

# **PROCUREMENT REFORM (SCOTLAND) BILL**

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## **EXPLANATORY NOTES**

### **(AND OTHER ACCOMPANYING DOCUMENTS)**

#### **CONTENTS**

As required under Rule 9.3 of the Parliament's Standing Orders, the following documents are published to accompany the Procurement Reform (Scotland) Bill introduced in the Scottish Parliament on 3 October 2013:

- Explanatory Notes;
- a Financial Memorandum;
- a Scottish Government Statement on legislative competence; and
- the Presiding Officer's Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 38–PM.

## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Procurement Reform (Scotland) Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

2. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### **THE BILL**

3. In broad terms, the Bill introduces a degree of regulation for procurements concerning the tranche of contracts above certain financial thresholds specified in the Bill and below the financial thresholds contained in the Public Contracts (Scotland) Regulations 2012 (S.S.I. 2012/88)<sup>1</sup>. It also makes provision in relation to a wider range of procurements, most notably creating obligations concerning advertising, community benefits and procurement strategies.

4. The Bill will establish a national legislative framework for sustainable public procurement. It places a small number of general duties on contracting authorities regarding their procurement activities and some specific measures aimed at promoting good, transparent and consistent practice in procurement. The Bill also places some administrative requirements on larger spending contracting authorities to publish procurement strategies and annual reports, which will aid visibility of the purchasing activities of these bodies and how they will meet their procurement obligations.

5. The Bill is in five parts and these are described below:

- Part 1: Key concepts and application of the Bill: These provisions determine the contracting authorities who are covered by the obligations under the Bill and the procurements to which the provisions of the Bill apply.
- Part 2: General duties and procurement strategies: This imposes general duties of equal treatment, non-discrimination, transparency and proportionality. Provision is also made for a sustainable procurement duty imposed upon contracting authorities. This part also makes provision for the preparation and publication of procurement strategies and annual reports by certain contracting authorities.
- Part 3: Specific duties: This imposes a range of specific duties including duties relating to advertising of contract opportunities and consideration of community benefit requirements. These duties also include measures concerning the conduct of the procurement processes.
- Part 4: Remedies: This part makes provision for remedies available to certain economic operators in relation to breach by a contracting authority of its procurement obligations.

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<sup>1</sup> [/http://www.legislation.gov.uk/ssi/2012/88/pdfs/ssi\\_20120088\\_en.pdf](http://www.legislation.gov.uk/ssi/2012/88/pdfs/ssi_20120088_en.pdf)

- Part 5: General provisions: This contains general interpretative and other miscellaneous provisions.

## **COMMENTARY ON SECTIONS**

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

#### **Contracting authorities**

##### *Section 1 – Contracting authorities*

6. Section 1(1) of the Bill describes those bodies to whom the provisions of this Bill will apply, by providing a definition of a “contracting authority”. This includes the bodies, office-holders and persons listed in the schedule, and contracting authorities as defined in the Public Contracts (Scotland) Regulations 2012 whose functions are exercisable in or as regards Scotland and do not relate to reserved matters. Broadly this includes all Scottish bodies that are subject to procurement obligations under the Regulations.

7. Section 1(2) gives power to the Scottish Ministers to modify the meaning of “contracting authority” by order, including the power to amend the definition and the list in the schedule. By virtue of section 38(2) such an order is subject to the affirmative procedure.

#### **Regulated procurements**

##### *Section 2 – Regulated procurements*

8. Section 2 defines what is meant by a “regulated procurement”. A regulated procurement describes only those parts of the procurement process starting with the point at which a contracting authority seeks offers (when a contract notice is published) through to the award of the contract. It does not include any pre-market engagement or similar activity undertaken by a contracting authority before it seeks offers under a procurement process, nor does it include any activity after the contract is awarded.

#### **Regulated contracts**

##### *Section 3 – Regulated contracts*

9. This section defines what is meant by a “regulated contract”. A regulated contract is a contract which is a “public contract” (defined in section 36 as having the same meaning as in Directive 2004/18/EC<sup>2</sup>) under which the contracting authority expects to pay £50,000 or more. If the contract is a “public works contract” (also defined in section 36 as having the same meaning as in Directive 2004/18/EC), the threshold value is £2,000,000 or more. Section 5 provides further detail on the estimated values of contracts, for the purpose of these thresholds. Public contracts meeting these thresholds will be subject to the provisions of this Bill unless they are explicitly excluded (see section 4).

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<sup>2</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:134:0114:0240:EN:PDF>

10. Section 3(3) enables the Scottish Ministers by order to amend the thresholds for application of this Bill. By virtue of section 38(2) such regulations are subject to the affirmative procedure.

*Section 4 – Excluded contracts*

11. Section 4(1), by reference to regulations 6(1) and 6(2) of the Public Contracts (Scotland) Regulations 2012, excludes certain types of contracts from the scope of the Bill.

12. Section 4(2) enables the Scottish Ministers to amend, by regulations, the types of contracts which are excluded from the scope of this Bill. By virtue of section 38(2) such regulations are subject to the affirmative procedure.

*Section 5 – Estimated value of contract*

13. Section 5 provides that, for the purposes of calculating contract values, the relevant amount is the sum that a contracting authority expects to pay under a public contract (see section 3); it is an estimate of the amount, as opposed to the actual sum, excluding any VAT that may be payable, that the contracting authority expects to pay.

14. Section 5(2) enables the Scottish Ministers to make further provision regarding the method used to calculate the value of the contract by regulations subject to the negative procedure (see section 38(3)).

**Framework agreements and dynamic purchasing systems**

*Section 6 – Framework agreements and call-off contracts*

15. This section provides a definition of framework agreement and call-off contract and clarifies that for the purposes of the Bill they are to be regarded as a “public contract” (see section 3) and therefore the provisions of the Bill apply to them. However, some sections will not apply to a regulated procurement in so far as it relates to a call-off contract, being a contract entered into pursuant to a framework agreement. These are the sections on general duties (section 8(2)), supported businesses (section 10) and exclusion of economic operators (section 22). Additionally, the obligation on a contracting authority to publish its intention to seek offers on the Public Contracts website (section 18(1)) will not apply in respect of call-off contracts (section 6(2)(b)(iii)).

*Section 7 – Dynamic purchasing systems*

16. A dynamic purchasing system is a procedure through which a contracting authority may buy goods, services or works (construction). Section 7(1) gives power to the Scottish Ministers to make provision in regulations about the application of the provisions of the Bill to dynamic purchasing systems and contracts awarded under them. These regulations are subject to negative procedure (see section 38(3)).

17. Section 7(2) defines dynamic purchasing systems for the purposes of this section.

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

### **General duties**

#### *Section 8 – General duties*

18. Section 8(1) introduces a requirement on contracting authorities, when undertaking regulated procurement, to treat all “relevant economic operators” equally and without discrimination (although see section 10 on supported businesses), and to act transparently in terms of their procurement activities and to ensure that any actions and decisions a contracting authority takes are proportionate in relation to the contract(s) in question.

19. Section 8(2) places a requirement on a contracting authority to comply also with the sustainable procurement duty (see section 9). However section 8(3) states that in complying with the sustainable procurement duty, a contracting authority may not act in a way which conflicts with its duty under section 8(1). Section 8(4) defines “relevant economic operator”.

#### *Section 9 – Sustainable procurement duty*

20. Section 9(1) sets out the specific requirements of the sustainable procurement duty on a contracting authority. This duty includes considering, before starting a procurement competition, how, by the way in which it conducts the procurement process, it might improve the economic, social and environmental well-being of the authority’s area. This section also requires a contracting authority to consider how, by the way in which it conducts the procurement process, it might facilitate the involvement of small and medium enterprises, third sector bodies and supported businesses, and also to consider how it can promote innovation.

21. Section 9(2) makes clear that the improvement activity considered must only extend to those matters which are relevant to what is being procured and to the extent that such matters are proportionate to the procurement.

#### *Section 10 – Supported businesses*

22. As an exception to the requirement to treat all bidders equally and without discrimination (section 8(1)), section 10 permits a contracting authority to seek offers from supported businesses only. This means that if a bidder does not meet the definition of a supported business, it can be precluded from participating in a competition on that basis alone. This does not mean that a contract can be awarded directly to a supported business (i.e. without competition), but rather that the competition will be amongst supported businesses only.

23. Section 10(3) provides the definition of a supported business, for the purposes of this Bill. A supported business is an economic operator who operates a supported business, supported employment programme or supported factory within the meaning of regulation 7 of the Public Contracts (Scotland) Regulations 2012<sup>3</sup>.

