

ECONOMY AND FAIR WORK COMMITTEE

**8th Meeting, 2024 (Session 6), Wednesday
6 March 2024**

Post-legislative scrutiny of the Procurement Reform (Scotland) Act 2014

Note by the Clerk

Background

1. Under the [Procurement Reform \(Scotland\) Act 2014](#) (“the Act”), public bodies are required to consider how their procurement activities can be used to improve the economic, social and environmental wellbeing of their area and how they will facilitate the involvement of SMEs, third sector and supported businesses, and support innovation. The Act places some administrative requirements on higher spending public bodies to publish procurement strategies and annual procurement reports.
2. The legacy report of the previous session committee noted work in this area had started but was curtailed due to the pandemic. It drew attention to a summary of evidence it had gathered which could be used as a foundation for future work.
3. This Committee noted that procurement issues had come up in its work and agreed it would be useful to undertake post-legislative scrutiny of the Act. At its meeting on 21 June 2023, a thematic approach was agreed and call for views was issued. At the meeting on 13 December, the Committee considered responses to the nine questions asked in the call for views and noted key emerging themes. The Committee then agreed the structure, themes, and witnesses for the oral evidence sessions.

Inquiry Structure

4. The call for written views ran from 29 June to 3 October 2023. Written responses [can be accessed online](#). The inquiry will be held over five sessions. Session 1 - the experience of businesses with procurement in Scotland. Session 2 – the third sector and social enterprise experience, Session 3 – contracting authorities, Session 4 – support for business and contracting authorities and Session 5 – Scottish Government.

5. The Committee also agreed to hold an online informal engagement event to hear directly from a local authority and suppliers to help it obtain a local snapshot of good practice. Arrangements for this event will be shared in due course.

Today's Witnesses

6. This is the third evidence session. The Committee will hear from—
 - Craig Fergusson, Head of Finance (Transactions), South Lanarkshire Council;
 - Melanie MacKenzie, Strategic Commercial Manager, Aberdeenshire Council and Aberdeen City Council; and
 - Lynette Robertson, Head of Commercial and Procurement Services, City of Edinburgh Council.

And then from—

- Gordon Beattie, Director of NHS National Procurement, NHS National Services Scotland;
 - Stephen Connor, Senior Procurement Manager, Advanced Procurement for Universities and Colleges; and
 - Rob Mustard, Director of Capital Investment and Joe Rowan, General Manager of Procurement, Scottish Water.
7. [Aberdeenshire Council](#), [Aberdeen City Council](#), [South Lanarkshire Council](#), [Scottish Water](#), and [Advanced Procurement for Universities and Colleges](#) provided written evidence ahead of today's session. This can be found at **Annexe A**.

**Economy and Fair Work Committee Clerks
February 2024**

Written submission from Aberdeenshire Council and Aberdeen City Council

What are the main barriers to businesses accessing public procurement contracts in Scotland, and how have these barriers changed since the Procurement Reform Act (Scotland) 2014 was implemented?

Historically, small to medium sized enterprises (SMEs) and 3rd sector organisations have faced a range of barriers in accessing public procurement opportunities and bidding successfully. Barriers include: contracting authorities not being fully aware of SMEs/3rd sector and the types of goods and services they can potentially provide; SMEs/3rd sector viewing the procurement process as unnecessarily lengthy and bureaucratic; SMEs/3rd sector not having the capacity to bid for opportunities and compete fairly with large business and the process of procurement often being undertaken on predominantly a cost basis therefore ruling out the ability of SMEs to demonstrate wider value. Challenges for SMEs include: the perceived length and complexity of public sector tenders, the cost and burden of obtaining and maintaining certain accreditations, insurances and standards commonly sought, registering, finding, and bidding for opportunities in addition to general capacity and capability to bid successfully. These factors can result in lower participation by SMEs and less successful outcomes for SMEs and Contracting Authorities.

PRSA encourages contracts to be structured into smaller lots to benefit the inclusive participation of SMEs in the procurement process as well as transparency and maximum accessibility of contracts. PRSA has forced less reliance on price only criteria and this aspect of the Act is welcomed. However, across a wide portfolio of contracts, lotting can create often insurmountable operational (resource) and governance challenges for the Contracting Authority in terms of contract and supplier management which could ultimately have adverse impacts on governance and quality of service. PRSA and the “regulated procurement” regime requires transparent advertising in Public Contracts Scotland (PCS) in contracts over £50K (goods and services) and £2M (works.) The Act and the PCS platform has therefore increased visibility and accessibility of contract opportunities to SMEs. Local Economic supplier development activity coupled with the excellent work of the national Supplier Development Programme can help (and is helping) to ensure that suppliers registered can set up alerts, express and interest in, inspect and respond to any regulated contract opportunity. Suppliers registered on Public Contracts Scotland (PCS) SMEs/ local SMEs theoretically have complete visibility over regulated contract opportunities assuming they are correctly and fully registered on Public Contracts Scotland (PCS). Local authorities and the national “Supplier Development Programme” look to raise the profile of PCS and increase registrations, capacity and capability to bid. Contract opportunities considered to be visible, transparent, accessible and (as far as possible) business-friendly within the confines of public procurement.

Awareness of PCS/registration and general competitiveness of SMEs and local supply chains considered to have improved since the introduction of the PRSA although potentially limiting factors do remain. It is recognised that local supply

chains can benefit from earlier engagement, lotting and supplier development (locally or through national Supplier Development Programme) but translating this into action not as quick and easy to implement as it might appear given the diverse nature of and number of procurements conducted by Public Sector bodies.

Consortia building/bidding (from suppliers of all sizes) remains comparatively rare and there are thought to be considerable untapped opportunities which could conceivably improve innovation and collaboration within the Scottish business community...potentially building entire local supply chains that might not presently exist to further the community wealth building agenda. A development programme of this nature would require considerable central government investment into national (SDP) and local supplier development activity. In terms of consortia building, the programme would necessitate complete, independent coverage of risks as well as potential rewards for businesses.

Does the sustainable procurement duty mean that adequate weighting is given to environmental considerations?

