

# Financial Scrutiny Unit Briefing

## The Procurement Reform (Scotland) Bill

24 October 2013

13/67

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The Procurement Reform (Scotland) Bill aims to establish a national legislative framework for public procurement in Scotland. This Briefing sets out the background to the Bill and summarises its main provisions.



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## EXECUTIVE SUMMARY

The Procurement Reform (Scotland) Bill was introduced in the Parliament on 3rd October 2013. Public procurement in Scotland is governed by a detailed and complex framework of European law and the Bill is necessarily framed within this existing EU legislation.

As the Bill and accompanying documents acknowledge, the European Union is currently at the latter stages of reforming the EU Directives, with the final Directives expected to be agreed in early 2014. Once the Directives are finally agreed, guidance will be issued by the European Commission. Given the complexity and breadth of the Directives, this guidance will be critical in interpreting and understanding the Directives and their impact on Scotland. It is important to note that **the Bill does not transpose the Directives**. The Directives will be transposed into Scots law via new Regulations, within two years of final agreement.

In addition to ensuring that it complements existing EU legislation, the Scottish Government also places the Bill within the wider reform of public procurement in Scotland that has been ongoing since the 2006 publication of the McClelland Report.

The Policy Memorandum states that the Bill will not be a replacement for existing EU legislation, but rather, in the main, applies to two separate levels of procurement. The Bill in part will create a legal framework for contracts below the EU thresholds. However, certain elements of the Bill will apply to all public procurement at any level above the thresholds set in the Bill (therefore including contracts above the EU Thresholds).

Part 1 of the Bill defines a range of key concepts in the Bill, including that the Bill should only apply to those contracting authorities already subject to the Public Contracts (Scotland) Regulations and provisions on contracts that can be excluded from the scope of the Bill. Part 1 also defines a new level of thresholds to which many of the Bill's provisions apply.

Part 2 contains a number of general duties on contracting authorities. In addition to setting out that they must comply with EU treaty principles even below the EU thresholds (as is the case at present), contracting authorities must fulfil the terms of a "sustainable procurement duty". Provision is also made for certain contracting authorities to publish procurement strategies and annual reports.

Part 3 places a number of specific duties on contracting authorities, including—

- that all regulated contracts must be published on the Public Contracts Scotland website;
- that community benefit requirements must apply to all contracts at or above £4,000,000; and
- a number of other measures designed to offer benefits to potential bidders in terms of greater transparency, and ensuring that processes are proportionate.

For those regulated contracts with a value between those set out in the Bill, and the EU thresholds, Part 4 of the Bill provides remedies for suppliers, similar (but not identical) to those in place for above-EU threshold procurement at present.

# INTRODUCTION AND BACKGROUND

The [Procurement Reform \(Scotland\) Bill](#) (“the Bill”) was introduced in the Parliament on 3rd October 2013. The Parliament has agreed to designate the Infrastructure and Capital Investment Committee as the lead committee on the Bill. Other Committees also have an interest in the Bill, and it is expected that the Local Government and Regeneration Committee will also take evidence at Stage 1.

The [Policy Memorandum](#) sets out the broad intention of the Bill—

“It aims to establish a national legislative framework for public procurement that supports Scotland’s economic growth by delivering social and environmental benefits, supporting innovation and promoting public procurement processes and systems which are transparent, streamlined, standardised, proportionate, fair and business friendly. The Bill will focus on a small number of general duties on contracting authorities regarding their procurement activities and some specific measures aimed at promoting good practice. These measures should help encourage local action within organisations with the aim of building procurement capability and capacity and maximising public procurement’s contributions to wider socio-economic and environmental policy objectives.”

This Briefing first sets out the current policy context around public procurement in Scotland, then goes on to discuss the main provisions in the Bill. The annexe contains a brief discussion of issues around the living wage and public procurement.

## EUROPEAN RULES ON PUBLIC PROCUREMENT

### CURRENT RULES

Public procurement in Scotland is governed by a detailed and complex framework of European law and the Bill is necessarily framed within this existing EU legislation. SPICe Briefing 12/23, [Public Procurement in Scotland](#) (Campbell et al 2012), sets out the current policy context for public procurement in detail. The overall legal framework includes principles deriving from the [Treaty on the Functioning of the European Union](#) (OJEU 2010), European Union directives on procurement and European Court of Justice and national court case law. The Treaty sets out four key fundamental principles that underpin the public procurement regime in Scotland, and across the EU—

- **Equal treatment:** everyone must be treated equally and given an equal chance of winning a contract, and the procurement processes must be fair.
- **Non-discrimination:** public bodies must not discriminate between individuals or businesses on the basis of the EU Member State in which they are located. They have a duty not to impede the free movement of workers, goods, services and businesses between EU Member States.
- **Transparency:** public bodies must ensure that their procurement and contracting processes are clear and transparent, and contract opportunities should generally be advertised. Tenderers must be able to clearly understand the process that the public body is following, the qualities that the tenderer is being asked to demonstrate, the authority’s requirements and the basis on which a contract will be awarded.
- **Proportionality:** public bodies have a duty not to include contract requirements and terms that are disproportionate to the size or value of the contract. Tenderers should not,

for example, be excluded on the basis of economic strength where their financial capacity is sufficient to meet the actual requirements of the contract. Procurement procedures and decisions must also be proportionate.