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<sup>3</sup> [http://www.legislation.gov.uk/ssi/2012/88/pdfs/ssi\\_20120088\\_en.pdf](http://www.legislation.gov.uk/ssi/2012/88/pdfs/ssi_20120088_en.pdf)

24. Section 10(4) gives the Scottish Ministers an order-making power to amend the meaning of “supported business” for the purposes of this Bill. This power is subject to the negative procedure (see section 38(3)).

### **Procurement strategy and annual report**

#### *Section 11 – Procurement strategy*

25. This section describes the circumstances in which a contracting authority is required to prepare a procurement strategy and what, as a minimum, it must contain.

26. Before the start of any financial year in which a contracting authority considers that it may have a total expenditure on regulated procurements (see section 2) exceeding £5,000,000 (excluding VAT) it is required to prepare a procurement strategy or review an existing procurement strategy and make any necessary changes before the start of the next financial year.

27. Subsection (3) applies if, before the start of its financial year, a contracting authority did not prepare a procurement strategy but after the start of that financial year it becomes apparent to a contracting authority that its total expenditure on public contracts for that financial year is likely to be greater than £5,000,000. It is required to, as soon as practicable, prepare a procurement strategy or review and revise its existing strategy as necessary, as soon as reasonably practicable after it becomes aware of the likelihood of the spend over £5,000,000. However, there is nothing to preclude a contracting authority from reviewing and making revisions to its procurement strategy at any additional interval as it considers appropriate.

28. Section 11(5) describes what a procurement strategy must include as a minimum and provides a power for the Scottish Ministers to make an order subject to the negative procedure specifying other matters that a procurement strategy should address (see section 38(3)).

29. Section 11(6) provides an order-making power for the Scottish Ministers to amend the threshold value at which a procurement strategy is required to be prepared or reviewed. By virtue of section 38(2) such an order is subject to the affirmative procedure.

#### *Section 12 – Joint strategies*

30. This section allows two or more contracting authorities who are required to prepare a procurement strategy to have a joint procurement strategy which covers their collective interest.

#### *Section 13 – Compliance with strategy*

31. This section places a requirement on a contracting authority obliged to have a procurement strategy to ensure, as far as is reasonably practicable, that its regulated procurement exercises are carried out in accordance with its procurement strategy.

#### *Section 14 – Annual procurement reports*

32. This section requires a contracting authority that is obliged to prepare or revise a procurement strategy to prepare, as soon as reasonably practicable after the end of its financial year, prepare an annual procurement report on its regulated procurement activities.

33. Sections 14(2) provides details of the minimum content that a report should contain.

34. A significant requirement of subsection (2) is that the contracting authority includes a summary of the regulated procurements that have been completed in the financial year. In relation to this, subsection (3) explains when a regulated procurement is completed, that is when the award notice is published or when it otherwise comes to an end.

*Section 15 – Publication etc.*

35. Section 15 requires a contracting authority to publish any procurement strategy (section 11), any revised strategy and any annual procurement report (section 14) it has prepared. Publication can take any form the authority deems appropriate, but must as a minimum include publication on the internet. Once publication has occurred, the authority is required to notify the Scottish Ministers accordingly (section 15(3)).

*Section 16 – Guidance*

36. This section requires the Scottish Ministers to issue guidance on the preparation and publication of procurement strategies (section 11) and annual procurement reports (section 14). It provides details of what the guidance may cover, including the possibility of it setting out a model procurement strategy and a model annual report. It requires a contracting authority to have regard to the guidance.

**PART 3: SPECIFIC DUTIES**

**Publication of notices on Public Contracts website**

*Section 17 – Public Contracts website*

37. Section 17 places a requirement on the Scottish Ministers to establish and maintain a website (the “Public Contracts website”), which is to be used by contracting authorities to publicise the seeking of offers and the award of a contract (which, by virtue of section 6(2)(a), includes a framework agreement).

*Section 18 – Publication of contract notices and award notices*

38. Section 18(1) and (2) requires all contracting authorities to publicise their intention to seek offers (contract notice) and the award of a contract or framework agreement (award notice) on the Public Contracts website.

39. Section 18(3) enables the Scottish Ministers to include in regulations, made by negative procedure (see section 38(3)), provisions about publication of this information. Subsection (4) details a list of particular, but not exhaustive, provisions that can be included in regulations in respect of publication of contract notices and award notices.

## **Community benefit requirements**

### *Section 19 – Community benefit requirements*

40. This section introduces a definition of community benefit requirement for the purpose of the Bill. This is relevant to a contracting authority's procurement strategy (see section 11(5)(b)) and also to the duty on a contracting authority in section 20 to consider imposing such requirements in certain procurements.

### *Section 20 – Community benefit requirements in major contracts*

41. Section 20 applies where a contracting authority proposes to carry out a regulated procurement equal to or greater than £4,000,000. In doing so, a contracting authority must consider whether to impose community benefit requirements as part of the contract delivery before carrying out the procurement. The contracting authority must include in the contract notice a summary of the community benefit requirements it intends to impose or the reasons for not including any requirement.

42. Section 20(4) states that where community benefits requirements are to be included in the contract, the contracting authority must state in the award notice the details of the benefits it considers will be derived.

43. The threshold for community benefit requirements can be amended by the Scottish Ministers, by order, subject to the affirmative procedure (see section 38(2)).

### *Section 21 – Guidance on community benefit requirements*

44. Section 21 gives the Scottish Ministers power to issue statutory guidance in relation to the use of community benefit requirements and makes provision regarding the content of that guidance.

## **Selection of tenderers**

### *Section 22 – Exclusion of economic operators on grounds of criminal activity*

45. The section applies only to regulated procurements which are not also EU-regulated procurements, that is procurements covered by regulation 5(1) of the Public Contracts (Scotland) Regulations 2012. These are a proposed public supply contract, public works contract, Part A services contract, framework agreement or dynamic purchasing system, save certain exclusions. Subsection (1) enables the Scottish Ministers to make regulations, subject to the negative procedure, requiring contracting authorities to exclude an economic operator where the operator or certain people connected with the operator have been convicted of an offence specified in the regulations.

46. The regulations made by Ministers may explain how contracting authorities are to determine whether or not a bidder has been convicted of an offence.



47. The regulations may also set out the specific circumstances under which a contracting authority may award a contract to a bidder despite the fact that the bidder meets the criteria which requires its exclusion.

#### *Section 23 – Selection of tenderers*

48. Section 23 enables the Scottish Ministers to make regulations, subject to the negative procedure, about the selection of economic operators in regulated procurements which are not EU-regulated procurements. The regulations may include provision about the use of minimum standard criteria which are designed to identify the suitability of a potential bidder to be invited to submit a bid in a regulated procurement. A minimum standard criterion is one which relates to the financial health of the potential bidder, its technical ability or any other characteristic referred to in the regulations that this section empowers Ministers to make.

49. The regulations may also specify how a contracting authority determines whether a potential bidder meets the specified minimum standard or not, and section 23(3) sets out criteria which may be specified in the regulations.

#### *Section 24 – Guidance on selection of tenderers*

50. Section 24(1) provides the Scottish Ministers with the power to issue guidance for contracting authorities on the selection of economic operators in relation to a regulated procurement.

51. By virtue of section 24(2), the guidance may cover the use of questionnaires and matters relating to the recruitment and terms of engagement of those persons who will be involved in producing, providing or constructing the subject matter of the regulated procurement .

52. Section 24(3) requires a contracting authority to have regard to this guidance when assessing the suitability of tenderers.

### **Technical specifications**

#### *Section 25 – Technical specifications*

53. Section 25 applies only to regulated procurements which are not also EU-regulated procurements.

54. Section 25(1) enables the Scottish Ministers to make regulations, subject to the negative procedure (see section 38(3)), regarding the use of technical specifications in regulated procurements (other than EU-regulated procurements). Technical specifications referred to are those used in invitation to tender documentation to describe goods, services or works to be provided pursuant to the procurement or the way in which the goods, services, materials or works are to be produced or provided.

55. This section also details a non-exhaustive list of particular provisions that may be included in regulations in respect of the use of technical specifications.

## **Charges for participation in procurement process**

### *Section 26 – Charges for participation in procurement process*

56. Section 26 prohibits a contracting authority charging a supplier any sort of fee for participation in the procurement process. This includes a fee to provide any document required to participate in that process.

## **Giving of reasons**

### *Section 27 – Giving of reasons to unsuccessful participants*

57. The section applies only to regulated procurements which are not also EU-regulated procurements. It imposes an obligation on contracting authorities to notify any supplier that submitted a pre-qualification questionnaire of the contracting authorities decision at pre-qualification stage (section 27(2)). Section 27(4) imposes an obligation on contracting authorities to notify all unsuccessful tenderers of its contract award decision as soon as reasonably practicable after awarding the contract or the framework agreement.

58. An economic operator who was excluded from participating in the procurement before submitting a tender must receive a notice with the information set out in section 27(3). An economic operator who was an unsuccessful tenderer must receive a notice of the decision with the information set out in section 27(5).