Arguably, no but the favoured approach continues to be promotion and maintenance of a “proportionate and relevant” balance across the social, economic and environmental pillars of the sustainable procurement duty. Potentially, environmental considerations could/should become more of an integral part of the specification relating to the core requirement rather than “added value” community benefits. Potentially some specific, practical Scottish Government support and guidance would be welcomed in this area. The Procurement Reform (Scotland) Act (PRSA), associated Scottish Procurement Policy Notes (SPPNs), guidance and (to a lesser extent) tools have provided generally clear direction and collectively, acted as a positive guiding force.

As a result of PRSA, procurement strategies, policies and approaches are generally geared towards the maximisation of social, economic and environmental wellbeing/reduction of inequality to the extent permitted by law. Embedding the sustainable procurement duty has had no known detrimental impact on any other pre-existing components of best value.

The “due regard” obligation within the Sustainable Procurement Duty currently operates at quite a low level of spend...£50K for goods and services and £2M for works. There is welcome focus on all three pillars of the sustainable procurement duty (social, economic and environmental.) The current financial thresholds are considered to work quite well but potentially there is scope to harmonise £50K as the appropriate applicable “regulated” threshold across goods, services AND works. Sustainable procurement requirements must continue to be “proportionate and relevant” as a package and balanced across all three pillars as the current legislation encourages and promotes. An increasing number of issues for bidders will emerge as more and more expected of bidders in terms of “added value” community benefits and for what is traditionally 10% of award criteria. Increasing weightings or introducing mandatory weighting thresholds is not considered to resolve all issues surrounding the potential response and contract/supplier management burden. To separate out environmental issues from the duty would not be supported but potentially environmental expectations should be adequately promoted or encouraged within the core requirement itself e.g. in construction, increased use of PassivHaus or Gold Standard housing. However, such measures can necessitate an

increase in costs which for which allowances must be made and reflected in budgetary allocations

The sustainable procurement duty aims to promote fair work practices. How effectively is this reaching secondary suppliers and the wider supply chain?

Fair Work is considered to sit very comfortably as a form of social and economic value and therefore a legitimate community benefit. The duty is very effective in terms of Tier 1 main contractors but potentially less so in terms of secondary suppliers and the wider workforce of any wider supply chain. Resource implications necessitate that Contracting Authorities must primarily concern themselves with workers directly connected to performance of the core contract. In many contracts there can be no subcontracting and therefore no wider supply chain. Approaches to Fair Work can and do cover the wider workforce of those directly connected with contract performance but potentially not the wider workforce of the wider supply chain. Across a wide portfolio of contracts, capturing Fair Work information on the wider workforce of the wider supply chain can create insurmountable challenges for the Contracting Authority around contract and supplier management, data, systems and governance which could ultimately impact on quality of service. Since the passing of PRSA, extremely positive impacts ensued from statutory guidance (Nov 2015) and (July 2018) toolkit/best practice. Embedding a bespoke approach from initial Nov 2015 guidance has been extremely beneficial in terms of equalities considerations, promotion (to the extent permitted by law) of payment Real Living Wage and employer accreditation, job security, training, prospects for progression, zero hours contracts, gender pay gaps etc.

Guidance on Fair Work that followed from PRSA has helped make meaningful links with all protected characteristics under the Equalities Act (and therefore the Public Sector Equality Duty.) In terms of improving standards and cascading “above and beyond” basic legislative requirements, PRSA (and later guidance) has had considerable and universally positive legacy impacts. Anecdotally, this can be evidenced by the increased quality of submissions and increasingly progressive commitments from bidders in many aspects of fair work.

Many supplier employers are already progressive in terms of their policies and approaches to equalities and employment. There is strong evidence that constant (but proportionate) reinforcement of the Fair Work/Real Living Wage message is having a very positive, incremental impact on the business/supplier community. It is for instance possible to make a strong case that Fair Work/Real Living Wage (and all employability skills measures) impact profoundly to mitigate child poverty issues. Fair Work considered to be most effective in procurement when bidders are free to play to their strengths and have a variety of options to demonstrate the required standard. Where the business sector is not problematic in terms of equality/pay/job security/employee voice etc, there can be a degree of trust between the contracting authority and the supplier. The bid can be used to establish a “snapshot” of basic credentials, direction of travel and future intentions. Depending on the contract, the supplier can be asked to evidence that the “snapshot” is at least as favourable as the standards demonstrated in the original bid on a quarterly, 6-monthly or annual basis. Improvements and progressive actions can be contract managed but this problematic to measure, benchmark or aggregate across an entire portfolio of contracts or wider supply chains where this becomes remote from performance of

the core contract and workers directly connected with performance of the core contract.

It is challenging to aggregate/benchmark outcomes of this type across a large portfolio of contracts given that any supplier may be genuinely constrained by resources, size or age of the business. A supplier is not forced to pay RLW or become accredited and this economic development balance is deemed to assist rather than hinder the fair work agenda. If Contracting Authorities COULD mandate real Living Wage, it is possible that some of the richer, more nuanced aspects of Fair Work could be lost. Approached in the wrong way and with the wrong messaging could be damaging and counterproductive to both suppliers and Contracting Authorities.

The Scottish Government have a framework contract which reserves opportunities for supported businesses (businesses where more than 50 per cent of the workforce are disabled workers unable to take up work in the open labour market). What is your experience of engaging with this framework as a supported business?

