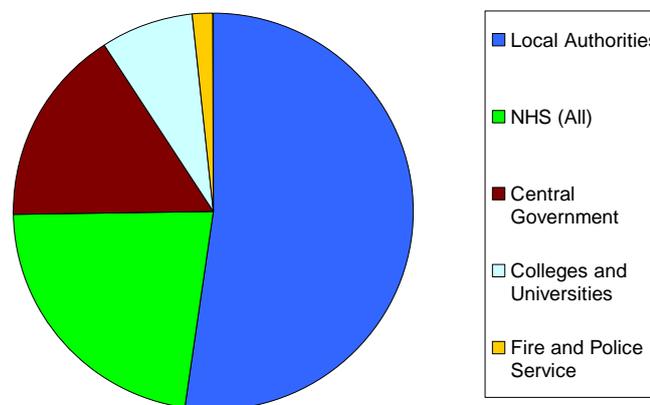
21. More effective and efficient public services will play a key economic and social role in Scotland's future and public procurement is an important lever for change. This Bill affords an opportunity to drive procurement reform further forward by embedding good policy, process, systems and practice in legislation to deliver improved consistency, efficiency and effectiveness.

INTRODUCTION

Background

22. Good procurement is vitally important to public, private and Third Sector alike. Public sector spending on goods and services across Scotland, in areas such as health and education services, amounts to over £9 billion per year. In 2010-11 procurement spending was in excess of £9.2 billion, almost half of which lay within the local government sector. As this figure does not include significant spending on social housing and other investment in infrastructure funded by the Scottish Government, the true scale of public procurement spending in Scotland may be nearer £11 billion per year.

Breakdown of Procurement Spending 2010-11



23. The size of the public procurement spending as a proportion of Scotland's GDP (£145bn¹) means that improving the way the public procurement market operates should have important consequences for economic efficiency and growth. Put simply, public bodies need to make the best use of the public money they are entrusted with, if they are to deliver best value and meet the needs of citizens.

24. The Christie Commission on public service reform, *Commission on the future delivery of public services*², published in June 2011, stressed the importance of public services being outcomes based and person centred. Those principles apply to procurement as much as any other aspect of public service. Indeed, procurement is one of those areas of public policy where process directly affects outcome.

25. The actions of the public sector have a huge impact on society, the economy and the environment and in no area is this more obvious than how we spend public funds. Procurement is a key means of delivering the Scottish Government's priorities and underpins the achievement of the social, economic and environmental benefits that sustainable economic growth demands.

26. As a major consumer in the economy the public sector can, through its procurement policy, exert a significant influence on economic development. The

¹ £145,573 million – including a 'geographical' share of North Sea oil.

² <http://www.scotland.gov.uk/Publications/2011/06/27154527/0>

*Government Economic Strategy*³, published in September 2011, gives a clear priority to accelerating economic recovery. It focuses on actions which will drive sustainable economic growth and develop a more resilient and adaptable economy, including through efficient use of energy and material resources.

27. Procurement has a key role to play by increasing the public sector's direct contribution to the economy through smart use of public procurement, in order to promote jobs and growth; encourage innovation; boost training and apprenticeship opportunities; support our most disadvantaged communities to become sustainable and promote well-being; and help Scottish firms, particularly SMEs and the Third Sector organisations, compete effectively for contracts. Procurement is also key to making sure we use energy and materials as efficiently as possible – both for financial savings and to help meet our climate change targets.

28. Procurement policy can shape our future resource use and needs by, for example, triggering demand for refurbished and recycled materials. Another easily understood area of public expenditure which demonstrates the potential of public procurement is sustainable food procurement. Public expenditure on food has the potential to unlock benefits for community health, well being and social justice through access to good nutrition, and in this key industry sector there are a high number of SMEs able to produce economic stimulus, innovation in the supply chain, employment and training.

29. Public procurement can be a powerful tool for Scotland to act as a responsible nation and global leader by using its buying power to support ethical and best standards. Procurement operates in a global context and sustainability for society, the economy and the environment has to be understood in this context.

30. The good news is that a great deal has been done already to improve public sector procurement in Scotland. Procurement reform has greatly improved the way procurement processes and systems operate and has delivered substantial savings over the last five years. This frees up resources, which can then be redistributed to other areas of government expenditure. The improvements have been achieved as a result of the whole of the public sector in Scotland and business working together.

31. There is an opportunity to do much more, however. To do more so that public sector spend is used to best effect by generating benefits not only to the organisation, but also to the economy and society as a whole. And to ensure that improvements are applied consistently and transparently across the public sector; to ensure competitive neutrality between suppliers of public services; and so that doing business with the public sector becomes as easy as it can be.

³ <http://www.scotland.gov.uk/Publications/2011/09/13091128/0>

Defining sustainable procurement

32. In the Scottish public sector, Sustainable Procurement is defined as:

“A process whereby organisations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life basis and generates benefits not only to the organisation, but also to society, the economy and the environment.”

Scottish Sustainable Procurement Action Plan, 2009

Public procurement legal framework

33. Public procurement is governed by a legal framework which includes principles deriving from the Treaty on the Functioning of the European Union, European Procurement Directives (as implemented in national legislation), Court of Justice of the European Union and national case law. The legal framework establishes procedures which must be followed by public bodies whenever they purchase goods, services or works from suppliers.

34. The European Commission is undertaking a comprehensive review of the EU Procurement Directives, with the intention of radically simplifying and updating the rules to make the award of contracts more flexible and to enable public contracts to be put to better use in support of other policies.

35. Following a public consultation exercise in January 2011, the European Commission published proposals for revised Directives on public procurement and procurement in the utilities sectors and a new Directive on the award of concession contracts in December 2011⁴. A summary of changes to the rules in the European Commission’s legislative proposals can be found at Annex B.

36. These legislative proposals are now subject to negotiation by Member States in Council Working Groups, and the Commission is pressing for the Directives to be adopted by December 2012 and transposed into national legislation by June 2014.

37. The implementation of EU Procurement law falls within the legislative competence of the Scottish Parliament - currently implemented by the Public Contracts (Scotland) Regulations 2012 and the Utilities Contracts (Scotland) Regulations 2012, as amended. The Scottish Parliament has also included procurement within the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012. These include a duty on contracting authorities to have due regard to whether award criteria and contract conditions should include considerations to enable the better performance of the public sector equality duty.

38. Transposition of the new Directives will require a comprehensive review of the Scottish Procurement Regulations by 2014.

⁴ http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/reform_proposals_en.htm

39. Whilst the process of transposition should not have an impact on the timetable for the Procurement Reform Bill, it will be important to ensure that the content of the Bill will be consistent with the outcome of the negotiations that will take place in Brussels throughout 2012.

Public procurement reform in Scotland

40. It would be simple to focus solely on the Bill when thinking about the ways we can improve accessibility to public sector contracts. However it is important not to view the Bill in isolation but as part of the broader public procurement reform agenda, which has achieved much over the last five years.

41. The Public Procurement Reform Programme in Scotland began in 2006, following the publication of a review by John McClelland CBE into public sector procurement in Scotland⁵. A far-reaching and ambitious undertaking, the Programme was established to improve procurement across the Scottish Public Sector.

42. Its vision was the implementation of structures, processes and capability to provide continuous improvement in procurement across the Scottish Public Sector in order to deliver Value for Money improvements and support increased efficiency.

43. Audit Scotland's report, *Improving Public Sector Purchasing*⁶, published in 2009, recognised the significant progress that had been made over the first three years of the reform programme. It also noted variable levels of engagement by public bodies and underlined the need for the Programme to review its strategy for procurement reform.

44. In January 2010, the Public Procurement Reform Board endorsed the second phase of the reform programme. The revised strategy - Transforming Procurement: Accelerating Delivery - set four key priorities:

- Maximising efficiency and collaboration;
- Delivering and demonstrating real cash savings across the public sector;
- Improving access to public sector contracts, particularly for SMEs and the Third Sector;
- Embedding sustainable procurement – which is a process whereby organisations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life basis and generates benefits not only to the organisation, but also to society, the economy and the environment – at the heart of the reform agenda.

45. These four priorities remain at the heart of procurement reform in Scotland today and feature significantly in the ongoing reform of public procurement in Scotland, which continues to make a real impact on public sector purchasing through its contribution towards unlocking economic opportunity for Scotland. That includes

⁵ www.scotland.gov.uk/Resource/Doc/96269/0023302.pdf

⁶ www.audit-scotland.gov.uk/docs/central/2009/nr_090723_improving_purchasing.pdf

encouraging creation of new jobs and new businesses in Scotland and supporting efforts to reduce our carbon footprint as well as making more efficient use of resources through a balance of cost, quality and sustainability. The reform agenda now has a well-established impetus, underpinned by real progress on joined-up working across a wide range of procurement activity and practice. For example:

- We are saving money from better procurement – Almost £1.2bn savings achieved across the public sector in the first five years of the Public Procurement Reform Programme in Scotland, along with the successful delivery of national and sectoral shared services through Scottish Procurement and the Procurement Centres of Expertise.
- We are making it easier to bid for public sector work – Public Contracts Scotland portal was launched in 2008 to provide easy online access to contracts. Over 62,500 suppliers have registered (82% are SMEs); over 465 public bodies are using the portal; and over 25,000 business opportunities have been published since its launch.
- Providing a framework for including training and recruitment opportunities in a range of public contracts through the use of Community Benefit clauses⁷. We are encouraging the creation of new jobs and new businesses through delivery of apprenticeships and training opportunities as well as through our SME-friendly procurement policies. Since initiating work in this area, a commitment to over 3,500 targeted recruitment and training opportunities has been achieved in contracts.
- Driving innovation by encouraging better use of resources in line with the waste hierarchy⁸ through increased resource efficiency and encouraging investment in renewable technologies.
- SMEs are winning public sector work – SMEs account for just over three quarters of all suppliers winning contracts advertised on Public Contracts Scotland. The level of total Scottish public sector spend (by value) that goes directly to SMEs has been over 45% over the past four years (this does not include sub-contract activity), despite SMEs accounting for only 37% of Scotland's turnover. This puts Scotland in the company of only four EU member States (Luxembourg, Slovakia, Germany and Ireland) in which, between 2006 and 2008, SMEs had greater access to public procurement above the EU-thresholds than their significance in the wider economy would suggest. The situation is very different for the UK as a whole (the Commission's analysis puts UK 20th on the list of 27 Member States).
- We are improving and standardising procurement processes – The continued central provision of e-commerce applications, which are used across Scotland, underpin the reform programme. The Procurement Journey (for buyers and suppliers) outlines a consistent approach and includes standard templates for key parts of the procurement process. A Standard Pre-

⁷ <http://www.scotland.gov.uk/Topics/Government/Procurement/policy/procurecombenefits>

⁸ <http://www.scotland.gov.uk/Topics/Environment/waste-and-pollution/Waste-1/tacklingwaste>

qualification Questionnaire to be used by the entire public sector was published for consultation in December 2011. The Procurement Capability Assessment (PCA) programme has now been in place for over three years. The programme is designed to assist public bodies in improving their capability through assessment. It also allows public bodies, locally, at sector level and nationally, to identify where best practice already exists, where there are gaps and where continuous improvements and efficiencies can be implemented.