As long as there is a certain cross-border interest in the subject of the procurement, public sector bodies are obliged to consider these principles **throughout their procurements, at whatever value**, regardless of whether the full EU procurement rules apply.

The detailed procedures with which public bodies must comply when procuring and awarding public contracts are set out in Directive [2004/18/EC on The Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts](#) (OJEU 2004). The Directive was given effect in Scots Law by the [Public Contracts \(Scotland\) Regulations 2006 \(SSI 2006/1\)](#), and subsequent revisions, the last of which was an amending and consolidating instrument in 2012. The Bill and this Briefing refer throughout to the [2012 Public Contracts \(Scotland\) Regulations \(SSI 2012/88\)](#), as “the Regulations”. There is a separate Directive and set of Regulations for the Utilities sector but these are not currently covered by the scope of the Bill.

The Regulations generally apply when three main pre-conditions are met—

- The procuring body must be a “contracting authority” as defined in the Regulations;
- The contract must be a public works, services or supplies contract; and
- The estimated value of the contract equals or exceeds the relevant financial threshold. The EU thresholds are discussed under Part 1 of the Bill below.

## REFORM OF THE EU PUBLIC PROCUREMENT DIRECTIVES

As the Bill and accompanying documents acknowledge, the European Union is currently at the latter stages of reforming the EU Directives referred to above. The Policy Memorandum states that—

“Political agreement between the European Commission, Council and Parliament on the text of proposed new Directives was reached on 17 July 2013 and it is considered unlikely that there will be any further significant changes to the text in the Directives, although the Scottish Government is continuing to monitor events. The Directives are expected to be approved by the European Parliament in January 2014.”

The proposed new Directives contain a range of reforms to public procurement, outlined in a [Cabinet Office Procurement Policy Note](#) (Cabinet Office 2013b).

Once the Directives are finally agreed, guidance will be issued by the European Commission. Given the complexity and breadth of the Directives, this guidance will be critical in interpreting and understanding the Directives and their impact on Scotland. Therefore, a further SPICe Briefing focussing on the new Directives will be produced following publication of the Commission guidance, not expected until 2014.

However, at this point, and for the purposes of the Parliament’s scrutiny of the Bill, it is important to note that **the Bill does not transpose the Directives**. The Directives will be transposed into Scots law via new Regulations, within two years of final agreement, now expected in early 2014.

In addition, Part 5 of the Bill allows Ministers, by regulations, to change references in the Bill to the new Scottish Regulations that will arise from the new EU Directives.

## SCOTTISH POLICY CONTEXT

In addition to ensuring that it complements existing EU legislation, the Scottish Government also places the Bill within the wider reform of Public Procurement in Scotland that has been ongoing since the 2006 publication of the [McClelland Report](#) (McClelland 2006). The SPICe Briefing on Public Procurement in Scotland discusses the actions taken by the Scottish Government since 2006. The Policy Memorandum describes the Scottish public procurement policy context and the Bill's place in it—

“The Bill is intended to build on the work achieved so far in the reform of public procurement in Scotland. The refreshed strategy for public procurement places emphasis on accelerating the pace of change and the delivery of benefits, and embedding initiatives into business as usual. At its heart is the concept of value for money in procurement being an informed balance between cost, quality and sustainability. The refreshed strategy focuses on four key priorities:

- Maximising efficiency and collaboration
- Delivering and demonstrating real cash savings across the public sector
- Improving access to public sector contracts, particularly for SMEs
- Embedding sustainable procurement at the heart of the reform agenda.”

Public Procurement has been a prominent issue in the Scottish Parliament in Session 4, and has been referred to regularly in the work of the Infrastructure and Capital Investment Committee, Economy Energy and Tourism Committee and the Local Government and Regeneration Committee. Prior to the Bill's introduction, in April 2013, the Infrastructure and Capital Investment Committee led [a debate on procurement reform](#) (Scottish Parliament 2013b).

In addition to the work of the parliament, a number of papers and reports have been published on procurement reform in Scotland, including the Jimmy Reid Foundation's report, [Using our Buying Power to Benefit Scotland](#) (Cuthbert and Cuthbert 2012).

## THE BILL

The remainder of the Briefing now summarises and discusses the main provisions in the Bill. It focuses on the main policy intention and most important provisions in the Bill. Following discussion of the policy intention, the Briefing looks in summary at the financial implications of the Bill.