The partner councils have not engaged with the Scottish Government framework and have no immediate plans to do so. In terms of considering opportunities for supported businesses, the partner councils would apply the 30% disabled or disadvantaged criteria. It is thought that the Scottish Government framework has quite a narrow range of professional disciplines that often mirror or duplicate alternatives offered in Scotland Excel or other national frameworks. Where the Contracting Authority does not have a “local” supported business option, they may elect to follow more traditional frameworks or other compliant procurement routes. Below are the three issues that could be said to act as barriers/potential opportunities to increased involvement of supported businesses/increased use of reserved contracts. In the context of EU exit, there is potential scope to make legislative provisions more flexible in order to make a very meaningful difference to the disability employment gap in Scotland. Such reforms are not considered to conflict with continued alignment to EU procurement rules. The reforms and further statutory guidance could be transformational to community planning and provide alternative, compliant procurement routes that could provide superior, localized outcomes compatible with the community wealth building agenda:

1. The ability of a supported business to compliantly subcontract services/works not performed by disabled/disadvantaged persons; (any other main contractor can compliantly subcontract so arguably causes bidder discrimination)
2. The ability of supported businesses to form multi-disciplined consortia/partnerships (perhaps with one entity/special purpose vehicle as the lead)
3. Treatment of volunteers (as potential employees) for the purposes of applying the 30% “disabled or disadvantaged” workforce threshold. (on the basis a volunteer will become an employee following award of contract)

Scottish Government guidance/clarification in these areas would allow Contracting Authorities to progress identification and formal recognition of local social enterprises meeting more relaxed supported business criteria (a liberal interpretation of

“disadvantage”) more quickly and easily. An increase in local social enterprises legitimately acquiring supported business status potentially derives alternative, localized and compliant commissioning models which could be transformational to existing community planning structures. One of the aims of PRSA and the duty is to facilitate the inclusive participation of the 3rd sector (including social enterprises and supported businesses) and the reforms outlined above are likely to improve outcomes in this area at a national level without compromising continued alignment to EU procurement rules.

How effective are community benefit requirements in procurement contracts, and how appropriate is the £4 million threshold?

There is considered to be scope and justification to review, lower and harmonize the current £4M threshold ... potential to lower the current £2M threshold to the level of the regulated works threshold of £2M. As stated earlier in the response, the sustainable procurement duty could conceivably be harmonized at £50K for goods, services AND works and a £2M threshold for community benefit inclusion applied which could apply to goods, services AND works. Works contracts often have the most scope for meaningful, localized community benefit requirements (particularly employability and skills, community support and environmental considerations) given that the supplier tends to be physically present in the authority’s area for reasonable periods of time. The construction industry sector (even at SME level) is considered to be sufficiently mature and experienced in delivering social, economic and environmental value at scale. The relatively short duration of some construction projects can however present a barrier. It is recommended that in works contracts over £50K, fair work, environmental and prompt payment could be encouraged or mandated. More demanding themes and quantities of community benefit outcomes (including but not limited to fair work, environmental and prompt payment outcomes) could be encouraged or mandated in any works contract over £2M in value AND over 6 months in duration.

The Procurement Reform Scotland Act (PRSA), associated SPPNs, guidance and (to a lesser extent) tools have provided clear direction and collectively, acted as a positive guiding force. Procurement strategies, policies and approaches are generally geared towards the maximisation of “proportionate and relevant” social, economic and environmental wellbeing/reduction of inequality to the extent permitted by law. Embedding the sustainable procurement duty/community benefits has had no known detrimental impact on any pre-existing components of best value. Strategy, guidance and policy re community benefits/sustainable procurement has strong focus on the Public Sector Equality Duty, Fair Work Practices and a wide range of other socio-economic considerations designed to alleviate various forms of poverty and disadvantage under the Fairer Scotland Duty and National Performance Framework.

Since the legislation was introduced, themed approaches to community benefits continue to evolve and improve in close alignment with local and national priorities (primarily LOIPs and National Performance Framework.) Development of “proportionate and relevant” community benefit clauses capable of fair “like for like” evaluation represents the principal means of realising the council’s aspirations in terms of social, economic and environmental impacts and securing improvement outcomes in these subject areas locally. It has proved helpful (to officers and suppliers) to treat community benefits and the sustainable procurement duty as

essentially working towards the same ends i.e. improving social, economic and environmental wellbeing in the authority's area. The added context and definitions applicable to community benefits and the duty are essentially subsets of the same overarching aim.

Procurement Annual Reports provide evidence of achievements, demonstrate compliance and year on year continuous improvement. Considerable positive improvements can be evidenced across a wide range of socio-economic factors including anti- poverty initiatives (food, fuel, income, in-work), knowledge transfer, cascade of information between partners, strengthening relationships with suppliers and relationships between procurement and Economic Development, local employability providers/agencies and the local 3rd sector/social enterprise sector.

What is your experience of tendering or bidding for framework contracts and lots within large contracts, are these becoming more prevalent in Scotland, and what is your view on how accessible these opportunities are?

From the perspective of a Contracting Authority, across a wide portfolio of contracts, lotting can create often insurmountable resource and governance challenges for the Contracting Authority in terms of contract and supplier management which could ultimately have adverse impacts on governance and quality of service.

In recent years there has been increasing use of Dynamic Purchasing Systems to good effect. Multiple supplier contracts, frameworks and Dynamic Purchasing Systems are recognised to be conducive to local supplier development i.e. an increasing volume of local SME suppliers can potentially participate in contract opportunities on terms acceptable to them on a no-commitment basis. On the other hand, multiple supplier arrangements arising from the lotting structure or choice of procurement route can impact adversely on the ability to secure and contract manage meaningful community benefit outcomes at scale in addition to potentially compromising traditional economies of scale e.g uniform, competitive pricing based on larger contract values.

The trend seems to be that contracts/frameworks and Dynamic Purchasing Systems tend to be getting larger and more prevalent. Lotting is potentially less frequent for the reasons described. A potential solution is to explore more robust methods of encouraging and capturing local sub-contracting in terms of the volume of local suppliers and the value of the sub-contract work awarded locally.

It has historically been challenging to capture consistent and comprehensive local sub-contracting information, but such data would positively impact on the community wealth building agenda. Potentially, Scottish Government guidance and support would be welcomed in terms of expectations, ways and means of encouraging and measuring local sub-contracting Perhaps initially, more ambitious local sub-contracting expectations could be piloted by Scotland Excel (as the centre of procurement expertise in Scotland) As with community wealth building, before embarking on such reforms, the question needs to be addressed as to "what is local?" "What is true Local?" (see later sections)

What is the administrative burden of complying with procurement regulations in Scotland, and how has this changed since the 2014 Act was implemented?

The administrative burden of complying with procurement regulations has increased significantly since the introduction of PRSA. The burden is particularly apparent in terms of Annual Reporting requirements...particularly requirements around community benefits.