46. There is no room for complacency, of course, and it is clear there is more to be done to build on our achievements to date.

47. That is why a key focus for the next few years will be a concerted effort to streamline the public sector's dealings with business, adopt more efficient and proportionate procurement processes and systems, and improve consistency of access to public contracts that encourage healthy competition and secure best value.

48. The Procurement Reform Bill is intended to play a significant role in supporting this work as part of the broader public procurement reform programme.

Proposed aim and content of the Bill

49. The Scottish Government remains focused on using procurement as a lever for economic growth, streamlining the public sector's dealings with business, and adopting more efficient procurement practices that encourage competition and secure best value.

50. The proposed aim of the Procurement Reform Bill is to establish a national legislative framework for sustainable public procurement that supports Scotland's economic growth by delivering social and environmental benefits including community benefits, supporting innovation and promoting public procurement processes and systems which are transparent, streamlined, standardised, proportionate, fair and business-friendly. All of which supports our continued focus on minimising bureaucracy, making it easier to do business with the public sector, encouraging more companies to compete and simplifying the reform agenda to accelerate delivery.

51. We would welcome your views on this proposed aim.

Q1 Do you agree with the proposed aim of the Bill given above?

Yes No Don't know/No view

– If you do not agree with the proposed aim, why not?

52. We have separated our proposals for this Bill into six sections. These sections outline specific proposals which may, subject to the response to this consultation, feature in a Procurement Reform Bill, expected to be laid in the Scottish Parliament in 2013:

- Public procurement processes are transparent, streamlined, proportionate, standardised and business-friendly
- Making it easier for business, particularly newer businesses, SMEs and Third Sector organisations, to access public contract opportunities and sub-contracting requirements
- Smarter use of public procurement to encourage innovation
- Taking account of social and environmental sustainability issues through public procurement, which in turn are expected to have a positive impact on Scottish industry and employment. This includes promoting employment opportunities for under-represented groups; promoting compliance with social and labour rights, e.g. fair and ethical trading; supporting social inclusion and promoting social economy organisations; stimulating socially conscious markets; stimulating demand for environmentally-friendly goods, services and works and contributing to climate change mitigation targets
- Dealing with inappropriate conduct and poor performing suppliers
- Application and compliance

53. Now is the right time to drive the public procurement reform programme further forward by embedding good policy, process, systems and practice in legislation through the implementation of a Procurement Reform Bill.

Purpose of this consultation

54. This consultation is your opportunity to shape the Procurement Reform Bill. The Scottish Government would like to hear your views on the suggested proposals that we believe could help us deliver the aim of this Bill. The Procurement Reform Bill covers a wide range of issues and we appreciate there is a lot to consider. That is why we wanted to set out these proposals at an early stage, to ensure we are having the right debates to create good and meaningful legislation.

55. We would be grateful if you would use the consultation questionnaire provided at the end of this document or, if not using the questionnaire, if you would clearly indicate in your response which questions or parts of the consultation paper you are commenting on as this will aid our analysis of the responses received.

56. We are using the consultation on the Bill as an opportunity to consult also on matters concerning the living wage through procurement. The text and questions concerning living wage through procurement can be found at Annex A.

57. We would encourage you to respond to any or all of those parts where you feel you have a contribution to make. We will publish the contributions we receive (except where respondents request anonymity) and use them to develop the draft Bill.

Assessing the impact of our proposals

58. Throughout the development process we have been considering the potential impacts the Procurement Reform Bill may have. We will carry out a Business and Regulatory Impact Assessment on the proposals that will be contained in the draft Procurement Reform Bill.

59. We will also consider the potential equalities and environmental impacts of any proposals and if an Equalities Impact Assessment, Privacy Impact Assessment and/or a Strategic Environmental Assessment will be required.

60. Completed assessments will be rigorously discussed with stakeholders and will be published online.

61. We welcome your thoughts on the potential impacts, both positive and potentially negative, of any of the proposals and questions have been included at the end of each section in the consultation paper for this purpose.

PART I: PUBLIC PROCUREMENT PROCESSES ARE TRANSPARENT, STREAMLINED, PROPORTIONATE, STANDARDISED AND BUSINESS-FRIENDLY

62. To achieve value for money in public procurement it is important that contract opportunities are made more transparent for those wishing to do business with the public sector. It is important also for the processes to be transparent, streamlined, proportionate and business-friendly. In response to this, the Scottish public sector has introduced a number of measures through the continuing procurement reform agenda:

- The Suppliers Charter⁹, a joint statement between public sector procurement and business organisations.
- The Public Contracts Scotland portal¹⁰ to enable suppliers to access public sector contracting opportunities in Scotland.
- The Single Point of Enquiry¹¹ to provide suppliers with feedback on procurement processes and to help businesses become more competitive.
- The Suppliers Journey¹², explains the process of awarding a public sector contract in straightforward terms and sets out what buyers expect you to do at each stage in that process.
- Scottish Procurement Information Hub (the Hub) – major public bodies have contract registers held here which contain Supplier/s name, contract title, start and end dates along with value.
- Procurement Capability Assessments – this process acts as a mechanism to check public bodies procurement capability and promote the use of good practice process/systems and tools.

⁹ <http://www.scotland.gov.uk/Topics/Government/Procurement/Selling/Supplierscharter2>

¹⁰ <http://www.publiccontractsscotland.gov.uk>

¹¹ <http://www.scotland.gov.uk/Topics/Government/Procurement/Selling/supplier-enquiries>

¹² <http://www.scotland.gov.uk/Topics/Government/Procurement/Selling/SupplierJourney>

63. Though much has been achieved already, there is no room for complacency, however. For example, *The FSB 'Voice of Small Business' Member Survey – Report of key findings – Scotland*¹³ states that over half of Scottish FSB members businesses indicate that there are barriers for small firms in bidding for public sector contracts. The time and cost of participating in the tendering process is the most common barrier. While EU law does not allow us to discriminate in favour of indigenous businesses, removing the remaining barriers to their participation in public procurement markets could contribute significantly to Scotland's economic growth.

64. There is therefore a clear opportunity to build on the measures introduced and to improve further. The following proposals are intended to deliver improved consistency, efficiency and effectiveness and we would welcome your views on the proposals set out below.

Introducing a new general duty on public bodies to conduct procurement in an effective, transparent and proportionate manner

65. While there are some specific rules on higher value contracts, rules that apply to particular types of contract award procedure, a statutory duty of Best Value for local authorities in the discharge of their functions,¹⁴ and Best Value principles¹⁵ that underpin the operation of public service organisations, there is not at present any general rule that obliges all public bodies to conduct procurement in an effective, transparent and proportionate manner.

66. It is proposed that we place a new general duty upon public sector bodies to conduct procurement in an effective, transparent and proportionate manner. In introducing such a duty, consideration would have to be given to associated guidance and its status. Also, the duty might extend beyond the conduct of individual procurement exercises and into the public body's broader approach to procurement and the extent to which it is effective in relation to transparency, governance and capability issues.

<p>Q2 Should we place upon public sector bodies a general duty to conduct procurement in an effective, transparent and proportionate manner?</p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/No view <input type="checkbox"/></p> <p>If yes to Q2–</p> <p>a) To support this general duty and other requirements being proposed for public bodies, would it be appropriate for public bodies to be required to publish annual strategic procurement plans?</p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/No view <input type="checkbox"/></p>
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¹³ <http://www.fsb.org.uk/Member-Survey-2012>

¹⁴ <http://www.scotland.gov.uk/Topics/Government/local-government/delperf/localgovernment>

¹⁵ <http://www.scotland.gov.uk/Topics/Government/PublicServiceReform/14838/bv-ps>

Standardising the prequalification process for public contracts

67. The Public Contracts (Scotland) Regulations 2012 sets out high level rules which apply to certain higher value procurement procedures, including rules which apply to pre-qualification procedures when only a limited number of companies are to be invited to tender. In practice the selection of tenderers by public bodies is usually carried out by the use of pre-qualification questionnaires. The current way of using pre-qualification questionnaires by individual public bodies has led to the following issues being raised by suppliers:

- The same or very similar questions being asked of suppliers in different formats
- Suppliers asked to supply the same information multiple times
- Lack of consistency in the questions asked
- Disproportionate pre-qualification requirements

68. The current process is, therefore, widely regarded as inefficient and over-bureaucratic; and has the potential to exclude capable organisations.

69. In October 2009, the then Cabinet Secretary for Finance and Sustainable Growth announced plans for a single pre-qualification database in Scotland that would allow suppliers to submit answers to standard pre-qualification questions once and re-use these answers in future procurement exercises.

70. Following an extensive consultation exercise last year with both buyers and suppliers, a suite of standard pre-qualification questions, including optional questions on themes such as health and safety and quality management, has now been agreed. A template containing the standard questions is incorporated into the Public Contracts Scotland tender module currently being implemented across the public sector. Due to proportionality it is recognised that the standard pre-qualification template cannot be a “one size fits all” document. Buyers will have the flexibility to delete any standard questions that are not relevant or proportionate to their procurement exercise. They will, when required, also be able to create questions specific to the procurement exercise they are carrying out. The next step is to build an online database where suppliers can store and re-use answers to the standard PQQ questions.

71. It is proposed that we place upon public sector bodies a requirement to use the standard suite of questions in a specified pre-qualification system, and that we should place additional (over and above those included in the EU procurement rules) limits on the minimum standards required of suppliers, for example that annual turnover should be used as a minimum standard only in exceptional circumstances but that if used, should not exceed three times the estimated contract value.

72. Standardising the prequalification process for public contracts would mean less duplication of effort, and greater standardisation and efficiency in the procurement process.

Q3 Should public sector bodies be required to use a specified standard pre-qualification system?

Yes

No

Don't know/No view

Q4 Should the Bill be used to require public bodies to observe limits on minimum standards?

Yes

No

Don't know/No view

If yes to Q4 –

a) Should the annual turnover requirement be limited to no more than three times the annual contract value?

Yes

No

Don't know/No view

Provision of debrief information

73. The provision of debrief information is an important part of procurement activity because it helps suppliers understand where they may have weaknesses and areas which require improvement. It can also provide an opportunity for suppliers to suggest improvements to the procurement processes.

74. The 2012 Regulations specify the requirements applicable to regulated procurements and detail is provided in the Scottish Procurement Policy Note 3/2010. In summary¹⁶:

- public bodies must notify suppliers (not previously notified of their exclusion from the competition) of the contract award decision or decision to conclude a framework agreement and provide information about the successful bid and a summary of the reasons why the supplier was unsuccessful;
- public bodies must, within 15 days of a written request from a supplier, provide information on why the supplier was unsuccessful (unless previously provided).

