

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

Social Firms Scotland

Title Mr Ms Mrs Miss Dr Please tick as appropriate

Surname

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2. Postal Address

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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.

General statement on the Statutory Guidance.

We recognise the importance of clear and robust Statutory Guidance in ensuring the provisions of the Act and new Directives are effectively implemented and complied with. We would urge Scottish Government to allow sufficient time and resource to develop the Guidance documentation and where practically possible continue to engage key stakeholders from the buyer and supplier communities to inform this process, building on existing and new tools to encourage continuity and good practice.

Statement on procurement strategies and reporting

In order to achieve the objectives sought within the Procurement Reform (Scotland) Act 2014, the Statutory Guidance in relation to Organisational Procurement Strategy should:

- Be bold but also clear in terms of fleshing out the detail of the sustainability and community wellbeing objectives it is seeking to achieve, providing a comprehensive narrative / explanation in terms of, ultimately, achievement of national performance indicators.
- Be clear in respect of each of the areas in which a public body is to set out its approach / general policy what the legal position is where the procurement is covered by the European regime (under Directive 2014/24). (SPPN/1/2015 on Living Wage is an example of a level of detail that is helpful in this regard)
- Be clear on the extent to which there are options to 'go further' for regulated procurements in terms of approach / general policy to the matters covered by Regulation 15 where the contract has a value beneath the European thresholds.
- Be clear as to the additional support / tools available to contracting authorities (e.g. the tools currently under Beta Testing or otherwise) that can be used to inform their proposed approaches / general policy.
- Be clear on the various different ways in which engagement with third sector entities can be considered under Directive 2014/24 (for above threshold procurement – (e.g. subject to policy decisions to be taken, by way of sheltered workshops, public service missions, raised thresholds on social care contracts etc).
- Relevant to regulated contracts beneath the European thresholds, it would

be useful to give careful consideration in the guidance to the extent to which the obligation to comply with "equal treatment and transparency" might preclude flexibility in the way in which contracting authorities currently engage successfully with the third sector, for example via quick quote processes or otherwise, so as to have a potentially negative impact on the involvement of third sector organisations in delivering public contracts.

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

Sustainable Procurement Duty

The Guidance should contain a full explanation of the parameters of the sustainable procurement duty, including a clear explanation of what the duty means in practical terms (with reference for example, to the Climate Change (Scotland) Act 2009 obligation). Clear delineation of duties for above EU threshold procurements and below EU threshold procurements should be made.

Guidance should reflect clearly the components of the Sustainable Procurement Duty and flexible ways in which to achieve best outcomes across the components contained in the duty - **Improve** social, environmental wellbeing of the areas, **Involve** SMEs and social enterprises and third sector, **Promote** Innovation. Clearly set out in the statutory guidance the importance of procurement strategies and reporting on performance against the sustainability considerations as the main way that commissioning authorities will be held to account on duties imposed.

It will also be important to align such outcomes with national performance framework and SOAs for example as key reference points.

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

The Statutory Guidance on Community Benefits in Procurement should:

1. Be bold but also clear in terms of fleshing out the detail of the community benefit objectives that can be achieved, providing a comprehensive narrative / explanation in terms of, ultimately, achievement of national performance indicators.
2. Be clear what the legal position is where the procurement is covered by the European regime (under Directive 2014/24). There is much documentation on this

from numerous sources.

3. Be clear on the extent to which there are options to 'go further' for regulated procurements in terms of approach / general policy to the matters covered by Regulation 15 where the contract has a value beneath the European thresholds.

4. Be clear as to the additional support / tools available to contracting authorities (be they the tools currently under 'Beta Testing' or otherwise) that can be used to inform their proposed approaches / general policy.

5. Draw upon the significant bank of practical examples that have developed over the past few years. The [Ready For Business](#) Programme and Community Benefits Champions Network ought to be in a position to provide such a bank.

