

PROCUREMENT REFORM (SCOTLAND) BILL

POLICY 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 9.3.3 of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 38–EN.

OVERVIEW OF THE BILL

2. The Scottish Government has set out a clear vision for the future of Scotland. At the core of its programme is the determination to focus Government and public services on creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth. Public procurement spend is a powerful lever at the Government's disposal and should be used where appropriate to deliver change.

3. The Scottish Government and wider Scottish public sector have been working towards improved procurement for a number of years. The Procurement Reform (Scotland) Bill ("the Bill") is intended to build on the work to date. It aims to establish a national legislative framework for public procurement that supports Scotland's economic growth by delivering social and environmental benefits, supporting innovation and promoting public procurement processes and systems which are transparent, streamlined, standardised, proportionate, fair and business friendly. The Bill will focus on a small number of general duties on contracting authorities regarding their procurement activities and some specific measures aimed at promoting good practice. These measures should help encourage local action within organisations with the aim of building procurement capability and capacity and maximising public procurement's contributions to wider socio-economic and environmental policy objectives.

4. The Bill will be combined with guidance and training for the public sector and businesses to maximise the benefits available from procurement spending

CURRENT LEGISLATION ON PROCUREMENT

5. Public procurement law is an area of responsibility devolved to the Scottish Parliament. The main legislation in force at present is the Public Contracts (Scotland) Regulations 2012 ("the

Regulations”), which transpose EU Directives 2004/18/EC¹ and 2007/66/EC² into national law under powers contained in section 2 of the European Communities Act 1972. These Regulations do not apply to every purchase made by contracting authorities, but only to those types of contracts that are not otherwise excluded from the Regulations³ and are above specified financial values. There is no single financial value that applies; for contracts for goods and services procured by central government bodies the threshold value is £113,057, for contracts for goods and services procured by sub central bodies (e.g. local authorities) the threshold value is £173,934 and in the case of works (construction) contracts the threshold value applicable to all bodies is £4,348,350. These threshold values derive from the euro figures quoted in article 7 of EU Directive 2004/18/EC (“the Directive”), which are amended once every two years by the European Commission, at which point the Commission also specifies a ‘conversion equivalent’ value that applies in those member States that do not have the euro as their currency. At present, the threshold value for central Government bodies for goods and services that applies across Europe is €130,000. The European Commission has converted that figure into a Sterling equivalent of £113,057; this explains the precise nature of the values that apply to public procurement contracts in Scotland. It is expected that these values will change again as from 1 January 2014, and will apply for a 24 month period. Details of the threshold values in force at any time are published on the Scottish Government website⁴ and communicated by means of a Scottish Procurement Policy Note, the most recent one being issued in December 2011 announcing changes taking effect from January 2012⁵.

6. Given that the Scottish Parliament has responsibility for public procurement Scotland has, therefore, the power to develop its own unique approach to procurement matters, either in the context of implementing EU public procurement law or the development of national policy and legislation.

7. The Bill needs to be framed within EU procurement law, which is itself subject to review. Political agreement between the European Commission, Council and Parliament on the text of proposed new Directives was reached on 17 July 2013 and it is considered unlikely that there will be any further significant changes to the text in the Directives, although the Scottish Government is continuing to monitor events. The Directives are expected to be approved by the European Parliament in January 2014.

8. The Bill will not be a replacement for the Regulations, nor will it simply have the effect of reducing the threshold values outlined in paragraph 5 above. Rather, the Bill will be an addition to these Regulations. At present, there is no specific procurement legislation that governs the award of contracts in Scotland below the threshold values in the Regulations. The Bill will, therefore, for the first time in Scotland create a legal framework for lower value contracts (see paragraphs 56 and 57 below for what constitutes lower value contracts for the purposes of the Bill). Some of the provisions of the Bill will apply to any contract where the value is greater than the Bill threshold, whilst there are other provisions that will only apply to contracts which have a value that is above the Bill threshold and below the 2012 Regulations threshold. This latter scenario is to recognise where a provision in the Bill already has an

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:134:0114:0240:en:PDF>

² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:335:0031:0046:en:PDF>

³ http://www.legislation.gov.uk/ssi/2012/88/pdfs/ssi_20120088_en.pdf

⁴ <http://www.scotland.gov.uk/Topics/Government/Procurement/policy/10613>

⁵ <http://www.scotland.gov.uk/Resource/Doc/116601/0124236.pdf>

equivalent provision in the Regulations. The Bill, therefore, acts as a complement to the existing procurement rules by applying measures which are not currently subject to regulation and by making provision similar to existing requirements but for lower value contracts.

BACKGROUND

9. The overarching aim of public sector procurement activity in Scotland must be the achievement of value for money for the taxpayer⁶. The Scottish Model of Procurement⁷ defines value for money in Scottish procurement as not just being about cost and quality, but about the best balance of cost, quality and sustainability.

10. Over a considerable number of years various UK reviews of public procurement have highlighted inefficiencies in spending and a lack of data on spending as significant issues. The Review of Public Procurement in Scotland⁸ (“the McClelland Report”) published in 2006 set out a strategy for procurement reform in Scotland. It concluded that public structures, people and technology were not in place to ensure good purchasing and that improvements were necessary. Amongst other issues identified, including those of lack of capability and capacity within the procurement profession, data on purchasing and procurement performance were found to be poor and often inaccurate. Other recommendations for improvement included the need for cultural change and more standardised and centralised approaches to public sector procurement.

11. There has been significant progress on procurement reform since 2006. However, it is clear from the Scottish Government’s engagement with key stakeholders that there is still room for substantial improvement. In particular, more could be done to ensure that procedures are proportionate and standardised, that contract opportunities are transparent and readily accessible, especially for SMEs and the third sector and that procurement activity supports sustainability in its broadest sense.

12. The Scottish Government’s strategic vision is that the Bill should be effective in promoting sustainable procurement and good practice in procurement without creating unnecessary risks or burdens on contracting authorities and suppliers. The Bill will focus on placing 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. These measures should help encourage local level 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 annual procurement strategies and reports, which will aid visibility of the purchasing activities of these bodies and how they will meet the provisions of the Bill.

13. The Bill is set in the socio-economic context of increasing demand for core public services in a period of reduced and constrained funding. Increasingly, procurers will need to identify better targeted, more innovative and radical service delivery solutions to meet this

⁶ [Ch 5 Scottish Procurement Policy Handbook](#)

⁷ <http://www.scotland.gov.uk/Topics/Government/Procurement/about/spd-aims>

⁸ <http://www.scotland.gov.uk/Resource/Doc/96269/0023302.pdf>

demand. Improving the operation of the public procurement market has the potential to contribute substantially to meeting these challenges.

14. It is particularly important that all opportunities to secure value for money in public spending are secured. In this context, thinking creatively about how to secure both the best value for money while at the same time pursuing the wider social, economic and environmental needs of the relevant area is crucial. For example, there is an increasing number of good examples of how food is being sustainably procured and it is intended that the Bill will drive consistency of this approach across the public sector in Scotland.

15. Continuing with the key themes of the procurement reform agenda will also help encourage a mixed range of suppliers in order to help develop and stimulate a varied and competitive marketplace.