75. In addition, there are several situations in which public bodies must notify suppliers but do not have to provide information on why the supplier was unsuccessful:

- public bodies must notify suppliers of their elimination from the competition at the PQQ stage or during a negotiated procedure or competitive dialogue;
- public bodies must notify suppliers which are unsuccessful in a mini-competition under a framework agreement or when a contract is awarded under a dynamic purchasing system of the contract award decision.

¹⁶ The requirements for debriefing in the 2012 regulations described in paragraphs 74 and 75 do not apply to below-threshold or otherwise exempt procurements and Part B services contracts.

76. Exemptions:

- Public bodies may withhold any information where the disclosure of such information: would impede law enforcement; would otherwise be contrary to the public interest; would prejudice the legitimate commercial interests of any economic operator; or might prejudice fair competition between economic operators.

77. In addition to this, the Suppliers' Charter commits public bodies to offering "meaningful feedback to suppliers on the evaluation of their proposal at the end of the tendering process", whilst the Procurement Journeys also contain information and guidance for both buyers and suppliers respectively.

78. Public bodies provide de-brief information where required to do so by the 2012 Regulations. They may also provide debriefing on a voluntary basis where requested in relation to below-threshold procurements (or otherwise exempt procurements and Part B service contracts). Public bodies may also be required to disclose information under the Freedom of Information (Scotland) Act 2002.

79. Despite this, approximately 8% of the cases handled by the Single Point of Enquiry from its establishment in January 2008 to April 2011 related to a public body's failure to provide de-brief information or the provision of inadequate de-brief information.

80. The report on activity¹⁷ noted that failure to provide adequate de-briefing is an ongoing source of frustration for suppliers who are looking for feedback to help improve their competitive profile and/or seeking reassurance that the tender exercise has been conducted in a professional and compliant manner. However, it is unclear if these cases related to breaches of the legal requirement to provide de-brief information (cases which would be unaffected by any proposal in the Bill), nor is it clear if these particular complaints were founded.

81. We propose to address the provision of de-brief information in the Bill in order to standardise the provision of information and support greater transparency in situations not covered by the 2012 Regulations.

82. We would like to hear your views on the available options.

Q5 Should the Bill require public bodies to provide de-brief information to suppliers which bid for public contracts in Scotland in situations not covered by the 2012 regulations?

Yes

No

Don't know/No view

If yes to Q5 –

- a) In what circumstances should public bodies be required to provide de-brief information – to all suppliers which bid or only to suppliers which submit a written request for such information?

¹⁷ <http://www.scotland.gov.uk/Resource/Doc/116601/0119712.pdf>

- b) Should any requirement apply only to contracts of a certain value, for example contracts above £50k?
 Yes No Don't know/No view
- c) What de-brief information should public bodies provide to suppliers?
 Should suppliers be given an option to receive information in writing or face to face?
- d) What timescales should apply?
- e) Should exemptions apply?
 Yes No Don't know/No view
- If yes, what exemptions should apply?
- f) What are the potential costs/benefits?
- g) Should there be separate limits for construction?
 Yes No Don't know/No view
- If yes, what limits should apply?

Prohibiting charges being levied for the issue of tender documents

83. The Federation of Small Businesses published *The FSB 'Voice of Small Business' Member Survey – Report of key findings – Scotland* in February 2012.

84. The reports states that over half of Scottish FSB members businesses indicate that there are barriers for small firms in bidding for public sector contracts. The time and cost of participating in the tendering process is the most common barrier.

85. There have been instances where purchasers have asked a company to pay a fee to receive tender documents, this has its origins in the days when preparing and issuing paper tenders could be costly for the public body concerned and it was intended to discourage frivolous requests for the documents.

86. As electronic despatch is now the norm, the costs of issuing the documents is insignificant in most cases. We therefore believe the time is right to prevent instances of charging for tender documents altogether.

87. The Scottish Government would therefore propose to use the Bill to prohibit charges being levied for the issue of tender documents. We believe that such instances could act as a barrier to doing business with the public sector and disproportionately affects SMEs and the Third Sector.

Q6 Should the Bill prohibit charges being levied for the issue of tender documents to tenderers?
Yes No Don't know/No view

Q7 How could any new arrangements outlined in Part I be fully enforced?

Q8 Please use this space to give reasons for your responses or if you have any further comments on the proposals in Part I. Please also use this space to give your thoughts on any definitions or potential impacts you would like us to consider in relation to this part of the Bill.

PART II: Making it easier for business, particularly newer businesses, SMEs and Third Sector organisations, to access public contract opportunities and sub-contracting requirements

88. The Scottish Government has a range of initiatives to encourage business start-ups and grow existing businesses as part of its aim to foster long-term sustainable economic growth in Scotland. These include financial support and advice, both directly and via other delivery agents.

89. As the largest purchaser in the Scottish economy, it is vitally important that the public sector leads by example and ensures that size is not a barrier to accessing and competing effectively for public sector contracts.

90. Much work has been done to date. For example:

- The *Procurement Policy Handbook*¹⁸ states that the primary role of the procurement function includes the pro-active management and development of the supplier base, including small and medium-sized enterprises (SMEs) and Third Sector organisations, identifying and managing any supply risks or value add opportunities. It also states that public bodies should keep bidding costs to the minimum necessary for effective competition and should remove barriers to participation by, for example small firms, the self-employed and the Third Sector.
- The Suppliers' Charter sets out a number of commitments for public bodies, including adequate publicity of contract opportunities; use of a core qualification questionnaire and provision of tender debriefing to any supplier that requests it.
- The *Buyers' guide to working with SMEs*¹⁹ outlines the barriers that businesses face and describes how SMEs can be assisted in bidding for work to ensure that they are not unduly discriminated against in the procurement process.

¹⁸ <http://www.scotland.gov.uk/Topics/Government/Procurement/policy/SPPHandbook>

¹⁹ <http://www.scotland.gov.uk/Topics/Government/Procurement/buyer-information/smeguidance>

- Scottish Procurement Policy Note 2/2009²⁰: Promoting the involvement of SMEs in public contracts sets out six simple steps to be taken by public bodies:
 - i) adopt the Suppliers' Charter;
 - ii) use the Public Contracts Scotland advertising portal;
 - iii) review contract award procedures – to ensure that they place the minimum possible burden on suppliers;
 - iv) use outcome based specifications;
 - v) require contractors to pay sub-contractors within 30 days;
 - vi) monitor spend with SMEs.
- The Procurement Journey²¹ encourages public bodies to: advertise the requirement so as to maximise participation and increase supplier diversity; make the tender documentation and procedure as simple and as accessible as possible; and support the six simple steps and Suppliers' Charter.
- Guidance has been produced for SMEs and for specific areas of expenditure including *Catering for Change: Buying food sustainably in the public sector*²².

91. Information to date suggests that 78% of firms winning business through Public Contracts Scotland are SMEs, 60% of which are Scottish. SMEs account for only 37% of Scotland's turnover but 45% (£4bn) of Scotland's £9bn procurement spend. SMEs in Scotland therefore have greater access to procurement spend than their significance in the wider economy would suggest.

92. This puts Scotland in the company of only four EU Member States (Luxembourg, Slovakia, Germany and Ireland) in which, between 2006 and 2008, SMEs had greater access to public procurement above the EU-thresholds than their significance in the wider economy would suggest. The situation is very different for the UK as a whole (the Commission's analysis puts UK 20th on the list of 27 Member States).

93. An evaluation of SMEs' access to public procurement markets in the EU undertaken by GHK²³ for the European Commission in 2010 considered activity in three areas:

- overcoming the limited technical and financial capacities of SMEs (e.g. by encouraging consortia bids or breaking requirements into lots);
- improving the dialogue between SMEs and procurers (e.g. by responding to questions submitted by suppliers on a shared site, providing de-brief information and issuing guidance for suppliers); and

²⁰ <http://www.scotland.gov.uk/Topics/Government/Procurement/policy/SPPNSSPANS/policy-notes/2009sixsteps>

²¹ <http://www.scotland.gov.uk/Topics/Government/Procurement/buyer-information/spdlowlevel/routetwotoolkit/developstrategyroutetwo/profilingthecommodity/sustainability>

²² <http://www.scotland.gov.uk/Publications/2011/01/12154555/0>

²³ http://ec.europa.eu/enterprise/policies/sme/business-environment/files/smes_access_to_public_procurement_final_report_2010_en.pdf

- simplifying the procurement procedure (in particular the requirements for documentation).

94. The work underway to streamline the public sector’s dealings with business and adopt more efficient procurement practices will help improve SME access to public contracts.

95. In addition, recent studies on behalf of the European Commission considered access to the market by SMEs and identified the division of contracts into lots as one of the most important tools.

96. This has led the Commission to propose that Member States should have the ability to specify that public bodies should split contracts over €500,000 into lots unless they have justification to the contrary²⁴.

97. The consultation on the proposed Bill offers a very clear opportunity to consider issues that can be addressed appropriately through national legislation. The following proposals are intended to build on what has been achieved to date. While EU law prohibits discrimination in favour of indigenous companies (i.e. companies who are contributing directly to employment and economic growth in Scotland), making improvements to the public procurement market in Scotland should help locally based companies win more business – by making it easier for them to access contracts and by providing mechanisms by which procurement practice can be more effectively and swiftly adapted in future. We would welcome your views on the proposals set out below.

General duty to consider and act to facilitate access to contract opportunities by newer businesses, SMEs and the Third Sector

98. We would propose that before starting a procurement process, a public body should consider:

- (a) for each and every requirement how the specification of requirements may impact on the ability of newer businesses, SMEs and Third Sector organisations to compete; and
- (b) how, in conducting the procurement process, it might act to facilitate access by newer businesses, SMEs and Third Sector organisations.

99. Placing contracting authorities under a legal duty to consider and act to facilitate newer businesses, SME and Third Sector access as part of their procurement strategy for each and every requirement would help ensure a uniform approach across the public sector in Scotland.

Q9 Should the Bill include a general duty on public bodies to consider for each and every requirement how the specification of requirements may impact on the ability of newer businesses, SMEs and Third Sector organisations to compete?

Yes No Don't know/No view

²⁴ http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/evaluation/index_en.htm

Q10 How, in conducting the procurement process, might public bodies act to facilitate access by newer businesses, SMEs and Third Sector organisations?

Q11 What, in your view, are the potential costs/benefits associated with such a duty?

Q12 How could such a duty be enforced?

Use of a single online portal

100. Public Contracts Scotland was launched in 2008 to:

- stimulate economic growth in Scotland by providing a single point of entry giving suppliers free access to contract opportunities for the Scottish Public Sector; and
- enable the Scottish Public sector to achieve best value for money by exposing the majority of procurement to an open and transparent competitive process.

101. To date, over 62,500 users (mostly businesses) and 465 public bodies have registered on PCS. The introduction of PCS has been warmly welcomed by the supplier community. However, it has not been universally adopted by public bodies and, even in those public bodies that have adopted the service, it is often not used across all parts of the organisation.