### *Section 28 – Request for further information*

59. Section 28 sets out that an economic operator who was excluded from participating in the procurement before submitting a tender, an unsuccessful tenderer and the successful tenderer can ask for further detail over and above any information that may already have been provided by the contracting authority. The request must be made in writing and no later than 30 days after receiving the notification. Section 28(4) details the relevant further information which must be provided by the contracting authority and to whom.

### *Section 29 – Withholding information*

60. Section 29 provides the circumstances in which a contracting authority would be justified in withholding information about the contract award decision from those who would otherwise be entitled to receive it under sections 27 and 28.

## **Contracts Register**

### *Section 30 – Contracts register*

61. Section 30 requires a contracting authority to keep and maintain a register of current contracts and make it publicly available, as a minimum on the internet. The register must include those contracts which have been awarded as a result of a regulated procurement. An entry can only be deleted after the relevant contract has expired or been terminated.

62. Section 30(6) gives details of the circumstances in which a contracting authority is able to decide not to include a particular contract in the register.

## **Procurement of recyclable and reusable materials**

### *Section 31 – Amendment of Climate Change (Scotland) Act 2009*

63. Section 31 creates a new section 82A in the Climate Change (Scotland) Act 2009. That new section provides a power for the Scottish Ministers, by regulations, to require specified contracting authorities to ensure that a certain proportion of things procured comprise of or include recycled material or material that is designed to be recycled. Subsection (3) sets out the kind of provisions that can be made. Subsection (4) provides for guidance to be given to enforcement authorities by the Scottish Ministers.

64. The new provision complements the existing powers in section 82 of the 2009 Act.

## **PART 4: REMEDIES**

### *Section 32 – Actionable duties*

65. Section 32 applies only to regulated procurements which are not also EU-regulated procurements. This section describes the circumstance in which a “relevant person” can bring legal proceedings against a contracting authority which may not have complied or be complying with its duties under particular sections of this Bill. In order to bring proceedings a relevant person must have sought to be awarded the contract and, as a result of the alleged breach, have suffered or is placed at risk of suffering a loss or damage.

### *Section 33 – Procedure and time limits*

66. Prior to a supplier bringing proceedings under section 33, which may be brought in the sheriff court or Court of Session, the supplier must notify the contracting authority of its intention to bring proceedings and the failure to comply with the duties referred to above. The time limit for bringing proceedings under section 32 is 30 days from the day on which the supplier knew or ought to have known that grounds for starting the proceedings had arisen, or such longer period of up to three months as the court considers appropriate. Extension of the period may be permitted by the court only if it considers that there is good reason for doing so.

### *Section 34 – Determination by the court*

67. Section 34 gives the court power to suspend the procedure leading to the award of a contract, and to suspend the implementation of any decision or action taken by a contracting authority in relation to that procedure. This section further details the considerations to be taken into account by the court in considering whether to make such a suspension and lists the remedies available to the court where a contracting authority is found to be in breach of its duties. The court must review the decisions taken by a contracting authority and must consider the balance of negative consequences against the benefits of its decision having regard to specified matters including public interest.

68. Where the breach of duty is in respect of a regulated contract which has already been entered into the only remedy available to the court is the award of damages. Section 34(6) specifies that nothing in section 34 affects any power that the court may have as a result of any other rule of law.

## **PART 5: GENERAL**

### *Section 35 – The Directive, Public Contracts Regulations and EU-regulated procurements*

69. This section provides definitions of these terms as used in the Bill. Section 35(2) gives the Scottish Ministers the power to amend the definition of “the Directive” in the Bill to take account of any new or subsequent EU directive relevant to this Bill. It also gives the Scottish Ministers the power to amend the definition of “Public Contracts Regulations” in the Bill to give the flexibility to take account of any relevant changes - for example to refer to an instrument that implements a new EU public procurement directive.

70. Section 35(3) provides that an order amending the definition of “the Directive” or of “the Public Contracts Regulations” may make appropriate consequential modifications to the Bill.

### *Section 36 – General interpretation*

71. Section 36(1) and (2) provide definitions of terms used in the Bill.

### *Section 37 – Ancillary provision*

72. Section 37 provides the Scottish Ministers with the power to make an order making such supplementary, incidental, consequential, transitional or transitory provision or savings as they consider appropriate. Any such order will be subject to the affirmative procedure if the order adds to, replaces or omits any part of the text of an Act (see section 38(2)), otherwise it will be subject to the negative procedure.

### *Section 38 – Subordinate legislation*

73. Section 38(1) provides that any power of the Scottish Ministers to make an order or regulations under the Bill includes powers to make different provision for different purposes and such supplementary, incidental, consequential, transitional, transitory or saving provision as they consider appropriate.

74. Section 38(4) provides that this section does not apply to commencement orders.

### *Section 39 – Commencement*

75. Section 39 provides for sections 35, 36, 37, 38, 39 and 40 of the Bill to come into force on the day of Royal Assent. Section 39(2) provides for the other provisions of the Act to be commenced by order made by the Scottish Ministers. Such an order may include transitional, transitory or savings provision.

### *Section 40 – Short title*

76. This section states the short title of the Act as being the Procurement Reform (Scotland) Act 2014.

## **FINANCIAL MEMORANDUM**

### **INTRODUCTION**

1. This document relates to the Procurement Reform (Scotland) Bill introduced in the Scottish Parliament on 3 October 2013. It has been prepared by the Scottish Government to satisfy Rule 9.3.2 of the Parliament's Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.

2. The Bill will establish a national legislative framework for sustainable public procurement that supports Scotland's economic growth through improved procurement practice. It will focus on a small number of general duties on contracting authorities regarding their procurement activities and some specific measures aimed at promoting good, transparent and consistent practice in procurement. 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. The Bill will also place some administrative requirements on larger spending contracting authorities to publish procurement strategies and annual reports, which will aid visibility of the purchasing activities of these bodies and how they will meet the provisions of the Bill.

3. The Bill is in five parts:

- Part 1: Key concepts and application of the Bill: These provisions determine the contracting authorities who are covered by the obligations under the Bill and the procurements to which the provisions of the Bill apply.
- Part 2: General duties and procurement strategies: This imposes general duties of equal treatment, non-discrimination, transparency and proportionality. Provision is also made for a sustainable procurement duty imposed upon contracting authorities. This part also makes provision for the preparation and publication of procurement strategies and annual reports by certain contracting authorities.
- Part 3: Specific duties: This imposes a range of specific duties including duties relating to advertising of contract opportunities and consideration of community benefit requirements. These duties also include measures concerning the conduct of the procurement processes.
- Part 4: Remedies: This part makes provision for remedies available to certain economic operators in relation to breach by a contracting authority of its procurement obligations.
- Part 5: General provisions: This contains general interpretative and other miscellaneous provisions.

4. From the Scottish Government's perspective, there is a limited number of additional costs to be associated with the Bill. For the most part, the Bill seeks to embed the use of systems and policies that have already been put in place as part of the reform of public procurement in Scotland. These are designed to ensure that procedures are proportionate and standardised, that contract opportunities are transparent and readily accessible, especially for small and medium-

sized enterprises (SMEs) and the third sector, and that procurement activity supports sustainability in the broadest sense.

5. Those costs that will be incurred principally relate to the continued system costs associated with Public Contracts Scotland (Public Contracts website) and to the development of secondary legislation and relevant guidance material. The latter reflects that many of the provisions within the Bill are enabling powers. This way the Bill will enable the flexibility required to encompass the diverse range of goods, services and works that are procured by the public sector and, as part of that, be flexible enough to support the wide range of policy and service delivery for which the public sector in Scotland is responsible.

6. This Memorandum considers the financial cost implications of the Bill, first in general terms and then in terms of key parts of the Bill (Parts 2, 3 and 4).

## **WIDER FINANCIAL CONTEXT**

7. The public sector spends over £9 billion each year on goods, services and works. The size of public procurement spending as a proportion of Scotland's gross domestic product means that improving the way the public procurement market operates should have important consequences for economic efficiency and growth. Contracting authorities need to make the best use of public money they are entrusted with if they are to deliver best value and meet the needs of citizens.

8. The proposed legislative changes are taking place in uniquely challenging times of increasing demand for services and diminished financial resources. It is increasingly important that the public sector extracts maximum value from its procurement spend, be that economic, social and/or environmental. Although good progress has been made in improving public procurement in Scotland, it is clear that more needs to be done to help drive improvements.

9. The Bill is intended to make it easier for those participating in public sector procurement by reducing inconsistency in procurement procedures and practices and also increasing transparency. The proposals in the Bill should reduce business costs by ensuring that participating in a public procurement exercise is simpler, more transparent and more accessible to suppliers irrespective of their size.