6. Be sensitive to the potentially detrimental impacts that overly onerous or complex Community Benefit requirements could have, in certain sectors and certain contract values, on successful participation of the Third Sector / SMEs.

7. Against the current threshold noted in the Act, we would comment that it would be useful for the Guidance to recognise that Community Benefit Clauses can be used successfully on lower value contracts. Indeed, practice across Scotland is well established at lower values. Differing approaches have emerged in this area and an aim of the guidance should be to harmonise current approaches to ensure that Community Benefit Clauses are being used to maximise impact against Procurement Strategies rather than on an ad-hoc basis.

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

A pragmatic approach should be taken and where a contractor is found to be in breach of environmental, employment and social laws the public authority reserves the right to end contracts with such a contractor.

By way of additional comment, we suspect that most authorities include the equivalent of a 'comply with all laws' clause. Is this simply what is proposed? Certainly, there would be a lengthening of all contracts that would be less welcome to the third sector/SMEs if provisions were to narrate what is set out in Annex A.

We would note an issue of sub-contractors found to be in breach of the obligation.

The Directive states that "*Member States and contracting authorities take relevant measures to ensure compliance with obligations in the fields of environmental, social and labour law*". We would propose that it is perhaps too strict to end contracts with contractors whose supply chain is found to be in breach of the obligation to adhere to environmental, employment and social laws. Of course contractors should ensure that sub-contractors are adhering to this requirement however arguably this may be difficult to police and is not wholly in the control of the contractor and the other sub-contractors in the supply chain. We propose that ending a contract abruptly due to the failure on the part of a contractor or other sub-contractor's breach may adversely affect another sub-contractor in the supply-chain. These are often SME's / third sector organisations who would find it difficult to replace work lost in this manner.

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

Yes No

Scottish Government's Economic Strategy (and Programme for Government) has a strong emphasis on tackling inequalities and supports a Scotland that is socially just. Indeed much of Scottish Government policy supports measures to give people who are recognised as disabled or disadvantaged, the opportunity to enter the labour market. So it follows that public funds should be spent in a way that supports this objective wherever practical.

Since 2006 public sector procurement Directive – under Article 19 – gave contracting authorities the option to reserve contracts for organisations providing supported employment opportunities to disabled people so that only supported businesses could bid for the work (provided they met the criteria set down in the Article). However, the use of these provisions within Scotland to date has been cautionary although the Public Procurement Reform Programme has improved processes, practices and awareness of their use. Indeed the Govt's framework for supported businesses although welcome has not had the desired impact that we might have sought.

There still remains a lack of clarity (amongst some buyers) about the legalities of using reserved contracts and a lack of awareness of how to do so.

Social Firms Scotland strongly welcomes the changes to this directive under Article 20 which seeks to broaden the scope of the reserved contract regime. Whilst we understand it is an optional policy for Member States, assuming it is retained (given Scottish Govt's strong support for supported businesses and social firms), we've got 2 things consider:

- the percentage change (from 50% down to 30% disadvantaged workforce);
- the definition change (from 'disabled' to 'disadvantaged' workers).

SFS would suggest that the Govt is very clear on how they are defining 'disadvantaged' so that buyers in the public sector understand and the sector itself knows who /what is 'in scope' re new reserved contracts regime. From a third sector perspective, 'disadvantaged' may open up significant opportunities for social firms/ work integration social enterprises beyond the traditional supported business sector. In terms of Social Firms, disadvantaged categories tend to be described as including: individuals with a *disability; mental health issue, offenders/ex-offenders (or those at risk of offending); substance abuse; homelessness; young people in NEET category.*

SFS does not agree that 'disadvantaged' in this context should include unemployed; single parents or anything further than that listed above.

