The introduction of the Bill is to be broadly welcomed. Scotland and The UK appear to be unusual in the European Union in not having a single unified set of regulations covering all public sector procurement.

Whilst it is recognised that the Bill is intended to fill the space left by the requirements of the EU Procurement Directive, the introduction of the Bill separately from Implementing Regulations transposing the forthcoming revision of the EU Procurement Directive will not deal with this anomaly. It will however provide a degree of clarity and certainty around applications of Treaty principles to sub-threshold contracts.

The Bill also clarifies the Government’s intentions with regard to the pursuit of social, economic, and environmental benefits to be derived from public procurement; and the use of public procurement as a tool of wider policy delivery. It is helpful to have this made explicit and to have some structure placed around these aspirations.

The requirements relating to transparency in all aspects of tendering are particularly to be welcomed.

The clarification of actionable duties and the means of bringing challenges, as well as the remedies available to affected parties similarly clarifies rights of challenge and should be welcomed in terms of allowing for a similar degree of right of challenge and ease of bringing challenges, at sub-threshold contract values. The difficulty in bringing a challenge under judicial review via the Court of Session as against the relative ease of bringing a challenge under Regulation 47 of the Public Contracts Scotland Regulations in respect of higher value contracts has always seemed an unaccountable anomaly.

There are some difficulties:
Firstly whilst clarification regarding the selection of suppliers is helpful, there are no similar provisions relating to the selection of award criteria. This allows the potential for discrepant and contradictory choices between the range of criteria available to Contracting Authorities at sub-threshold level and those available for over-the-threshold projects. An alignment between the Procurement Reform Bill and the Public Contracts (Scotland) Regulations would be very welcome. There seems to be no real reason why they should be different, however the fact that the Bill leaves Contracting Authorities to interpret these matters differently allows for the continuation of inconsistent behaviour, which the Bill seems to be seeking to minimise.

Secondly there will undoubtedly be costs in implementation which have been underestimated. Since one of the purposes of the Bill is to improve transparency and consistency, it follows that the public sector must currently be behaving in an opaque and inconsistent way, in at least so significant a number of areas as to require legislation. That being the case, a significant number of organisations must
require significant amendments and improvements to their working methods, and are likely to incur significant costs in doing so.

Finally there are many factors in the Bill in which Ministers may by regulation or order introduce further regulations or requirements. Whilst this may well be to allow for the requirements of the transposition of the forthcoming EU Procurement Directive into Scots Law, it does leave a considerable degree of uncertainty as to what the final regime following the amendment of the Public Contract (Scotland) Regulations or other relevant legislation such as the Community Empowerment and Renewal Bill, will look like.

With regards to specific requirements:

**Regulated Contracts:** Many Councils’ Standing Orders threshold for works is £50,000. If local thresholds increase their thresholds to fall in line with the new threshold of £2m for Works, this may mean a loss of visibility of contracts for SMEs below £2m. Clarity is required around whether Councils can maintain its £50,000 works threshold.

**Sustainable Procurement Duty:** Although some Councils already consider the requirements noted in the bill, there is a requirement to consider to what extent SMEs and Third Sector wish to access public contracts. Research carried out elsewhere in the public sector that shows of SMEs surveyed in Scotland, only around 20% of them wish to access public contracts directly though the percentage is much higher via sub-contracting.

**Procurement Strategy and Plans:** The Bill will require a contracting authority to have a procurement strategy where it expects to spend £5 million or more on regulated procurements in the next financial year. If the contracting authority does not already have such a strategy, one will require to be prepared. Existing strategies must be reviewed and where necessary revised in successive years where anticipated spend meets the £5 million threshold. Given the requirements under the Annual Procurement Report (APR) it would seem to make sense to reflect the items to be reported in the APR in each strategy review. As the APR requires a summary of all regulated procurements for the following 2 years this may prove a difficult projection, or may mean that the strategy will require to be updated more frequently than annually. The obligation to indulge in wide spread consultation of stakeholders to verify sustainable and community benefits could provide onerous implementation, monitoring and enactment obligations requiring significant resources. A final area of concern may be the Council’s ability (via the Strategy) to recommend/oblige/adopt as policy, payments to organisations we do not technically have contracts with – sub-contractors and their sub-contractors – there is also significant risks in the Council’s ability to monitor such obligations.

The annual report seems to require significant forward planning and identification of future needs. This would not take account of factors which are unpredictable or outwith the Council’s control. The requirement to forecast 2 years ahead seems out of synch with most Strategies (usually 3 or 5 years) and may require strategies to be amended to this timescale to align information gathering. Again the alignment to the Procurement Strategy and its success or otherwise, may prove a difficult reporting...
obligation. There is also the risk that secondary legislation may require significant reporting obligations in areas such as community benefit and sustainability.

Annual Procurement Report: Scottish Procurement already requires the Public Sector to upload best practice indicators to their national system which are extracted for reporting to Public Procurement Reform Board. Rather than creating a new and additional annual report requirement, Scottish Procurement should use the mechanism they already have to draw off annual reports rather than require all public sector bodies to create numerous annual reports across the public sector.

Community Benefit Requirement: The bill advises that detailed guidance will be issued on Community Benefits. However, it should be noted that not all contracts can support community benefits. Where contracts can support community benefits there may be an additional cost factor both for the Council and supplier which will result in a higher contract value. The cost will only be known at the point of tender. Rather than require all public sector bodies to incur repetitive administrative costs of tracking community benefits and SME participation in tenders, this can and should be done nationally by Scottish Procurement through Public Contracts Scotland.

The requirement for community benefit requirements to be specified in the contract notice, reduces the possibility for consideration of other community benefits which tenderers may have been able to suggest. It is arguable that suppliers and providers are better placed, particularly in areas such as innovation, to propose community benefits which are much more relevant to the nature of the contract being performed.

Exclusion of Economic Operators on grounds of criminal activity
This is broadly welcomed. However, further clarification would be helpful on which criminal convictions would result in the economic operators being excluded from a contract.

Clarity is required around how this sits with requirements such as the rehabilitation of offenders and spent convictions.

Technical Specification: The bill advises that detailed guidance will be issued on technical specifications. Although, clarity is required on what this will entail, care must be taken to ensure that any guidance allows for flexibility to develop the scope of the contract being tendered and ensure that specifications can be most economically advantageous to avoid additional cost factor both for the Council and supplier as too prescriptive guidance and inflexibility may result in a higher contract values.

Amendment of Climate Change (Scotland) Act 2009 – 82A Procurement of recycled and recyclable products etc. The bill advises that detailed guidance will be issued on specifications. Although, clarity is required on what this will entail, Care must be taken to ensure that any guidance allows for flexibility to develop the scope of the contract being tendered and ensure that specifications can be most economically advantageous to avoid additional cost factor both for the Council and supplier as too prescriptive guidance and inflexibility may result in a higher contract values.