The Scottish Government consulted on the Bill in 2012, and also engaged with stakeholders through workshops, a ministerial “sounding board” and specific steering groups on different aspects of the policy intention. An [Analysis of Consultation Responses](#) (Scottish Government 2013b) was published in early 2013. The consultation is referred to regularly below.

The Policy Memorandum sets out that the Bill will not be a replacement for existing EU legislation, but rather, in the main, applies to two separate levels of procurement. The Bill in part will create a legal framework for contracts below the EU thresholds. However, certain elements of the Bill will apply to all public procurement at any level above the thresholds set in the Bill (therefore including contracts above the EU Thresholds). The level of thresholds to which the Bill will apply is discussed below under Part 1.

Given the EU legislative framework already in place, and the on-going reform of public procurement in Scotland, some respondents to the Bill consultation (mostly NHS, agencies,



NDPBs and local authorities) asked whether additional primary legislation was necessary. However, the Policy Memorandum cites an [OECD research paper](#) (OECD 2010) which states that—

“A very large majority of Member States regulate public procurement below the EU thresholds by law or regulation, at least in the Classical sector. Only in the UK and Ireland is guidance documentation the exclusive means of instructing contracting entities on their obligations and good practice in procurement below the EU thresholds.”

How other Member States approach below-EU threshold procurement (including reforms introduced at a UK level since the OECD paper was published) is discussed under Part 1 below.

## **PART 1 – KEY CONCEPTS AND APPLICATION**

Part 1 of the Bill defines a range of key concepts in the Bill, including that the Bill should only apply to those contracting authorities already subject to the Public Contracts (Scotland) Regulations and provisions on contracts that can be excluded from the scope of the Bill.

In terms of which bodies the Bill applies to, it is important to note that the Bill only refers to those bodies either in the schedule or those covered by the Public Contracts (Scotland) Regulations. This means that the Bill does not apply to bodies in the Utilities sector (for example Scottish Water), which have their own separate EU Directive and Regulations.

Part 1 also defines a new level of thresholds to which many of the Bill’s provisions apply. This section is discussed in detail below.

### **Regulated contracts: new thresholds introduced by the Bill**

#### *Current EU Thresholds*

As explained above, the Public Contracts Regulations, which flow from the European Directives, only apply to contracts with estimated values at or above certain thresholds. Table 1 below sets out those thresholds as they currently stand (they may change in January 2014).

**Table 1: Current EU Procurement Thresholds**

<b>Contracting Authority</b>	<b>Supplies or Services Contracts</b>	<b>Works Contracts</b>
Entities listed in Schedule 1 of the Public Contracts (Scotland) Regulations 2012 (which covers the Scottish Government and selected NDPBs and agencies and NHS Scotland bodies)	£113,057 (€130,000)	£4,348,350 (€5,000,000)
Other public sector contracting authorities (which includes local authorities and other NDPBs and agencies)	£173,934 (€200,000)	£4,348,350 (€5,000,000)

### *Proposed new thresholds in the Bill*

Section 3 of the Bill sets out the thresholds at or above which the provisions in the Bill (see section on the application of the Bill below) apply (those that refer to a “regulated contract”), set out in table 2 below.

**Table 2: Proposed thresholds for “regulated contracts” under the Bill**

Contracting Authority	Supplies or Services Contracts	Works Contracts
All contracting authorities	£50,000	£2,000,000

The Policy Memorandum sets out the Government’s reasoning and justification for choosing these particular thresholds, summarised as follows—

- The Scottish Government’s “Procurement journey” already uses a threshold of £50,000 to identify lower value contracts, therefore it is consistent with existing practice;
- Although under the Regulations, local authorities and others have a higher threshold for supplies or services contracts than central government etc, under the Bill this distinction is removed. The Government states that its approach will help avoid confusion.
- However, as the EU thresholds are higher for local authorities and some others (£173,934, compared to £113,057 for central government), this will mean that a greater range of contract values will be subject to the Bill’s provisions for those bodies (i.e. from £50,000 to £173,934 compared to £50,000 to £113,057) than for central government.
- The Government justifies using round figures rather than, say, exactly half the EU amount as it would be “unnecessarily specific and likely to create confusion”.

It is not clear from the Government’s consultation document that the Government has consulted stakeholders on the thresholds in the Bill, and the implications of imposing new legislation on procurements below the EU thresholds. The consultation document does not refer to creating a new regime for contracts below the EU thresholds. It does refer to thresholds, but only in relation to publication on the Public Contracts Scotland website (see discussion of Part 3 below).

### *Application of the thresholds*

The term “regulated contract” in the Bill applies to all contracts which are **equal to or any value above** the Bill thresholds. Certain sections add the words “other than an EU-regulated contract” – this means that these provisions then apply to contracts that **fit between** the two sets of thresholds.