Guidance

The easy headline for the guidance should be: "we've always had the ability to do this, we've still got it and it's just been made easier - use it!" We particularly note that the guidance should be articulated so that it *specifically* includes social firms. Social firms are businesses which are set up in the open market to employ and increase the employability of those who have barriers to the labour market through disability/disadvantage as per the definition above. Existing tools and levers should also be enhanced to reflect availability and benefits of using this provision e.g.

- the procurement journey;
- Tools & techniques – flexible framework & prioritization (bolt it on);
- Procurement capability assessments;
- Ministerial letter to all public authorities encouraging use;
- Tie into guidance on developing procurement strategies;
- Update 'supported business' brochure to include Social Firms /work integration social enterprises that meet the new threshold and definition.

Aligned to the above, Scottish Government should consider how funding/finance and incentives including and beyond procurement opportunities might fundamentally improve the volume of employment opportunities for disabled people and others with significant barriers to employment - supported through social firms and work integration social enterprises e.g. through a 'wage subsidy' initiative beyond that available via DWP's Work Choice programme which has proved to be limited. This would serve to create additional opportunities for individuals with additional support needs and compensate social firms and work integration social enterprises for the higher costs associated with supporting these individuals to gain and retain paid employment.

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?

SFS would suggest that the Govt is very clear on how they are defining 'disadvantaged' so that buyers in the public sector understand and the sector itself knows who /what is 'in scope' re new reserved contracts regime. From a third sector perspective, 'disadvantaged' may open up significant opportunities for social firms/ work integration social enterprises beyond the traditional supported business sector. In terms of Social Firms, disadvantaged categories refer to: *disability; mental health, offenders/ex-offenders (or those at risk of offending); substance abuse; homelessness; young people in NEET category.*

SFS does not agree that 'disadvantaged' in this context should include unemployed; single parents or anything further than that listed above. Social Firms across the EU generally accept the categories above as the primary ones where people require additional support to enter the labour market.

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 observe that there may well be, on the face of it, advantages to having the flexibility of reserving contracts for mutual and other non-public sector bodies in Scotland as such reservation is potentially useful in the context of service reconfiguration / restructuring. However, the wording associated with this Article is loose and ambiguous.

We are concerned that the wording and by virtue implications of this article will not reserve contracts specifically for co-operatives or social enterprises, but may allow private sector organisations to adapt their own characteristics to suit the contracting criteria. An additional concern is that public bodies might 'float off' a number of service areas under an ALEO structure that fits the criteria of 'public service mission' or would lead to hybrid business models that are not true to the principles and values of the social enterprise model. The additional wording adds to this concern, allowing a range of private sector organisations to engage in the bidding process without a genuine embedded commitment to social enterprise or co-operative principles.

Furthermore, there is no clarity as to how the requirement of profit distribution or reinvestment, and participatory management, ownership and principles might be

defined, effected or policed. We don't think that this can "just happen", as the nature of social enterprise is embedded in the constitution and principles of an organisation, not an optional extra depending on the contracts criteria or business opportunity available. We think the ambiguities inherent in this article might fail to benefit genuine social enterprises, whilst pitting them against commercial enterprises, essentially privatizing public services (especially after the time limited contract period of 3 years).

As an alternative, SFS would favour exploring the new EU procedure re 'Innovation Partnership' which could offer opportunities across service areas in particular for commission authorities to seek a deeper, longer engagement with suppliers who could potentially enhance service outcomes and innovative approaches. This could be along the lines of the [Public Social Partnership](#) model already operational in Scotland.

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

Yes No

We would prefer an approach under which processes for "regulated contracts" below the European Threshold are kept as simple as possible so as to maximise the ability of the third sector and SME's to participate and the ability/flexibility of contracting authorities to let such contracts in a way that minimises process time and cost.

In any event, if there is a general duty not to "discriminate", this ought to be sufficient in terms of regulating mis-use of labelling in processes for the new regulated tier of contracts.

