FINANCE COMMITTEE CALL FOR EVIDENCE

PROCUREMENT REFORM (SCOTLAND) BILL: FINANCIAL MEMORANDUM

SUBMISSION FROM ADVANCED PROCUREMENT FOR UNIVERSITIES AND COLLEGES

Introduction
1. APUC is the Procurement Centre of (procurement) expertise and representative body for procurement matters for all of Scotland’s Universities and Colleges.

2. This briefing is to summarise the concerns of the Scottish HE/FE sectors in relation to the Procurement (Scotland) Reform Bill.

3. APUC had raised some concerns as part of the consultation process on behalf of the sector regarding some of the proposed content - the scope has since been modified and many of the aspects of concern revised or removed, there are however some issues of material concern remaining.

4. Both APUC and its institutional membership supports the spirit of the Bill, however some aspects within it, if applied as statutory duties, could have a negative effect on the Scottish HE/FE sectors. These could lead to “unintended consequences”, but not just in relation to aspects directly operationally impacting on HE/FE institutions, but also on Scotland's international reputation as a knowledge economy.

5. These “unintended consequences” impact beyond those from simply following the process required to comply with the Bill. The consequences are significant, it is important therefore, that we highlight these concerns to both the Infrastructure and Capital Investment Committee and the Finance Committee in order that they can consider the position, taking into account all related consequences.

6. The HE/FE sectors have since its inception, been very strong supporters of the Public Procurement Reform Programme, as can be evidenced by its very high uptake of government supported e-procurement tools, its commitment to the PCA programme and its commitment to collaborative contracting – all delivered at significant levels of success. However, a one size fits all approach has not been the success factor – indeed there is significant evidence that it is a reliable failure factor – success has come from the Reform Programme setting a clear direction of travel and then APUC and the sector working together in partnership to deliver success in a way that supports, through tailored delivery of improvement and change, the sectors core deliverables of excellence in teaching, education, research and knowledge transfer, while meeting the governments aspirations, both in the core deliverables and in wider social and economic development.

7. It should be remembered that Universities and Colleges are autonomous bodies with varied backgrounds and incorporated under a number of different Acts of Parliament. They have independent governing bodies and are partially funded by the Scottish Funding Council. Colleges are required to be treated as central government bodies for financial reporting purposes as required by the UK Office of National Statistics. The fact that Universities and Colleges are covered by the EU procurement directives / public contracts regulations is a quirk of EU law. A significant level of the sectors’ funding is obtained from internationally competitive activities both in relation to student/teaching and research income, in fact for Universities in total, the Scottish Government (via the SFC) provides circa
35% of institutional funding (based on 2011/12 data published by the Higher Education Statistics Agency) with the rest coming from these wider sources.

8. The Finance Committee has provided a questionnaire format to obtain inputs to their considerations, we have therefore used this format to provide our inputs. Before this however we have included a section on Critical Areas of Concern and the related unintended consequences relating to them.

**Critical Areas of Concern – unintended consequences**

9. The aspects of concern, as noted earlier, extend beyond simple matters of process compliance and related costs. These concerns, if not addressed, have a high risk of putting greater demand on education funding in order for the Scottish Government to maintain its commitment to free higher education; they are likely to have negative impacts on the brand positioning / reputation of Scotland’s university sector in the global marketplace and ultimately on Scotland’s highly prized reputation as a country punching several times beyond its weight as a ultra-high knowledge economy.

10. The key considerations centre over funding, efficiency and competitive impacts. There are several aspects that make considerable sense in the proposed Reform Bill such as publishing of Strategic Procurement Plans etc – these positive impacts however are already being addressed successfully through the PCA process within the HE/FE sectors so there is no need for legislation to make this a reality in the HE/FE sectors.