Retrospective reporting of community benefit outcomes (Procurement Annual Reports) is necessary, transparent and fully supported. However, current reporting requirements could be regarded as unnecessarily complex and time-consuming (therefore a barrier.) The necessary elements of the definition applicable to community benefits reporting (awarded, regulated, imposed and fulfilled) arguably do not give a true picture of CB activity year on year and the meaningful outcomes secured at a local level year or year and over the entire duration of a contract. Capturing information on community benefit outcomes “imposed” in +£4M, regulated, unregulated whether the contracts have been awarded or not and focus on increasing rates of % inclusion rather than “fulfilled” is strongly favoured. If the contract notice has not been cancelled, reasonable to assume the contract will proceed and deliver all CB outcomes “imposed” over the life of the contract. The point at which a community benefit is “delivered” or “fulfilled” is a moot point. An apprenticeship “imposed” in year 1 of a contract might not be “fulfilled” until year 4 of the same contract. A concentration on community benefits “imposed” according to type and “% inclusion” re contracts advertised in each reporting year potentially gives a more reliable and comparable measure of CB activity in Scotland in any given year.

If adopted, procurement professionals would have more capacity to increase the quality and quantity of social requirements and increase incorporation rates as opposed to looking back and forensically examining what might or might not be delivered in whole or in part in any given year. There can be a very short time frame between award and when the snapshot of the report is compiled. There could be a large contract with 200+ outcomes awarded on 30th March of the reporting year...none of those outcomes could be included according to the letter of the definition and could not be counted in the following year in the main body of the report in the subsequent reporting year.

How can procurement policy in Scotland support the strengthening of local supply chains?

To respond to this question, it is considered necessary to define “local” and for consistent measures and approaches to be in place across all Scottish local authority areas. Under current procurement rules, Contracting Authorities cannot favour SMEs or 3rd sector bodies located anywhere let alone “local”. Although there is a strong desire to improve local economic development outcomes, the continued application of TFEU principles and continued EU alignment on a voluntary basis is supported i.e. equality of treatment, transparency mutual recognition and proportionality as well as the more streamlined “proportionality and relevancy Contracting Authorities are accustomed to. To abandon or dilute treaty principles could have far-reaching unintended consequences as was alluded to by the Law Society of Scotland in their response to the England & Wales Green Paper on Procurement Reform.

Local spend share cannot and should not be manipulated on the basis of which supplier wins a (public) procurement. Municipal protectionism can discourage inward

investment and arguably does not challenge the market. From an internal governance perspective, potentially challenging to demonstrate that “best value” has been secured in these circumstances.

A supplier from outside the Contracting Authority’s area winning a contract and moving into the area instantly becomes “local” when they move into the area, start paying business rates, employing people and become part of local business community. Some research points to local SMES winning and being dependent for their survival on winning work outside their own area (whether “local” is determined by HQ, invoice payment address or business rates billing address.) A well-meaning Contracting Authority adopting a radical CWB approach may inadvertently be making their “local” SMEs less resilient and competitive (or contribute to total business failure in extreme cases) rather than empowering SMEs in their area to become more prosperous and invested in their communities...or the areas and communities a local SME might depend on for continued prosperity and resilience. What does “Local” Actually Mean and What Should it Mean?

Some community wealth building material on “positive procurement” potentially presents a high level, selective picture, is the critical success factor “locally” awarded contract value or actual spend? Unnecessary spend/demand should be challenged but arguably the CWB model encourages increased spending on the proviso that it is “local” spend.

Lotting, early engagement, inclusive participation and visibility of opportunities can all positively impact on local economic development and this is discussed in responses to other questions. Across all pillars, CWB depends on how “local” is or should be defined. “Following the money”, a purist definition (and the way this is measured in procurement and finance circles) is invoice payment address and no other factor...not where HQ located, where business rates are paid or where the business represents a major local employment hub etc.

For CWB to be successful it is vital that each Contracting Authority reports “local” in exactly the same way. It should also be recognised that many cities will be “advantaged” by having a high concentration of SMEs or large employers in their area that might (or might not) consistently win contracts...an HQ/registered office could be a lawyer or accountant’s office (employing nobody local and not economically interacting locally at all) so this situation might not always derive advantage. Either way, is it the “strategy” or geographic good fortune that is necessarily making the difference and deriving the CWB outcomes? “Spend leakage” is not necessarily a failure of the local authority and “spend concentration” is not necessarily an entirely positive thing when it can lead to dependence and vulnerability.

What are the opportunities to reform procurement in Scotland following the UK’s exit from the European Union? Supported Business Reform

As per response to Question 11, below are the three issues that could be said to act as barriers to increased involvement of supported businesses/increased use of reserved contracts. In the context of EU exit, there is perhaps scope to make provisions more flexible in order to make a very meaningful difference to the disability employment gap.

1. The ability of a supported business to compliantly subcontract services/works not performed by disabled/disadvantaged persons; (any other main contractor can compliantly subcontract so arguably causes bidder discrimination)
2. The ability of supported businesses to form multi-disciplined consortia/partnerships (perhaps with one entity/special purpose vehicle as the lead)
3. Treatment of volunteers (as potential employees) for the purposes of applying the 30% “disabled or disadvantaged” workforce threshold. (on the basis a volunteer will become an employee following award of contract)

Guidance/clarification in these areas would allow organisations to progress identification and recognition of potential supported businesses (and what they do) more quickly and easily. A liberal interpretation of “disadvantage” is potentially necessary and explicit Scottish Government guidance around this could be helpful as would a body overseeing compliance/maintain a definitive register of qualifying businesses. An increase in local organisations acquiring supported business status potentially derives alternative, localized and compliant commissioning models and would further the objectives of Community Wealth Building.

Reform/liberalization of the “Light Touch” Regime

One of the aims of PRSA and the duty is to facilitate the inclusive participation of the 3rd sector (including social enterprises and supported businesses)

Schedule 3 of the Public Contracts (Scotland Act 2015) (Social and other Specific Services – “Light Touch”) could potentially be liberalised to create more opportunities for 3rd sector/social enterprise organisations. “Light Touch” flexibility only presently permitted in a very narrow range of categories under “Health, social and related services”.