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 an approach under which processes for "regulated contracts" below the European Threshold are kept as simple as possible so as to maximise the ability of the third sector and SME's to participate and the ability/flexibility of contracting authorities to let such contracts in a way that minimises process time and cost

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

From a third sector perspective, social enterprises can often provide best possible value for money as their offering considers both economic impact and social value. Social enterprises' work, particularly in providing services, improves social and public welfare and this can often be overlooked when evaluating on cost alone.

For the above reasons, we would welcome a very strong emphasis on contracts **not** being evaluated on a price only basis. Indeed we would argue that this works against the '**Scottish model**' of procurement which seeks to maximise VfM through the best balance of cost, sustainability and quality issues. So Rebalancing the focus on **social environmental and community benefits** (as well as **savings & efficiencies**) presents the best possible opportunity to **drive up quality, improve outcomes and increase innovation** from procurement spend.

However, we are aware that for some commodity/supply contracts, it can be appropriate to award based on MEAT principles (with, for example, fair trade, environmental etc conditions dealt with by contract conditions without separate qualitative award criteria).

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

We strongly agree that splitting requirements into lots is beneficial to bidders and to the contracting authority.

By splitting up large contracts not only does this ensure more organisations are potentially able to participate (i.e. smaller organisations that would otherwise not have the capacity to bid for a large contract) but it ensures that the best organisations are providing the work for the best value for the parts of the contract they are best suited to provide.

It is important that this division is promoted and encouraged where possible and that buyers provide sound reasons for aggregation where lotting could provide a broader market response/mix.

We recognise that in some instances it may be appropriate for larger contracts to be awarded where there is a sound rationale for doing so however we see much more potential for requirements to be split into smaller lots to encourage greater access /participation from SMEs and third sector organisations. This would result

in a mixed supplier base with smaller organisations able to submit tenders based on their capacity, experience and specialisms.

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?

Whilst generally we support all measures that have the potential to increase involvement of third sector organisations and SMEs in public procurements, we would wish to avoid contractors being mandated to specify sub-contractors. In some instances this could be viewed as administratively burdensome on the part of the contractor. In any event, the rules on PQQ assessment / contract modification will apply to supply chains put forward.

We imagine that targeted Procurement Strategies for some contracting authorities may place particular emphasis on SME/third sector engagement. Indeed, using the tools currently under beta testing it is possible that some authorities will target SME/third sector engagement on particular sectors / contract size. If so, such authorities may well exercise their discretion to request additional information regarding supply chain for the purposes of monitoring the outcomes of their chosen strategy.

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?

SFS agrees with the proposition to retain this obligation with the public bodies.

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

Agree Disagree

We agree on the basis that we prefer an approach under which processes for "regulated contracts" below the European Threshold are kept as simple as possible so as to maximise the ability of the third sector and SME's to participate and the ability/flexibility of contracting authorities to let such contracts in a way that minimises process time and cost.

Q15 We believe that similar payment terms for sub-contractors, as for main contractors, is a good thing and there are some measures underway, or in place, to address this. We

also believe that direct payments to sub-contractors could be complicated and could mean public bodies assuming some responsibilities that should arguably remain with the main contractor. In light of this, we believe that public bodies should be able to make direct payments to sub-contractors only where the contract allows this to happen and parties agree. Do you agree or disagree?

Agree Disagree

Again a pragmatic approach is proposed and we agree with that.

We agree that similar payment terms for sub-contractors is a positive step however we do not believe this treatment should be reserved for a select few contracts. Any delay in payment to small businesses / third sector organisations can cause serious issues /cash flow challenges and as the economic downturn proved many sub-contractors were put out of business due to slow payment / or indeed no payment from the main contractor. We note the approach under the Public Contracts Regulations 2015 of 30 day payment terms for sub-contractors and would welcome an approach which ensured at least the same. We would welcome strong reference to this commitment in public bodies' procurement strategies and reports around performance in this area.

