

## **Scotland Excel**

**To: Executive Sub-Committee**

**On: 20 October 2023**

**Report by:  
Chief Executive of Scotland Excel**

**Procurement Reform Act**

**Consultation Response**

### **1. Introduction**

The Economy and Fair Work Committee published a consultation entitled “*Assessing the impact of the Procurement Reform Act*” in June 2023.

The Procurement Reform (Scotland) Act 2014 introduced a range of duties on public bodies to consider how procurement could be used to improve the wellbeing of local areas. That includes the impact on the economic, social and environmental health of the area.

The 2014 Act also sought to reduce barriers to entry for small businesses, third sector organisations and supported businesses to participate in public procurement.

This consultation seeks views on a broad range of themes covered by the Act to assess whether it is achieving these aims.

### **2. Consultation Response**

A draft response to the consultation has been prepared and is presented to the committee as Appendix 1.

### **3. Recommendation**

Committee members are requested to note the content of this report and approve the submission to the Economy and Fair Work Committee.



# **Draft Response to Procurement Reform Act Consultation**

**Prepared October 2023**

## **1. Information about your organisation**

Scotland Excel is the centre of procurement expertise for the local government sector serving Scotland's 32 local authorities and over 150 associate members from the public and third sector.

Established in 2008 in response to the McClelland Review of Public Procurement in Scotland which recommended increased collaboration and improved procurement capability across the public sector. Over the past 15 years, Scotland Excel has worked closely with the Scottish Government and other centres of expertise for health and further education on initiatives to raise the profile of public procurement and maximise the social, economic and environmental benefits it can bring.

Scotland Excel's £2bn portfolio of collaborative contracts ensures that our members achieve best value from procurement through their combined spending power. Scotland Excel enables procurement professional development and the resourcing of commercial projects for Scottish Local Government.

## **2. What are the main barriers to businesses accessing public procurement contracts in Scotland, and how have these barriers changed since the Procurement Reform Act (Scotland) 2014 was implemented?**

The Procurement Reform Act (Scotland) 2014 has underpinned the evolution of approaches to reduce barriers to entry in procurement.

Over time the approach deployed by Scotland Excel to sub lotting has developed to include lotting by region, by council, by product/service grouping and through the signposting of second tier supply chain opportunities and advertisement.

Furthermore, the type and format of market consultation has evolved from PIN publication towards surveys, initiatives to shape the opportunity with the market, group or individual supplier/provider engagement sessions and hosted category events. Stakeholder engagement has become wider with the market directly as well as with a diverse range of supplier representative organisations.

The development of selection and award criteria and tender weightings has progressed to include more innovative approaches for the assessment and management of social and environmental outcomes.

These measures help to ensure that the vast majority of suppliers awarded onto contracting arrangements are Small and medium-sized Enterprises (SMEs) comprising c. 75% of all suppliers.

Through our development of national collaborative opportunities for our members Scotland Excel has a long history of engaging extensively with our supply chain partners. Our current portfolio is served by over 1000 suppliers/providers working alongside our member organisations to deliver vital public services across Scotland.

This collaborative approach provides an insight into the experiences of organisations seeking to tender for public sector contracts and managing those arrangements already in place.

The following represents the types of feedback commonly shared.

- Difficulties in locating and interpreting procurement strategies, annual reports and contract registers to predict when opportunities may become available.
- Inconsistent format and content of reports.
- Lack of market consultation at the appropriate time in the procurement journey.
- Difficulties in engaging with the PCS/PCS-T systems.
- Fragmentation of requirements and duplication in providing selection and award criteria within and across contracting authorities.
- Complexity of tendering requiring investment of time and resource.
- Lack of capability in engaging with complex legislative backdrop.
- Ongoing market volatility causing difficulties in committing to commercial rates, sustainable outcomes, or environmental measures for the period of a tender/contract.

There exists the opportunity to further reduce barriers to entry including broader utilisation or expansion of the supplier profile on PCS-T, proliferation of early market engagement, targeted supplier development initiatives and meet the buyer events.

### **3. Does the sustainable procurement duty mean that adequate weighting is given to environmental considerations?**

With the climate emergency recognised as a strategic national priority, Local Government procurement has a critical role in achieving net zero greenhouse gas emissions by 2045.

The sustainable procurement duty legislates an approach embedded within procurement consciousness as value being representative of the balance between environmental, social and commercial considerations.

The tools and guidance published alongside the sustainable procurement duty, life cycle impact mapping, sustainability test and prioritisation tool, continue to be highly beneficial as a mechanism to segment and prioritise procurement portfolios.

In recent years the contract delivery plan has evolved to ensure national collaborative arrangements are in place to offer members a route to market for net zero enablers such as Electric Vehicle Charging Infrastructure, Energy Efficiency Contractors and Property Maintenance and Refurbishment. Key procurements have delivered innovative environmental measures for example:

- New Build Residential Construction developing a specification which enables offsite construction methods and requires a range of sustainability standards.
- Groceries and Provisions including consideration of food miles, route planning and recycled packaging.