102. The UK Government has established an advertising and publication threshold of £10,000 for Central Government contracts and £500 for local government contracts.

103. Existing policy in Scotland is that all contracts of £50,000 and above should be considered for advertising through Public Contracts Scotland. We would welcome your views on whether this threshold is too high or too low and whether a different threshold would be appropriate for works contracts.

104. There are still a significant number of public bodies which have not fully implemented Public Contracts Scotland, especially for low value procurement. And mandating the use of a single online portal for advertising public contracts would ensure that there is a one stop shop for suppliers seeking to do business with the Scottish public sector.

105. The Scottish Government intends to use the Bill to make it a requirement that public bodies use a single online portal to advertise contract opportunities, publish award of all public contracts above a given threshold and other key information relating to contract award procedures and decisions above a given threshold. In this context advertise may include a Request for Quotation from Supplier/s.

Q13 Do you agree that public sector bodies should be required to use a single specified online portal to advertise and award all contracts?

Yes No Don't know/No view

If yes to Q13 –

a) What level do you think the threshold should be set for:

- goods and services contracts
- works contracts.

Mandatory publication of contract documentation

106. There is presently no requirement for public bodies to publish contract documentation proactively, although the Scottish Government publishes details of any individual transactions over £25,000 on its website.

107. Freedom of Information (FOI) legislation allows the public to request information relating to specific contracts. This usually involves the public body and supplier(s) concerned identifying commercially sensitive information and, where appropriate, redacting such information prior to publication.

108. FOI legislation includes exemptions which include trade secrets and information likely to prejudice substantially the commercial interests of any person (including the public body).

109. The process of redacting any information deemed to be commercially sensitive can be time consuming for both the public body and supplier(s) concerned. Most major public bodies have contract registers held on the Scottish Procurement Information Hub (the Hub). Access to these is currently limited to those with a log-in to the Hub (around 500 individuals). The contract registers contain details of:

- The contract start date
- The contract end date
- The title of the contract
- The value of the contract
- Suppliers that are included in the contract

Q14 Should the Bill place a duty on public bodies to publish contract documentation?

Yes No Don't know/No view

Q15 What do you see as the advantages/disadvantages to requiring that public bodies publish contract documentation?

Q16 What are the resource implications for buyers/suppliers if commercially sensitive information had to be removed from every contract prior to publication?

Q17 Could a requirement to publish contract documentation²⁵ inhibit competition by deterring suppliers from bidding for public contracts, and subsequently have a detrimental effect on the value for money achieved on behalf of taxpayers?
Yes No Don't know/No view

Q18 Would the publication of contract registers by public bodies be a better alternative to publishing full contract documentation?
Yes No Don't know/No view

Q19 Would publication of contract documentation lead to greater transparency in the procurement process?
Yes No Don't know/No view

Q20 Would publication of contract documentation improve value for money by ensuring that public bodies took greater care to ensure that contracts are of a high standard?
Yes No Don't know/No view

Sub-contracting opportunities

110. Community benefits in public procurement are referred to in further detail later in this document. Access to sub-contracting opportunities is one of the defined Community Benefits²⁶.

111. We are looking at ways to increase transparency within supply chains for major contracts and capital infrastructure programmes across Scotland. There is no single place where businesses can access sub-contracting opportunities related to public contracts.

112. The advertising of sub-contract opportunities on Public Contracts Scotland has been piloted with the Forth Crossing Bridge Constructors' consortium with positive results (over £20 million worth of sub-contracts now awarded to 118 Scottish firms, and with 134 further sub-contracts on the project currently being advertised there is likely to be significant further benefit during the five-year construction process). Public Contracts Scotland has been developed to allow the publication by prime contractors to the public sector of sub-contracting opportunities.

²⁵ The documentation between the public body and the supplier that form the contract

²⁶ <http://www.scotland.gov.uk/Topics/Government/Procurement/policy/procurecombenefits>

113. The Bill provides an opportunity to consider making it a requirement to advertise sub-contract opportunities connected with all major public contracts on Public Contracts Scotland, thereby ensuring all businesses have access to information on opportunities within major public sector contracts.

Defining a “major contract”

114. We need to define what a “major contract” is. While there are a number of options, the simplest approach would appear to be that the contract is one which is a public contract as defined by the EU procurement Directives and has an estimated value that matches or exceeds the threshold applicable to public works contracts as defined by the EU public procurement Directive (currently £4.3m)²⁷.

<p>Q21 Should all “major contracts” be defined as one which is a public contract as defined by the EU procurement Directives and has a total estimated value over the contract duration that matches or exceeds the threshold applicable to public works contracts as defined by the EU public procurement Directive (currently £4.3m)?</p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/No view <input type="checkbox"/></p>
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115. Placing a requirement on primary suppliers and the supply chain, to advertise sub-contract opportunities in relation to major public sector contracts would:

- provide businesses with free access to sub-contract opportunities;
- provide suppliers with easy access to information on potential sub-contractors, particularly in relation to local supply chains;
- encourage competition which will ensure value for money, while at the same time supporting economic growth;
- encourage an open, inclusive and transparent market place

<p>Q22 Should the Bill place a duty on those in receipt of major contracts to advertise sub-contract opportunities on a single specified online portal?</p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/No view <input type="checkbox"/></p> <p>If yes to Q22 –</p> <p>a) Should the duty extend to all contractors through the supply chain to do the same?</p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/No view <input type="checkbox"/></p>
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<p>Q23 Are there other ways in which the Bill could achieve the desired policy objective (making it easier for SMEs and Third Sector organisations to access and compete effectively for contracts)?</p>

<p>Q24 How could any new arrangements outlined in Part II be fully enforced?</p>

²⁷ <http://www.scotland.gov.uk/Topics/Government/Procurement/policy/10613>

Q25 Please use this space to give reasons for your responses or if you have any further comments on the proposals in Part II. Please also use this space to give your thoughts on any definitions or potential impacts you would like us to consider in relation to this part of the Bill.

PART III: SMARTER USE OF PUBLIC PROCUREMENT TO ENCOURAGE INNOVATION AND GROWTH

116. While the reform of public procurement in Scotland has increased awareness of procurement innovation, it is a commonly held perception that the value of innovation in procurement as an enabler of sustainable economic growth is yet to be fully utilised. Ultimately, we want to see tenders which harness the creativity of suppliers to deliver services more efficiently, leading to social and environmental benefits and to financial savings.

117. By creating new markets, and enhancing existing markets, for sustainable products and services, public procurement can play a critical role in attracting investment in new infrastructure and the creation of new supply chains for sustainable products and services.

118. One example would be refurbished IT and telecommunication equipment. If the public sector was committed to purchasing a fixed proportion of refurbished IT and telecommunication equipment, it would help stimulate expansion of existing, or investment in new, sophisticated refurbishment, facilities to supply the new demand for these products in Scotland, creating new jobs and growth of an important manufacturing base. For the public sector, such investment would help create a stable supply chain of low carbon and resource efficient goods.

119. To ensure that high quality refurbished products are available, both in quantity and in high quality, potential suppliers need considerable advance warning of a definite shift in requirements. Creating a stable policy landscape and a clear future demand for new and more sustainable goods and services is key to securing investment in facilities to support these demands.

120. To help Scotland realise the potential economic and environmental benefits of these procurement driven market investments, we propose to amend the Climate Change (Scotland) Act 2009 to introduce an enabling provision allowing the Scottish Ministers to specify in regulations the procurement of certain quantities of reused and refurbished goods, as well as goods with high levels of recyclability. This would complement the existing power in Section 82 of the Climate Change (Scotland) Act 2009 that allows the Scottish Ministers to specify, through regulations a requirement: to ensure that things procured or constructed by or on behalf of such persons – (a) comprise of; or (b) include or contain a certain proportion of recyclate. Complementing the power in this way would be in line with the waste hierarchy which prioritises reuse and refurbishment over recycling.

121. The Scottish Government recognises the importance of providing a practicable lead-in time for introducing any new statute in this area. A full impact analysis would be undertaken, including a market and supply chain analysis, prior to the introduction of any regulations. Furthermore, this approach would be undertaken

in concert with wider work to support investment opportunities in Scotland in material reprocessing facilities, and reuse, refurbishment and remanufacturing facilities.

Q26 How could the Bill help businesses develop and commercialise new or novel goods, services and works for internal and international markets?

Q27 Do you support our proposals to stimulate new businesses opportunities and inward investment in facilities to provide new, sustainable products and services for the public sector?

Yes No Don't know/No view

122. EU procurement procedures allow procurement specialists to specify whether variant bids will be considered. A variant bid in this context is an alternative way of meeting the purchaser's requirements. The European Directives allow public bodies to decide, on a case by case basis, whether they will accept variant bids and require them to specify this in the contract notice.

123. One measure that could be included in the Bill to help promote innovation in procurement is a statutory requirement that purchasers must permit the submission of variant bids.

Q28 Should the Procurement Reform Bill make it a requirement that purchasers must permit the submission of variant bids?

Yes No Don't know/No view

Q29 How could any new arrangements outlined in Part III be fully enforced?

Q30 Please use this space to give reasons for your responses or if you have any further comments on the proposals in Part III. Please also use this space to give your thoughts on any definitions or potential impacts you would like us to consider in relation to this part of the Bill.

PART IV: TAKING ACCOUNT OF SOCIAL AND ENVIRONMENTAL SUSTAINABILITY ISSUES THROUGH PUBLIC PROCUREMENT

124. The actions of the public sector have a huge impact on society, the economy and the environment and in no area is this more obvious than how we spend public funds. Procurement is a key means of delivering the Scottish Government's priorities and underpins the achievement of the social, economic and environmental benefits that sustainable economic growth demands.²⁸ At the end of this section, we provide an opportunity for respondents to give their views on a proposed overarching duty on public bodies to act in a way that promotes social, economic and environmental well-being through procurement activity and to be able to evidence this behaviour.

²⁸ Quote from the Scottish Sustainable Procurement Action Plan

125. As a major consumer in the economy the public sector can, through its procurement policy, exert a significant influence on economic development. While preserving competition and transparency, procurement may be used in a way to steer the market in a more environmentally and socially responsible direction and thus contribute more generally to sustainable development. Benefits include:

- Promoting training and employment opportunities, often for under-represented groups, for example for youth employment, women's employment, long-term unemployed and people with disabilities
- Promoting SMEs and Third Sector organisations through observance of existing duties of equal treatment, proportionality and transparency and by making subcontracting opportunities more visible
- Promoting compliance with social and labour law, including related national and international policy commitments/agendas
- Stimulating socially conscious markets
- Stimulating demand for environmentally-friendly goods, services and works
- Demonstrating socially responsive governance
- Promoting fair and ethical trading
- Contributing to health improvement priorities including the reduction of diet-related disease
- Contributing to climate change mitigation targets and to energy efficiency
- Stimulating social integration
- Ensuring more effective and efficient public expenditure

126. Another area where procurement can exert an influence is in our buildings. The design and orientation of buildings, the control of the construction process and the way in which buildings are used all offer opportunities to improve the sustainable performance of developments.