CONSULTATION

16. Informal consultation with stakeholders took place in the early part of 2012. The Scottish Government engaged with a number of private and third sector bodies as well as umbrella groups as part of this engagement. For example:

- a construction sector workshop was held in January 2012, the purpose of which was for Scottish Government officials to hear from a range of construction industry leaders about specific measures that the Bill should or should not address. Attendees included representatives from Armour Construction consultants, Balfour Beatty, Scottish Building Federation, Association for Project Safety Limited, Civil Engineering Contractors Association, SELECT, University of Dundee and Construction Skills (the Sector Skills Council and Industry Training Board for the construction industry); and
- Scottish Government officials presented at a number of well attended round table meetings, including the Scottish Council for Voluntary Organisations (“SCVO”), Glasgow Chambers of Commerce, the Coalition of Care and Support Providers in Scotland and Social Firms Scotland.

17. These events enabled the Scottish Government to engage directly with a wide range of member organisations and individual businesses on the issues relating to public procurement in Scotland and helped shape the public consultation paper.

18. Engagement with stakeholders continued during the consultation process and this included the governance bodies associated with the wider public procurement reform programme.

19. A short-life Ministerial-led sounding board was established and met for the first time in May 2012. The sounding board brought together representatives from differing stakeholder groups into one forum to ensure that differing views were discussed and understood so that the Scottish Government could reach a balanced view on development of the Bill. Key stakeholders were drawn from business, the third sector and the public sector, including procurement

professionals and made best use of the existing reform board governance structure. Sounding board membership included representation from:

- Scottish Chambers of Commerce
- Confederation of British Industry (Scotland)
- Federation of Small Businesses (Scotland)
- Institute of Directors (Scotland)
- Scottish Council for Voluntary Organisations
- Social Firms Scotland.
- Scottish Building Federation
- Civil Engineering Contractors Association
- ScotlandIS
- Coalition of Community Care providers Scotland
- Scottish Trade Unions Congress (“STUC”)
- Scottish Council for Voluntary Organisations.

20. The Scottish Government has engaged with the Sounding Board, and other stakeholders, on the potential themes of the Bill, during the development of the public consultation, and on the development of the policy content of the Bill. The Sounding Board meetings in 2013 were used to engage with stakeholders on the draft policy outline, to get feedback on the range of measures being considered and the practical implications therein.

21. A short-life Steering Group was also established to support development of the Bill. The Steering Group had a distinct focus on social and environmental themes. Its membership includes representation from Scottish Fair Trade Forum, Zero Waste Scotland, Sustainable Scotland Network, Stop Climate Chaos (Scotland), Institute for Sustainable Construction, STUC and Social Firms Scotland.

22. In addition to this, there was engagement with the Supplier Engagement Working Group (“SEWG”) on the Bill. SEWG brings together a diverse range of representatives from the public, private and third sectors and is chaired by the Chief Executive of the Scottish Chambers of Commerce. Face to face discussions on the Bill were held at a meeting in March 2012 with a further workshop held in April 2013 to discuss thinking on the Bill to which all private and third sector representatives were invited to attend or give comments. Attendees at these meetings included Luddon Construction Limited, Enterprise Rent-a-Car, First Scottish Group, Social Firms Scotland, SCVO and the Federation of Small Businesses.

Consultation on proposed policy content (August to November 2012)

23. The formal public consultation⁹ was launched on 10 August 2012 and ran until 2 November 2012. The consultation posed a series of questions under six main themes:

⁹ <http://www.scotland.gov.uk/Resource/0039/00398733.pdf>

- Ensuring public procurement processes are transparent, streamlined, proportionate, standardised and business-friendly.
- Making it easier for business (particularly newer businesses, small and medium-sized enterprises (SMEs) and the third sector) to access public contract opportunities and sub-contracting requirements.
- Smarter use of public procurement to encourage innovation and growth.
- Taking account of social and environmental sustainability issues through public procurement.
- Dealing with inappropriate conduct and poor performing suppliers.
- Application and compliance.

24. The response was strong, with a total of 251 consultation responses received; 48 from individuals and 203 from organisations. The consultation responses were analysed and the consultation analysis report¹⁰ was published on 25 January 2013.

Key findings

25. There is substantial support for the aim of the Bill and general agreement to a wide range of the measures proposed. For example, responses largely supported the introduction of a general duty on contracting authorities to conduct procurement in an effective, transparent and proportionate manner. There is support also for the publication of annual strategic procurement plans, contract registers, use of a single specified online portal to advertise and award all contracts and use of a specified standard pre-qualification system.

26. There is support for the introduction of general duties on contracting authorities to consider how each procurement specification may impact on the ability of businesses, small and medium sized enterprises (“SMEs”) and third sector organisations to compete and to demonstrate the extent to which what is being procured will promote or improve the economic, social, and environmental well-being of the relevant area.

27. There is also broad agreement on removing barriers to SMEs participation in the procurement process, e.g. disproportionate pre-qualification requirements and lack of transparency in identifying contract opportunities.

28. There is strong support for providing de-brief information to suppliers that bid for public contracts in Scotland in situations not covered by the 2012 Regulations and prohibiting contracting authorities from charging suppliers to receive tender documents, a practice that has occurred in some instances in the past.

29. Some proposals resulted in differences of opinion. For example the suggestion that the Bill might require major contractors to publish sub-contract opportunities and the suggestion that the Bill require the publication of contract documentation are not supported. Also the proposals that each contracting authority should have at least one contract with a supported business and

¹⁰ <http://www.scotland.gov.uk/Resource/0041/00412974.pdf>

that contracting authorities might be required to appoint supported business champions received little support. There are, however, similar numbers agreeing and disagreeing as to whether any requirement should apply only to contracts of a certain value, for example, contracts above £50k and whether exemptions should apply.

30. There was strong support for the consideration of community benefits clauses in major contracts and for a requirement that the details of the benefits to be delivered should be published. There was support for a requirement that public sector bodies should act with a view to securing improvement in the economic, social and environmental well-being of the relevant area and for dealing appropriately with poor performance and poor standards of ethics on the part of contractors.

31. The findings from the public consultation were considered along with other available evidence to help inform development of the Bill.

EVIDENCE REVIEW

32. A review of evidence carried out between November 2012 and March 2013 examined existing material on procurement reform and reveals that there is policy support at Scotland, UK and EU levels for the principles underpinning procurement reform.

33. Evidence suggests, however, that despite reported progress as noted in available data sources on aspects of the reform agenda, there is need for continued action, and that this requires a balanced approach to encouraging and enforcing further reform. The report on the review of evidence has been published¹¹ by the Scottish Government.

POLICY OBJECTIVES

34. The Scottish Model of Procurement puts procurement at the heart of Scotland's economic recovery and sees procurement as an integral part of policy development and service delivery. Focussing on outcomes as opposed to outputs, it uses the power of public spending to deliver additional public value over and above the traditional savings and quality improvements that better purchasing can deliver.

35. Whilst the Model is Government-led, it is owned by all of the Scottish public sector and strategic relationships with key business and third sector organisations have been developed.

36. As stated earlier, the Scottish Government's vision is that the Bill should be effective in promoting sustainable procurement and good practice in procurement without creating unnecessary risks or burdens on contracting authorities and suppliers. The Bill will focus on a small number of general duties on contracting authorities regarding their procurement activities and some specific measures aimed at promoting good practice. These measures should help encourage local action within organisations with the aim of building procurement capability and capacity and maximising public procurement's contributions to wider socio-economic and environmental policy objectives.