## **COSTS ON THE SCOTTISH ADMINISTRATION**

10. Table 1 summarises Scottish Government expenditure that will be required in supporting the Bill.

Table 1: Summary of Scottish Government expenditure				
	2014/15	2015/16	2016/17	Total
<b>Costs associated with Bill implementation</b>				
<b>a) System costs#</b>	£560,000	£560,000	£560,000	£1,680,000
<b>b) Staff costs##</b>	£216,000	£437,000	£441,000	£1,094,000
<b>c) Non-staff costs</b>	£250,000	£150,000	£100,000	£500,000
<b>Total (all costs)</b>	<b>£1,026,000</b>	<b>£1,147,000</b>	<b>£1,101,000</b>	<b>£3,274,000</b>

# Existing system costs are currently being met by the Scottish Government and will continue to be so. These figures are therefore already considered within existing budgets as opposed to being new or additional costs.

## Staffing cost estimates are based on average staffing costs for Scottish Government staff 2012-13 and uprated by 1% each subsequent year. Details of these staff are set out in paragraphs 13 - 14. The lower staffing costs for 2014/15 allow for the time needed to resource the additional posts; and therefore, do not represent full annual costs.

11. The costs set out in table 1 are best estimates for the implementation of the Bill. There are limited margins of uncertainty about these figures as they are based on existing costs or are based on anticipated staffing requirements.

12. Approximately half of the costs (£1,680,000) shown in section a) of table 1 are for payments to third party providers for operating the systems that will provide the functionality described in the Bill. These system costs are currently being met by the Scottish Government and will continue to be so. These figures are, therefore, already provided for within existing budgets as opposed to being new or additional costs. However, as specific provisions will now require contracting authorities by law to publicise their intention to seek offers (contract notice) and the award of a contract or framework agreement (award notice) on the Public Contracts website, these system costs have been included in the Memorandum (they are essential to support the provisions in the Bill). While the current costs of these systems are clear, the Scottish Government will need to run a further competition for the systems as existing contracts come to an end. While there is no reason to expect that costs will vary significantly following the retender, the Scottish Government cannot be completely certain that existing costs will reflect future costs of these systems. There is, however, a highly competitive market for the provision of these systems. In light of this, the Scottish Government would be surprised if the system costs increased significantly. As stated, these annual system costs are currently being met by the Scottish Government and are expected to be on-going annual costs, beyond financial year 2016/17.

13. The costs outlined at section b) of table 1 relate to staffing resources needed to support the Bill. It is anticipated for the policy area within the Scottish Government that the main costs will be incurred in preparing the relevant secondary legislation and guidance material on the key Parts of the Bill (Parts 2, 3 and 4) and that this is made available to support contracting authorities in meeting the requirements placed upon them. Given the extent of the guidance material already available to contracting authorities, there will be a need to review and refresh existing guidance, as well as produce new guidance where appropriate. The staffing resource for this will principally involve 1xC1 Policy Team Leader, 1xB3 Senior Policy Officer, 2xB2 Policy Officers and 1xA4 Policy Support Officer at an estimated cost of £547,000 over the three years. This figure makes up half of the total staff costs shown over the three year period outlined in table 1. The level of resourcing is an assumption based upon the Scottish Government's experience of the resources required to provide policy support for the interpretation and guidance on existing procurement policy in Scotland. It is currently not clear whether these costs will

continue beyond 2016/17, a decision on this will have to be taken about the level of policy and guidance support required based upon demand closer to that time.

14. It is anticipated that there will also be a requirement for additional staffing resource to support the business systems that underpin the Bill (Public Contracts website). This will principally involve 1xC1 Portal Tender Project Manager, 1xB3 Best Practice Manager, 2xB2 Portal Tender Account Managers and 1xA4 Modern Apprentice at an estimated cost of £547,000 over the three years. This figure makes up half of the total staff costs shown over the three year period outlined in table 1 and relates primarily to Part 3 of the Bill. The additional staffing resource is needed to meet the increase in demand and to ensure that the system meets requirements and remains fit for purpose. It is anticipated that there will also be additional staffing resource costs associated with developing and maintaining policy and best practice guidance with associated advice needed in relation to the system and legislative requirements. These are conservative estimates based on the Scottish Government's experience to date of delivering the systems over a number of years. More resources would allow for more rapid and effective progress, but the Scottish Government believes that this level of resourcing would be sufficient to meet the requirements of the Bill (principally to ensure that the public sector is able to access Public Contracts Scotland effectively). There is a degree of uncertainty however, regarding the level of demand for training and support for roll out of the systems. In the event that demand outstrips proposed capacity based on the staffing levels proposed, the Scottish Government would have various options available, including an expansion of "train the trainer" events rather than provision of direct staff training.

15. The non-staff costs, other than system costs, associated with the Bill relate to a programme of work that will be carried out to support public sector bodies and the market on embedding sustainable procurement as effectively as possible. This will be done by ensuring a robust procurement framework is in place and functioning effectively. The programme of work will comprise developing practical training materials and guidance, and dissemination through a number of training events and e-learning. This will not only help meet the needs of the procurement community, particularly in meeting requirements set down by the Bill but, equally importantly, also facilitate the continued development of public procurement in Scotland through learning lessons from best practice and experiential learning. Over the course of the three years, it is estimated that around £280k of the costs will be deployed on stakeholder engagement and training for buyers, budget holders and the market; whilst the remaining £220k will ensure development of relevant guidance, training materials and evaluation of the programme of work. Again, the demand for materials is uncertain and the need for public bodies to receive adequate support in meeting the requirements of the Bill is an issue which various stakeholders emphasised during the formal and informal consultation phases. The costs are based on the Scottish Government's experience of having rolled out training across the public sector in 2011/12 based on the Marrakech approach<sup>4</sup>. There is, therefore, confidence in the estimated costs provided, which are based on an assumption of delivering 30 training courses in 2014/15, 30 refresher courses in 2015/16 and 30 refresher courses in 2016/17 as capability develops. As stated earlier in the paragraph, the remaining costs relate to the development of supporting guidance and training materials and evaluation.

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<sup>4</sup> <http://www.scotland.gov.uk/Topics/Government/Procurement/policy/corporate-responsibility/CSR/Marrakech>



16. This programme of work supports the wider transformational changes needed to embed sustainable procurement into existing working practices. The Bill may be enacted without the expenditure set out in section c) of table 1. However, if these wider transformational changes are ignored, the Bill is likely to be less effective. As part of continuing work to build momentum of the procurement reform process, evidence would suggest the need for a mixed approach (both encouraging and supporting)<sup>5 6</sup>.

17. The costs set out at section c) in table 1 are not expected to extend beyond 2016/17. This is because they relate to a time-limited programme of work focusing on supporting contracting authorities to embed sustainable procurement into working practices. The Scottish Government would expect to utilise fully the governance bodies attached to broader procurement reform on overseeing the commencement, implementation and monitoring of the Bill as part of the continuing reform agenda. These bodies contain senior representatives from the public sector working collectively to oversee the continuing public procurement reform programme.

18. The Scottish Government does not expect the Bill to lead to significant additional long-term costs as, for the most part, it seeks to embed the use of systems and policies that have already been put in place following the Review of Public Procurement in Scotland (“the McClelland Report”) in 2006<sup>7</sup>. The Bill is expected to drive greater compliance with these systems and policies, which should result in more streamlined and standardised procurement which should and lead to a more efficient and effective process. The business community in particular has emphasised that existing processes vary considerably across the public sector and can be costly to participate in<sup>8</sup>.

19. It is important to note that, for the purposes of the Financial Memorandum, costs on the Scottish Administration focus firmly on the implementation of the legislation. The Scottish Administration is also a procurer, and in that respect it is considered that whilst there may be nominal compliance costs, the proposed measures will be absorbed into existing work practices and are therefore likely to be cost neutral. This is consistent with the Scottish Government’s view on compliance costs for local authorities and other contracting authorities who are, and will continue to be, involved in procuring goods, services or works.

## **COSTS ON LOCAL AUTHORITIES AND OTHER CONTRACTING AUTHORITIES**

20. For the purposes of this Memorandum, the Scottish Government has made reference to local authorities and other contracting authorities. This is because the Bill describes those bodies to whom the provisions of the Bill will apply by providing a definition of a “contracting authority”. The Bill, therefore, makes no distinction between one contracting authority and another. For example, no distinction is made between a local authority that procures goods, services or works and any other public body that procures goods, services or works.