**The Competitive UK / International Position**

11. Due to the new funding arrangements across English universities (and colleges teaching HE level courses - all of Scotland's universities and most of its colleges are involved in delivering some degree of HE level courses), virtually all English HE institutions will become exempt from being required to comply with the EU procurement legislation or any national level public procurement regulations. This will allow them to have a more private sector approach to their procurement and obtain significantly better value for money in a much less bureaucratic environment.

12. The utilisation of private sector procurement practices, primarily enjoying the benefits of post-tender-negotiation and dynamic sourcing approaches. Based on the experience of universities in England that already have achieved exemption level, could enable savings consistently in the region of circa 10% of their spend, or to put it in context of lost opportunity that Scottish institutions will not enjoy, this lost opportunity is like a circa £70m per year loss in income across Scottish HE versus the advantageous position that English institutions will ultimately enjoy (note that this figure relates purely to costs of procuring goods, services and works, it does not include potentially significant losses from loss of major tracts of research funding - please see below).

13. This will allow the English sectors to be more competitive in running their institutions, in their offerings to students and their ability to compete for research funding, both public and private.

14. **The Procurement Reform Bill has the significant potential to damage the sector’s activities around research excellence.** The Scottish University sector in research terms punches well beyond its weight on the World stage, the proposals within the Bill however threaten real damage to this by making much research based procurement impractical and / or required to be delivered in a manner that will discourage collaboration with other parties including academic institutions outside of Scotland, from research funding sources and other organisations, including private sector organisations driving innovation, both within Scotland and internationally.
15. The time required to enable research projects to commence will be significantly increased due to the additional work required to procure the goods and services to make it happen, this could result in research funding going elsewhere on a regular basis due to the greater agility of universities in other countries enabling them to commence much quicker.

16. Research can be a highly competitive and / or confidential activity so public advertising of some requirements could also be very problematic on occasions.

17. The Bill does have a section that allows Ministers to vary the scope of the Bill, the Scottish Procurement and Commercial Directorate have indicated that due to the serious risks to research activity, they may be willing to explore including an exemption for research related procurement, although this is still to be confirmed. We believe it is so critical however that as an absolute minimum, research related procurement activity should be specifically stated within the Bill to be excluded from its scope.

18. Further information on the valuable impact that research and research related activity provides, beyond its use in an academic environment, including the value it brings to the Scottish economy, can be found in the recent Universities Scotland publication Grow, Export, Attract, Support. Key highlights from this include:

19. Universities create spin-out companies as a product of their research and development. Scotland is now the most successful part of the UK for spin-out creation and Scottish universities have grown their competitive edge over the rest of the UK increasing their share of all spin-outs from 19 per cent ten years ago to 28 per cent of all spin-outs now.

20. Universities generated export income of £1.3 billion in 2011/12 of which 60 per cent was from outside of the UK.

21. BIGGAR Economics calculated the gross value added (GVA) from Scotland’s higher education institutions. It was estimated to be £6.67 billion in 2012/13 (supporting 142,000 jobs), this equates to £2,824 for every household in Scotland.

Consultation

Did you take part in the Scottish Government consultation exercise which preceded the Bill and, if so, did you comment on the financial assumptions made?  
22. Yes we took part in the earlier consultation. We commented on the significant financial and resource impacts the Bill will incur on contracting authorities, we do not feel our comments have been fully recognised in the current draft of the Bill.

Do you believe your comments on the financial assumptions have been accurately reflected in the FM?  
23. No, the assumptions in the Bill’s latest explanatory notes state that there will be no financial impacts on contracting authorities when in fact there will be significant negative impacts.

Did you have sufficient time to contribute to the consultation exercise?  
24. Yes.

Costs

If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the FM? If not, please provide details.  
25. I do not believe that the implications for HE/FE institutions have been accurately assessed and reflected. The compliance processes will add a significant burden to procurement professionals across institutions and in Centres of Expertise.
26. Due to the lower volume of agreements put in place or facilitated by sectoral Centres of Expertise, they will be able to cope with the additional burdens with slight increases in resource levels.