¹¹ <http://www.scotland.gov.uk/Resource/0043/00430602.pdf>

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

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

38. The Bill is an important strand of the work underpinning these four priorities and forms part of the continuum to achieve the Scottish Government purpose of creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth.

THE ALTERNATIVES TO LEGISLATION

39. As stated in paragraph 37 above, the Bill has to be viewed as part of the procurement reform agenda, and not in isolation. Reviews and audits of public procurement in the last ten years in Scotland and the UK have underscored the need for reform of procurement in terms of capability and capacity development within the profession and in relation to procurement processes, procedures and systems¹². The Scottish Government has responded to the findings from reviews and as a result developed a programme of procurement reform.

40. Changes that have occurred in Scotland since these reviews include, in particular, the creation of Centres of Expertise, the Scottish Procurement Policy Handbook, a single public sector electronic portal, a Single Point of Enquiry and the development of the pre-qualification questionnaire, in addition to the introduction of Procurement Capability Assessments (conducted annually across the public sector and designed to assess the developing capability of organisations to help with their continuous improvement)¹³. These areas of work are still considerably new in their development and are under continuous improvement.

41. As part of continuing work to build momentum of the procurement reform process, evidence would suggest the need for a mixed approach to encouraging and enforcing continual engagement with procurement reform. Progress has been made regarding systems and processes within procurement in Scotland. However, there is still room for continued improvement in terms of capability, capacity, cultural and behavioural change¹⁴.

42. The EU directives allow for a good degree of discretion at member state level for managing below threshold level contracts and in practice, the UK and Scotland tend to support a guidance led and informal approach to interpretation of the directives for below threshold levels.

¹² <http://www.scotland.gov.uk/Resource/0043/00430602.pdf>

¹³ Ch 3 <http://www.scotland.gov.uk/Resource/0043/00430602.pdf>

¹⁴ <http://www.scotland.gov.uk/Resource/0043/00430602.pdf>

However, as evidence suggests and as a result of feedback from stakeholders in Scotland, there is a need for a balanced approach to encouraging and enforcing and achieving continual development in procurement. Creating primary legislation for general duties that reflect the EU directives' procurement principles and promote the facilitating of access to SMEs and third sector bodies to public sector contracts, encourage innovation in procurement, encourage sustainable procurement and promote the principle of transparency should convey the message that not only is procurement concerned with the transparent use of public resources and open competition at all levels of spend but also, that procurement plays a central role in the achievement of wider governmental objectives.

43. Legislative action needs to be both business-friendly while also addressing social and environmental needs and aspirations. 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 includes feedback from businesses, who have for some time been stating that Scotland needs to do more to improve procurement processes and drive both good practice and standardisation and simplification. It is recognised, however, and that there is a need for a mixed approach to encouraging and enforcing continued engagement with procurement reform.

44. 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. This concurs with the public consultation and wider stakeholder engagement whereby stakeholders agree that legislation is needed, but that it has to be balanced with continued non-legislative action.

THE BILL PART BY PART

45. The Bill is in five parts:

- Part 1: Key concepts and application
- Part 2: General duties and procurement strategies
- Part 3: Specific duties
- Part 4: Remedies
- Part 5: General.

46. One of the key overarching policy objectives of the Bill is to maintain consistency with existing procurement legislation where there is commonality between both pieces of legislation. As an example, the Public Contracts (Scotland) Regulations 2012 define, for the purposes of those Regulations, a “contracting authority”. The Scottish Government sees no benefit, but potentially the creation of confusion and lack of certainty, if the Bill was to take anything other than an identical interpretation of a contracting authority and so the Bill is drafted in a manner which ensures that the meaning of a contracting authority is the same irrespective of whether reference to the term is being made under the Bill or under the Regulations.

PART 1: KEY CONCEPTS AND APPLICATION

Policy objective

47. The policy intention is that the measures in the Bill will apply to contracting authorities who propose to enter into contracts or framework agreements of a kind that are subject to the Regulations. The Regulations do not apply to every contract that a contracting authority awards and exempt certain types of contracts from their scope¹⁵. The Bill will do likewise, and thus contains a provision to exclude those types of contracts that are excluded from the Regulations. In addition, the Bill will provide Ministers with a power to modify the types of contracts which are, or are not, excluded contracts from the Bill. Examples of the types of contracts that Ministers may consider exempting from the scope of the Bill will be contracts in pursuit of a shared service and contracts which are in support of a commercial offering by a contracting authority.

48. Financial thresholds will be set, above which contracts will be considered to be “regulated” and subject to the measures set out in the Bill. The threshold will be set at a level which is below the level applicable for the Regulations and, therefore, the Bill will apply to contracts of a lower value than those that are covered by the Regulations. As explained in paragraph 8 above, certain provisions within the Bill may apply to a contract which is also a regulated contract under the 2012 Regulations¹⁶.

Key information

49. As mentioned in paragraph 46 above, the Scottish Government wishes to maintain as much consistency as possible between the Bill and the Regulations. This includes the definition of the contracting authorities that are within the scope of the Bill and also the types of contracts that are within the scope of the Bill.

Contracting authorities (section 1)

50. The Bill should only apply to those contracting authorities that are already subject to procurement legislation in terms of their purchasing activities. The approach adopted in the Bill is to describe those bodies that fall within its scope by certain criteria:

- The first criterion is a list consisting of the more commonly known contracting authorities. This list has been compiled based upon the list of bodies that are subject to the Regulations. There are three observations to be made regarding the list found at Schedule 1 to the Bill;
 - firstly, to create as much certainty and transparency as possible the list contains a greater level of detail in terms of the bodies subject to the Bill than found in the Regulations – in other words, the lists are not identical in terms of how they describe the bodies;
 - secondly, there may be some changes in relation to the bodies named in the Regulations (some bodies may have amalgamated, some may no longer exist and some may now have a new name) and therefore the bodies named in Schedule 1

¹⁵ [Regulation 6\(2\) of the Public Contracts \(Scotland\) Regulations 2012](#)

¹⁶ [Public Contracts \(Scotland\) Regulations 2012](#)

of the Bill and the bodies named in the Regulations may not always be identical; and

- thirdly, whilst the purpose of the list is to identify the major contracting authorities, the list is not exhaustive. However, a body that does not appear in the list may still be within the scope of the Bill if it is a contracting authority in terms of the second criterion.
- The second criterion is that if the body does not appear on the list, it must be a contracting authority for the purpose of the Regulations, subject to the limitation that it is only such bodies which have functions not relating to reserved matters in terms of the Scotland Act 1998¹⁷ and whose functions are exercisable in or as regards Scotland,
- The second criterion will include bodies that are contracting authorities by virtue of regulation 3(1)(bb) of the Regulations (which applies a test to determine if a body that is not otherwise specifically listed meets the definition of a contract authority, and thus will be within the scope of the Regulations). Adopting this approach ensures that consistency is maintained between the bodies in scope of the Bill and of the Regulations. For example, neither universities nor Registered Social Landlords are specifically mentioned in the Regulations, yet they are subject to them as they meet the test set out in regulation 3(1)(bb). If, at any point in the future, there is a change that results in such bodies no longer meeting the criteria of regulation 3(1)(bb), they would fall out of scope of the Regulations and therefore also out of coverage by the Bill.