21. The Bill provides a statutory basis for what is already a routine and on-going cost for local authorities and other contracting authorities who are involved in procuring goods, services

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<sup>5</sup> <http://www.scotland.gov.uk/Resource/0041/00412974.pdf>

<sup>6</sup> <http://www.scotland.gov.uk/Resource/0043/00430602.pdf>

<sup>7</sup> <http://www.scotland.gov.uk/Resource/Doc/96269/0023302.pdf>

<sup>8</sup> <http://www.scotland.gov.uk/Resource/0043/00430602.pdf>

or works as part of the reform agenda. The duties relating to the conduct of specific procurement processes are firmly focused on enshrining good practice into legislation to remove inconsistencies and duplication, and conversely ensuring greater standardisation and consistency of approach, where appropriate, across the public sector in Scotland.

22. As stated earlier, the system costs set out in section a) of table 1 are currently being met by the Scottish Government and will continue to be so. These figures are, therefore, already considered within existing budgets as opposed to being new or additional costs. Furthermore, the Bill recognises the importance of proportionality, and the extensive consultation undertaken has been designed to ensure this is widely understood. Public bodies already benefit from support and guidance from the procurement centres of expertise. The Scottish Government is developing a shared service proposal for the central government sector specifically targeted at smaller agencies and NDPBs. However, this work is being taken forward separately to the Bill.

23. Accordingly, 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.

## **COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES**

24. There will be no costs falling on private individuals as a result of the Bill. 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. It is important to note that, for the purposes of the Financial Memorandum, “other bodies” is considered to include third sector and supported businesses.

## **THE BILL – PART BY PART**

25. The Bill will focus on a combination of a small number of general duties on contracting authorities regarding their procurement activities and some specific measures aimed at promoting good practice in procurement. The provisions of the Bill can be broadly separated into two categories: those relating to the general administrative conduct of procurement and those relating to the conduct of specific procurement processes.

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

26. The Bill will place a small number of general duties on contracting authorities to act without discrimination and in a transparent and proportionate manner, and in a way that seeks to improve the economic, social and environmental wellbeing of the relevant area. It will also place some administrative requirements on larger-spending contracting authorities to publish procurement strategies and annual reports, which will aid visibility of the purchasing activities of these bodies and how they will meet the provisions of the Bill.

## **Costs of complying with general duties and duties relating to the administrative conduct of procurement**

27. The Bill will require specific contracting authorities to prepare and publish a corporate procurement strategy and an annual report. The determining factor as to whether a public body is required to produce a procurement strategy is whether it expects before the start of the financial year to have a procurement spend of £5m or more or if it becomes aware of the likelihood of having such a procurement spend during that year. Ministers will have the power to amend this figure.

28. It is recognised that there is no one-size-fits-all approach. Each corporate procurement strategy will be proportionate to the size and spend of the body. However, there are some fundamental principles which will apply in each case. Standardising the approach to these principles will support better information, increased transparency and visibility, provide a better basis for engagement and remove inconsistencies.

### *Costs on the Scottish Administration*

29. The Bill places a requirement on the Scottish Ministers to issue guidance to contracting authorities on the preparation and publication of procurement strategies and annual reports. Staffing resource costs needed from putting in place the necessary guidance material are set out in table 1 and paragraph 13 above.

### *Costs on local authorities and other contracting authorities*

30. The Scottish Government considers that these measures will not impose material additional costs on local authorities and other public bodies. The procurement capability assessment (PCA) programme has now been in place for four years. The programme is designed to assist public bodies in improving their capability through assessment. It will assist organisations to improve their structure, capability, processes and ultimately performance, by attaining the best standards that are appropriate to the scale and complexity of their business. The PCA will assess capability in key areas against common criteria and standards which will allow contracting authorities, locally, at sector level and nationally, to identify where best practice already exists, where there are gaps and where continuous improvements and efficiencies can be implemented. Organisations will have the opportunity, where appropriate, to develop and implement improvement plans as a result of the PCA with assistance from their relevant sectoral procurement Centre of Expertise (bodies designated as representative of each key sector on procurement matters who provide a range of services to their sector including collaborative contracts and policy and best practice support).

31. Many contracting authorities already have a current procurement strategy in place. In 2012, 98% of the 126 contracting authorities who were subject to a PCA had a current procurement strategy that had been signed off by its Board, and aligned to the authority's strategic plan, core business and service objectives and the Scottish Procurement Policy Handbook<sup>9</sup>. All 32 local authorities had a procurement strategy in place. However, the production of procurement strategies and their content currently varies significantly across all sectors. There is little consistency in the content or depth of the strategies that do exist, and

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<sup>9</sup> <http://www.scotland.gov.uk/Resource/Doc/256155/0076031.pdf>

details of current contracts and future contract opportunities are mostly absent. In many cases, current strategies could certainly be improved.

32. These duties will, therefore, require contracting authorities to revisit and perhaps revise their approach to their corporate procurement strategy as opposed to putting in place a completely new or additional requirement. As stated in paragraph 31, 98% of the 126 contracting authorities who were subject to a PCA in 2012 have a current procurement strategy, including all 32 local authorities. The Scottish Government will produce guidance and templates for contracting authorities, which will also continue to be supported by the PCA process. It is, therefore, anticipated that meeting the requirements placed on them will be absorbed into existing work practices of local authorities and other contracting authorities.

#### *Costs on other bodies, individuals and businesses*

33. These measures will not have a detrimental impact on the costs to businesses or the third sector of participating in public procurement processes. Standardising the approach to procurement, where appropriate, and standardising the preparation and publication of procurement strategies will support better information, increase transparency and visibility, remove inconsistencies and provide a better basis for engagement with suppliers.

### **PART 3 – SPECIFIC DUTIES**

34. The Bill will place certain duties on contracting authorities relating to the conduct of their procurement. These duties are designed to tackle unnecessary inconsistencies for organisations working with the public sector, facilitate greater transparency and ensure that processes are proportionate to what is being procured. The obligations being placed on contracting authorities are:

- Introducing a requirement for public bodies to advertise contracts using a single on-line portal (Public Contracts website).
- Introducing a requirement for public bodies to consider community benefits for major contracts in procurement.
- Exclusion of bidders – The grounds for exclusion that apply to EU-regulated procurements will be made applicable to procurements which are valued at or above the Bill threshold. This will set out the grounds for mandatory exclusion as well as the grounds for discretionary exclusion for companies who fail to meet prescribed standards.
- Provision requiring a public body to take into account guidance that will be issued by Scottish Ministers, when preparing a pre-qualification questionnaire for use in a competition.
- Prohibiting contracting authorities from charging for participating in the procurement process.
- Requiring contracting authorities to provide information on the outcome of a procurement exercise to bidders on request.
- Introducing a requirement for contracting authorities to publish contracts registers.

35. Provision is also made enabling regulations to be made concerning technical specifications, under which contracting authorities would have to comply with the obligations set out therein.

36. The specific obligations in the Bill are further considered below.

### **Requirement for contracting authorities to advertise using a single online portal (Sections 17 and 18)**

37. Public Contracts Scotland was launched four years ago at the request of businesses and as one of the recommendations from the McClelland Report<sup>10</sup> to provide a “one stop shop” for Scottish contracting opportunities. Good progress has been made. However, there are still disparities in the use of the service across contracting authorities.

38. Introducing a requirement for contracting authorities to advertise contract opportunities and contract award notices through a single on-line portal is needed to ensure adequate transparency in relation to Scottish public contracts.

#### *Costs on the Scottish Administration*

39. The system costs for the Scottish Government in continuing to support a single online portal (Public Contracts website) are shown in section a) of table 1. The Scottish Government is already meeting the cost of Public Contracts Scotland, therefore the figures outlined in table 1 reflect maintained system costs as opposed to new or additional costs.

40. It is anticipated that there will be additional staffing resource costs involved in meeting the increased demand and to ensure that the system meets requirements and remains fit for purpose. It is anticipated that there will also be additional staffing resource costs associated with developing and maintaining policy and best practice guidance and associated advice in relation to the system and legislative requirements. These costs are set out in table 1 and paragraph 14 of the Memorandum.

#### *Costs on local authorities and other contracting authorities*

41. There will not be a cost to individual contracting authorities for using the portal. In fact, without this system, contracting authorities would have to use other means to advertise relevant public sector procurement opportunities, which may lead to a proliferation of portals. The Scottish Government estimates that if, for example, 200 contracting authorities were to purchase their own advertising portal, this could cost the public sector an additional £250,000 p.a. compared to a single online portal. A publication by the CBI on the results of its 2012 survey of members on progress in delivery of procurement reform across the UK<sup>11</sup> recommends that public sector bodies should look at how the number of procurement portals in use can be rationalised. One member reported that the move to the use of portals had meant the member’s company now had to register and use over 70 portals across the UK, each with different processes and requirements.