127. For example, the highest environmental assessment rating for a UK office building was achieved in 2006 by a Scottish Government Non Departmental Public Body (NDPB).

Design: In a sensitive rural setting, the NDPB's building responds to climatic, visual, ecological and environmental factors. Located on a south-east facing slope to maximise advantages in terms of wind shelter and natural heating, the building was designed to allow natural ventilation to control its air quality and temperature.

Construction: Since an existing building on the site could not be converted for the required new purpose, its roofing slates were re-used as cladding; floor boarding as finishing joinery; and cladding and masonry crushed to form aggregate. The Building Research Environment Green Guide was used to inform the specification and attain its 'A' rating.

Usage: The building is designed with an emphasis upon long-term functionality and efficiency. It is for the most part naturally lit. Solar collectors contribute 62% of hot water needs and rainwater is recycled. Links were created to local transport networks, the frequency of buses was increased and a new cycle path provided.

Using major public contracts to promote jobs and training opportunities through community benefit in procurement clauses

128. Increasing the public sector's direct contribution to the economy through better use of procurement in order to promote jobs and growth is a key action which will help drive sustainable economic growth and develop a more resilient and adaptable economy.

129. Policy and guidance on training and employment opportunities in public procurement has been in place since February 2008²⁹. This has evolved to recognise the opportunities that may be afforded through working with suppliers and related supply chains.

130. Community Benefits policy has been delivered by championing best practice across the public sector through a range of workshops and development of an informal network of "Community Benefit champions". More recently the policy delivery has been supported by:

- Publication of supplementary guidance that links community benefits in procurement to the Scottish Government's National Performance Framework³⁰
- Construction Skills who have developed complementary guidance for the Scottish market and have offered to support public bodies to implement this policy in their construction contracts
- The Scottish Government "Opening Markets" contract supports public bodies in developing Community Benefit clauses in non-construction contracts.

131. We know that a number of public bodies record targets and achievements relating to this policy including contracts relating to the Glasgow 2014 Commonwealth Games, Southern General Hospital in Glasgow, Forth Road Crossing and Scottish Futures Trust HubCo projects. To build on this, there are plans to identify Community Benefits in contract notices published on the Public Contracts Scotland portal. This should encourage inclusion of these clauses in relevant contracts. It should also encourage public bodies to provide reasons why some higher value contracts are not considered suitable for the inclusion of community benefit clauses (for example, the contract is of very short duration or perhaps a spot purchase of goods).

132. The effects of the recession have impacted disproportionately on certain groups and communities. In particular, young people were amongst the first to experience deterioration in labour market conditions, there are also currently impacts for women and disabled people. Our disadvantaged communities are finding it more difficult to access funding and resources to help them become sustainable.

133. The *Government Economic Strategy* sets out our commitment to improving the labour market opportunities for all in Scotland - to tackle unemployment, skills gaps and lack of opportunity. In addition, *Achieving a Sustainable Future, Our*

²⁹ <http://www.scotland.gov.uk/Publications/2008/02/13140629/0>

³⁰ <http://www.scotland.gov.uk/Resource/Doc/116601/0124887.pdf>

Regeneration Strategy, sets out our approach to support our most disadvantaged communities to become sustainable and promote well-being. Public procurement has a contribution to make to both of these through:

- Asking every company in receipt of a major government contract to produce a training and apprenticeship plan as part of our wider action on skills;
- Encouraging a broad consideration of sustainability in contracting, for example by using community benefit clauses to provide training opportunities for local people, or by reserving contracts for supported businesses.

134. To ensure that public procurement spending supports the creation of new training and employment opportunities, we propose to make it a requirement that those awarding major contracts must consider including community benefits clauses and publish, with the contract notice, a statement of their approach to delivering these benefits through the contract **or** the reason why the contract is not considered suitable for inclusion of community benefit clauses.

<p>Q31 Should those awarding major contracts³¹ be required to consider including community benefits clauses?</p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/No view <input type="checkbox"/></p> <p>If yes to Q31 –</p> <p>a) Should those awarding major contracts be required to publish details of the benefits those clauses are intended to deliver and the outcomes or a statement explaining why the contract is not considered suitable for the inclusion of community benefit clauses?</p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/No view <input type="checkbox"/></p> <p>b) Should those awarding major contracts be required to consult communities regarding Community Benefits they would wish to see delivered?</p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/No view <input type="checkbox"/></p> <p>c) Should those awarding major contracts be required to consider extending community benefit clauses to sub-contractors?</p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/No view <input type="checkbox"/></p>
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<p>Q32 Should those in receipt of major contracts be required to publish training and apprenticeship plans for those contracts?</p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/No view <input type="checkbox"/></p>
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Assisting supported businesses

135. Supported businesses play a key role in delivering training and employment for disabled people. EU procurement law permits public bodies to restrict participation in a competitive tendering exercise to only those suppliers who meet the

³¹ A question on defining a “major contract” features earlier in the document.

definition of a supported business – this is sometimes referred to as a “reserved contract”.

136. In addition, it is Scottish Government policy that every public body should aim to have at least one contract with a supported factory or business. Guidance has been provided via the *Scottish Sustainable Procurement Action Plan*³²; the *Sustainable Procurement Delivery Plan*³³ and the *Social Issues in Public Procurement*³⁴ documents.

137. At a time when other sources of public support for supported businesses are being reduced or withdrawn, it is vitally important that supported businesses are able to access public procurement markets.

138. We believe it is important to take this opportunity to consider whether we use provisions in the Procurement Reform Bill to promote greater use of supported businesses by the public sector. For example, we could place a legal requirement that public bodies nominate a “Champion” for supported business – to act as a focal point for enquiries and liaison.

Q33 Should we use the Procurement Reform Bill to promote greater use of supported businesses by the public sector?

Yes No Don't know/No view

If yes to Q33 –

a) how can we ensure that public bodies consider use of supported businesses as part of their approach to procurement?

b) Should we make it a statutory requirement that public bodies have at least one current contract with a supported business?

Yes No Don't know/No view

Q34 Should we use the Bill to place a legal requirement that public bodies nominate a “Champion” for supported business to act as a focal point for enquiries and liaison?

Yes No Don't know/No view

Maximising benefits of environmental opportunities

139. The public sector is already subject to challenging environmental legislation in the form of carbon reduction targets under the Climate Change (Scotland) Act 2009 and forthcoming requirements to separate waste for recycling in the Waste (Scotland) Regulations 2012.

³² <http://www.scotland.gov.uk/Topics/Government/Procurement/policy/corporate-responsibility/sspap>

³³ <http://www.scotland.gov.uk/Topics/Government/Procurement/policy/corporate-responsibility/procurementdelplan>

³⁴ <http://www.scotland.gov.uk/Resource/Doc/116601/0053331.pdf>

140. There is provision under the Climate Change (Scotland) Act 2009 to make it a requirement for public bodies to report their environmental performance, however this is not currently in force. Guidance published by the Scottish Government encourages all public bodies to voluntarily report their performance by adapting their existing environmental reporting regimes to incorporate reporting against the new climate change duties. All of Scotland's local authorities have signed up to the voluntary Scottish Climate Change Declaration, which commits signatories to take action to reduce emissions and adapt to climate change, and all 32 authorities have published reports on actions taken covering the period 2010-11.

141. Further guidance published in January 2012, and targeted at all central government bodies in Scotland, encourages Scottish Public bodies to publish an annual "sustainability report" comprising a table of financial and non-financial information covering the organisation's emissions, waste, water and any other finite-resource consumption for the financial year to which it relates³⁵.

142. Our Zero Waste Plan (2010) sets out our strategic approach to waste and material resources. The key focus is to view what could be waste as the valuable resource it really is. The Waste (Scotland) Regulations 2012 set specific requirements for key recyclable materials to be collected for recycling and not landfilled. And to unlock even greater economic and environmental benefits, we plan to consult on a programme of measures to reduce waste and use materials more efficiently in the first place.

- There is synergy between the Zero Waste Plan and the proposed Procurement Reform Bill. Both are about unlocking economic opportunity for Scotland and making more efficient use of resources.
- The Zero Waste Plan recognises the potential to save money, create jobs, and grow Scotland's recycling and reprocessing industry and that many Scottish businesses are already adopting "zero waste" measures to give them a competitive edge. It is estimated that by taking simple steps to reduce waste and use materials more efficiently, Scottish businesses could save up to £2 billion per year. Reducing waste also saves on disposal costs and is best for the environment.

143. Existing legislation permits inclusion of environmental factors in public procurement and we promote minimum environmental standards/performance characteristics of goods and services through the following existing policy and tools:

Scottish Sustainable Procurement Action Plan (SSPAP) – was launched by John Swinney MSP, Cabinet Secretary for Finance and Sustainable Growth at the Scottish Government's 5th National Procurement Conference on 28th October 2009. The plan has been endorsed by the Public Procurement Reform Board.

³⁵ <http://www.scotland.gov.uk/Topics/Government/sustainabilityperformance>

Flexible Framework – The SSPAP recommends that organisations carry out initial and periodic self-assessments against the Flexible Framework and public bodies are currently working to this.

Training in the Marrakech Approach – The Scottish Government, along with other public bodies, has piloted and rolled-out an approach to sustainable procurement known as the Marrakech approach. This is a risk and opportunity-based methodology that enables public bodies to identify priority categories of spend for their organisation and secure sustainable outcomes through the procurement process for these categories.

It specifically builds in use of Community Benefit clauses and of environmental criteria including DEFRA’s Government Buying Standards and EU Green Public Procurement (GPP) criteria. It explains the concept of the “Waste Hierarchy”, demonstrating how organisations can use the procurement process to minimise waste. The Marrakech Approach aligns with the Scottish Sustainable Procurement Action Plan and advocates the use of the Flexible Framework to enable organisations to self-assess their progress towards good procurement in the form of sustainable procurement.

Procurement Capability Assessment (PCA) – organisations that participate in the PCA Programme are currently assessed on sustainable procurement using the following four questions:

- Can the organisation demonstrate clear leadership and commitment from Senior Management towards sustainable procurement?
- Do contracts demonstrate strong management of sustainability responsibility in the supply chain? Has the exposure to risk been analysed?
- To what extent does the organisation take account of its sustainability in its procurement activity? For example evidence of clear sustainable targets and community benefit deliverables.
- To what extent does the organisation monitor its progress towards demonstrating sustainable procurement practices and processes?

Procurement Journey – this refers to sustainable procurement including guidance and tools like the sustainability test and whole life costing methodology for public bodies to access and use.

144. We are proposing to use the Bill to place a general duty on public sector bodies to demonstrate the extent to which what is being procured will promote or improve the economic, social and environmental well-being of the relevant area³⁶. For example, by demonstrating that steps have been taken to use energy and materials efficiently, and to minimise waste. And in conducting the process of procurement, public sector bodies should act with a view to securing that improvement.