Regulated procurements (section 2)

51. The provisions within the Bill can be broadly split into two strands. Firstly, there are provisions that relate to the conduct of the procurement process itself; secondly there are administrative provisions. Regulated procurements explicitly covers the seeking of offers and the award of regulated contracts.

Regulated contracts (section 3)

52. As explained earlier in paragraph 5, contracts above a certain value are subject to the Regulations (£113,057 for contracts for goods and services procured by central government bodies, £173,934 for contracts for goods and services procured by sub-central bodies e.g. local authorities and £4,348,350 for construction-type contracts). Below these values, Scotland, and indeed the UK, is one of a very small minority of countries in the European Union that does not have procurement-specific legislation¹⁸. The Bill therefore presents an opportunity to bring lower value contracts within a legislative framework. The options available were to:

- i. align the Bill threshold to that applicable to the Regulations,
- ii. set a Bill threshold somewhere below the Regulations threshold, or
- iii. apply the Bill to all contracts irrespective of value.

¹⁷ [1998 c.46](#)

¹⁸ “A very large majority of Member States regulate public procurement below the EU thresholds by law or regulation, at least in the Classical sector. Only in the UK and Ireland is guidance documentation the exclusive means of instructing contracting entities on their obligations and good practice in procurement below the EU thresholds.” – [Organisation for Economic Cooperation and Development - SIGMA Paper 45](#)

53. The first option was discounted as it would result in the Bill simply sitting on top of the Regulations, and the opportunity being lost for the Bill to apply to contracts that the Regulations did not. The third option was also discounted as it was recognised that there will be a de-minimis point below which the flexibility and relatively low costs of running a low-value procurement exercise could be lost by the need to comply with the provisions of the Bill. Option two was the preferred choice, but a decision had to be reached on the threshold below which contracts and procurement activities would not be covered by the Bill.

54. The Procurement Journey¹⁹, online Scottish Government guidance intended to support all levels of procurement activities and to facilitate best practice and consistency across the public sector, uses the threshold of £50,000 as one of the criteria used to identify low-value contracts. As the policy intention is to keep procurement legislation and policy as joined up as possible, there was logic to using this figure as the threshold point for contracts for goods and services for all contracting authorities (deviating slightly from the approach in the Regulations where different levels of threshold apply depending on the status of the contracting authority, which can lead to confusion that the Scottish Government is keen to avoid introducing into the Bill).

55. Another option that was considered was to link the Bill threshold to the Regulations thresholds (which are changed every two years to ensure consistency with changes made by the European Commission to the relevant EU Directive). Creating such a link would have to be on the basis of a percentage (e.g. 50% of the Regulations threshold), which would then be likely to result in the Bill threshold being an “unrounded” and very precise figure. The Regulations threshold derives from Directive 2004/18/EC and at present the threshold value for central Government bodies for goods and services that applies across Europe is €130,000. However, as shown previously in paragraph 5 above, when that figure is converted by the European Commission into a Sterling value it becomes £113,057. If the Bill threshold was linked to a percentage of the Regulations threshold value (using 50% as an example) the actual threshold value for the Bill would be £56,528.50, which it is believed would not be welcomed as it would be unnecessarily specific and likely to create confusion and may ultimately lack the clarity required.

56. It was considered that setting the Bill threshold in the region of 50% of the Regulation threshold would strike the balance between being able to have an impact on contracts below the Regulations threshold but not too low as to have a disproportionate impact on low-value procurements. Therefore, it was concluded that a figure of £50,000 struck the correct balance.

57. As mentioned in paragraph 5 above, the Regulations have a separate threshold for works (construction) contracts in recognition that these types of contracts are generally of much higher value than contracts for goods and services. The current threshold figure is £4,348,350, and in keeping a consistent approach, to establish a threshold for the Bill, it would be a value that offers clarity and in the region of 50% of the threshold under the Regulations. It was, therefore, concluded that the Bill threshold for works contracts should be £2,000,000.

¹⁹ [Procurement Journey decision matrix](#)

PART 2: GENERAL DUTIES AND PROCUREMENT STRATEGIES

Policy objective

58. The policy intention is that the Bill shall place some general duties on contracting authorities in terms of their procurement activities to act without discrimination and in a transparent manner and in a way that is best designed to improve the economic, social and environmental well-being of the area in which the body operates. In addition, the Bill will also place some specific administrative duties on higher spending contracting authorities.

Key information

Requirement on contracting authorities to treat potential contractors equally and without discrimination and to act in a transparent and proportionate manner (section 8)

59. In all procurements where the contract could be of interest to bidders from another member State of the European Union, overarching Treaty principles of transparency, equal treatment, non-discrimination and proportionality apply. In practice the application of the principles is usually considered on the basis of whether the contract opportunity must be advertised and, if so, how extensive that advertising should be.

60. These principles are designed to protect the integrity of the internal market of the European Union and it is for that reason that they only apply where there is a certain cross-border interest in the subject of the procurement. The existence of such an interest will largely be determined by the nature and value of the contract although currently, interpretation of this is left to individual contracting authorities in the absence of any clear ruling from either the European Commission or the Court of Justice of the European Union.

61. The uncertainty makes for inconsistent practice which may raise questions as to whether a contracting authority has actually met its obligations and leads to a certain degree of complaint and disquiet from the suppliers as to whether contract opportunities have been promoted fairly.

62. The Regulations place a specific obligation²⁰ on contracting authorities to treat suppliers equally and without discrimination and to act in a transparent and proportionate manner. Whilst this provides clarity and certainty for those contracts which are within the scope of the Regulations, the interpretation is less certain for contracts below the Regulations threshold, which includes contracts covered by the Bill. It is therefore proposed that these principles should be reflected in domestic legislation, creating a greater degree of certainty of application thereby leading to increased clarity and consistency of practice. It is the policy intention that the application of these should be applied as general duties applicable to contracting authorities. The Bill will, therefore, impose duties upon contracting authorities to treat potential contractors equally and without discrimination and to act in a transparent and proportionate manner.

²⁰ [Regulation 4\(3\) of the Public Contracts \(Scotland\) Regulations 2012](#)

Requirement on contracting authorities to facilitate access to contracts by SMEs and third sector bodies including supported businesses (section 9)

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

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

Requirement on public sector bodies to encourage suppliers to propose novel or innovative goods, works and services (section 9)

65. While the reform of public procurement in Scotland has increased awareness of procurement innovation, it is a commonly held perception that the value of innovation in procurement as an enabler of sustainable economic growth is yet to be fully utilised.

66. This provision will ensure a proportionate and uniform approach across the public sector in Scotland. And it will help encourage a mixed range of suppliers in order to help develop and stimulate a varied and competitive marketplace.

Supported businesses (section 10)

67. Under the Regulations, it is possible to restrict participation in a procurement exercise to only those bidders that are "supported businesses"; in summary a supported business is one where 50% or more of its employees have a disability. By excluding all other potential bidders, this is a form of positive discrimination that stems from the Regulations. Although the consultation responses were not in favour of placing on a statutory footing the existing policy that every contracting authority should aim to have at least one contract with a supported business the Bill will "draw-down" from the Regulations the ability to restrict competitions to supported businesses into the Bill to avoid any uncertainty on this point should contracting authorities be considering doing so.