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<sup>10</sup> <http://www.scotland.gov.uk/Resource/Doc/96269/0023302.pdf>

<sup>11</sup> [http://www.cbi.org.uk/media/1830922/cbi\\_procurement\\_reform\\_report\\_12\\_november\\_2012.pdf](http://www.cbi.org.uk/media/1830922/cbi_procurement_reform_report_12_november_2012.pdf)

*Costs on other bodies, individuals and businesses*

42. In the Scottish Government's view, this measure will not have a detrimental impact on the costs to businesses or the third sector of participating in public procurement processes. In fact, the current disparity in the use of a single online portal causes real issues for suppliers including:

- increased costs for suppliers having to search in many places for contracts and perhaps leading to missed opportunities,
- inconsistency of approach across the public sector which leads to discontent amongst suppliers,
- lack of transparency of where public money is spent.

43. Public Contracts Scotland automatically sends notification of contract opportunities to suppliers who are registered on the system at no cost to them. By placing a requirement on contracting authorities to use a single online portal, the Bill will reduce and remove the need for suppliers to search for public contracts. While the cost on suppliers searching for public sector contracts outwith Public Contracts Scotland is difficult to estimate, suppliers using Public Contracts Scotland have suggested that this could cost businesses between £17m and £40m per annum. The difference in these illustrative costs depends on whether suppliers manually search for public contracts or whether they use an email subscription service (the illustrative costs are based on an assumption that there are around 45,000 businesses selling to the public sector in Scotland, based upon information taken from the Scottish Procurement Information Hub<sup>12</sup>) Suppliers suggest that one hour per week would be spent searching a variety of websites and other sources to identify contract opportunities. This has been multiplied by 52 weeks then by £7.45 (Living Wage rate) and finally by the number of suppliers to arrive at £17,433,000. If an email subscription is taken out instead, whereby the supplier is alerted to opportunities, the cost estimated is £895 (supplier subscription). This figure has been multiplied by the number of suppliers to arrive at £40,275,000.

**Requirement for contracting authorities to consider community benefits for major contracts in procurement (Sections 19-21)**

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

45. Policy and guidance on training and employment opportunities in public procurement has been in place since February 2008<sup>13</sup>. This has evolved to recognise the opportunities that may be afforded through working with suppliers and related supply chains. Whilst good progress has been made on use of community benefits in procurement, the Scottish Government recognises that further action is required to accelerate improvements.

46. Placing a requirement on those awarding major contracts to include a statement of their approach to delivering community benefits, including training and apprenticeships, or, where no

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<sup>12</sup> <http://www.scotland.gov.uk/Topics/Government/Procurement/eCommerce/ScottishProcurementInformationHub>

<sup>13</sup> <http://www.scotland.gov.uk/Resource/Doc/212427/0056513.pdf>

opportunities have been identified, record reasons for not including these requirements in the procurement, will ensure a more consistent approach.

#### *Costs on the Scottish Administration*

47. The Bill provides that the Scottish Ministers may issue guidance on the use of community benefit requirements. Staffing resource costs needed for putting in place the necessary guidance material are captured in table 1 and paragraph 13 above.

#### *Costs on local authorities and other contracting authorities*

48. The Scottish Government does not expect this measure to impose material additional costs on local authorities and other contracting authorities as it builds on the good work to date done as part of the wider procurement reform agenda and seeks to enshrine into legislation policies that have already been put in place. The guidance on Community Benefits in Public Procurement<sup>14</sup>, published in 2008, included several case studies, the focus of which is the suitability of using community benefit clauses in procurement projects and the effectiveness of the procurement process in obtaining a contractor that is committed to delivering the required community benefits. Details on reports and guidance relating to community benefits are published on the Scottish Government's website.

49. Monitoring community benefits is an integral part of contract management arrangements, so no additional costs should be incurred. There is existing, free of charge, support available to contracting authorities to help them develop their competence in the use and application of community benefit clauses through Construction Skills<sup>15</sup> (the Sector Skills Council and Industry Training Board for the construction industry) and the Scottish Government 'Developing Markets' contract<sup>16</sup>. There is also a growing network of practitioners who are happy to share their experience of using the clauses and a growing body of case studies is available.

#### *Costs on other bodies, individuals and businesses*

50. This measure will not impact on the costs to businesses or the third sector of participating in public procurement processes. Similar to the case for contracting authorities, support for including community benefits is available from Construction Skills and the Scottish Government 'Just Enterprise' contract<sup>17</sup>. Funding and advice on training and recruitment is available from a range of sources, including the Skills Development Scotland website – 'Our Skills Force'<sup>18</sup>.

### **Exclusion of bidders (Section 22)**

51. High quality public procurement is not only dependent on good practice by contracting authorities and their purchasers, but suppliers to the public sector need to play their part by delivering high quality and cost-effective goods, services and works, and by maintaining the highest possible business ethics and standards. The public in general, businesses and the third sector rightly expect that only reputable persons and organisations should be awarded public

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<sup>14</sup> <http://www.scotland.gov.uk/Resource/Doc/212427/0056513.pdf>

<sup>15</sup> <http://www.citb.co.uk/>

<sup>16</sup> <http://www.scotland.gov.uk/Topics/People/15300/enterprising-organisation/Opening-Markets>

<sup>17</sup> <http://www.justenterprise.org/justentindex.html>

<sup>18</sup> <http://www.ourskillsforce.co.uk>

sector contracts. The Bill provides Ministers with a power to make regulations to exclude suppliers from being awarded a contract if they meet any of the criteria set out in those regulations.

*Costs on the Scottish Administration*

52. The Bill provides that the Scottish Ministers may make further provision by regulations on the exclusion of bidders. Staffing resource costs needed from putting in place the necessary guidance material are captured in table 1 and paragraph 13 above.

*Costs on local authorities and other contracting authorities*

53. This measure will not impose material additional costs on local authorities and other contracting authorities. Current procurement exercises will normally contain a stage at which the purchaser considers whether grounds exist that would warrant the exclusion of a particular supplier from the competition. The Bill will allow Ministers to specify grounds over and above those found in current European legislation and, therefore, this will not require a new process or procedure that would incur costs; it will simply require the public body to assess the supplier against the criteria listed in the regulation.

*Costs on other bodies, individuals and businesses*

54. This measure will not have an adverse impact on the costs to businesses or the third sector of participating in public procurement processes. Arguably, the fact that this could result in new questions being asked of the supplier regarding its suitability in a pre-qualification could be seen as adding costs to the process (as it will require the supplier to answer the question(s)). However, given that answers to standard questions can be stored by the supplier for future competitions (and questionnaires) as part of the standard pre-qualification questionnaire, any costs should be off-set by the system or reduced to a minimum.

**Guidance on pre-qualification questionnaires (sections 23-24)**

55. In practice, the selection of tenderers by contracting authorities is usually carried out by the use of pre-qualification questionnaires. The current way of using pre-qualification questionnaires by individual contracting authorities has led to the following issues being raised by suppliers:

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

56. The current process is, therefore, widely regarded as inefficient, overly bureaucratic and expensive for bidders and has the potential to exclude capable organisations. In order to simplify the process and reduce cost to business, it is considered that the PQQ requirements should be made more consistent. To that end, the Bill requires a contracting authority to take into account guidance, which will be issued by the Scottish Ministers, when preparing a questionnaire for use in a competition.



*Costs on the Scottish Administration*

57. The Bill provides that the Scottish Ministers may issue guidance to contracting authorities on pre-qualification and the selection of tenderers. Staffing resource costs needed from putting in place the necessary guidance material are set out in table 1 and paragraph 13 above.

*Costs on local authorities and other contracting authorities*

58. The Scottish Government does not expect this measure to impose additional costs on local authorities and other contracting authorities. The measure is not introducing a new step in the procurement process. Where a local authority or other public body deems that a pre-qualification stage is necessary for a given procurement then it would typically prepare a pre-qualification questionnaire. This measure will simply require local authorities and other contracting authorities to take into account guidance, which will be issued by the Scottish Ministers, when preparing a questionnaire for use in a competition. A set of core questions has been made available to local authorities and other contracting authorities and promoting greater use of these core questions will help ensure greater consistency for bidders allowing them to re-use responses and reducing the amount of cost and effort required to participate in the procurement process.

*Costs on other bodies, individuals and businesses*

59. This measure will not have a detrimental impact on the costs to businesses of participating in public procurement processes. The Scottish Government expects the measure to lead to cost savings to suppliers by avoiding unnecessary duplication of standard supplier information. Based on feedback received from its members<sup>19</sup>, the Scottish Building Federation claimed that, in the construction sector in particular, firms expected to spend about £1,000 per £1m of public contract value on filling out questionnaires. The standard pre-qualification questionnaire will contain standard questions; the system will allow suppliers to store and re-use their answers to these questions thus reducing bureaucracy, time and therefore cost.

**A provision enabling regulations to be made on the use of technical specifications (Section 25)**

60. This will enable regulations to be made which may prevent contracting authorities making reference to specific products or makes of product when undertaking a procurement with the intention of restricting the competition to offers for those products. Should a contracting authority wish to lay down a technical specification it must do so in the relevant contract documents.