27. The burdens on institutions however will be severe with significant additional resources required to comply with the obligations in the bill. The threshold (section 3.2) of £50k per contract means that annual expenditure areas of around £13-15k will come under the scope of the Bill as these agreements often will last circa 4 years – this brings a vast amount of purchases under the scope of the regulations, several hundred a year for some institutions. It also applies to call-off contracts (section 6.2) against framework agreements despite the work already having to be undertaken at framework creation level, thereby duplicating work and ultimately diminishing the value that institutions can obtain by using collaborative framework agreements, which is a key cornerstone of the Procurement Reform Programme.

28. The financial implications go much wider however than simply resource impacts as they impact on the competitiveness of the HE/FE sector to compete in the international student marketplace and for research income. More information on this is below.

Do you consider that the estimated costs and savings set out in the FM and over the timescales for which they are projected are reasonable and accurate?

29. No, as above, a significant amount of costs that will be incurred by contracting authorities has not been recognised.

30. The saving figures have been overestimated as they assume (based on section 55 etc of Explanatory Notes) that suppliers will be able to create one PQQ and use it virtually unchanged for all tenders. This is an erroneous assumption. The purpose of the PQQ is to pre-qualify suppliers for a specific need by responding to specific questions about this specific need.

31. PQQs were invented to be specific and assist suppliers in allowing them to respond to specific requirements before spending considerably more resource and money in taking part in the tender phase.

32. There are only a few relevant questions that can be generic and suppliers will already most likely cut and paste these questions from past PQQs. If PQQs are forced to become generic, the ability to effectively shortlist diminishes significantly, and many more suppliers that are not technically or otherwise capable of meeting the need, will go through to the tender stage. The tender stage is by far the most expensive stage for suppliers so across Scottish business there will be considerably more money being wasted in bidding for the same amount of business if contracting authorities use the standard PQQ questions for all tenders without suitable scope for specific requirements to be addressed.

33. For example, currently a contracting authority may have 120 suppliers completing PQQs, this will narrow down to perhaps 10-12 for the tender stage. If the questions are substantially generic and not focused on the specific need, it is likely the contracting authority will need to allow circa 100 suppliers through to the tender stage (most of whom will not be technically or otherwise capable of meeting the need in the first place) – if it costs £10k to draft the tender, that is a cost to the Scottish supplier community of £1m pounds rather than £100k – a pointless loss of £900k from the Scottish economy. It does not take many tenders to cause serious financial loss to the Scottish economy.

34. For the contracting authority, they will have an extra 90 tenders to evaluate, a 900% increase in resources is therefore required to do this. Tenders / contracts will cost much
more and take much longer to put in place (and this is excluding all the other time delaying and cost impacting aspects of the proposed Bill process – please see below).

35. After a few costly bidding exercises, it is likely to dissuade suppliers from bidding for work, because they will not be able to ascertain from a generic PQQ whether they are suitable or not, we risk highly suitable suppliers not taking part, causing additional issues further down the line for contracting authorities (less competition, constrained capacity, higher costs).

If relevant, are you content that your organisation can meet any financial costs it is expected to incur as a result of the Bill? If not, how do you think these costs should be met?

36. Budgets are highly constrained across the HE/FE sectors at present. The impacts of the Bill will require additional resources to be employed which are not in current budgets / funding allocations. It would be concerning if funding is used to comply with the Bill rather than in delivering teaching and research activity.

37. It is difficult to ascertain the detailed resource implications of the Bill but we would estimate it to be requiring an increase in resources of at circa 20% (plus additional resources in non-procurement areas to assist in undertaking social / economic impact assessments etc).

Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

38. No.

Wider Issues / Impacts
Do you believe that the FM reasonably captures the costs associated with the Bill? If not, which other costs might be incurred and by whom?