Procurement strategy (section 11) and annual report (section 14)

68. Current procurement law only applies in the context of the requirements for the award of any given contract. There is no requirement for authorities to consider what they are procuring and when nor, save for the application of rules in any given case, how they should undertake procurement.

69. Purchasing decisions, if taken in isolation, can appear to be rather ad-hoc and reactive only to need whereas on a considered approach strategies in relation to procurement can have significant impact in relation to a range of different issues, including the economy and environment.

70. It is, for example, increasingly common for procurers to include community benefit requirements in contracts which generate training and apprenticeship opportunities which assist in local skills development and employment opportunities. Another area of public expenditure which demonstrates the potential of public procurement is sustainable food procurement, which the Scottish Government would expect to see covered in any procurement strategies. Public expenditure on food has the potential to unlock benefits for community health, well-being and social justice through access to good nutrition including access to fresh and seasonal produce; and market, employment and training opportunities in this key sector where there are a high number of SMEs. Whilst taking into account such matters in any given procurement is a matter of best practice, it is considered appropriate to ensure that contracting authorities consider the wider social, economic and environmental aims of procurement on a more consistent basis, by producing a procurement strategy.

71. The production of corporate procurement strategies currently varies significantly across all sectors. There is no consistency in the content or depth of strategies that do exist, and details of current contracts and future opportunities are mostly absent. In all cases current plans could certainly be improved.

72. 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. By standardising the approach to these principles, this will support better information, increase transparency and visibility, provide a better basis for engagement and remove unnecessary inconsistencies.

73. It is the policy intention therefore that specific contracting authorities will be required to prepare and publish a corporate procurement strategy and an annual report. The determining factor as to whether a contracting authority is required to produce a procurement strategy is whether it expects, before the start of the financial year, to have a “significant procurement spend”. For the purposes of the Bill, it is proposed that a significant procurement spend is an annual spend of £5m or more. By setting this threshold the intention is to strike a balance between ensuring sufficient transparency and consistency of approach and consideration of wider benefits that can be achieved through procurement – and hence through publication of a strategy - with the need to avoid placing this obligation on contracting authorities that only procure occasionally or at lower values. Based upon data taken from 120 contracting authorities who provided details of their spend activity in financial year 2011-2012 to the Scottish Information Procurement Hub, 102 of these bodies had spend above this threshold. Whilst the hub does not hold data from every public body, it does include central Government, all 32 local authorities, 22 bodies from the health sector, all universities and some colleges. Based upon this data, the Scottish Government believes that the £5m threshold has not been set too high with the consequence that it would exclude too many contracting authorities from the need to produce strategies and reports and that it will ensure sufficient transparency from all but the lower spending contracting authorities. There will be no requirement in the Bill that a contracting authority must prepare a strategy from scratch each year; it will be possible for authorities to review and amend their existing strategies for the purposes of this section of the Bill; likewise nothing will prevent authorities from updating their strategies throughout the financial year.

PART 3: SPECIFIC DUTIES

Policy objective

74. The intention of Part 3 is to place, on contracting authorities, specific duties with regard to their procurement activities that are designed to offer benefits to potential bidders with respect to greater consistency across the public sector, greater transparency and ensuring that processes are proportionate to the contracts in question. The intention is also that contracting authorities should seek to deliver a community benefit whenever a contract has a value of £4m or more. In addition, this section requires contracting authorities to exclude bidders from a competition in certain, specified circumstances.

Key information

Publication of notices on Public Contracts website (section 18)

75. Public Contracts Scotland (PCS) was launched over four years ago at the request of businesses and as one of the recommendations from the McClelland Report²¹ to provide a one stop shop for Scottish contracting opportunities.

76. Good progress has been made with PCS, which is supporting work to make public procurement more competitive, providing increased transparency and probity of procurement processes.

77. Use of PCS has seen increased competition. As contracting authorities have increasingly adopted the service, SMEs and Scottish suppliers have increasingly benefitted from the implementation. The PCS website contains details of case studies of SMEs that have been successful in winning business through PCS²².

78. However, despite the success to date of PCS and the high number of suppliers that have registered with the service, there are still large disparities in the use of PCS across contracting authorities. For example, one contracting authority with a procurement spend of approximately £300m conducted over 2,400 contract opportunities within PCS, whereas another contracting authority which had a spend of approximately £323m only placed 104 contract notices during the same period. Greater engagement with PCS from those contracting authorities that are not using it as effectively as others would almost certainly result in a larger number of opportunities being conducted through the site, and in particular a greater number of lower value opportunities of interest to SMEs.

79. Although the use of portals is seen as improving visibility and transparency of public sector contracts, there is a risk that unless co-ordinated, actions may result in a proliferation of portals being used to advertise opportunities. That is why there is provision within the Bill requiring contracting authorities to advertise contracts and contract award notices through a single on-line portal. This will benefit suppliers by offering them a one stop shop to identify public sector contract opportunities. The Bill will not preclude contracting authorities from

²¹ <http://www.scotland.gov.uk/Resource/Doc/96269/0023302.pdf>

²² http://www.publiccontractsscotland.gov.uk/casestudies/casestudy_main.aspx

advertising elsewhere (for example, on their own website - indeed the functionality of PCS allows contracting authorities to maintain their own Buyer Profile within their website, without the need to “double key” information), but this will be in addition to advertising on the single on-line portal.

Community benefit requirements (section 19)

80. Increasingly, 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.

81. Policy and guidance on training and employment opportunities in public procurement has been in place since February 2008²³. This has evolved to recognise that community benefits clauses in contracts can be used to achieve small business and social enterprise development and community engagement. Details on reports and guidance relating to community benefits are published on the Scottish Government’s website²⁴.

82. Under the Regulations, contracting authorities may stipulate conditions relating to the performance of a public contract provided the conditions are compatible with EU law and are clearly indicated in the contract notice or contract documents. The Regulations make clear that the conditions may, in particular, concern social and environmental considerations.²⁵

83. The Regulations do not, however, require such conditions to be used or even considered in the context of any particular procurement; that being a matter for the discretion of the contracting authority.

84. The Bill will be used to drive a more transparent and consistent approach to community benefits. The policy intention is that for significant contracts (which the Bill will define as contracts over a value of £4 million) there should be a requirement placed upon a contracting authority to consider, before a competition has commenced, whether to impose a community benefit requirement as part of that contract. Further, the contracting authority should then state the requirement it intends to include in the contract in the contract notice or, as the case may be, state in the notice the reasons for not including any requirement.

85. A number of contracting authorities already record targets and achievements relating to this policy including contracts relating to the Glasgow 2014 Commonwealth Games, Southern General Hospital in Glasgow, the Queensferry Crossing and Scottish Futures Trust HubCo projects. However, the Bill will deliver a consistent approach to community benefits through:

- The general duties in Part 2;
- Provisions relating to procurement strategies and annual reports;
- Provision for contracts above £4 million to include a community benefit clause in the contract notice or to provide reasons why the contract is not considered suitable for

²³ <http://www.scotland.gov.uk/Resource/Doc/212427/0056513.pdf>

²⁴ <http://www.scotland.gov.uk/Topics/Government/Procurement/policy/corporate-responsibility/CSR/SSPAP/ComBen>

²⁵ [Regulation 39 of the Public Contracts \(Scotland\) Regulations 2012](#)

the inclusion of community benefit clauses (for example, the contract is of very short duration or perhaps a spot purchase of goods); and

- Provision for contracting authorities to publish details of the community benefits agreed in the contract award notice.