However the Bill and accompanying documents do not provide a summary of which duties/sections apply to which threshold of procurement. The table below sets out this information. If a section is not noted, it is not considered to apply directly to a public procurement contract.

Also, it should be noted that if a section only applies to those that fit between the two thresholds, then generally there is an equivalent provision already in the regulations – this is noted in the third column of the table.



**Table 3: Application of the thresholds**

Section of Bill and title	Applies to all public contracts above the Bill thresholds	Applies only to public contracts between the Bill and EU thresholds	Equivalent or similar provision in the Regulations?
8 – General Duties		✓	✓
9 – Sustainable Procurement Duty	✓		N/A
10 – Supported businesses		✓	✓
18 – Publication of contract notices and award notices	✓		N/A (1)
20 – Community benefit requirements in major contracts	✓ (2)		N/A
22 – Exclusion of economic operators on grounds of suitability		✓	✓
23 – Selection of tenderers		✓	✓
24 – Guidance on selection of tenderers	✓		N/A
25 – Technical specifications		✓	✓
26 – Charges for participation in procurement process	✓		N/A
27 – Giving of reasons to unsuccessful participants		✓	✓
28 – Request for further information		✓	✓
30 – Contracts register	✓		N/A
32 – Actionable Duties		✓	✓

#### Notes

(1) – The Regulations do not contain reference to PCS, but do, of course, contain reference to publication in OJEU.

(2) – Section 20 applies only to contracts with an estimated value equal to or greater than £4 million.

*Value and number of contracts that the new thresholds will apply to*

Table 4 and Figures 1 and 2 below indicate the number and value of contract award notices advertised through Public Contracts Scotland which are at or above the OJEU threshold; between the Bill threshold and the OJEU threshold; and below the Bill threshold.

However, these numbers should be treated with caution because at present there is only a statutory requirement to publish notices above OJEU thresholds. Although the Bill (see discussion of Part 3 below) introduces new requirements for “regulated procurements”, at present there is no requirement for sub-OJEU contract notices to be published. This means that the picture is far more complete for over-OJEU threshold contracts than it is for sub-OJEU threshold contracts. In other words, the available data, especially for sub-OJEU threshold notices, is substantially incomplete.

Nonetheless, at present this is the best available data to illustrate the number and value of contracts that the different level of threshold will apply to.

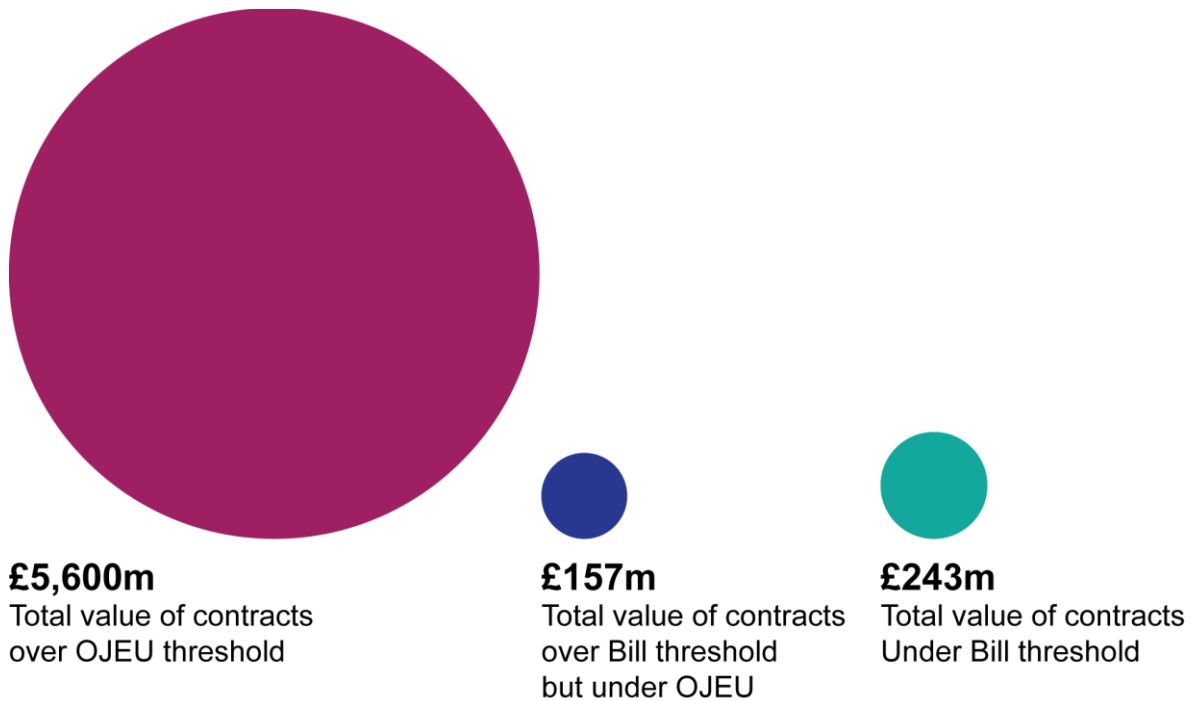
**Table 4 – value and numbers of contracts**