39. In addition to the aspects mentioned above, the other factors that cause concern with a financial and / or other negative impact are as follows:

40. Economic impacts (section 9.1) - there will be a duty on all contracting authorities to consider how it might consider the economic, social and environmental well-being of the local area. For a local authority and possibly to a slightly lesser degree NHS bodies, this is related to their core purpose so is entirely relevant – while HE/FE will always strive to deliver in this area, the delivery of the core purpose of their brief (and for which they are funded) should be the key focus for their procurement activity, i.e. meeting the spec for the delivery in excellence in teaching, education, research and knowledge transfer.

41. While in principle it is to be encouraged, as it is a duty, it has the potential to require highly bureaucratic activities and wide consultation, for areas of annual expenditure that could be circa £13-15k, to undertake resource intensive impact assessments which will be costly and could delay and compromise delivery of the actual need. As there will be a duty to consult we assume that there will be a legal ability for a party to challenge (no matter how frivolous the challenge is) where they feel they have not been consulted and thus cause delay and further additional cost (there is also a requirement to consider inclusion of SMEs as part of this duty, as the sector normally already does this, we do not feel this presents a problem).

42. Payments to suppliers (section 11.5) – this appears to effectively mandate the payment of all suppliers within 30 days even where more advantageous payments are being offered by suppliers. While we would support offering of prompt payment terms to SME size businesses and those with directly dependent SMEs in their supply chains, we feel it would be wrong to, for example, pay a major pharmaceutical or IT business who is offering 60 or
90 days payment terms, within 30 days. It should be remembered that the HE/FE sectors are leanly funded third sector organisations and should manage their funds as wisely as possible to maximise the delivery of high quality teaching and research.

43. PCS (sections 17 - 18) - all contracting authorities will be required to use Public Contracts Scotland (PCS) to advertise all contracts within scope. Maximum use of this excellent tool is already made, it is not clear how this will impact on joint tendering on UK HE sector wide contracts where appropriate supply markets exist – for many non-SME applicable supply markets, Scottish HE/FE currently benefit from UK wide collaborative contracts with leverage and pricing obtained for Scottish institutions based on UK volumes (i.e. 1000% more than Scottish sector alone leverage volumes) – if this is put at risk, Scottish HE/FE could be put at a significant cost disadvantage versus the rest-of-UK HE/FE, particularly in expenditure related to scientific teaching and research.

44. Debriefs (section 27) - all contracting authorities will be required to provide a formal debrief to all suppliers who request a debrief for contracts above the defined threshold – this will bring a material increase in resources required for debriefing when existing processes are generally effective at providing relevant productive feedback to suppliers and where already relevant additional feedback is provided on request to these suppliers desiring more information (even if a contracting authority does not wish to, they are legally bound to provide such data already via the Freedom of Information Act).

45. Requirement to publish contract registers (section 30) – although this may be partially automated, it will require considerable manual intervention (publishing award notices etc, especially for every call-off) and resource consumption.

46. Remedies (sections 32-34) – within the Bill there is a process for remedies that could enable a challenge from a supplier to stop a procurement process / contract award. This has a serious risk of being used as a tool by incumbent suppliers who are about to lose business to cling on to business for further years while the court process proceeds, and to keep the rightful new supplier from providing the business. We would strongly advise that this section be removed from the Bill, suppliers would still based on existing legislation, have the right to claim for damages etc. and for a court to cancel a contract should it be found to be faulty.

Focus of the Bill & Expectations Already Being Delivered

47. The Bill itself appears to almost entirely focus on resolving issues that are felt to exist in enabling SME access to publicly funded sectors contracts, when in fact, Scotland is one of the leading countries in the developed world in terms of SME inclusion and contract award in public procurement, with the HE/FE sector already providing a leading role in this (without legislation).