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

We prefer an approach under which processes for "regulated contracts" below the European Threshold are kept as simple as possible so as to maximise the ability of the third sector and SME's to participate and the ability/flexibility of contracting authorities to let such contracts in a way that minimises process time and cost.

We would wish to avoid a scenario in which contracting authorities simply "run all regulated contract competitions" on the same basis as EU competitions.

In short, for regulated contracts, there should be discretion as to whether the

above are used as selection criteria but if they are to be used, it would make sense to adopt the same approach as for above threshold contracts.

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

We prefer an approach under which processes for "regulated contracts" below the European Threshold are kept as simple as possible so as to maximise the ability of social enterprises and SME's to participate and the ability/flexibility of contracting authorities to let such contracts in a way that minimises process time and cost. In particular, for a below threshold regulated contracts, it may be that with evolving forms of third sector funding / financing, it may be useful to permit innovative approaches whereby a funder may "guarantee" a small third sector organisation's performance in the context of the growth.

This flexibility might apply through the new procedure around 'Innovation Partnerships' which could encourage access by large & smaller, specialist providers, encourage innovation in service design and delivery that could support the public bodies strategy, upstream and sustainability considerations. We would strongly encourage this procedure on the basis of Scottish Government's support and experience around Public Social Partnership model.

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

It would seem sensible to draw this down to below EU threshold regulated contracts.

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

See above

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

As detailed in the consultation, the power to disqualify a bidder for tax evasion should be a proportionate one. Where public authorities can use this power proportionately we agree that the power should remain with the public authority to assess and to decide whether a contractor should be excluded from a procurement process.

We would reiterate our caution about selection for below EU threshold regulated contracts being treated as the same as that for above threshold regulated contracts.

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

Pragmatic approach proposed. Public body would need to be open to scrutiny regarding their decision.

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

See 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

Risks and issues associated with this discretion needs further exploration.

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

Yes No

We prefer an approach under which processes for "regulated contracts" below the European Threshold are kept as simple as possible so as to maximise the ability of the third sector and SME's to participate and the ability/flexibility of contracting authorities to let such contracts in a way that minimises process time and cost.

We would wish to avoid a scenario in which contracting authorities simply "run all regulated contract competitions" on the same basis as EU competitions as the administrative cost of bidding could increase (against what it currently is) for, say, a £56,000 service contract were that the case.

We also note that the selection stage (as a separate stage) has been removed under the Public Contracts Regulations 2015, ostensibly to simplify processes through removing additional burden. We do not see this as a panacea without issue though as it will likely mean additional resource (and time) is required to assess tenders within contracting authorities.

In short, for regulated contracts, there should be discretion as to whether the above are used as selection criteria but if they are to be used, it would make sense to adopt the same approach as for above above threshold contracts.

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

We would seek clarification /examples that might be 'deemed to be exceptional circumstances'?

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

Yes No

Comments

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

Decision/discretion to exclude or not needs to be open to scrutiny if questioned.

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

Yes No

Comments

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

Agree Disagree

It is understandable that the Scottish Government wishes to legislate for the maximum period of exclusion and this should cause no issues if the public authority acts proportionately and reasonably in their decision to exclude and their decision regarding the sufficiency and evidence of bidders self-cleansing steps. Again full guidance on this should be provided to public authorities to ensure conformity across authorities.

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

Yes No

Comments

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

Yes No

We would expect that targeted Procurement Strategies for some contracting authorities may place particular emphasis on such matters extending into the supply chain. If so, such authorities may well exercise their discretion to request additional information regarding supply chain for the purposes of monitoring the outcomes of their chosen strategy. Discretion is appropriate and decisions to check exclusion criteria should be proportionate to the value/risk/service area in question.

Any requirement would risk increasing the administration (and length) of processes in circumstances where there is little benefit to so-doing, to the

detriment of all bidders, including SMEs and those in the third sector.

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

We would seek clarification on whether views are sought on selection and/or award.