With reform there is scope and justification to allow Contracting Authorities to “favour” local 3rd sector organisations/community planning partners by expanding the “light touch” regime in Schedule 3 to cover certain community orientated requirements. For example: community food, equalities, employability & skills, training, food (including catering and local growing), educational initiatives (schools), sport/active lifestyles, net zero, circular economy, (local) events management, various forms of poverty (food, fuel, income etc)

In many cases, such requirements require or lend themselves a local result from a trusted, not-for-profit local 3rd sector organisation with a compatible social purpose. Such requirements are not generally regarded as being of cross-border interest and “best value” considerations are primarily related to quality and impact of outcomes rather than price. Such collaboration could allow presently untapped opportunities for the available budget/impact/number of interventions to grow through independent funding accessible to local 3rd sector partners individually or as a consortium. At present, difficult for Contracting Authority’s to engage at this level with a guarantee of work at the end of the process. Arguably a lot of unnecessary tenders are a barrier to progressing the CWB agenda. This increased flexibility would be particularly helpful

in centrally grant funded initiatives that (at present) require a compliant public procurement process to be demonstrated.

With the required reforms, a direct award route in these circumstances would become a fully compliant procurement route. A lot of time would be saved and superior outcomes for local communities would result. Local 3rd sector organisations are not economic operators or economic undertakings for the purposes of State Aid in the main so there are not considered to be legal barriers to implementation (including continued alignment to EU procurement rules). These reforms could be transformational to CWB.

There is potential (especially in light of EU Exit) to open up the whole (or much more) of schedule 3 to light touch and allow contracting authorities the option (if best value conditions satisfied) to direct award to the local 3rd sector between £50K and light touch threshold (£663,540) This would be at least a partial reinstatement of Part B services which would fit with aspirations around “alternative delivery models” and community wealth building...especially where requirements are met by local social enterprises/the local 3rd sector or supported businesses.

There are CPV categories that could potentially/compliantly be used without a Contracting Authority invoking or establishing an emergency/extreme urgency situation beyond the control of the contracting authority e.g. “services to the community.” As stated previously, there are CPV codes such as catering, employability, community services, “administrative social services”, events management, education services, training, sporting services, library services, museum services etc that could create more opportunities for the local 3rd sector/social enterprise sector under existing community planning structures without compromising transparency, accountability or governance.

These reforms would allow early engagement with local social enterprises/3rd sector with potentially a guarantee of work. Awards could be to one local 3rd sector/social enterprise organisation or a collective/consortia. Extensive guidance would be required to ensure appropriate governance, fairness and evidence of best value but there is considered to be strong underlying demand (from Contracting Authorities and 3rd sector regulatory bodies) to liberalise Schedule 3 to benefit the 3rd sector/social enterprise sector in particular.

Treaty Principles

There are several barriers to full and effective application of the sustainable procurement duty. However, some barriers (e.g. those emanating from TFEU principles) reduce the risk of inadvertently creating or perpetuating bidder discrimination as discussed in Question 15 above. Any wholesale reform needs to be very carefully considered and balanced with risk. For example, “proportionality and relevancy”, localisation of benefits (local jobs, local suppliers, use of local materials etc), allowing for equivalency and inability to compliantly mandate certain provisions e.g. payment of Real Living Wage. In the context of EU Exit, central government could potentially explore measures that might allow increased localisation of benefits and ability to mandate key provisions either at selection or award stage. Such measures could not have the unintended consequence of conferring unfair advantage to local, Scottish or UK suppliers or to particular (local) suppliers of materials/produce or create discrimination for smaller suppliers. Arguably, large

scale municipal protectionism might cause more local economic harm than the benefits that might be derived (e.g. inward investment might be discouraged.) In some cases, these barriers/limiting factors can be surmounted by local signposting, careful articulation of requirements and encouragement of the desired outcomes impacting locally.

Community Benefits and Sustainable Procurement

The appropriate package of community benefits per project or tender will vary according to the value, duration, nature and the range of professional disciplines a supplier in a particular business sector (of any size) can reasonably be expected to draw upon. The barrier and challenge is less concerned with selection of “proportionate and relevant” benefit types but selection of the appropriate quantities according to length, value, nature and the likely physical presence (of the supplier) in the authority’s area. Further indicative guidance in this area would be welcomed as a means of increasing the breadth, reach and impact of community benefits and the sustainable procurement duty.

An increasing number of new social, economic and environmental elements continue to be recommended or mandated for inclusion under the duty (e.g. modern slavery, gender pay gaps, gender representation, mental health, innovation climate/carbon/circular economy) Whilst progressive approaches in these areas are strongly supported, the subject becomes increasingly overwhelming complex for Contracting Authority’s and suppliers and could act as a barrier to securing meaningful, honest outcomes. To continue to add an increasing number of expectations and adding to the response burden into what is traditionally 10% of award criteria could be argued to be unsustainable. Increasing weightings or introducing mandatory weighting thresholds is not considered to resolve the underlying issues surrounding the potential response and contract/supplier management burden. There is a risk that the range and scale of benefits could be compromised or diluted if expectations continue to increase e.g. a disproportionate concentration on one aspect of value (e.g. environment/carbon) might reduce opportunities to secure the optimum quantity of employability & skills outcomes (and vice-versa.)

In some cases, responding to community benefit requirements can be more challenging and time consuming for bidders than responding to all other aspects of tender combined. Contracting authorities can find it challenging to maintain a proportionate balance per tender/project between all elements of the duty to ensure that as a package, overall requirements remain “proportionate and relevant”, challenging but not over-ambitious.