³⁶ “relevant area” in this context is determined by the policy interest/s of the public body, the subject matter and professional procurement judgement.

145. Based on the precedent of the Climate Change (Scotland) Act 2009, these general duties would be supplemented by statutory guidance from the Scottish Ministers on the discharge of these duties. Such guidance, proportionate to the public sector bodies concerned, could deal with issues such as the procurement of services rather than goods to reduce resource use; procurement of re-used or refurbished goods; use of clauses requiring efficient use of energy and materials and minimisation of waste; and demonstration of the application of the Marrakech approach described above.

Q35 Should public sector bodies be placed under a general duty which requires them to demonstrate the extent to which what is being procured will promote or improve the economic, social, health and environmental well-being of the relevant area?

Yes No Don't know/No view

If yes to Q35 –

a) In conducting the process of procurement, should public sector bodies act with a view to securing that improvement?

Yes No Don't know/No view

b) What are the key issues that should be set out in the guidance?

Q36 How could any new arrangements outlined in Part IV be fully enforced?

Q37 Please use this space to give reasons for your responses or if you have any further comments on the proposals in Part IV. Please also use this space to give your thoughts on any definitions or potential impacts you would like us to consider in relation to this part of the Bill.

PART V: DEALING WITH INAPPROPRIATE CONDUCT AND POOR PERFORMING SUPPLIERS

146. High quality public procurement is not only dependent on good practice by purchasers, suppliers to the public sector need to play their part by delivering high quality, cost effective goods works and services, and by maintaining the highest possible business ethics and standards. Businesses and the public rightly expect that only reputable persons should be awarded public contracts.

147. Against this background we propose to use the Bill to introduce provisions which will allow the Scottish Government and public sector bodies in Scotland to deal with poor performance, both in relation to the delivery of contracts and business standards and conduct, by excluding companies from competition for public contracts in Scotland for a designated period where they have:

- failed to perform a contract satisfactorily;
- failed to meet acceptable standards of business conduct; and
- failed to pay tax or national insurance contributions.

148. In this context, unacceptable standards of business conduct would include:
- suspected links to organised crime (where there is evidence to suggest that the person or company may have associations with organised crime);
 - anti-competitive practice;
 - overcharging under a contract (where there is evidence to suggest that the company has exploited its position as an incumbent supplier to make excess profits from a public body); and
 - any convictions that the person/company or any of its employees/directors may receive for relevant offences in Scotland or elsewhere (including breaches of employment, environmental, health and safety and equalities law).

Q38 Should the Bill include measures to ensure that the public sector deals appropriately with poor performance and poor standards of business ethics on the part of contractors?

Yes No Don't know/No view

Q39 Should contractors that fail to adhere to appropriate standards of conduct, performance and business ethics be excluded from competing for public contracts

Yes No Don't know/No view

If yes to Q39 –

a) What should that form of exclusion be?

Q40 How could any new arrangements outlined in Part V be fully enforced?

Q41 Please use this space to give reasons for your responses or if you have any further comments on the proposals in Part V. Please also use this space to give your thoughts on any definitions or potential impacts you would like us to consider in relation to this part of the Bill.

PART VI: APPLICATION AND COMPLIANCE

149. We need to consider the coverage of the Procurement Reform Bill in relation to the types of contract and categories of public body to which general provisions will apply. We also need to ensure that it provides appropriate measures to promote compliance with its provisions. Measures to promote compliance must be effective, while avoiding unnecessary costs and risks for all those concerned.

150. Defining what is and is not a public contract or a public body in a way that does not create anomalies or unintended consequences can be a surprisingly complex task. This issue has already been addressed in the EU Procurement Directives.

151. Rather than attempt to redefine in the Bill what a public contract or a public body is, we would propose to adopt the same approach as in the EU Directive and implementing Scottish Regulations, with the exception that we intend to include specific provisions in the Bill to deal with an anomaly that has arisen in the context of the EU Directive, regarding some forms of non-commercial contractual relationships (e.g. on shared services).

Q42 Should the Bill adopt the same approach to defining public contracts as in the EU Directive and implementing Scottish Regulations?

Yes No Don't know/No view

If yes to Q42 –

a) what should our approach be to local exemptions?

Q43 Should we include specific provisions which explicitly exclude from coverage, contracts between public bodies which are non-commercial (e.g. those that are in pursuit of shared service initiatives)?

Yes No Don't know/No view

Procurement of health and social services

152. The procurement of health and social services is governed by the Public Contracts (Scotland) Regulations 2012, although the full requirements of the Regulations do not apply. Further detail on the application of the rules to contracts for health and social services is provided in guidance produced by the Scottish Government³⁷.

153. This guidance was developed in recognition that the procurement of health and social services requires special consideration because of the significant impact it has on the quality of life, health and well-being of service users and carers.

³⁷ <http://www.scotland.gov.uk/Resource/Doc/324602/0104497.pdf>

154. As explained in paragraphs 33 to 39, the European Commission has published its proposal for a revised Public Procurement Directive. The Commission's legislative proposal makes special provision for the procurement of health and social services.

155. The Commission has acknowledged that health and social services are of limited cross-border interest and should, as a result, be subject to specific and much simpler rules. Under the Commission's proposal, the procurement of health and social services would be subject to a higher threshold of €500,000 and the requirements imposed by the Directive would be limited to publication of a contract notice and contract award notice.

156. Member States would remain free to determine any procedural rules applicable to procurements above €500,000; they would have to make provision for public bodies to be able to take into account the need to ensure:

- quality, continuity, accessibility, availability and comprehensiveness of the services;
- the specific needs of different categories of service users;
- the involvement and empowerment of service users; and
- innovation.

157. Member States would have the option of specifying that contract award decisions could not be based solely on "lowest price".

158. The Commission's proposal is currently subject to negotiation and we will not be able to provide confirmation of the rules applying to health and social services until the negotiations are complete and a final text has been adopted. Where the final text includes options for Member States, we will consult stakeholders as part of our work on new Scottish Procurement Regulations which will transpose the new Directive into Scots law.

159. We are also keen to seek stakeholders' views on whether the Bill should make special provision for the procurement of health and social services. We would welcome feedback in response to the following questions.

Q44 Should all of the proposals discussed in this consultation paper apply to the procurement of health and social services?

Yes No Don't know/No view

If no to Q44 –

- a) From which of the proposals should the procurement of health and social services be exempt and why?
- b) Should the Bill include additional provisions which apply only to the procurement of health and social services?

If yes to Q44 –

- c) What should be included in the Bill to deliver its proposed aims in the context of health and social care procurement?

Utility activities conducted by Private Sector bodies

160. EU public procurement law also applies to a separate category of bodies, known as “utility entities” which are active in certain fields, e.g. the operation of certain types of transport. Bodies classed as “utility entities” are a mixture of public and Private Sector. The effect of the EU utilities rules is to allow public bodies that are engaged in utility activities to apply a more liberal procurement regime than if they were subject to the public sector directive.

161. The rationale for this is that while activities covered by the Utilities Directive are not regarded as subject to full competition and are not, therefore, subject to commercial pressures in the normal sense, they may be regarded as quasi-commercial (so contracts connected with these activities do not need to be subject to the same EU law regime).

162. In light of this, we do not intend the Bill to apply to Private Sector bodies engaged in utility activities, but need to decide whether contracts awarded by public bodies in connection with utility activities should be subject to the full provisions of the Procurement Reform Bill, a more limited regime or should be exempt.

<p>Q45 Should the Bill apply to utility activities conducted by Private Sector bodies? Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know/No view <input type="checkbox"/></p>
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<p>Q46 Should the Procurement Reform Bill apply in full or in part to contracts awarded by public bodies in furtherance of utility activities as defined in Directive 2004/17/EC, given effect in Scotland by the Utilities Contracts (Scotland) Regulations 2012?</p>

Compliance

163. We need to ensure that the Procurement Reform Bill is effective in changing procurement practice while avoiding unnecessary additional costs and risks. If the Bill is to be effective it will need to include measures designed to promote compliance with its provisions.

164. EU procurement law is the subject of a specific remedies regime. Remedies for non-compliance with EU law are enforceable in the Court of Session and Sheriff Courts. They can include damages, fines and a ruling that contract is ineffective, depending on the category of breach and its seriousness.

165. Most EU countries that have legislation on procurement practice not covered by the EU Procurement Directive simply apply the same remedies regime to compliance with their national law. The effectiveness of the EU remedies regime is critically dependent on businesses being prepared to challenge procurement practice as it is based on the granting of rights to potential contractors to bring legal proceedings.

166. Extending the EU Remedies regime to the provisions of the Procurement Reform Bill would be one possibility, however that approach is unlikely to be effective in relation to many of the Bill's provisions, especially those relating to social and environmental issues. This is because there may be little incentive for businesses to challenge compliance with those provisions in the Courts.

167. In this context, it should be noted that very few cases currently come before the Courts in relation to compliance with EU procurement law. That would also suggest that the EU remedies system is unlikely to be effective for lower value contracts. This is because the existing EU remedies are potentially costly and require the complainant to demonstrate that they have suffered, or risk suffering, loss or damage.

168. For example, it is hard to see how a company could demonstrate this in the event that a public body chose to ignore any requirements in the Procurement Reform Bill in relation to the inclusion of community benefits clauses.

169. There are clearly a great many options in relation to compliance, but there are few that would meet the test of being effective in promoting compliance, while avoiding creating new and unnecessary costs, risks and burdens.

170. The Scottish Government is anxious to promote alternative means of dispute resolution, including arbitration and mediation, where appropriate. We will wish to consider how these can play a helpful role in relation to sustainable procurement practice.

Q47 How could any new arrangements be fully enforced?

Q48 What sanctions might be appropriate for failure to comply?

Q49 Should the Single Point of Enquiry have a role in relation to enforcement of the provisions of the Bill?

Yes No Don't know/No view

If yes to Q49 –

a) Should it do so on the basis of statutory powers?

Yes No Don't know/No view

Q50 Please use this space to give reasons for your responses or if you have any further comments on the proposals in Part VI. Please also use this space to give your thoughts on any definitions or potential impacts you would like us to consider in relation to this part of the Bill.

HOW TO COMMENT

The Scottish Government would like to hear your views on the suggested proposals that we believe could help us deliver the aim of this Bill.

It would be helpful to have your response by email. Email responses should be sent to procurementbillconsultation@scotland.gsi.gov.uk.

We are of course happy to receive written submissions too.

Written submissions:

Procurement Reform Bill Team,
Area 3D North,
Victoria Quay,
Edinburgh EH6 6QQ.

We would be grateful if you would use the consultation questionnaire provided or would clearly indicate in your response which questions or parts of the consultation paper you are responding to, as this will aid our analysis of the responses received.

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at: www.scotland.gov.uk/consultations

You can telephone Freephone 0800 77 1234 to find out where your nearest public internet access point is.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public.

Please complete and return the Respondent Information Form which forms part of the separate consultation questionnaire as this will ensure that we treat your response appropriately.