Exclusion of bidders (sections 22 – 23)

86. High quality public procurement is not only dependent on good practice by contracting authorities and their purchasers, but suppliers to the public sector also need to play their part by delivering high quality, cost effective goods, services and works and by maintaining the highest possible business ethics and standards, particularly in relation to their workforce. The public, in general, businesses and the third sector rightly expect that only reputable persons/organisations should be awarded public sector contracts. Recent events, such as the practice of blacklisting and the inappropriate use of zero hours contracts, have highlighted a number of instances where the activities of employers could be viewed as falling below the standards that the public would expect of a company performing a public contract.

87. European Procurement Directive 2004/18/EC²⁶, transposed into national law in the 2012 Regulations, sets out the criteria relating to the behaviours and characteristics that a contracting authority can legitimately consider in determining the suitability of a supplier to be invited to bid for a public contract. The criteria can be summarised as falling into two distinct types. The first is a list of specific offences, the existence of any one of which *requires* a contracting authority to exclude the supplier (although there is an exception to this if there are overriding requirements in the general interest which justify disregarding the prohibition). The second type is a list which could be summarised as covering matters relevant to the professional standing of the supplier (such as bankruptcy, a winding up order, a conviction relating to an offence in the conduct of the supplier's business or profession, failure to pay taxes and the commission of an "act of grave misconduct" in the course of the supplier's business or profession). Exclusion from a competition on the basis of the second type is regarded as discretionary – in other words, for this type of matter the purchaser has discretion to exclude the supplier from the competition, but is under a legal obligation to act fairly and proportionately. As a result, a decision of this type must always take into account any remedial action the supplier has taken and the seriousness of the matter in relation to the supplier's suitability to bid. The Regulations also permit a contracting authority to exclude a supplier from a competition on the basis of criteria and/or minimum standards that it sets in respect of the supplier's financial and economic standing as well as technical or professional capability.

88. As a first step, the Bill will give Ministers the power to make regulations specifying the criteria against which a contracting authority may exclude a supplier from participating in a procurement process under the Bill. The intention will be to use this power to "draw-down" the list of exclusions from the 2012 Regulations into the Bill thus ensuring consistency with the 2012 Regulations and providing legal clarity on the matters which a contracting authority may take account of in considering excluding a supplier from bidding for a contract regulated by the Bill. This will also allow the Scottish Ministers to define what is to be regarded as "grave professional" misconduct. For example, the regulations could be used to make it explicit that offences connected with blacklisting of workers must be regarded as constituting grave

²⁶ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:134:0114:0240:en:PDF>

professional misconduct and that such offences would, until and unless the supplier is able to demonstrate that it has taken remedial action which is appropriate and proportionate to the scale and seriousness of the offence, result in the exclusion of that supplier from public tender lists.

89. In addition to this, the Bill will also give Scottish Ministers the power to issue guidance that contracting authorities must have regard to when selecting suppliers to participate in a procurement process. The Bill will make clear one area which the guidance should address relates to a supplier's approach to workforce matters. A supplier's general approach to workforce matters can in certain circumstances be very important in terms of its capability and quality of service in delivering or performing a contract. Without a well-managed and well-motivated workforce, a supplier may be less likely to be capable of delivering the required quality of service. Common practice at present is to ask for CVs of key staff, but not to ask about the motivation or strength of engagement of staff. Furthermore, the quality of delivery may be reduced if the supplier has a poorly motivated workforce, which can be an issue relevant to technical quality at the contract award stage of a procurement. The types of workforce issues that could determine whether a supplier has a well-motivated and engaged staff may include those identified in paragraph 86 above, and the guidance provided under the Bill may assist contracting authorities in taking these types of issues into account in a procurement process.

90. This approach of taking a power to issue guidance will allow Ministers to address current known workforce related issues, for example inappropriate use of zero hours contract, whilst retaining the flexibility to respond quickly to future issues, including, but not limited to, any that may arise as part of the work to implement the forthcoming EU Procurement Directive into Scots law.

91. As contracting authorities are required to have regard to any guidance that Ministers issue, if a body decides not to follow the guidance and is challenged, it will have to show good reason for not following the guidance. However, it is believed that contracting authorities are likely to welcome such guidance and disregarding it will not become an issue.

Pre-qualification questionnaires (section 24)

92. The Regulations sets out high level rules which apply to certain higher value procurement procedures, including rules which apply to pre-qualification procedures when only a limited number of participants are to be invited to tender.

93. Pre-qualification is a commonly used part of procurement procedures. Done properly, it can help reduce costs to all concerned by limiting the competition to a small number of those companies which are most likely to win the contract. In practice the selection of tenderers by contracting authorities is usually carried out by the use of pre-qualification questionnaires ("PQQs"). Typically at PQQ stage a company wishing to bid for a contract is required to submit various pieces of information and documents which, in theory, allow the contracting authority to assess its suitability to bid. A form of PQQ can also be required in an "open" competition where the purchaser wishes to assess suitability at the same time as it considers the company's bid.

94. The current way of using pre-qualification questionnaires by individual contracting authorities has led to the following serious issues being raised by suppliers:

- The same or very similar questions being asked of participants in different formats
- Participants asked to supply the same information multiple times
- Lack of consistency in the questions asked
- Pre-qualification requirements which are disproportionate to the contract in question.

95. The current process is, therefore, widely regarded as inefficient, overly bureaucratic and expensive for bidders; and has the potential to exclude capable organisations.

96. Significant steps have already been taken in Scotland. For example the Supplier Engagement Working Group has brought procurement, business and third sector communities together to develop a standardised suite of questions and associated guidance for use by the Scottish public sector but, as has been highlighted in a number of independent reports, more needs to be done.

97. The Bill will enable Ministers to issue guidance to purchasers about the selection of bidders and the use of questionnaires in that process. The use, for example, of a standard questionnaire, should result in greater consistency of information being requested by individual purchasers and in the responses provided by the supplier. This should lead to a substantial reduction in the time and effort required to respond to PQQs and should reduce bureaucracy and costs to both businesses and purchasers alike. The guidance may also address issues of proportionality in the selection process, for example, stating that a purchaser must not set a limit on a supplier's annual turnover as part of the selection process which exceeds two times the value of the contract unless it was justified by the nature of a particular contract. Doing so would not only ensure a proportionate approach to selection but would also assist smaller suppliers, who may otherwise be excluded from the competition if a turnover level was set higher, or without regard to the contract in question.

Technical specifications (section 25)

98. The Regulations makes provision in relation to technical specifications in relation to works, materials, goods or services to be procured. They require that where a contracting authority wishes to lay down a technical specification it must do so in the relevant contract documents. These documents, and therefore the specification, will be disclosed to potential contractors at the invitation to tender stage. The Regulations oblige bodies to ensure that any technical specifications afford equal access to bidders and do not have the effect of creating unjustified obstacles to the procurement being opened to competition.