Procurement Annual Reports and Community Benefits

Retrospective reporting of community benefit outcomes (Procurement Annual Reports) is necessary, transparent and fully supported. However, current reporting requirements could be regarded as unnecessarily complex, lengthy and time-consuming (therefore a barrier.) The necessary elements of the definition applicable to community benefits reporting (awarded, regulated, imposed and fulfilled) arguably do not give a true picture of CB activity year on year and the outcomes secured at a local level. Capturing information on CB outcomes “imposed” in +£4M, regulated, unregulated contracts whether the contracts have been awarded or not and focus on increasing rates of % inclusion rather than “fulfilled” is strongly favoured. If the

contract notice has not been cancelled, reasonable to assume the contract will proceed and deliver all CB outcomes “imposed” over the life of the contract. The point at which a community benefit is “delivered” or “fulfilled” is a moot point. An apprenticeship “imposed” in year 1 of a contract might not be “fulfilled” until year 4 of the same contract. A concentration on community benefits “imposed” according to type and “% inclusion” re contracts advertised in each reporting year potentially gives a more reliable measure of community benefit activity in Scotland in any given year. If these reforms are adopted and standardised, procurement professionals would have more capacity to increase the quality and quantity of requirements and increase incorporation rates as opposed to looking back and forensically examining what might or might not be delivered in whole or in part in any given year. There can be a very short time frame between award and when the snapshot of the report is compiled. There could be a large contract with 200+ outcomes awarded on 30th March of the reporting year...none of those outcomes could be counted according to definition and could not be counted in the following year in the main body of the report in the subsequent reporting year.

Reform of Thresholds Applicable to Sustainable Procurement Duty and Community Benefits

As per response to Q12, There is considered to be scope and justification to review, lower and harmonize the current £4M threshold ... potential to lower the current £2M threshold to the level of the regulated works threshold of £2M. As stated earlier in the response, the sustainable procurement duty could conceivably be harmonized at £50K for goods, services AND works and a £2M threshold for community benefit inclusion applied which could apply to goods, services AND works. Works contracts often have the most scope for meaningful, localized community benefit requirements (particularly employability and skills, community support and environmental considerations) given that the supplier tends to be physically present in the area for reasonable periods of time. The construction industry sector (even at SME scale) is sufficiently mature and experienced in delivering social, economic and environmental value at scale. The relatively short duration of some construction projects could present a barrier. It is recommended that in works contracts over £50K, fair work, environmental and prompt payment could be encouraged or mandated More considered community benefit outcomes (including but not limited to fair work, environmental and prompt payment outcomes) could be encouraged or mandated in any works contract over £2M in value AND over 6 months in duration.

Establish and Consistently Apply a definition of “local”

As per response to Q15, it is considered essential that every Contracting Authority reports in exactly the same way for CWB to be credible. It should also be recognised that many cities will be "advantaged" by having a high concentration of SMEs or large employers in their area that might (or might not) consistently win contracts...an HQ/registered office could be a lawyer or accountant's office (employing nobody local and not economically interacting locally at all) so a local address might not always derive advantage. Either way, is it the "strategy" or geographic good fortune that is necessarily making the difference and deriving the outcomes? The seemingly simple issue of "what is local?" urgently needs to be bottomed out and measures applied with complete honesty, external scrutiny and consistency.

Sub-Contracting/Local Subcontracting

As per response to Q 13 and linked to definitions of “local” ...it has historically been challenging to capture consistent and comprehensive local sub-contracting information, but this would positively impact on the community wealth building agenda. Potentially, Scottish Government guidance and support would be welcomed in terms of expectations, ways and means of encouraging and measuring local sub-contracting. Perhaps initially, more ambitious local sub-contracting expectations could be piloted by Scotland Excel (as the centre of procurement expertise in Scotland.) As with community wealth building, before embarking on such reforms, the question needs to be addressed as to what is local?/what is true local? with complete consistency between measures and methodologies.

Supplier Development/Consortia Building

As per response to Question 8, consortia building/bidding (from suppliers of all sizes) remains comparatively rare and there are thought to be considerable untapped opportunities which could conceivably improve innovation and collaboration within the business community...potentially building entire local supply chains that might not presently exist to further the community wealth building agenda. A development programme of this nature would require considerable central government investment into national (SDP) and local supplier development activity. In terms of consortia building, the programme would necessitate complete, independent coverage of risks as well as potential rewards for businesses.

Written submission from South Lanarkshire Council

What are the main barriers to businesses accessing public procurement contracts in Scotland, and how have these barriers changed since the Procurement Reform Act (Scotland) 2014 was implemented?

- The Scottish Government’s own research in this area in 2022 for new businesses and third sector concluded that lack of capacity to bid and complexity of bidding remains an issue, despite the consistency of tools through PCS and PCS-T. The view from bidders may be that PCS and PCS-T are not user friendly but improvements to these products are within the influence of Scottish Procurement.
- Recognition of the supports in place from the Supplier Development Programme should be recognised as a significant factor in improving accessibility of contracts.
- Other factors which are in the control of local authorities and should have improved since 2014 are pre-market engagement, feedback on unsuccessful bids, short term contracts and insufficient lotting.
- Some barriers identified by bidders are more challenging for councils to address, including insurance requirements, financial standing and terms and conditions. While these requirements may be considered to be onerous,

councils must have protections in respect of services and reliability of contractors. South Lanarkshire Council aims to ensure insurance requirements and financial standing are proportionate to the procurement exercise.

- In respect of the Single Procurement Document, there is no ability to amend requirements and bidders may welcome a lighter touch approach.

Does the sustainable procurement duty mean that adequate weighting is given to environmental considerations?

- Allocation of weighting to environmental considerations will vary depending on the individual procurement, however, ultimately the balance between sustainability and cost is a financial challenge across the public sector.
- South Lanarkshire Council has introduced a mandatory sustainability weighting in the technical envelope which includes Fair Work, Community Benefits and Climate sustainability.
- Further guidance on monitoring and reducing emissions from procured goods and services, as notified by the Scottish Government in July 2023, will be useful to further quantify climate impact.

The sustainable procurement duty aims to promote fair work practices. How effectively is this reaching secondary suppliers and the wider supply chain?

- The Council have implemented the Scottish Government guidance on Fair Work First for all appropriate contracts and this requires all contractors to demonstrate how they will commit to adopting Fair Work First principles, (including any agency or sub-contractor workers) engaged in the delivery of the contract. We also require all contractors to complete a Prompt Payment Certificate confirming their commitment to paying subcontractors and the supply chain within 30 days.
- Previous discussions with Scottish Procurement have outlined the challenges in monitoring and capturing this data in respect of sub-contractors and the wider supply chain. At contract evaluation stage, the evaluation panel will consider Fair Work First responses submitted by the principal contractor, in as far as this refers to sub-contractors and those companies involved in the wider supply chain at that time. However, the council is not currently resourced for the level of contract management resource required over the term of the contract to monitor delivery against Fair Work First standards of the principal contractor, their sub-contractors and the wider supply chain. Engagement with the contractor to establish the fluctuating contractors involved in a potentially complex and geographically widespread supply chain, and their performance against the Fair Work First standards would require a significant additional investment in resourcing levels. This is estimated at 2 FTEs, with a financial cost of £0.100m.