- Domestic Furniture and Furnishings including a lot for reuse furniture.

While environmental considerations are recognised as a pillar of public sector procurement initiatives there are a number of factors that can limit the weighting attributed.

The scale of the transformation required to deliver net zero 2045 leads to complex considerations in the transition to a circular economy. For example, how to;

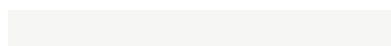
- Invest in goods, works and services to extend their lifecycle when contractual arrangements recur c. every four years.
- Move from established working practices of owning goods to alternative models of lease/hire with the corresponding practical and contractual implications.
- Invest in innovative and lower carbon goods, services or works when these may not be market ready, specified or recognised in the appropriate standards/certification regimes.
- Develop longer term supply chain collaboration on net zero measures but through more inclusive and flexible non-commitment contracting.
- Establish a baseline for both direct and indirect carbon emissions and a way of measuring progress against this.
- Evidence that the whole life cost of those procurements tackling carbon reduction represent value for money against business-as-usual activities.
- Fund the cost of this transformation.

#### **4. The sustainable procurement duty aims to promote fair work practices. How effectively is this reaching secondary suppliers and the wider supply chain?**

Fair Work First criteria are embedded in public sector procurement opportunities and, where relevant, bidders are asked to demonstrate how they will commit to progressing those criteria through planned, measurable actions at the point of tender. Most commonly this is measured through responses on the payment of the Real Living Wage and responses are categorised according to whether bidders are accredited, working towards accreditation, paying without accreditation, or not paying. This is monitored throughout the duration of contract management such that payment of the Real living wage is reportable.

There is lesser visibility on how awarded suppliers cascade or assess how Fair Work First criteria is applied within the supply chain. The introduction of prompt payment performance in the supply chain (SPPN 2/2022) provided a format for these social considerations to be extended further.

Greater visibility of how Fair Work First criteria impacts the supply chain would underpin Community Wealth Building initiatives. There is the opportunity to align a proposed Community Wealth Building Bill with procurement legislation.



**5. The Scottish Government have a framework contract which reserves opportunities for supported businesses (businesses where more than 50 per cent of the workforce are disabled workers unable to take up work in the open labour market). What is your experience of engaging with this framework as a supported business?**

N/A

**6. How effective are community benefit requirements in procurement contracts, and how appropriate is the £4 million threshold?**

Operating a portfolio of Category B national collaborative frameworks means the threshold is consistently applied to regulated procurements. Over time different models have been introduced to ensure that bidders offering for national frameworks, where extensive sub-lotting can exist, are enabled to contextualise proportionate and relevant community benefits.

Opportunities to embed community benefits require appropriate contract mobilisation and management to ensure that supply chain partners are investing in those outcomes most desirable to contracting authorities. In this regard it is essential that buyers are signposting appropriately within and across departments to optimise economic development and community wealth building opportunities.

These opportunities are most likely to be embedded when the commitment contract is made, and the supplier can quantify offerings against expected spend. Furthermore when the contracting authority has visibility of the sustainable outcomes possible, balancing commercial, social and environmental objectives in the spirit of the legislation. Further latitude has been drafted into national procurements to enable “national” community benefits projects in instances where significant aggregated spend levels are in place and local opportunities for community benefits have not been exhausted.

**7. What is your experience of tendering or bidding for framework contracts and lots within large contracts, are these becoming more prevalent in Scotland, and what is your view on how accessible these opportunities are?**

N/A

**8. What is the administrative burden of complying with procurement regulations in Scotland, and how has this changed since the 2014 Act was implemented?**

There is a significant administrative burden in complying with the Procurement Regulations and set out below are examples of this through different stages of procurement.

### **Tender**

Within a regulated procurement exercise the evaluation of the selection criteria represents a significant investment of time and resource to complete business probity. This is also in direct proportion to the number of bidders. For example, checking of bidder details against companies house, compliance with mandatory and discretionary exclusion grounds and the validity of insurance alongside appropriate due diligence of financial standing, certification requirements and quality and environmental management standards.

The expansion of lotting and sub lotting procurement opportunities, while an important measure to remove barriers to entry, can result in large numbers of bidders. Evaluation methodologies must be carefully crafted to ensure that they are applied fairly, consistently and transparently to those bidding for a single specialist element alongside bidders who may be offering for the entire procurement. This has implications for the number and range of technical award criteria, word count, number of evaluators required and administrative measures to safeguard the appropriate application and recording of scores.

Standstill and award procedures also require a significant investment of time and resource to administer. Ensuring that recommendations for award progress through governance procedures appropriately. Ensuring that the outcome of the procurement is communicated consistently through Regulation 85 procedures while containing the appropriate level of detail is a labour-intensive process.