Clearly, the Statutory guidance should be clear on what can and cannot be taken into account as selection and award criteria for above EU threshold procurements (though this may be simply to reflect what the Regulations (once drafted) state. To the extent that additional detail, such as that in SPPN/1/2015 relevant to workforce matters, can be included, it would be useful to make the guidance as full as possible.

Equally, it will be very important, for reasons noted above relevant to: simplicity and proportionality of below EU threshold regulated procurements; clarity on where matters can be considered going beyond what can be done on EU regulated procurements etc; flexibility separately to be clear on what can be done on below EU threshold regulated procurements.

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 tick agree - but with some strong caveats. We strongly support an approach under which processes for social care/health & support services are kept as simple as possible so as to maximise the ability of the third sector to participate and the ability/flexibility of contracting authorities to re-tender care contracts **only** where there is clear rationale for so doing.

Continuity and quality of care and well performing suppliers should be a key consideration. This light touch regime should ensure continuity in this way and also minimise process time and cost. We would seek clarification on the Act's aspirations for a lighter touch regime and what **extent** of discretion the Act/guidance will set out for commissioning authorities regarding not seeking offers? This needs to be very clear. Aligned to the new light touch regime which the new Directives sets out, this should take account of quality, continuity of services, service users voices in the decision making process.

The EU directive in this respect has many good features (service user focus, quality

considerations etc) but we need some comfort that notwithstanding adherence to the principles of transparency and equal treatment, there remains clear and understood discretions only to seek offers where there is a clear rationale for doing so.

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

Third sector organisations can often provide best possible value for money as their offering considers both economic and social value. Third sector organisation's work, particularly in providing services to people, improve social and public welfare with an emphasis on quality of care & support which can often be overlooked when evaluating on cost alone.

For the above reasons, we would welcome a very strong emphasis on contracts **not** being evaluated on a price only basis. Indeed we would argue that this works against the '**Scottish model**' of procurement which seeks to maximise VfM through the best balance of cost, sustainability and quality issues. So Rebalancing the focus on **social environmental and community benefits** as well as **savings & efficiencies** presents the best possible opportunity to **drive up quality, improve outcomes** and **increase innovation** from procurement spend.

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

Guidance on care services should encourage commissioning authorities to construct contracts (when they are open to seeking offers) to consider 'quality' matters that are sufficiently weighted and include measures around how these will be monitored appropriately.

- Guidance **MUST** be clear on aligning social care with the SDS/personalisation agenda
- MEAT – or balance of cost/quality – guidance needs to take account of quality issues (as above) seriously weighted and evaluated and thus should discourage CA's from evaluating cost/quality to seek best value then put a price cap on the value of contract, which is sometimes the case.

We note the current special treatment of social care contracts under the 2014 Act. It will be important to separate proposed guidance for such below EU threshold contracts from the base-line guidance provided for above EU threshold procurement in this area (and indeed any below EU threshold regulated contracts

that are not exempt under the 2014 Act.)

We note again that it will be important from a third sector perspective to continue to engage with CCPS and others to inform the guidance in this area.

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

Seems sensible and transparent.

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

PINs are used to outline expected forthcoming requirements. At a high level this information ought to be being produced to forewarn economic operators under the 2014 Act. Given the lower values involved, we do not see why a contracting authority would issue a PIN for a suite of regulated contracts (between £50-172.5k supplies/services, between £2-4m works).

However, noting the options regarding 'Innovation Partnerships' procedure, PINs might be a useful route to informing the market of the commencing authorities desire to encourage innovations in service redesign etc.

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

See answers to 33, 34, 35

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

Yes. As above

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

Comments

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

Comments

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

Yes No

Clarification can be helpful to bidders and public bodies.

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

Agree Disagree

Modification provided a clear rationale for so doing might sometimes be necessary and appropriate.