99. The Bill provides Ministers with a power to make provision on the use, by contracting authorities, of technical specifications in contracts that are not covered by the Regulations. The effect of this will be to prevent reference in a contract document to specific products or makes of product which has the effect of restricting either the goods and services that can be offer or the suppliers who can meet the requirement.

Prohibiting contracting authorities from charging for documents etc. (section 26)

100. Businesses and business representatives have highlighted instances where contracting authorities have required a participant to pay a fee to receive tender documents. This is despite

guidance to the effect that this is poor practice and could act as a barrier to doing business with the public sector, and disproportionately affect smaller firms and third sector bodies.

101. The practice has its origins in the days when preparing and issuing paper tenders could be costly for the contracting authority concerned and it was intended to discourage frivolous requests for the documents.

102. As electronic despatch is now the norm, the costs of issuing the documents are insignificant in most cases. The Scottish Government believes the time is right to prevent instances of charging for tender documents altogether. Therefore, this provision will prohibit charges being levied by contracting authorities for the issue of tender documents.

Provision of debrief information (sections 27 – 29)

103. The provision of debrief information is an important part of procurement activity because it helps participants understand the relative strengths and weaknesses in their bids and provides a focus for developing their business. It can also provide an opportunity for participants to suggest improvements to the procurement processes.

104. The Regulations specify the requirements applicable to procurement exercises within their scope and detail is provided in a Scottish Procurement Policy Note²⁷. In addition, there are several situations in which contracting authorities must notify participants but do not have to provide information on why the participant was unsuccessful.

105. The Suppliers' Charter²⁸, a joint statement between public sector procurement organisations and Scottish businesses outlining how they will work together to facilitate access to public sector procurement opportunities, commits contracting authorities to offering "meaningful feedback to suppliers on the evaluation of their proposal at the end of the tendering process", whilst the Procurement Journey²⁹ also contains information and guidance for buyers and the Supplier Journey³⁰ contains information and guidance for suppliers. Despite these tools and supporting guidance feedback from stakeholders suggests that debriefs are not offered as a matter of course in circumstances where the Regulations do not apply, for example where the value of the contract is below the Regulations threshold.

106. This provision will require contracting authorities to notify all suppliers of the outcome of a competition and will entitle the supplier to ask for a summary of the reasons why its bid was unsuccessful. Feedback from suppliers has resulted in the inclusion of a provision for successful suppliers to ask for feedback. Traditionally, feedback has been associated with unsuccessful bidders, but successful bidders can also benefit from receiving feedback on their bids and gain a clear understanding of what they do well and possible areas for development of their business that will improve their performance and improve their market understanding.

²⁷ <http://www.scotland.gov.uk/Resource/0039/00391642.pdf>

²⁸ <http://www.scotland.gov.uk/Topics/Government/Procurement/Selling/supplierscharter>

²⁹ <http://www.scotland.gov.uk/Topics/Government/Procurement/buyer-information/spdlowlevel>

³⁰ <http://www.scotland.gov.uk/Topics/Government/Procurement/Selling/SupplierJourney>

Contracts register (section 30)

107. Introducing a requirement for contracting authorities to publish a contract register will help ensure greater transparency of procurement outcomes and augment other proposals such as publication of corporate procurement strategies and production of contract registers. Greater transparency will help underpin greater efficiency in procurement processes and outcomes, may assist contracting authorities in identifying collaborative opportunities and assist business in assessing current spend areas and potential future contract opportunities.

Procurement of recyclable and reusable materials (section 31)

108. The Bill provides an opportunity to stimulate demand for certain products that can be, are, (or are designed to be) repaired, reused, refurbished, remanufactured or recycled.

109. This is not simply about tapping into existing markets; it is about creating demand for new, resource efficient types of products that will incentivise firms to offer new types of products and services by driving innovation and collaboration.

110. By creating this demand, procurement can help accelerate shifts already occurring in manufacturing and business models, thus helping Scottish companies, and the Scottish economy, gain an early advantage in the shifting global market.

111. To help Scotland realise the potential economic and environmental benefits of these procurement driven market investments, the Bill will add section 82A to the Climate Change (Scotland) Act 2009³¹, complementing existing section 82 which states that the Scottish Ministers may, by regulations, require that things procured or constructed comprise of or include or contain a certain proportion of recycle. The Bill will create a power to make regulations to introduce similar requirements in relation to remanufactured or reused goods or goods intended for repair, reuse, refurbishment or remanufacture.

112. The power could be used, for example, in relation to refurbished IT products including PCs, servers, network products, storage, etc. to realise the value of products at the end of leasing agreements. The residual value of devices is an important part of business, helping companies keep costs down and stay competitive with their leasing contracts. The most effective way to maximise value is to see products re-sold in the marketplace, so it is in companies' interests to refurbish as much as possible.

113. Exercising and implementing such a power will require careful planning and will need to be done in coordination 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. It is also intended to put in place other actions to support these market opportunities through the market development programme in Zero Waste Scotland, and/or through Scottish Enterprise.

114. The expectation is that contracting authorities will procure these types of goods through service type agreements, thus ensuring that companies retain ownership of the goods, and

³¹ http://www.legislation.gov.uk/asp/2009/12/pdfs/asp_20090012_en.pdf

thereby retain an additional incentive to design things for remanufacture, refurbishment or for recycling. It is thought there are existing routes to promoting this service based approach to procurement.

PART 4: REMEDIES

Policy objective

115. This Part provides a supplier with a right of recourse to the courts where it believes it has suffered or risks suffering loss or damage as a consequence of an action or non-action or a decision by a contracting authority as part of a regulated procurement. Whilst the right for a supplier to raise an action in the courts has long been a part of public procurement legislation, the remedies available to a supplier changed significantly with the introduction of a new European Directive³². The new remedies regime has been in force in Scotland under the Regulations since 20 December 2009³³.

116. The remedies in the Bill will not be available under regulated procurements where the contract is within the scope of the 2012 Regulations. There will not be any cross-over between the regimes; where the Regulations apply to a procurement the remedies under those Regulations will apply and will not be displaced by the Bill. Whilst the Bill will provide suppliers with similar rights as those found in the Regulations, they will not be identical; the Bill will not provide for all the remedies that are available in the Regulations. Some of what may be considered to be the more significant remedies in the Regulations, such as an ineffectiveness order (which cancels of all future obligations under the contract), will not be available in the Bill. This is in recognition that, in general, any challenge brought under the Bill will be for a lower value contract.

Key information

117. Although the policy intention is for the Bill to be consistent with the 2012 Regulations where there are common issues, the remedies available to suppliers is one area where the Scottish Government is deliberately taking a different approach.

118. European Directive 2007/66/EC set out a new regime in terms of the remedies that were available under EU Procurement Directive 2004/18/EC. Both of these Directives have been transposed by the 2012 Regulations.

119. Under the existing remedies rules, a contracting authority is required to notify all suppliers of its contract award decision and then “standstill” (i.e. not enter into contract with the winner) for a period of at least 10 days. Only if, at the end of that standstill period, there has been no legal challenge to the award decision, can the contract be entered into. If there has been a legal challenge, this creates a period of “automatic suspension” and the contract cannot be entered into unless the proceedings are determined, discontinued or disposed of or the court, by interim order, brings to an end the prohibition.