48. For total HE/FE sector spend in Scotland, over the last few years there has been significant work by APUC and institutional procurement teams to make business opportunities more accessible through use of work packaging and on-line portals etc (the PCS tool etc) to advertise potential business. This is proving very popular with constantly increasing use of such solutions. APUC have adopted various enablement strategies such as sub-lotting (either on a sub-regional basis or on technical attributes, or both), and / or encouraging supplier-consortia bidding wherever it can be realistically and competitively done as well as running supplier awareness and support days at the beginning of the tender process to assist smaller businesses that may not be familiar with public procurement processes. This widens opportunities for SME involvement and allows them access to collaborative tenders that may otherwise be out of reach or felt to be out of reach. We believe the figures highlight that these approaches both in institutions and in APUC have been very successful, without the need for added statutory instrument based bureaucracy. In the last period (YE July 2012) for which we have validated data, the data is as follows:
o Percentage of total HE/FE sector spend (both local agreements and collaborative agreements) going to SME businesses by value: over* 46%

o Percentage of suppliers who are SME businesses on all agreements as a percentage of the total supplier numbers: over* 76%

*= suppliers with aggregate spend of less than £1000 per year are not categorised in the central data hub, these are most likely to be SME businesses so the likely levels of SME involvement are very likely to be higher than the figure noted based on categorised spend

49. The HE/FE sectors are clearly, as can be seen from the data above, fully on-message with, and fully delivering (and fully intending to continue to deliver) on, the Scottish Government’s agenda on SME inclusion, with the sectors SME inclusion levels being at internationally leading levels. It is difficult to understand how legislation can materially add to this constantly developing position in the HE/FE sectors.

Do you believe that there might be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

50. Apart from the ongoing cost impacts mentioned above, we believe that as the concerns highlighted above become apparent, there will be significant resistance to the (then) Act from the supplier community as well as contracting authorities – this will likely require the Bill to be amended to take account of the concerns raised.

51. However, in relation to the damage caused to Scotland’s ability to be competitive in the international student market and to their ability to compete for research funding, the damage may well have been severe and the position could be very difficult to recover from.

Conclusion

52. Overall, the main concern is whether or not it is appropriate that the HE/FE sectors are included within the scope of new additional statutory duties via the Bill (and if they are, whether research related procurement is exempted), especially when bearing in mind that they are autonomous bodies which are operating in increasingly competitive market places. The Scottish Government has advised that at present, it intends to fully apply the Procurement Reform Bill to all bodies covered by the Public Contracts Scotland Act 2012, i.e. all of Scottish HE / FE.

53. We believe that we should consider the impending competitive advantage to be enjoyed by the rest of UK (mainly England) HE where institutions will become free of burdensome EU public sector procurement legislation. Therefore any “shooting in the foot” legislation should be avoided at all cost in order to avoid additional costs / reduction in competitiveness being incurred in Scottish HE/FE.

54. While it is appreciated that the Scottish government cannot influence our need to comply with EU regulations, it can choose to enable the HE/FE sectors to benefit fully from the more relaxed EU Procurement regulatory regime due to come into place in 2014, thereby limiting the uncompetitive impact by not adding further restrictions to competitiveness of the sector in Scotland and not adding to the bureaucratic burden through applying the Bill to the HE/FE sectors (the Bill carries the almost definite risk of removing much of the benefits that could be obtained from the new more relaxed EU procurement regime) across almost all of its spend.

55. What the Scottish HE/FE sectors really need in order that they can sustainably maintain their position on both the national and international arena is a minimisation of the
applicable bureaucracy and administrative burden, not a significant increase to it. As a minimum, surely it should not have to shoulder a burden beyond that which currently exists.

56. We would urge consideration to the approach that the university and college sectors are either deemed / legislated to be outside of the scope of the Procurement Reform Bill, or the bureaucratic and competitive burdens minimised. The sector would ideally wish to comply with the spirit of the legislation (as opposed to statutory duties etc), with this application of complying with the spirit actively supported and monitored by APUC as the sectors’ Centre of Procurement Expertise.