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

Agree Disagree

Agree with some qualifying commentary - We agree that emphasis on programmes such as BIM is not always the best method to ensure participation from all possible bidders. As detailed above SMEs are less likely to have access to such resources (although we appreciate the emphasis on these types of programmes may be retained for large scale infrastructure projects).

Q45 Do you agree or disagree that we should establish an overall confidentiality and security framework which individual public bodies would use to inform their own approach

to the security handling of electronic communication? Please explain your answer.

Agree Disagree

We favour a pragmatic approach and would seek clarification on the pros and cons of an overarching framework

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

Agree Disagree

Comments

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

Agree Disagree

Comments

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

Yes No

Comments

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

Agree Disagree

Comments

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

Agree Disagree

Appears that to implement this public bodies would need time to align systems but it is a positive move and will save time/effort on the bidders when introduced.

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

Agree Disagree

Comments

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

Agree Disagree

Comments

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

Yes No

Comments

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

Comments

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

Comments

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

Public Authorities are best placed to make decisions re their own procurements and as such the use of central purchasing bodies should not be mandatory.

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

Comments

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

Probably agree but it depends precisely on what a newly defined SPoE "enforcement" remit is to be going forward. On the Single Point of Enquiry to date, there have been various concerns that its "review" would only go so far and/or not necessarily have as its primary purpose ensuring a remedy for a wronged bidder. In addition, the SPoE has been under resourced although on a positive front; annual reports give detail on the number /types of enquiries, and trends regarding these enquiries, the process of review undertaken and the outcome.

In addition, many third sector organisations and SMEs have been reticent in approaching SPoE for fear of putting at risk their ability to bid for future work (albeit the SPoE review respected anonymity of the enquirer). It is difficult to assess how these difficulties might be overcome practically (and in the minds of potential users) where the Scottish Ministers are the enforcement body.

The SPoE having more 'teeth', being seen as operating more autonomously and increasing the 'enforcement' remit would need to be well thought through. The SPoE should in some fashion continue to engage with key supplier representation as it has done in its operations to date.

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

It is difficult to simply agree or disagree with the above. From a third sector perspective, there are very few challenges of public procurements that have gone through the UK courts. This is due to cost considerations (and also in part due to the nature of third-public sector funding relationships taken as a whole). If the existing provisions were copied across, the remedies regime would likely remain largely "academic" for third sector entities (indeed, it is understood there are some concerns the current court system does not provide effective remedy "full

stop". However, if looking at alternatives, whilst it would be nice for third sector entities to have an ability to seek to challenge decisions and potentially obtain remedy, a cost might be the time-period / flow of procurement contracts in the event that it becomes too easy to challenge and/or if any replacement process does not permit quick and definitive resolution.

There is a very important consideration flowing from the "flow down" of remedies into the 2014 Act. Theoretically, service and supply contracts at £50,001 are going to be subject to legal challenge and there is a danger of a "risking up" of what have hitherto been contracts let under the best value / standing order regime. Very careful thought needs to be given to the implications of this. It would certainly be very unfortunate if the balance between providing a remedy and ensuring the flow/functioning of contract placements is struck such that the aims of simplifying matters, including for SMEs and the Third Sector, takes a step back from what it currently is for below threshold contracts.

In relation to the above paragraph, the approach in the Public Contracts Regulations 2015 is markedly different to that in the 2014 Act in its absence of prescriptive bidder remedies for below EU threshold procurements.

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

Yes No

It is difficult to have a view on this until we are clearer on how an invigorated well-resourced SPoE might function in form and remit.

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

Yes No

Pros and cons need further examination in this regard.

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

Yes No

SFS likely favours this approach via an Ombudsman.

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?

SFS strongly supports the Scottish Government's position and track record in its commitment to engage social and business partners and wider stakeholders in the process of improving policy and practice re public procurement in Scotland. SFS welcomes continued positive engagement on issues affecting the implementation of the PPR (Scotland) Act 2014, drafting of statutory guidance and on the procurement reform programme.