Type of contract	Under Bill threshold	Over Bill threshold but under OJEU	Over OJEU threshold	No value	Total (rounded)
Services	377	221	553	233	1384
	£9.2m	£16.9m	£3,100m	£0	£3,100m
Supply	107	118	222	64	511
	£3.1m	£9.2m	£1,600m	£0	£1,600m
Works	818	45	48	467	1378
	£231m	£131m	£933m	£0	£1,300m
Total	1302	384	823	764	3273
	£243m	£157m	£5,600m	£0	£6,000m

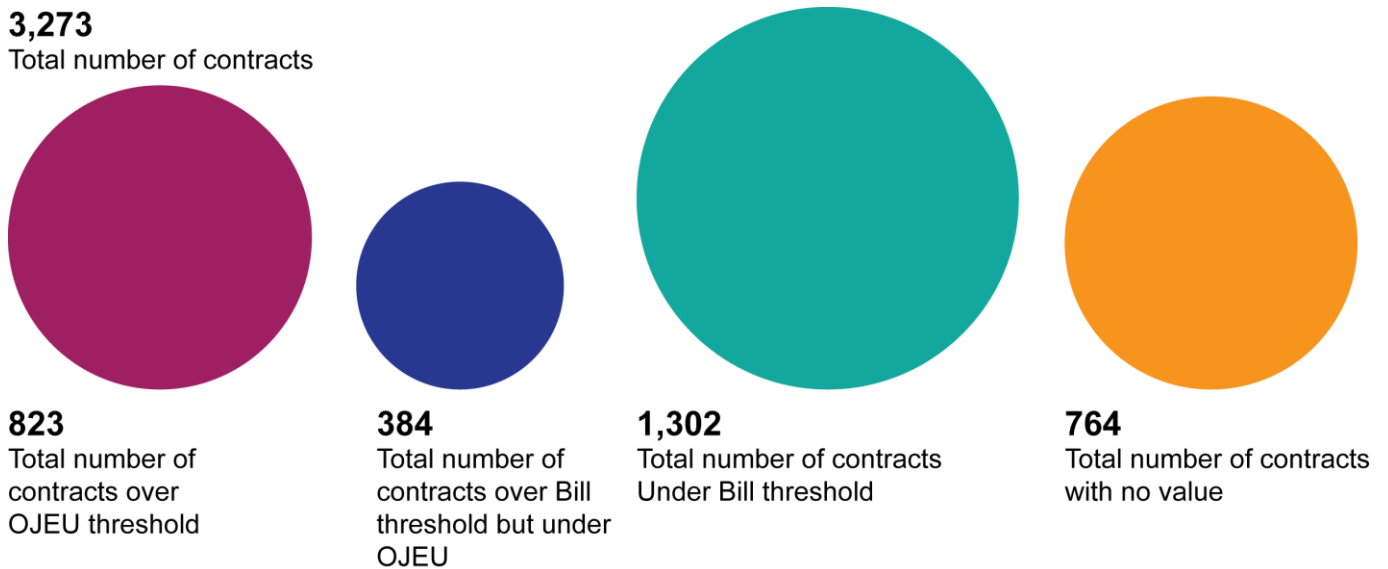
Source: Scottish Government 2013a

Bearing the above caveats in mind, Figure 1 below shows the total proportion of the value of contracts that come under the different thresholds, and figure 2 shows the total proportion of the number of contracts that come under the different thresholds.

**Figure 1: Total value of contracts per threshold level, 2012-13**



**Figure 2: Number of contracts per threshold level, 2012-13**



Some points to note about the data, again noting the caveats above—

- There are more than 700 contract award notices with no value attached, the majority from typically larger works contracts.
- Overall, the vast majority of procurement spend is done at the level governed by the Regulations (i.e. above the EU thresholds).
- The level of procurement between the two sets of thresholds is relatively small – only 2.6% of the total value of procurement in 2012-13.

- But, as noted above, many of the Bill’s provisions apply to **all** procurement above the Bill thresholds; and for those duties that only apply **between** the thresholds there is generally an equivalent or similar provision in the Regulations.