*Costs on the Scottish Administration*

61. The Bill provides that the Scottish Ministers may make further provision by regulations on the use of technical specifications. Staffing resource costs needed from putting in place the necessary material are captured in table 1 and paragraph 13 above.

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<sup>19</sup> <http://www.scottish-building.co.uk/newsitem.php?id=158>

*Costs on local authorities and other contracting authorities*

62. The Scottish Government does not expect this measure to impose additional costs on local authorities and other contracting authorities, as it mirrors the obligation that these bodies are already under with regards to higher value contracts that are within the scope of the European procurement directives. Therefore, this practise should be absorbed into existing working practices.

*Costs on other bodies, individuals and businesses*

63. In the Scottish Government's view, this measure will not impact on the costs to businesses or the third sector of participating in public procurement processes. The provision will ensure that contract opportunities are more readily accessible by businesses and that competition is not restricted. Therefore, the Scottish Government does not expect the measure to impose additional costs on businesses when participating in public procurement processes.

**Prohibiting contracting authorities from charging for participating in a procurement process (Section 26)**

64. Businesses and business representatives have brought some instances to the attention of Ministers where contracting authorities have asked a supplier to pay a fee to receive tender documents. Charging suppliers for access to tender documents is poor practice that could act as a barrier to doing business with the public sector, and disproportionately affect smaller firms and third sector bodies.

65. This provision will prohibit contracting authorities from imposing any charge for access to tender documents to potential suppliers and thus remove this potential barrier for participation in procurement.

*Costs on the Scottish Administration*

66. This measure will not result in additional costs to the Scottish Administration.

*Costs on local authorities and other contracting authorities*

67. There should be no direct costs for contracting authorities arising from this provision. The practice has its origins in the days when preparing and issuing paper tenders could be costly for the public body concerned and it was intended to discourage frivolous requests for the documents. As electronic despatch is now the norm, the costs of issuing the documents are insignificant in most cases. Though a small number of instances where contracting authorities have asked a supplier to pay a fee to receive tender documents have been brought to Ministers' attention, these are exceptional cases.

*Costs on other bodies, individuals and businesses*

68. The Scottish Government considers that this measure will not add to the costs to businesses of participating in public procurement processes. Although far from being a widespread practice, the provision in the Bill will prevent businesses from incurring costs merely to participate in a competition.

**Provision requiring contracting authorities to provide information on the outcome of a procurement and more detailed de-briefing information to bidders on request (Sections 27-29)**

69. The provision of de-brief information is an important part of procurement activity because it helps suppliers understand where they may have weaknesses and areas which require improvement. It can also provide an opportunity for suppliers to suggest improvements to the procurement processes, although that is not the primary purpose of the de-brief.

70. There has been guidance in place for some time. For example, the Suppliers' Charter<sup>20</sup>, published in 2006, is a joint statement between public sector bodies and Scottish businesses which commits contracting authorities to offering meaningful feedback to suppliers, whilst the Procurement Journey<sup>21</sup> and the Supplier's Journey<sup>22</sup> also contain information and guidance for both buyers and suppliers respectively. However, despite this, feedback from stakeholders suggests that there are significant inconsistencies in the quality and availability of de-brief information.

71. The Scottish Government proposes to include a requirement that a contracting authority must, as soon as is reasonably possible after awarding a contract, notify its decision to all unsuccessful tenderers. Furthermore, contracting authorities will be required to provide, on written request, de-brief information to bidders. This will ensure greater consistency with the obligation that these bodies are already under with regards to higher value contracts that are within the scope of the European procurement directives.

*Costs on the Scottish Administration*

72. This measure will not result in additional net costs to the Scottish Administration as debriefing is already provided routinely as a matter of good practice.

*Costs on local authorities and other contracting authorities*

73. There could be a nominal cost for some local authorities or contracting authorities that do not routinely offer a de-brief, but, done properly, costs of de-briefing should be outweighed by the benefits as the information needed to provide the de-briefing should be readily available from the bid evaluation process. It is anticipated that any minimal costs will be absorbed into existing work practices for those local authorities and contracting authorities who are involved in procuring goods, services or works and are, therefore, likely to be cost-neutral. Helping businesses gain a better understanding of their performance should also help ensure that they improve their bids in future, offering the prospect of improved value for money for the contracting authority. No overall net impact on costs is, therefore, anticipated.

*Costs on other bodies, individuals and businesses*

74. This measure will not have an adverse impact on the costs to businesses or the third sector of participating in public procurement processes. In fact, feedback can have an important

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<sup>20</sup> <http://www.scotland.gov.uk/Topics/Government/Procurement/Selling/Supplierscharter2/>

<sup>21</sup> <http://www.scotland.gov.uk/Topics/Government/Procurement/buyer-information/spdlowlevel>

<sup>22</sup> <http://www.scotland.gov.uk/Topics/Government/Procurement/Selling/SupplierJourney>

role in helping suppliers understand where they have weaknesses and areas which require improvement.

### **Requirement for contracting authorities to publish contracts registers (Section 30)**

75. Introducing a requirement for contracting authorities to publish contracts registers would ensure greater transparency of procurement outcomes and augment other proposals (publication of strategic plans and contract documentation).

76. Greater transparency will help underpin greater efficiency in procurement processes and outcomes and assist business in assessing current spend areas and potential future opportunities.

#### *Costs on the Scottish Administration*

77. This measure will not result in additional costs to the Scottish Administration. System costs for the Public Contracts website are currently being met by the Scottish Government and any staff resource costs derived from putting in place the necessary processes and guidance material have been included in table 1 and paragraph 14 above.

#### *Costs on local authorities and other contracting authorities*

78. Whilst there may be a risk of increased administrative effort in maintaining the register, the risk is mitigated through automatic data capture via the Public Contracts website. Therefore, no additional costs are anticipated. Furthermore, it is a requirement of EU procurement law that every year a public body that awards at least one public contract that is within the scope of the Public Contracts (Scotland) Regulations 2012 must submit a report to the Scottish Ministers containing details of all such contracts it has awarded in the preceding calendar year. Practice to date has been that, although the legislation requires contracting authorities to submit a report to Scottish Ministers no later than 31 July, contracting authorities only provide this information when the Scottish Governments contacts them to ask for the information. The Scottish Ministers then provide this information to the European Commission through the UK Government. The most recent exercise, in 2013, has involved contacting 358 contracting authorities asking them to provide a return. In the future, the publication of contracts registers should remove the need for this type of 'annual trawl' and might, therefore (in conjunction with automatic data capture through Public Contracts Scotland) actually reduce costs.

#### *Costs on other bodies, individuals and businesses*

79. This measure will not impact on the costs to businesses or the third sector of participating in public procurement processes.

### **Amendment of Climate Change (Scotland) Act 2009 (Section 31)**

80. To help Scotland realise the potential economic and environmental benefits of procurement-driven market investments, the Bill will amend the Climate Change (Scotland) Act 2009. It creates a new section 82A of the Climate Change (Scotland) Act that provides a power for the Scottish Ministers, by regulations, to require specified contracting authorities to ensure that a specified proportion of goods or works procured or a specified proportion of the materials used in the production, provision or construction of goods, services or works so procured must

be reused, remanufactured or designed to be repaired, reused, refurbished, remanufactured or recycled.

81. The Scottish Government understands that exercising and implementing such a power will require careful planning and will need to be done in co-ordination with a series of market analysis projects to understand the viability of creating market demand, as well as the viability of investment at a scale sufficient to furnish the public sector's needs. The costs and impact of any such regulations will be set out in the Business and Regulatory Impact Assessment that will accompany them.

#### **PART 4 - REMEDIES**

82. Notwithstanding any power that a court otherwise has, this section gives the court power to suspend a procedure leading to the award of a contract or framework agreement or to suspend the implementation of any decision or action taken by a public body in relation to that procedure. This section further details the considerations to be taken into account by the court in considering whether such a suspension is appropriate and lists the remedies available to the court where a public body is found to be in breach of its duties.

83. Where the breach of duty is in respect of a contract or framework agreement which has already been entered into, the only remedy available to the court is the award of damages.

#### *Costs on the Scottish Administration*

84. This measure is not expected to result in material additional costs on the Scottish Administration. The right for a supplier to raise an action in the courts has long been a part of public procurement legislation. The new remedies regime<sup>23</sup>, which has been in force since 20 December 2009<sup>24</sup>, changed the remedies available to a supplier. Whilst the Bill will provide suppliers with similar rights as those found in the Public Contracts (Scotland) Regulations 2012, 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.