If you ask for your response not to be published we will regard it as confidential and treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps

If you tell us we can make your response public, we will put it in the Scottish Government Library and on the Scottish Government consultation web pages. We will check all responses where agreement to publish has been given for any wording that might be harmful to others before putting them in the library or on the website.

If you would like to see the responses please contact the Scottish Government Library on 0131 244 4565. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next?

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us reach a decision about the finalised Procurement Reform Bill. We will issue a report on this consultation process which will be published on the Scottish Government website at:

www.scotland.gov.uk/Publications/Recent

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to:

Scottish Procurement and Commercial Directorate,
Procurement Reform Bill Team,
Area 3D North,
Victoria Quay,
Edinburgh EH6 6QQ.

ANNEX A

LIVING WAGE THROUGH PROCUREMENT

This is not a proposal for legislation. We are using the consultation on the Procurement Reform Bill as an opportunity to consult also on matters concerning the living wage through procurement.

1. The Scottish Government is a living wage employer and supports the living wage campaign as one of the measures to address poverty in Scotland. In 2011, the Scottish Government introduced the requirement for all employers subject to its public sector pay policy to pay the Scottish living wage, which is currently set at £7.20 an hour³⁸.
2. There have been calls for the Scottish Government to support the use of public procurement processes to promote payment of the living wage by suppliers to the public sector in Scotland.
3. We are keen to seek stakeholders' views and to fully understand the potential impacts of using procurement activity as a mechanism for delivering the living wage.
4. Suppliers to the public sector are required to comply with any statutory duty relating to employment, including minimum wage legislation. However, case law of the Court of Justice of the European Union suggests that imposing additional requirements as a requirement of a public procurement process or public contract may represent a restriction on suppliers' freedom to provide services guaranteed by Article 56 of the Treaty on the Functioning of the European Union.
5. In response to a request for clarification from the Scottish Government, the European Commission has recently confirmed that any **requirement** on contractors to pay their employees a living wage set higher than the UK's National Minimum Wage is unlikely to be compatible with the Treaty. In practice, this means that public bodies cannot address living wage in the award criteria for a public contract or the contract performance clauses. **It is therefore not possible to use the Bill to mandate payment of the living wage through procurement activity.**
6. If public bodies wish to **encourage** contractors to pay their employees a living wage through procurement processes, this is still possible. However, they cannot treat suppliers who say that they will pay employees engaged in the delivery of the contract a living wage any more favourably than those suppliers that say that they will not; public bodies also have no means of enforcing payment of a living wage.
7. Promoting payment of the living wage through procurement activity may lead to an increase in the number of private and voluntary sector employees engaged in the delivery of public contracts who receive the living wage. It may also contribute to wider promotion of the living wage throughout the private and voluntary sectors.

³⁸ The National Minimum Wage is currently set at £6.08 an hour for workers over 21 years of age.

ANNEX A

8. It would not, however, alter the fact that individual employers are responsible for determining wage structures (provided they comply with the National Minimum Wage Act 1998); it is for them to consider the impact on their competitiveness and to decide if payment of the living wage is sustainable within their organisations.

9. We would be grateful for stakeholders' views on the practicalities and potential impacts of promoting payment of the living wage through procurement activity.

Q51 Should procurement activity be used to encourage contractors to pay the living wage to their employees engaged in the delivery of public sector contracts?

Yes

No

Don't know/No view

If yes to Q51 –

- a) To what extent, in what form and at what stage should contractors be encouraged through procurement processes to pay a living wage?
- b) Would it be appropriate to promote payment of the living wage in all public contracts or only contracts of a certain type or of a certain value?
- c) What are the potential benefits and costs associated with promoting payment of the living wage through procurement activity?
- d) What are the implications for private and voluntary sector suppliers, public bodies and the market?
- e) How can public bodies determine the wider social and economic implications of promoting payment of the living wage in a particular procurement process?

ANNEX B

Summary of changes to the rules in the European Commission's legislative proposals

The changes to the rules proposed by the Commission are wide-ranging and include:

- shorter deadlines for submitting expressions of interest and tenders, reducing the length of the procurement process;
- self-declarations by suppliers at the selection stage, with only the successful bidder required to submit supporting documentation;
- greater flexibility in relation to the sequence of the selection and award stages;
- ability to take account of the expertise and experience of staff assigned to performing the contract as an award criterion;
- ability to refer to all factors directly linked to the production process in the technical specification and in the award criteria;
- ability to exclude suppliers whose performance in delivering previous contracts has been deficient;
- ability to accept suppliers if they have taken appropriate steps to rectify behaviour which would otherwise result in their exclusion;
- provision for the modification of contracts;
- introduction of “life-cycle costing” as the basis for award decisions;
- ability to require specific labels certifying environmental, social or other characteristics (or equivalent labels);
- division of contracts above €500,000 into lots, supported by a requirement to provide reasons if this is not done;
- turnover requirements limited to three times the estimated contract value, except in duly justified cases;
- potential for Member States to provide that subcontractors to the main contractor may request direct payment by the contracting authority;
- removal of the current distinction between Part A and Part B services;
- removal of current restrictions on the use of the negotiated procedure;
- a new procedure to encourage innovation – innovation partnership;

ANNEX B

- a lighter regime for contracting authorities other than central government;
- extension to the ability to reserve contracts to include organisations whose main aim is the “social and professional integration of disabled and disadvantaged workers”, where such workers make up more than 30% of the employees;
- rules governing arrangements between public bodies for the delivery of shared services;
- a specific regime for health and social services, with a higher threshold of €500,000, the ability to take into account all criteria deemed necessary in relation to quality and continuity of services and the potential for Member States to specify that award decisions cannot be based on “lowest price”;
- improvements to the mechanism for exemption provided for in Article 30 of Directive 2004/17/EC and clarification of the definition of special and exclusive rights; and
- a new regime for works and services concessions above €5,000,000.

ANNEX C

Procurement Reform Bill Consultation

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

Title Mr Ms Mrs Miss Dr Please tick as appropriate

Surname

Forename

2. Postal Address

Postcode	Phone	Email

3. Type of respondent

Please tick appropriate box

- 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

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If other please specify

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 website)?

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 website).

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**

ANNEX D

CONSULTATION QUESTIONNAIRE

AIM OF THE BILL

Q1. Do you agree with the proposed aim of the Bill?

Yes

No

Don't know/No view

– If you do not agree with the proposed aim, why not?

PART I: PUBLIC PROCUREMENT PROCESSES ARE TRANSPARENT, STREAMLINED, PROPORTIONATE, STANDARDISED AND BUSINESS-FRIENDLY

Q2. Should we place upon public sector bodies a general duty to conduct procurement in an effective, transparent and proportionate manner?

Yes

No

Don't know/No view

If yes to Q2 –

a) To support this general duty and other requirements being proposed for public bodies, would it be appropriate for public bodies to be required to publish annual strategic procurement plans?

Yes

No

Don't know/No view

Q3. Should public sector bodies be required to use a specified standard pre-qualification system?

Yes

No

Don't know/No view

Q4. Should the Bill be used to require public bodies to observe limits on minimum standards?

Yes

No

Don't know/No view

If yes to Q4 –

a) Should the annual turnover requirement be limited to no more than three times the annual contract value?

Yes

No

Don't know/No view

Q5. Should the Bill require public bodies to provide de-brief information to suppliers which bid for public contracts in Scotland in situations not covered by the 2012 regulations?

Yes

No

Don't know/No view

If yes to Q5 –

a) In what circumstances should public bodies be required to provide de-brief information – to all suppliers which bid or only to suppliers which submit a written request for such information?

ANNEX D

b) Should any requirement apply only to contracts of a certain value, for example contracts above £50k?

Yes No Don't know/No view

c) What de-brief information should public bodies provide to suppliers? Should suppliers be given an option to receive information in writing or face to face?

d) What timescales should apply?

e) Should exemptions apply?

Yes No Don't know/No view

– If yes, what exemptions should apply?

f) What are the potential costs/benefits?

g) Should there be separate limits for construction?

Yes No Don't know/No view

– If yes, what limits should apply?

Q6. Should the Bill prohibit charges being levied for the issue of tender documents to tenderers?

Yes No Don't know/No view

ANNEX D

Q7. How could any new arrangements outlined in Part I be fully enforced?

Q8. Please use this space to give reasons for your responses or if you have any further comments on the proposals in Part I. Please also use this space to give your thoughts on any definitions or potential impacts you would like us to consider in relation to this part of the Bill.

PART II: Making it easier for business, particularly newer businesses, SMEs and Third Sector organisations, to access public contract opportunities and sub-contracting requirements

Q9. Should the Bill include a general duty on public bodies to consider, for each and every requirement, how the specification of requirements may impact on the ability of newer businesses, SMEs and Third Sector organisations to compete?

Yes

No

Don't know/No view

Q10. How, in conducting the procurement process, might public bodies act to facilitate access by newer businesses, SMEs and Third Sector organisations?

Q11. What in your view are the potential costs/benefits associated with such a duty?

Q12. How could such a duty be enforced?

Q13. Do you agree that public sector bodies should be required to use a single specified online portal to advertise and award all contracts?

Yes

No

Don't know/No view

ANNEX D

If yes to Q13 –

- a) What level do you think the threshold should be set for:
- goods and services contracts
 - works contracts.

Q14. Should the Bill place a duty on public bodies to publish contract documentation?

Yes No Don't know/No view

Q15. What do you see as the advantages/disadvantages to requiring that public bodies publish contract documentation?

Q16. What are the resource implications for buyers/suppliers if commercially sensitive information had to be removed from every contract prior to publication?

Q17. Could a requirement to publish contract documentation³⁹ inhibit competition by deterring suppliers from bidding for public contracts, and subsequently have a detrimental effect on the value for money achieved on behalf of taxpayers?

Yes No Don't know/No view

Q18. Would the publication of contract registers by public bodies be a better alternative to publishing full contract documentation?

Yes No Don't know/No view

Q19. Would publication of contract documentation lead to greater transparency in the procurement process?

Yes No Don't know/No view

Q20. Would publication of contract documentation improve value for money by ensuring that public bodies took greater care to ensure that contracts are of a high standard?

Yes No Don't know/No view

³⁹ The documentation between the public body and the supplier that form the contract

ANNEX D

Q21. Should all “major contracts” be defined as one which is a public contract as defined by the EU procurement Directives and has a total estimated value over the contract duration that matches or exceeds the threshold applicable to public works contracts as defined by the EU public procurement Directive (currently £4.3m)?

Yes

No

Don't know/No view

Q22. Should the Bill place a duty on those in receipt of major contracts to advertise sub-contract opportunities on a single specified online portal?

Yes

No

Don't know/No view

If yes to Q22 –

a) Should the duty extend to all contractors through the supply chain to do the same?

Yes

No

Don't know/No view

Q23. Are there other ways in which the Bill could achieve the desired policy objective (making it easier for SMEs and Third Sector organisations to access and compete effectively for contracts)?