### *How other member states approach below-EU level thresholds*

The Government cites a 2010 OECD paper, which looks at below-threshold procurement across the EU, and shows that there is a huge variety of approaches across Member States. In general, certain Member States have three or more bands below the level of the EU thresholds, whilst most have two, with a single national threshold, below which there is direct procurement and above which the rules are not as rigorous as the full EU regime. However, the lower threshold below which direct procurement can take place varies considerably, for instance in Finland, France, Poland and other countries, this limit (in 2010) stood at €15,000 or less. In Italy, Hungary and others, it ranges between €20,000 and €30,000. In Austria and Estonia the limit is €40,000 and in Denmark and the Czech Republic the limit is €67,000 and €70,000 respectively. The proposed £50,000 (around €60,000) threshold in the Bill places Scotland at the upper end of these limits.

In terms of works, the situation is again varied. According to the OECD paper, the minimum threshold for works contracts is usually “at least twice higher” than the one for supplies and services contracts. In the Bill, the proposed works threshold of £2,000,000 is 40 times higher than the services/supplies threshold.

Although it cites the fact that various other countries have below-threshold regimes, the Policy Memorandum does not explain how an examination of other procurement regimes has fed into the thresholds set out in the Bill.

Since the OECD paper was published, the UK Government has enacted new legislation on service contracts, the Public Services (Social Value) Act which requires that purchasers in England consider, at the “pre-procurement” phase the economic, environmental and social benefits of their approach to procurement. [Guidance on the Act](#) (Cabinet Office 2012) sets out how it can be used.

The UK has also [launched a consultation](#) (Cabinet Office 2013a) on legislation to make public procurement more accessible to SMEs, focussing on advertising on a single portal, addressing PQQ procedures and prompt payment.

## **PART 2 – GENERAL DUTIES AND PROCUREMENT STRATEGIES**

Part 2 contains a number of general duties on contracting authorities. In addition to setting out that that they must comply with EU treaty principles even below the EU thresholds (as is the case at present), contracting authorities must fulfil the terms of a “sustainable procurement duty”. Provision is also made for certain contracting authorities to publish procurement strategies and annual reports. These sections of the Bill are discussed below.

### **Sustainable procurement duty**

Section 9 of the Bill provides that, before carrying out a “regulated procurement” (in this case any procurement above the Bill thresholds), a contracting authority must consider how, in the procurement process, it can—

- improve the economic, social, and environmental wellbeing of the authority’s area;
- facilitate the involvement of small and medium enterprises, third sector bodies and supported businesses in the process; and

- promote innovation.

In doing so however, the contracting authority must not conflict with compliance with the key EU treaty principles of transparency, non-discrimination etc. Any action must also be “relevant to what is proposed to be procured”.

The Government states in the Policy Memorandum that—

“As the largest purchaser in the Scottish economy, it is vitally important that the public sector leads by example. The Scottish Government has done much work to date to streamline the public sector’s dealings with business and the third sector and adopt more efficient procurement practices to help ensure that size is not a barrier to accessing and competing effectively for public sector contracts.

However, the Scottish Government’s engagement with key stakeholders suggests that more needs to be done. Placing a requirement on contracting authorities to facilitate access to public contract opportunities by SMEs and third sector bodies including supported businesses is intended to build on what has been achieved to date.”

The Scottish Government has confirmed that guidance will be issued to contracting authorities on how to interpret and comply with the sustainable procurement duty. Contracting authorities subject to the procurement strategy and annual report provisions (see below) will be required to report on the sustainable procurement duty through these documents.

### **Procurement strategies and annual reports**

The Bill provides that those contracting authorities that expect to have an annual spend on regulated procurements of more than £5,000,000 (excl VAT) must prepare a procurement strategy (or review an existing one) and produce an annual report.

The strategies and annual reports will be the main way in which contracting authorities will report on the duties imposed by the Bill, including the general duties introduced by section 8, the sustainable procurement duty, and on community benefit requirements (see discussion of Part 3 below). In addition, the strategy must contain a statement on the authority’s general policy on community engagement around its procurements and it must set out how the authority will ensure its procurement will deliver value for money.

Provision is also made for joint strategies and reports, which will enable those authorities that have a shared-service approach to procurement to produce a single strategy and report.

The Policy Memorandum recognises that there is “no one size fits all approach” but that—

“there are some fundamental principles which will apply in each case. By standardising the approach to these principles, this will support better information, increase transparency and visibility, provide a better basis for engagement and remove unnecessary inconsistencies.”

A sizeable number (30%) of respondents to the Government’s consultation disagreed with the proposal to publish an annual procurement strategy, including many local authorities and representative bodies for professionals.

## PART 3 – SPECIFIC DUTIES

Part 3 places a number of specific duties on contracting authorities, including—

- that all regulated contracts must be published on the Public Contracts Scotland website;
- that community benefit requirements must apply to all contracts at or above £4,000,000; and
- a number of other measures designed to offer benefits to potential bidders in terms of greater transparency, and ensuring that processes are proportionate across the Scottish public sector.

