

## Annex B – Respondent Information Form



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

### RESPONDENT INFORMATION FORM

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

#### 1. Name/Organisation

##### Organisation Name

Scottish Enterprise

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

##### Surname

Martin

##### Forename

Philip

#### 2. Postal Address

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Glasgow

**Postcode** G2 6HQ

**Phone** 0141 228 2233

##### Email

philip.martin@scotent.co.uk

#### 3. Type of Respondent

**Please tick as appropriate**

Executive Agencies and NDPBs

Local authority

NHS

Other statutory organisation

Representative body for private sector organisations

Representative body for third sector/equality organisations

Representative body for community organisations

Representative body for professionals

Private sector organisation

Third sector/equality organisation

Community group

Academic

Individual

#### 4. Permissions - I am responding as...

**Individual** / **Group/Organisation**

Please tick as appropriate

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

Please tick as appropriate

Yes  No

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

Please tick **ONE** of the following boxes

Yes, make my response, name and address all available

or

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

or

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

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

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

Please tick as appropriate

Yes  No

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

Please tick as appropriate

Yes

No

## Questions

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

We agree with the suggested content from the Act and think that having a procurement strategy will help with senior buy in.

What is being suggested by consultation – internally within an organisation or wider? We feel it is more relevant to internal stakeholders who understand the organisation where proportionate and appropriate to do so.

It is important to have a consistent approval process and access to organisations strategies.

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

Focus on the content of the Act and build guidance to support this. This should tie in with the AR and reduce duplication. The focus should be on outputs. To allow proportionality the Flexible Framework tool should not become statutory.

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

We think that the £4m figure stated in the Act is appropriate and should not be reduced.

Stakeholder engagement to define an appropriate community benefit could be too much of a requirement. This should happen where appropriate and proportionate.

Guidance on what to include in the contract notice and contract award notice would be welcomed.

Flexibility should be included within the list of circumstances where community benefits would not be relevant or proportionate to allow amendments to be made to interpret ongoing open environments.

We agree that reporting should be carried out on expected and achieved benefits. A simple, clear format and process is required to allow consistent reporting across the public sector. Guidance on definitions required.

Guidance is also required around calling off from existing frameworks such

as CCS frameworks – is it possible to include community benefits or not?

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

Agree  Disagree

This will protect the organisation (risk and reputation).

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

Yes  No

Yes

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

Yes  No

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

This is quite vague and needs to be much more precise. A definition is required for disadvantaged minorities or otherwise socially marginalised groups.

This wording may further marginalise communities by labelling / the language used, or could appear patronising.

We suggest the definition could be for those with disabilities and long term unemployed.

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

Advantages  Disadvantages

We are not sure that this is less of an issue in Scotland. SG policy supports this (establishment of Co-operative Development Scotland) and would help to address social issues. Guidance should be provided on circumstances where these could be reserved and organisations that it applies to. It

should not, in our view, include other public sector organisations as this could be used to avoid competition. Use of this could be the exception rather than the rule where approval is granted where backed by good justification.

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

Yes  No

Agree although options should be allowed rather than prescribing.

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

Yes  No

We would prefer to have flexibility and allow substitutions where appropriate and necessary. A list of exceptions could be provided as guidance. The current system is working so why change this?

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

Agree  Disagree

It is occasionally appropriate to award contracts based on lowest cost / lowest price. The proposal to change this would take away flexibility where the current system seems to work well and is used appropriately.

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

Agree  Disagree

Retain discretion.

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

We believe that this information should be required from first tier suppliers. Systems would need to be developed to support this first. Implementation

by 2017 or other time to allow public sector to get geared up for this. This could be applicable over a certain level and be proportionate.

Suppliers would state expectations through the tender process and they would monitor and report. This would not be a scored section of the tender process but would help to inform proportion of spend with Scottish Companies, proportion of spend with SME's etc and would form part of the contract.