### **Contract Management**

From a contract management perspective monitoring the performance of the procurement portfolio requires the collection, cleansing and processing of quarterly spend data from c. 1200 suppliers. This data is then used to ensure that commitments made at the point of tender e.g. community benefits, real living wage accreditation etc. have been met or as a prompt to enter further discussions. Running contract maintenance with annual checks that relevant documentation remain in place requires significant administrative activity e.g. insurance, certification etc. Negotiation of price variance procedures, running cost impact analysis, assessing market conditions, updating and communicating pricing details through electronic catalogues etc. Request to assign framework placings or respond to other methods of corporate restructuring as well as assess new entrants to Dynamic Purchasing Systems or continually open flexible framework agreements (light touch regime) are impactful also.

Since the Covid-19 pandemic, Brexit, Russia/Ukraine conflict, Suez Canal blockage and corresponding market volatility many of these activities have been exacerbated/constrained by;

- Higher volumes of price fluctuation requests and negotiations
- Higher volume of request to response to corporate restructuring (termination, withdrawal, assignation)
- Difficulties with insurance markets
- Unpredictable spend and market forecasts
- Bottlenecks in procurement pipelines, prevalence of extensions

### **Reporting**

Essential that the benefits of procurement are quantified through robust contract management and reporting mechanisms. Measures to monitor SMEs awarded onto arrangements, suppliers that pay the real Living Wage and community benefit outcomes are embedded alongside spend and savings summaries. Work is ongoing to embed the reporting of benefit types to broaden the articulation of value and environmental measures are under-represented as part of reporting also. There is also a need to develop qualitative alongside quantitative measures as part of performance management and link this reporting to the classification of contracts in accordance with how they are segmented.

## **9. How can procurement policy in Scotland support the strengthening of local supply chains?**

One way in which this could be achieved is for the public sector to have greater visibility in how the investment with a tier one supplier is shared through a supply chain. The introduction of prompt payment clauses is recognised as providing the second-tier supplier recourse to the contracting authority in instances where payment terms are not being honoured. There is an opportunity to encourage/obligate supply chain reporting of how spend is disseminated further to understand the local and regional implications of investment.

An investigation of supply chain resilience post-pandemic is important to understand whether the volatility experienced has led to an increase in spending with local suppliers. This is closely related to Scottish manufacturing capabilities through supply chain development initiatives and the proliferation of “green” jobs required to deliver Net Zero 2045. Wider analysis into the appetite for public sector contracts i.e. the proportion of businesses registered on PCS and the proportion actively tendering for opportunities is required.

Alongside this would be a definition of “local”. Global and national organisations can deliver stronger local supply chains. Regional arrangements can strengthen local supply chains across local authority boundaries. It would also be useful to distinguish between local supply chains and SMEs as these often become conflated.

## **10. What are the opportunities to reform procurement in Scotland following the UK’s exit from the European Union?**

Set out below are views on further opportunities to reform procurement in Scotland.

- Review exclusionary grounds in relation to serious and organised crime to give contracting authorities greater powers to act upon intelligence shared by Police Scotland or relevant regulatory/certification bodies.
- Guidance on the apportionment of risk in contracting, public sector risk averse and insurance levels not always adjusted appropriately – equally greater dialogue on setting of liability caps and market ability to respond on that basis.
- Review the maximum duration of framework agreements, and the drivers and parameters for this to facilitate greater supply chain commitment to the delivery of longer-term social impact. Consider mechanisms to increase the flexibility of framework agreements so easier to open/admit new entrants.
- Support for contracting authorities to trail wider use of procurement routes.
- Support for contracting authorities to have greater flexibility in the application of post tender negotiation to maximise commercial outcomes in view of the significant and sustained budgetary pressures.
- Delivery of a central repository of documentation for supply chain selection criteria and contract management processes to ease the administrative burden for all stakeholders. Furthermore, optimise the uptake of the functionality of the PCS/PCS-T systems to ensure bidders are pre-populating their supplier profile.



- Better support the supply chain to offer relevant and proportionate social outcomes and develop qualitative mechanisms of recording impact. This could be achieved through consultation, signposting to economic development departments or the creation of a library of national/local community benefit objectives.
- Support for contracting authorities to segment procurement opportunities based on influenceable spend in recognition that ambitious commercial, social and environmental outcomes cannot be delivered wholesale for every exercise.
- Develop guidance on the establishment of baseline carbon measures and how KPIs should be introduced to monitor progress towards Net Zero for both direct and indirect emissions.
- Investigation of supplier engagement and appetite for public sector contracting opportunities, proportion of supply chain registered and competing for public sector contracts and eliciting feedback from the market on why not registered or not tendering.
- Mechanism to obligate awarded bidders to share supply chain data in relation to sustainable outcomes and also to understand access of wider supply chain to public sector contracts.
- SPPN 1/2022 has implications for Local Government, who were restricted from taking “non-commercial matters” into consideration relative to section 17 of the Local Government Act 1988. Consideration whether this should be taken into account to ensure consistency across the public sector.
- Clarity on whether lots within frameworks can be “reserved” for supported business as opposed to the entire procurement as appears to be the case set out in Reg 21 of the 2015 Regs. It may also be useful to consider the definition of “supported businesses” more generally. For example, whether the EU definition best reflects those organisations operating in Scotland.