### Publication on Public Contracts Scotland

The [Public Contracts Scotland](#) (PCS) website was established over four years ago, with the aim of providing a “one stop shop” for Scottish contracting opportunities. Although it cites successes of the PCS website since its establishment, the Policy Memorandum states that—

“there are still large disparities in the use of PCS across contracting authorities... Greater engagement with PCS from those contracting authorities that are not using it as effectively as others would almost certainly result in a larger number of opportunities being conducted through the site, and in particular a greater number of lower value opportunities of interest to SMEs.”

The Bill therefore places an obligation on all contracting authorities to advertise all contract opportunities and publish all contract awards above the “regulated contract” /Bill threshold on PCS. Therefore all contracts which are between the two thresholds will be published on PCS, and all contracts equal to or above the OJEU threshold will be published on both PCS and in the OJEU.

### Community Benefit Requirement

A Community Benefit Requirement in public procurement (also called a Community Benefit Clause) is defined in the Bill either as a requirement for building in training or recruitment or the availability of sub-contracting opportunities into a public contract; or a much wider provision—

“which is otherwise intended to improve the economic, social or environmental wellbeing of the authority’s area in a way additional to the main purpose of the contract in which the requirement is included.”

Scottish Government [guidance has been in place on Community Benefit Clauses](#) since 2008 (Scottish Government 2008), and under the current Regulations, contracting authorities may consider including these requirements in a public contract, but there is no obligation to do so.

The Policy Memorandum explains that for all “significant contracts” (defined in the Bill as equal to or greater than £4,000,000) contracting authorities must—

- before a competition, consider whether to impose community benefit requirements in the contract; and
- if a requirement is to be imposed, state these in the contract notice; and
- if a requirement is not to be imposed, state the reasons for not imposing in the contract notice.



Alongside the specific provision in Part 3, contracting authorities will also have to report on their community benefit activities in the annual reports and strategies introduced by Part 2.

## **Exclusion of bidders**

Part 3 also contains provision on the potential exclusion of bidders from public contracts. The Policy Memorandum states that—

“The public, in general, businesses and the third sector rightly expect that only reputable persons/organisations should be awarded public sector contracts. Recent events, such as the practice of blacklisting and the inappropriate use of zero hours contracts, have highlighted a number of instances where the activities of employers could be viewed as falling below the standards that the public would expect of a company performing a public contract.”

Under the current Regulations, there are two types of criteria that can lead to the exclusion of a bidder—

- committing a specific offence which requires the bidder to be excluded; and
- a list of matters related to the professional standing of the bidder, e.g. bankruptcy, a winding up order, and commission of an “act of grave misconduct”, which is at the discretion of the contracting authority.

The Bill includes a power to make regulations specifying the criteria for which a supplier can be excluded from participating in a procurement process under the bill, but not an EU-regulated procurement. The Government’s intention is to have the same list of exclusions as the Regulations. But, in having its own specific regulations on this point, it will enable the Government to define what is meant by “grave professional” misconduct. The Government states that this—

“could be used to make it explicit that offences connected with blacklisting of workers must be regarded as constituting grave professional misconduct and that such offences would, until and unless the supplier is able to demonstrate that it has taken remedial action which is appropriate and proportionate to the scale and seriousness of the offence, result in the exclusion of that supplier from public tender lists.”

The Bill also gives the Government power to issue guidance that contracting authorities must have regard to when selecting suppliers, which will include reference to workforce issues. The Policy Memorandum states that this guidance will allow Ministers to address “current known workforce related issues, for example inappropriate use of zero-hours contracts.”

## **Other issues**

Part 3 also contains a number of other provisions designed to increase transparency and consistency for bidders across the public sector, including—

- enabling Ministers to issue guidance about selection of bidders and use of pre-qualification questionnaires, to address the current process which is regarded as “inefficient, overly bureaucratic and expensive for bidders;”
- prohibiting contracting authorities charging for participating in the procurement process and for procurement documentation; and
- for procurements above the Bill thresholds, but below EU thresholds, that debrief information must be provided to both successful bidders (if requested) and unsuccessful

bidders, and to those excluded from bidding, providing the opportunity to request additional information in a defined timescale.

Part 3 also contains an amendment to the Climate Change (Scotland) Act 2009, which gives Ministers a power to make regulations to ensure that a certain proportion of goods procured by contracting authorities are remanufactured or reused goods.

## **PART 4 – REMEDIES**

For those regulated contracts with a value between those set out in the Bill, and the EU thresholds, the Bill provides remedies for suppliers, similar (but not identical) to those in place for above-EU threshold procurement at present. The Policy Memorandum states that the Bill provides—

“a supplier with a right of recourse to the courts where it believes it has suffered or risks suffering loss or damage as a consequence of an action or non-action or a decision by a contracting authority as part of a regulated procurement. Whilst the right for a supplier to raise an action in the courts has long been a part of public procurement legislation, the remedies available to a supplier changed significantly with the introduction of a new European Directive. The new remedies regime has been in force in Scotland under the Regulations since 20 December 2009.”