The Scottish Government have a framework contract which reserves opportunities for supported businesses (businesses where more than 50 per

cent of the workforce are disabled workers unable to take up work in the open labour market). What is your experience of engaging with this framework as a supported business?

- The Council has awarded a contract in the past 12 months through the Supported Business framework and engagement with the framework was positive.
- Expansion of the framework to a wider network of Supported Businesses to improve the number of reserved opportunities would be welcomed.

How effective are community benefit requirements in procurement contracts, and how appropriate is the £4 million threshold?

- South Lanarkshire Council includes community benefit requirements in all appropriate procurements above £50,000: there is scope to reduce the threshold below £4million to extend the scope of community benefits, although it should be noted that some bidders consider onerous community benefits as a barrier to bidding.
- There may be scope to consider alternative thresholds for contracts where community benefits are well established, including works.

What is your experience of tendering or bidding for framework contracts and lots within large contracts, are these becoming more prevalent in Scotland, and what is your view on how accessible these opportunities are?

- Question for bidders, not relevant for Council response.

What is the administrative burden of complying with procurement regulations in Scotland, and how has this changed since the 2014 Act was implemented?

- The administrative burden associated with complying with the procurement regulations is significant and has increased since the 2014 Act: there have been additional resourcing pressures arising from:
 - core tendering arrangements
 - the Sustainable Procurement Duty, including use of the Scottish Government sustainable toolkit, administration of Fair Work First and Real Living Wage and monitoring of Community Benefits
 - preparation and publication of the Procurement Strategy, Annual Report and associated contract information.
- This additional administration has not been met by additional funding to Scottish Local Authorities.

How can procurement policy in Scotland support the strengthening of local supply chains?

- The regulations currently support the strengthening of local supply chains, however, the drive to increase local spend and improve community impacts is being driven by local council priorities rather than the Reform Act.

What are the opportunities to reform procurement in Scotland following the UK's exit from the European Union?

- The opportunities for procurement reform following EU exit include:
 - simplify procurement arrangements in response to bidder feedback
 - simplify Single Procurement Document (SPD)
 - expand the light touch regime for regulated procurements
 - focus on opportunities to boost growth and productivity
 - focus on development of robust local supply chains
 - improve community outcomes from procurement, including local investment and sustainable procurement objectives

Written submission from Scottish Water

Thank you for giving Scottish Water the opportunity to provide a written submission in advance of the evidence session on Wednesday 6th March. We thought it would be helpful to provide the Committee with an overview of procurement at Scottish Water.

Scottish Water is a publicly owned company that provides vital water and wastewater services to 2.62 million households and more than 159,000 business across the whole of Scotland. We are the fourth largest water and wastewater service provider in the UK and, at circa £1.1 billion in turnover, one of Scotland's largest businesses. Our investment programme is one of the largest infrastructure programmes in Scotland – delivering the vital assets that enable us to maintain and improve services people depend on every day and supporting growth and development in Scotland's communities.

Every day we deliver 1.51 billion litres of clear fresh drinking water to customer taps and remove 1.07 billion litres of wastewater to help protect the natural environment. We are responsible for an estimated £92.5 billion in assets, and this include: 229 water treatment works, 30,515 miles of water pipes, 1,838 wastewater treatment works and 33,691 miles of sewer pipes.

About Scottish Water's Procurement Supply Chain

Scottish Water spends around £1 billion per year buying goods and services and procuring works. Our Procurement and Integrated Supply Chain Management activity has a critical role in delivering significant benefits and value for money. From a regulation perspective, Scottish Water is covered by The Utilities Contracts (Scotland) Regulations 2016. We use the Negotiated Procedures across the majority of our procurements, along with Innovation Partnership.

Key Facts About Scottish Water's Supply Chain

- Scottish Water's £1 billion spending with our supply chain last year included roughly £670m in capital spend and £370m in operational spend. This includes procuring items such as chemicals, infrastructure, civil and construction materials, contractor services, fleet and equipment, etc.
- We have circa 430 core framework partners across 190 frameworks and circa 500 wider ecosystem suppliers providing localised and specialist services.
- We are supporting over 3,000 supply chain jobs including 1,300 apprentices and graduates.
- 75% of Scottish Water's supply chain has businesses with locations in Scotland and 90% of our spend is with suppliers with a Scottish base (circa £779million).
- 70% of Scottish Water's supply chain are classed as SMEs and circa 40% of our spend is with suppliers that are SMEs.
- 95% of invoices are paid within 30 days.

- All of our suppliers pay, as a minimum, the Real Living Wage and this is verified through sample ethical audits by Scottish Water. Scottish Water also engages with its supply chain in terms published statements and commitments, for example in relation to Modern Slavery.

Supply Chain Engagement

Scottish Water provides its key partners with easy access to framework information via a supply chain portal, which has 3,700 viewers and has been visited around 172,000 times.

This provides access to key information, ranging from training, carbon reduction, support with standards and specifications, and appropriate access to framework pricing, as well as a means for suppliers to submit monthly reports, insurance documents, modern slavery declarations etc.

Scottish Water currently use Scottish Government's PECOS for catalogues, with around 430 catalogues and 24,500 items on the catalogues. Our key supply chain partners have access to the catalogue content based on the frameworks they require access to.