85. While there is no central data available on the number of public procurement cases brought each year in Scotland, it is believed that cases are relatively rare, typically in single figures. This may be because it is a requirement of the EU procurement law remedies regime that the company wishing to bring a complaint must first bring the issue to the attention of the contracting authority. As such, where there is an obvious problem with compliance, the contracting authority is provided with an opportunity to rectify the problem. This provision is being replicated in the proposed remedies for the Bill. While it is difficult to estimate the number of cases which might result, it is less likely that disputes regarding lower value contract award decisions would result in action being brought in the courts. As such it seems unlikely that there will be more cases for contracts regulated by the Bill than there are for contracts covered by the

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<sup>23</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:335:0031:0046:en:PDF>

<sup>24</sup> [http://www.legislation.gov.uk/ssi/2009/428/pdfs/ssi\\_20090428\\_en.pdf](http://www.legislation.gov.uk/ssi/2009/428/pdfs/ssi_20090428_en.pdf)

Public Contracts (Scotland) Regulations 2012. This would suggest that resulting court action would be relatively rare, albeit there may be more occasions when an authority is made aware of a problem which it then has to rectify.

*Costs on local authorities and other contracting authorities*

86. The Scottish Government does not expect this measure to result in additional costs to local authorities or other contracting authorities. There may be an additional risk of challenge by tenderers to procurement procedures or decisions. However, this risk is mitigated by adopting good procurement practices.

*Costs on other bodies, individuals and businesses*

87. This measure will not have an adverse impact on the costs to businesses participating in public procurement processes. Bidders who believe that their legitimate commercial interests may have been harmed by non-compliance will have a right of action following a potential breach of the applicable duties.

**SUMMARY OF COSTS**

88. As mentioned in paragraph 18 above, the Scottish Government does not expect the Bill to lead to significant additional long-term recurring costs. For the most part, the Bill seeks to embed the use of systems and policies that have already been put in place as part of the reform of public procurement in Scotland. The Bill, therefore, should not be viewed in isolation but as a continuum of the reform of public procurement in Scotland.

89. In determining the areas to focus on, consideration has been given to where evidence suggests, despite reported progress on the key aspects of the reform agenda, there is a need for further action. This will ensure that the legislation is proportionate and targeted only at issues where further action is required to accelerate improvement in the way public procurement in Scotland is conducted. The table below summarises the expenditure being made to support delivery and costs that arise as a direct result of the Bill.

Table 2: Summary of the expenditure required to support delivery and the costs arising as a direct result of the Bill.	
	<b>Costs</b>
<b>Scottish Government / Scottish Administration</b>	System costs of £1,680k over three years.  Staffing costs of £1,094k over three years.  Costs indirectly associated with the Bill implementation of £500k over three years (2014-15 to 2016-17).
<b>Local authorities and other contracting</b>	No net impact on costs is anticipated. The Bill provides a statutory basis for what is already a

<p><b>authorities</b></p>	<p>routine and on-going cost for local authorities and other contracting authorities who are involved in procuring goods, services or works. The duties relating to the conduct of specific procurement processes are firmly focused on enshrining good practice into legislation to remove inconsistencies and duplication, and conversely ensuring greater standardisation and consistency of approach, where appropriate, across the public sector in Scotland. It is, therefore, expected that any costs will be nominal and will be absorbed into existing work practices.</p>
<p><b>Other bodies, individuals and businesses</b></p>	<p>The Scottish Government does not expect any direct costs to other bodies, private individuals and businesses specifically arising from the Bill. This is because the Bill is targeted at the behaviours and practices of contracting authorities. It is intended to make it easier for suppliers, irrespective of their size, to participate in public sector procurement by reducing inconsistency in procurement procedures and practices across the public sector.</p>

## **COST SAVINGS**

90. It is not possible to precisely estimate cost savings to be accrued in cash terms from the benefits of the new proposals, primarily because of a lack of reliable data and because impact will differ across individual contracting authorities. However, there is a significant amount of qualitative evidence on procurement reform that has informed the Bill process and outlines the issues that the Bill addresses as well as the benefits that it might produce.

91. The inconsistent application of pre-qualification criteria for public contracts is a good illustration of the potential for delivering savings. Although pre-qualification questions are well-defined within the existing legislation and are the subject of policy guidelines, the questions are currently applied in an inconsistent manner across contracting authorities which leads to a sense of frustration amongst suppliers about the wasted costs of repeatedly being asked to provide similar PQQ information (relating to business probity, financial standing, standard company information and technical and professional ability) in different formats to a variety of contracting authorities. Tackling this issue has the potential to deliver savings for businesses. The administrative cost of the existing PQQ process for suppliers is high. Work undertaken by the Civil Engineering Contractors Association estimates the cost of completing capacity and capability (pre-qualification) questions to be around £1,000 per competition, which it considers to be a conservative estimate. A recent report by the University of Dundee - The Cost to the

Scottish Public Sector of Current Pre-qualification<sup>25</sup> - estimates that the total cost to the Scottish public sector of preparing, submitting and assessing PQQs is £1,317.8m or about 22% of the value of works procured. Furthermore, as stated at paragraph 59 above, the Scottish Business Federation claimed that, in the construction sector in particular, firms expected to spend about £1,000 per £1m of public contract value on filling out questionnaires<sup>26</sup>. Whilst these figures can be interpreted as not being entirely consistent, what they agree on is that the pre-qualification process is a costly one for suppliers. Using the more conservative estimate of £1,000, if contracting authorities could use the same standard pre-qualification questions, and suppliers hold their information electronically then the Scottish Government estimates that in excess of £75m could be saved annually by removing the administrative burden from suppliers. This estimate assumes a 50% saving in resource through the use of standard pre-qualification questions, and the ability for suppliers to hold their information electronically for reuse. This is a best approximation based on experience to date and feedback from stakeholders.

92. Public Contracts Scotland has made public procurement more competitive, providing increased transparency and probity of the procurement process, whilst saving money for the public purse. The service brings buyers and suppliers together, providing improved efficient procurement processes. At the same time as creating a highly competitive transparent process for all levels of contract value, there have also been large increases in contract awards providing transparency of where public money is being spent.

93. Use of Public Contracts Scotland has increased substantially year on year<sup>27</sup>. For example, table 3 illustrates that the number of new business opportunities contract notices and Quick Quotes have increased by 32% between 2011 and 2012.

	Year 1 - 2009	Year 2 - 2010	Year 3 - 2011	Year 4 -2012
New business opportunities contract notices, and Quick Quotes	3,516	6,021	8,968	11,810
New quick quotes (low value)	200	2,111	4,491	7,471
Average unique visitors to the site every month	15,338	25,598	54,670	57,728
Average page views per month	395,113	732,871	981,816	1,090,555

<sup>25</sup> Rahman, M & Horner, M (2013)

<sup>26</sup> <http://www.scottish-building.co.uk/newsitem.php?id=158>

<sup>27</sup> [http://www.publiccontractsscotland.gov.uk/guides/Guide\\_Download.aspx?id=1261](http://www.publiccontractsscotland.gov.uk/guides/Guide_Download.aspx?id=1261)



94. However, there are still disparities in the use of the service across contracting authorities. It is difficult to know what contracts from which contracting authorities do not use this inclusive service. However, by way of illustration the Scottish Government is aware of one local authority that on average creates a contract notice on Public Contracts Scotland for every £122k of spend, in comparison to the rest of the local authority sector which on average places a notice for every £460k of spend. The disparity in the use of Public Contracts Scotland causes real issues for suppliers including:

- increased costs for suppliers having to search in many places for contracts and perhaps leading to missed opportunities,
- inconsistency of approach across the public sector which leads discontent amongst suppliers,
- lack of transparency of where public money is spent.

95. Suppliers searching for public contract opportunities is a real cost to the Scottish economy. While the cost on suppliers searching for public sector contracts outwith Public Contracts Scotland is difficult to estimate, suppliers using Public Contracts Scotland have suggested that this could cost businesses between £17m and £40m (see paragraph 43 above). The difference in these illustrative costs depends on whether suppliers manually search for public contracts or whether they use an email subscription service; the illustrative costs are based on an assumption that there are around 45,000 businesses selling to the public sector in Scotland

*These documents relate to the Procurement Reform (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 3 October 2013*

## **SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE**

On 3 October 2013, the Cabinet Secretary for Infrastructure, Investment and Cities (Nicola Sturgeon MSP) made the following statement:

“In my view, the provisions of the Procurement Reform (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

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## **PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE**

On 3 October 2013, the Presiding Officer (Rt Hon Tricia Marwick MSP) made the following statement:

“In my view, the provisions of the Procurement Reform (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”



*These documents relate to the Procurement Reform (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 3 October 2013*

# **PROCUREMENT REFORM (SCOTLAND) BILL**

## **EXPLANATORY NOTES (AND OTHER ACCOMPANYING DOCUMENTS)**

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