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

Disagree. It would be more efficient to collect this information from the main contractor and should happen as part of the contract management process.

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

Agree  Disagree

It should remain applicable to over OJEU threshold procurements but allow flexibility to apply to under threshold if organisation think appropriate and proportionate.

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

Agree X Disagree

This would require an increased amount of resources to operate in this manner which organisations may not have. We agree as long as flexibility remains and all parties agree to it.

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

- The use of turnover as a selection criterion?

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

Please explain your answer.

Yes  No

Agree with both questions. Conflict of interest should be scored and allowed to exclude if the organisation can't demonstrate that it could manage it properly.

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

Agree  Disagree

Agree that flexibility should remain with public bodies.

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

Yes  No

Yes for consistency

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

Yes  No

In principle we agree but would like clarification on the definition for senior position? The person must be accountable and have authority. Guidance required on how to treat spent convictions. How would we monitor convictions? Will we have access and ability to check convictions?

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

Yes  No

Retain discretion. We do not see how this would be legally enforceable if not in statute as it has not been demonstrated that any offence has been committed.

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

Yes  No

Agree, discretion should be allowed.

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

Yes  No

What is meant by breached obligations? Yes, if legally proven as above.

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

Yes  No

We don't believe that the public sector should deal with companies that are in administration. There are other mechanisms to support companies in administration rather than using public procurement.

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

Yes  No

Yes, as per our Q23 answer.

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

Yes  No

What are the circumstances? Please provide further examples. Question not clear enough to answer. If allowing this would Ministerial approval be required?

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

Yes  No

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

Yes  No

Yes if evidence based. Significant failure to perform could be subjective. Need to be certain how this would be used. Should it be related to the same scope of contract only? Guidance required on circumstances & period of when the exclusion might apply.

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

Yes  No

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

Agree  Disagree

Agree

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

Yes  No

Agree

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

Yes  No

No, the main contractor should be responsible for this.

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

Provide guidance and allow flexibility for contracting authorities.

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

Agree  Disagree

We would not want to impose an additional burden of legislation on commissions unnecessarily.

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

Agree  Disagree

Agree. In particular social services are very much reliant on the qualitative aspects so should not to be awarded on price or cost alone.

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

Comments

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

Agree  Disagree

Agree to allow flexibility and reduce tendering timescales where appropriate although we feel that the current timescales are short enough already so care needs to be taken if using this route. Suppliers will price for risk.

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

Agree  Disagree

Generally disagree as it would add another layer of complexity and not add any value to lower value pieces of procurement. If included it should be an option to use and not mandatory.

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

Agree  Disagree

Agree

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

Agree  Disagree

Agree

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

Agree  Disagree

Allows flexibility.

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

Yes  No

Allow flexibility.

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

Yes X No

Yes

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

Agree X Disagree

Agree

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

Agree X Disagree

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

Agree X Disagree

Agree for longer term.

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

Agree X Disagree

Agree, allow as much time as possible to prepare.

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

Agree X Disagree

Yes but by the longest time possible to implement electronic means as per Q46.

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

Yes X No

Public bodies should be able to decide at their discretion.

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

Agree X Disagree

Yes, we should allow time to prepare and implement.

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

Agree X Disagree

Agree. This will allow time for a process to be implemented on how to store documents etc

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

Agree X Disagree

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

Agree X Disagree

Agree, no reason why it should be treated differently.

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

Yes  No

Yes.

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

Yes  No

Agree where this would be an appropriate solution to use a dynamic purchasing system.

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

Agree  Disagree

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

Agree  Disagree

Agree.

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

Agree  Disagree

Agree.

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

Agree  Disagree

Conflict of interest should be a separate body.

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

Agree  Disagree

Comments

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

Yes X No

Agree there is a need for a review body which sits beneath the national courts.

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

Yes  No X

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

Yes X No

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

We agree within this as a way forward and believe that transparency is already well established in processes.