Q24. How could any new arrangements outlined in Part II be fully enforced?

Q25. Please use this space to give reasons for your responses or if you have any further comments on the proposals in Part II. Please also use this space to give your thoughts on any definitions or potential impacts you would like us to consider in relation to this part of the Bill.

PART III: SMARTER USE OF PUBLIC PROCUREMENT TO ENCOURAGE INNOVATION AND GROWTH

Q26. How could the Bill help businesses develop and commercialise new or novel goods, services and works for internal and international markets?

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Q27. Do you support our proposals to stimulate new businesses opportunities and inward investment in facilities to provide new, sustainable products and services for the public sector?

Yes No Don't know/No view

Q28. Should the Procurement Reform Bill make it a requirement that purchasers must permit the submission of variant bids?

Yes No Don't know/No view

Q29. How could any new arrangements outlined in Part III be fully enforced?

Q30. Please use this space to give reasons for your responses or if you have any further comments on the proposals in Part III. Please also use this space to give your thoughts on any definitions or potential impacts you would like us to consider in relation to this part of the Bill.

PART IV: TAKING ACCOUNT OF SOCIAL AND ENVIRONMENTAL SUSTAINABILITY ISSUES THROUGH PUBLIC PROCUREMENT

Q31. Should those awarding major contracts⁴⁰ be required to consider including community benefits clauses?

Yes No Don't know/No view

If yes to Q31 –

a) Should those awarding major contracts be required to publish details of the benefits those clauses are intended to deliver and the outcomes or a statement explaining why the contract is not considered suitable for the inclusion of community benefit clauses?

Yes No Don't know/No view

b) Should those awarding major contracts be required to consult communities regarding Community Benefits they would wish to see delivered?

Yes No Don't know/No view

c) Should those awarding major contracts be required to consider extending community benefit clauses to sub-contractors?

Yes No Don't know/No view

⁴⁰ A question on defining a “major contract” features earlier in the document.

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Q32. Should those in receipt of major contracts be required to publish training and apprenticeship plans for those contracts?

Yes No Don't know/No view

Q33. Should we use the Procurement Reform Bill to promote greater use of supported businesses by the public sector?

Yes No Don't know/No view

If yes to Q33 –

a) How can we ensure that public bodies consider use of supported businesses as part of their approach to procurement?

b) Should we make it a statutory requirement that public bodies have at least one current contract with a supported business?

Yes No Don't know/No view

Q34. Should we use the Bill to place a legal requirement that public bodies nominate a “Champion” for supported business to act as a focal point for enquiries and liaison?

Yes No Don't know/No view

Q35. Should public sector bodies be placed under a general duty which requires them to demonstrate the extent to which what is being procured will promote or improve the economic, social, health and environmental well-being of the relevant area?

Yes No Don't know/No view

If yes to Q35 –

a) In conducting the process of procurement, should public sector bodies act with a view to securing that improvement?

Yes No Don't know/No view

b) What are the key issues that should be set out in the guidance?

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Q36. How could any new arrangements outlined in Part IV be fully enforced?

Q37. Please use this space to give reasons for your responses or if you have any further comments on the proposals in Part IV. Please also use this space to give your thoughts on any definitions or potential impacts you would like us to consider in relation to this part of the Bill.

PART V: DEALING WITH INAPPROPRIATE CONDUCT AND POOR PERFORMING SUPPLIERS

Q38. Should the Bill include measures to ensure that the public sector deals appropriately with poor performance and poor standards of business ethics on the part of contractors?

Yes

No

Don't know/No view

Q39. Should contractors that fail to adhere to appropriate standards of conduct, performance and business ethics be excluded from competing for public contracts?

Yes

No

Don't know/No view

If yes to Q39–

a) What should that form of exclusion be?

Q40. How could any new arrangements outlined in Part V be fully enforced?

Q41. Please use this space to give reasons for your responses or if you have any further comments on the proposals contained in Part V. Please also use this space to give your thoughts on any definitions or potential impacts you would like us to consider in relation to this part of the Bill.

ANNEX D

PART VI: APPLICATION AND COMPLIANCE

Q42. Should the Bill adopt the same approach to defining public contracts as in the EU Directive and implementing Scottish Regulations?

Yes No Don't know/No view

If yes to Q42 –

a) What should our approach be to local exemptions?

Q43. Should we include specific provisions which explicitly exclude from coverage, contracts between public bodies which are non-commercial? (e.g. those that are in pursuit of shared service initiatives.)

Yes No Don't know/No view

Q44. Should all of the proposals discussed in this consultation paper apply to the procurement of health and social services?

Yes No Don't know/No view

If no to Q44 –

a) From which of the proposals should the procurement of health and social services be exempt and why?

b) Should the Bill include additional provisions which apply only to the procurement of health and social services?

If yes to Q44 –

c) What should be included in the Bill to deliver its proposed aims in the context of health and social care procurement?

Q45. Should the Bill apply to utility activities conducted by Private Sector bodies?

Yes No Don't know/No view

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Q46. Should the Procurement Reform Bill apply in full or in part to contracts awarded by public bodies in furtherance of utility activities as defined in Directive 2004/17/EC, given effect in Scotland by the Utilities Contracts (Scotland) Regulations 2012?

Q47. How could any new arrangements be fully enforced?

Q48. What sanctions might be appropriate for failure to comply?

Q49. Should the Single Point of Enquiry have a role in relation to enforcement of the provisions of the Bill?

Yes No Don't know/No view

If yes to Q49 –

a) Should it do so on the basis of statutory powers?

Yes No Don't know/No view

Q50. Please use this space to give reasons for your responses or if you have any further comments on the proposals in Part VI. Please also use this space to give your thoughts on any definitions or potential impacts you would like us to consider in relation to this part of the Bill.

ANNEX D

Living Wage through procurement

Q51. Should procurement activity be used to encourage contractors to pay the living wage to their employees engaged in the delivery of public sector contracts?

Yes

No

Don't know/No view

If yes to Q51 –

- a) To what extent, in what form and at what stage should contractors be encouraged through procurement processes to pay a living wage?

- b) Would it be appropriate to promote payment of the living wage in all public contracts or only contracts of a certain type or of a certain value?

- c) What are the potential benefits and costs associated with promoting payment of the living wage through procurement activity?

- d) What are the implications for private and voluntary sector suppliers, public bodies and the market?

- e) How can public bodies determine the wider social and economic implications of promoting payment of the living wage in a particular procurement process?

ANNEX E

GLOSSARY

Term (A – Z)	Definition
Business	Includes all sizes of organisations that may want to compete for public sector contracts/or even sub contracts, including but not limited SMEs and Third Sector organisations.
Commissioning	Commissioning is the term used for all the activities involved in assessing and forecasting needs. It links investment to agreed desired outcomes, considering options, planning the nature, range and quality of future services and working in partnership to put these in place.
Delegated Purchasing Authority (DPA)	Is the authority given to an individual to place contracts and or orders. It is not to be confused with Delegated Finance Authority as it is important that there is adequate separation of duties between the individual who has finance authority i.e. the budget holder and the individual with purchasing authority i.e. who places the contract.
Flexible Framework	Is a self assessment tool which enables measurement against various aspects of sustainable procurement. The tool will help organisations to assess where their current level of performance lies and the actions required to improve their performance.
Pre Qualification Questionnaires (PQQ)	The Public Contracts (Scotland) Regulations 2012 set out in regulations 23-29 the criteria public bodies must use when selecting suppliers to bid for contracts. In practice the selection of tenderers by public bodies is usually carried out by the use of pre-qualification questionnaires, which reflect the criteria set out in the regulations to varying degrees.
Procurement Capability Assessment (PCA)	Assists organisations to improve their structure, capability, processes and ultimately performance, by attaining the best standards that are appropriate to the scale and complexity of their business. The PCA assesses capability in key areas against common criteria and standards which will allow public bodies, locally, at sector level and nationally, to identify where best practice already exists, where there are gaps and where continuous improvements and efficiencies can be implemented.
Procurement Competency Framework	Is a people and skills tool to support the delivery of the recommendations in the Review of Public Procurement in Scotland (2006). The framework identifies the skills and competency levels required by all staff involved in the procurement process and assists individuals to take ownership of their personal development through skills assessment, identification of training and development needs and career planning. It is well-structured, easy to follow and

ANNEX E

Term (A – Z)	Definition
	readily transferable across the public sector in Scotland.
Procurement Journey	Is intended to support all levels of procurement activities and to help manage the expectations of stakeholders, customers and suppliers alike. It facilitates best practice and consistency across the public sector. The processes, templates and guides allow procurement professionals to concentrate on the higher value, higher risk areas in which they can add value and deliver value for money for the public purse. There are also simplified processes, templates and guidance to support individuals with authority to procure lower value, lower risk procurements. This provides one source of documentation nationally which can be updated on a continual basis with any changes in legislation, policy and promotion of best practice.
Procurement Specialist	Buyer/Purchaser/and may cover commissioner if appropriately experienced/qualified and have Delegated Purchasing Authority.
Public Contracts Scotland (PCS)	A portal that enables transparent and standardised access to public sector contracting opportunities in Scotland.
Scottish Sustainable Procurement Action Plan (SSPAP)	An action plan to assist the public sector to build sustainable procurement into their corporate culture, take proper account of sustainability in procurement activity and to be able to demonstrate how this is being achieved.
Single Point of Enquiry (SPoE)	An independent, impartial and confidential service for suppliers to the public sector in Scotland. It helps Suppliers by offering advice on the procurement rules which must be followed by public bodies in Scotland and information on how contracts are advertised and awarded.
Small Medium Enterprise (SME)	The category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding 50 million euro, and/or an annual balance sheet total not exceeding 43 million euro. Source: <i>Extract of Article 2 of the Annex of Recommendation 2003/361/EC</i>
Standard Pre-Qualification Questionnaire (SPQQ)	Is a tool within Public Contracts Scotland that provides a single pre-qualification database in Scotland that would allow tenderers to submit answers to standard pre-qualification questions once and re-use these answers in future procurement exercises.
Suppliers	Includes providers/contractors, business directly delivering a public sector contract.

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Suppliers Charter	Is a joint statement between public sector procurement and business to facilitate access to public sector procurement opportunities.
Supplier Journey	Explains the process of awarding a public sector contract in straightforward terms and sets out what procurement specialists expect businesses/suppliers to do at each stage in that process. It gives practical information on how a business/supplier can find out about business opportunities, how to bid for business, and what to expect when delivering the contract. It also tells the business/supplier what support is available to help them win business, and what they can do if they are unsuccessful.
Sustainable Procurement	A process whereby organisations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life basis and generates benefits not only to the organisation, but also to society, the economy and the environment.
Sustainable Procurement Delivery Plan (SPDP)	This is a living document that can be used by public bodies to implement the Scottish Sustainable Procurement Action Plan. It reflects Scottish Government priorities, demonstrating the broad reach of sustainable procurement across social, economic and environmental issues including equalities diversity and fair and ethical trading.



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