The Policy Memorandum further explains that—

“Whilst the Bill will provide suppliers with similar rights as those found in the Regulations, they will not be identical; the Bill will not provide for all the remedies that are available in the Regulations. Some of what may be considered to be the more significant remedies in the Regulations, such as an ineffectiveness order (which cancels of all future obligations under the contract), will not be available in the Bill. This is in recognition that, in general, any challenge brought under the Bill will be for a lower value contract.”

## **FINANCIAL IMPLICATIONS**

The financial implications of the Bill are set out in the Financial Memorandum. The Finance Committee will consider the financial implications of the Bill and report to the lead committee, although it is not known at this stage precisely the format that the Finance Committee’s scrutiny will take.

In summary, the financial memorandum states that there will be some implementation costs for the Scottish Government – totalling around £3.2 million over three years to 2016-17, although around half of these are not additional costs, but for existing systems.

However, for contracting authorities, the financial memorandum states that—

“the Scottish Government considers that, whilst there may be nominal costs for some bodies, the proposed measures will be absorbed into existing work practices for local authorities and other contracting authorities who are involved in procuring goods, services or works and are, therefore, likely to be cost neutral. No overall net impact on costs is, therefore, anticipated.”

The Government’s consultation summary notes that local authorities and executive agencies/NDPBs raised the issue of resources in their responses, stating that “proposals must not lead to increased costs, especially any costs arising from increased bureaucracy.”

And, in terms of individuals and businesses, the financial memorandum states that—

“The Scottish Government does not expect any direct costs falling to other bodies and businesses specifically arising from the Bill. As stated earlier, the Bill is intended to make it easier for businesses to participate in public sector procurement by reducing inconsistency in procurement procedures and practices. The proposals in the Bill should lead to reduced business costs by ensuring that participating in a public procurement exercise is simpler, more transparent and more accessible to suppliers irrespective of their size.”

## **TIMETABLE FOR PARLIAMENTARY SCRUTINY OF THE BILL**

Although it has yet to be agreed by Parliament, the approximate timetable for parliamentary scrutiny of the Bill is expected to be as follows—

- October – December 2013: Infrastructure and Capital Investment Committee (and other interested Committees) take evidence on the Bill at Stage 1.
- February 2014: Deadline for completion of Stage 1.
- March 2014: Likely Stage 2 proceedings
- April/May 2014: Likely date for completion of Stage 3 (i.e. the final debate and vote on the Bill).

Information about the stages of Scottish Parliament legislation can be found on the [Bills section of the Parliament's website](#) (Scottish Parliament 2013a).

## ANNEXE – THE LIVING WAGE IN PUBLIC PROCUREMENT CONTRACTS

The “living wage” currently paid through the Scottish Government’s pay policy is £7.45. The issue of whether—

- a. contracting authorities can require contractors to pay the “living wage” as part of a public contract; or
- b. how contracting authorities can “encourage” contractors to pay the “living wage”

has been prominent in debates on procurement in the Parliament and elsewhere.

Annex A of the Scottish Government’s consultation document explained the current legislative position, and set out a series of questions on the living wage, in terms of both of the approaches above. Neither the Bill, nor the accompanying documents mention any issues around the living wage, either in terms of requiring or encouraging contractors to pay the living wage. The Bill does, however, at section 24 provide that Ministers may issue guidance about the selection of economic operators and that, in particular, that guidance may cover “matters relating to the recruitment and terms of engagement of persons involved in producing, providing or constructing the subject matter of the regulated procurement that are to be taken into account in assessing the suitability of an economic operator”.

This annexe therefore provides information on the current legal position.

In February 2012, [Scottish Ministers sought clarification](#) (Scottish Government 2012) from the European Commission on its view of requiring contractors, as part of the public procurement process, to pay their staff involved in delivering the public contract a “living wage”.

In [response to the Government’s letter](#), Michel Barnier, European Commissioner for Internal Market and Services confirmed that any requirement, as part of the a procurement process or public contract, on contractors to pay their employees a living wage set higher than the UK’s National Minimum Wage, is unlikely to be compatible with EU law.

The main issue is not compatibility with the EU procurement directive but with the European directive on the posting of workers and article 56 (ex Art 49) of the Treaty on the Functioning of the European Union concerning freedom of services.

Regulation 39 of the Public Contracts (Scotland) Regulations 2012, states that a contracting authority may stipulate conditions relating to the performance of a public contract, however only where those conditions are compatible with EU law. Therefore, a contract clause, stipulating the payment of a living wage would not appear to be possible. What is possible is that the company’s general approach to recruitment and staff engagement can be considered at the selection stage.

Also, it is not anticipated that the reform of EU Procurement Directives will have any material effect on this position.

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