³² [Directive 2007/66/EC](#)

³³ [S.S.I. 2009/428](#)

120. In addition to the “standstill period”, court proceedings can be brought by any supplier who sought, seeks or would have wished to be awarded the contract and who suffers or risks suffering loss or damage as a result of a breach of the procurement rules. The court has a number of powers under the Regulations if it finds in favour of the challenger. Prior to contract or framework agreement award, if the court is satisfied that there has been a breach of the procurement rules, it may set aside a decision or action taken by the contracting authority (this might be, for example, the decision to award a contract to a particular supplier) or order the contracting authority to amend any document; and/or award damages to the challenger. After contract or framework agreement award, the court may, depending on the nature of the breach, make an ineffectiveness order (which renders unenforceable all rights and obligations directly arising from the contract in respect of the period commencing on the date of the order), order the contracting authority to pay a financial penalty, make an order shortening the duration of the contract or framework agreement, make any other order that it considers appropriate to address the consequences of ineffectiveness or shortening the duration of the contract and award damages to the challenger.

121. The consequences of remedies available under the 2012 Regulations can, therefore, be significant for a contracting authority; not only financially but also in the issues that arise if a legal challenge is mounted during the “standstill period” or a court rules that a contract has to be terminated early or with immediate effect.

122. This remedies regime will continue to apply to procurements regulated under the 2012 Regulations. However, for lower value contracts within the scope of the Bill but not the 2012 Regulations, the provisions of Part 4 will apply.

123. Whilst recognising that it is right that suppliers should have some sort of remedy available to them if they suffer a loss as a result of the action (or non-action) or decision of a contracting authority, and that this should be set out in the Bill (just as it is in the Regulations) it is also recognised that this right is not appropriate for, and should not therefore be available for, breach of every provision in the Bill. It is further recognised that given the quite significant powers that are available to the courts under the Regulations, it would be disproportionate for the Bill to provide suppliers with remedies identical to those in the Regulations for what will be lower value contracts under the Bill.

124. Therefore, a right of action under the Bill should only be available to a supplier who sought, seeks or wishes to be the supplier awarded the contract (in other words had an interest in winning the contract), where the contracting authority has failed to comply with certain, specified duties under the Bill and the consequence of which is that the supplier suffers, or risks suffering, loss or damage. The provisions in the Bill where a supplier may suffer loss or damage are the general duties (section 8), publication of contract notices and award notices (section 18) the selection and exclusion of suppliers to be invited to submit a bid (sections 22-24), technical specifications (section 25), charging for participation (section 26), and failure to provide a de-brief (sections 27-28).

125. The options available to a court will be that it may, by interim order, suspend either the procedure leading to the award of the regulated contract or the implementation of any decision or action taken by a contracting authority in relation to that procedure. The court will be required to

decide whether the negative consequences of such an order are likely to outweigh the benefits. If it grants an order it may set aside the decision or action, or require the contracting authority to amend any document and award damages. Damages will be the only remedy available to the court if the contract has been entered into. Unlike the 2012 Regulations, there will be no standstill period or automatic suspension and the court will not have the power to issue an ineffectiveness order.

PART 5: GENERAL

126. This Part contains information on interpretation and on subordinate legislation. This Part also provides for the commencement of the Bill.

EVALUATION AND MONITORING

127. Contracting authorities are responsible for ensuring that their procurement activity complies with the relevant legislation and that the decisions they take in the context of their procurement activity are in accordance with the legislation.

128. The Scottish Government will monitor how the new legislation is working through regular dialogue with wider public sector bodies, business and the third sector.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

129. An Equality Impact Assessment (EQIA) has been undertaken and no significant issues have been raised. It is important to recognise that there is a difference between the EQIA for the Bill's proposals and the equalities requirements in relation to what is being procured.

130. The EQIA did not identify any group that would be adversely affected by new legislation on public procurement.

131. Public procurement policy and legislation is fundamentally non-discriminatory and requires contracting authorities to treat all bidders equally and without discrimination. That said, as recognised at paragraph 67 above, the Bill will allow contracting authorities to restrict participation in a procurement exercise to only those bidders who meet the definition of a supported business (i.e. 50% of its employees are disabled persons).

Human rights

132. The Bill has been considered proportionately against a human rights impact assessment. The impact assessment confirmed that the Bill does not give rise to any issues under the European Convention on Human Rights. In fact, it is arguable that the Bill goes further in enhancing the three relevant human rights as follows:

- In relation to the *freedom of assembly and association*, where a person has a right to assemble with other people in a peaceful way and also has the right to associate with

other people, which includes the right to form a trade union, guidance will be produced under the Bill relating to workforce-related matters. This should ensure that contractors that are awarded public contracts maintain high standards of business ethics and professional conduct e.g. employees are not blacklisted due to their involvement in trade union activity.

- In relation to the *prohibition of discrimination*, where a person is entitled not to be treated differently because of their sex, race, colour, language, religion, politics, opinions, nationality, social status, association with minorities, property, birth or other status, the Bill includes a:
 - General duty to treat potential contractors equally and without discrimination and to act in a transparent and proportionate manner. This lowers the threshold at which EU Treaty Principles are applied through regulated procedures and will help to exclude discrimination at a lower threshold.
 - Provision on guidance on the use of prequalification questionnaires, which support adherence to equality, diversity and data protection legislation.
 - Requirement for contracting authorities to consider whether to impose community benefits requirements for major contracts, which can help promote equality as they provide a means of targeting under-represented groups.
 - General duty on contracting authorities to facilitate involvement in procurement competitions on SMEs, third sector bodies (including supported businesses).
- In relation to the *right to work* where everyone has the right to work, to free choices of employment, to just and favourable conditions of work and protection against unemployment, the Bill includes a requirement for contracting authorities to consider whether to require the contractor to deliver community benefits as part of a major contracts. This can help promote equality, as community benefits provide a means of targeting under-represented groups, and offer modern apprenticeships and employment opportunities.

Island communities

133. The Bill will have no differential impact on island communities. The provisions of the Bill will apply to all local authorities and therefore to all communities across Scotland, including island communities.

Local government

134. The Bill will directly impact on local authorities. The local government sector accounts for around half of all procurement expenditure. The Scottish Government has engaged with COSLA and Scotland Excel throughout the development of the Bill. In fact, local government have been represented in the broader procurement reform agenda, since its establishment in 2006.

135. No net impact on costs is anticipated. 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 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 ensure 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.

Sustainable development and environmental issues

136. The Bill will have no negative impact on sustainable development. On the whole, the provisions are expected to have a positive effect through the Bill's focus on helping ensure that contracting authorities extract maximum value from public sector procurement spend, be that economic, social or environmental.

137. It is considered that the Bill is likely to have minimal effect in relation to the environment and, as such, is exempt for the purposes of section 7 of the Environmental Assessment (Scotland) Act 2005 Act. A pre-screening report has been completed. This confirmed that the Bill will have minimal or no impact on the environment and consequently that a full Strategic Environmental Assessment did not need to be undertaken. The pre-screening report will be published on the Scottish Government website within the SEA database under case number 00858³⁴.

³⁴ <http://www.scotland.gov.uk/Topics/Environment/environmental-assessment/sea/SEAG>

This document relates to the Procurement Reform (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 3 October 2013

PROCUREMENT REFORM (SCOTLAND) BILL

POLICY MEMORANDUM

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