Procurement and Supply Chain Challenges

Some of the challenges we see in procurement and supply chain include:

- The availability of skills and capacity in the Scottish marketplace to cover increasing levels of investment anticipated in the Energy, Transport and Water sectors and the drive to achieve Net Zero.
- Mergers and acquisitions are consolidating the competitive options available for procurement teams and there is a need to consider how to support the growth of other businesses and to attract businesses to Scotland.
- Inflation and risk appetite continues to put pressure on the market, potentially reducing purchasing power over time as bidders reconsider their risk profiles and insurance costs increase.
- A divergence in procurement regulations across the UK marketplace may impact on the attractiveness of the marketplace.
- From a global perspective, geo-political instability and conflict continues to impact on costs, lead times and availability.
- Ethical issues (such as Modern Slavery) create challenges for senior leaders between seeking carbon reduction and sourcing products and materials.
- Embodied Carbon reduction remains a challenge as global manufacturing can have differing priorities and timescales.

Additional information about Scottish Water's Procurement

Scottish Water has been awarded platinum accreditation status by The Chartered Institute of Procurement and Supply (CIPS) (in 2015 and reaccredited in 2018 and 2021).

This year, we also ranked number 1 in an annual survey conducted by British Water on water and wastewater company performance where contractors, consultants and suppliers rate their clients' performance in 12 areas (including procurement, innovation, professionalism, contractual approach, and communication). Scottish Water's procurement team are members of various groups, such as:

Selectus Online (a collaborative group of utilities in the UK), Achilles (supply chain audits for Health and Safety additional independent verification) and Slave Free Alliance as part of the Utilities Against Slavery.

We take professional development very seriously, as well as supporting graduate schemes – currently 39% of our procurement staff are chartered and 45% have associate membership of professional bodies.

Written submission from Advanced Procurement for Universities and Colleges

The statutory guidance for the Procurement Reform (Scotland) Act 2014 states that the Act was introduced with the intention of providing “a national legislative framework for sustainable public procurement that supports Scotland’s economic growth through improved procurement practice”.

The Act has had a large impact on public procurement in Scotland since it was introduced in 2014. I feel the impacts can broadly be put into 3 groups.

Impact on Procurement Activity

The Act introduced a new £50k threshold for regulated procurement, much lower than the threshold in the Public Contracts (Scotland) Regulations 2015. This has meant that a lot more spend is now covered by procurement regulations. This has in turn meant a greater need for public bodies to understand and control their spend and to ensure that staff are appropriately trained in order to comply with the Act.

Reporting and Transparency

The Reform Act has introduced measures for increased reporting and transparency – contracting authorities are required to publish a contracts register, a procurement strategy and an annual procurement report. In many cases this increase in transparency and scrutiny has led public bodies to think more about procurement, how it is addressed in their organisation and how to meet the requirements of the Act.

Sustainability

The Reform Act has sought to promote and embed sustainability in procurement, through the introduction of the Sustainable Procurement Duty as well as various other provisions around Community Benefits and Fair Work.

All of the changes introduced by the Reform Act have been in line with the wider Public Procurement Reform Programme.

Impact on the Higher and Further Education Sector.

Initially the introduction of the Act was a major change for the sector. This required serious readjustment and change management from Universities and Colleges due to the impacts outlined above. This required extensive training and in many cases additional resource both for institutions and APUC.

Overall it is my view that the introduction of the Act has been a net benefit to public procurement in Scotland and the University and College Sector.

The requirement to publish a procurement Strategy has forced organisations to, at the very least, publicly outline their approach to procurement. The ongoing reporting requirements means that organisations have a greater level of accountability.

The introduction of the Procurement Reform Act has raised the profile and professional standards of procurement in the sector. Although it should be noted that this is not only due to the Reform Act on its own. This has also been part of the wider Public Procurement Reform Programme and the work done by organisations, Centres of Expertise and Scottish Government to support this.

Another positive impact of the Act has been the focus on sustainability. There are various provisions within the Act, including the Sustainable Procurement Duty, that empower Contracting Authorities to take more account of sustainability in public procurement. It has also served to raise the profile of sustainability issues. The increased focus on sustainability is not solely due to the Act but is part of wider policy and social trends, but the Act has empowered organisations that wish to use it.

Overall, the Act has led to an increase in the profile of procurement and greater recognition of its value.

Challenges presented by the Act

However, the introduction of the Act has not been without issues.

There has been an increased administrative burden due to greater regulation. For lower value requirements it is not necessarily clear whether the increased competition, which is driven by having a lower threshold, is offset against the administrative burden of carrying out a procurement exercise.

Another challenge is that, whilst obviously a key component, public procurement has become viewed as a way of delivering policy goals (e.g. around environmental or social issues) sometimes ahead of the main goal of delivering best value.

Potentially the requirement to consider wider policy issues is also leading to the stifling of best value and innovation. Contracting Authorities can be so focussed on including all aspects of policy (fair work, environment etc) that it becomes a box ticking exercise and dissuades smaller companies from bidding.

Contracting authorities can be put in an awkward position if the requirements to deliver policy outcomes start to stray too far from the subject matter of a contract. There is a risk of failing to secure best value. There is also a risk of failing to treat suppliers fairly and equally and therefore breaching the regulations.

More generally with the current issues around inflation and continuity of supply there needs to be greater recognition of the competing priorities faced by procurement staff. There is a difficult balance between seeking to achieve best value whilst also ensuring that goods and services are ethically and sustainably sourced.

Economic/Supplier Impact

It is difficult to judge from the buying side how the Act is impacting suppliers. Anecdotally there seems to be an appreciation that more opportunities are being

advertised. However, suppliers often seem to be unhappy about the burden of completing tender documentation.

I'm not aware of any challenges having been brought by suppliers under the Reform Act – this could be a good sign that contracting authorities are following the regulations at all times. But it could also be a sign that remedies contained within the Act are too difficult to follow through.

Shared Best Practice

APUC and the Higher and Further Education sector do a lot to try and share best practice but more could be done. Across the sector there are difficulties in effectively sharing best practice, building capability and finding adequate resource.

This is particularly true with regards to Contract and Supplier Management. With inflation and supply chain pressures, delivery of the full value of contracts is increasingly important. Sharing and utilising best practice requires resource and management. It is not just about making documents available but about teaching and sharing.

The Future

Some views on the future of the Reform Act.

Brexit – The Reform Act was drafted to ensure that it did not contradict the EU Directive on Public Procurement. Since Brexit that requirement has arguably fallen away. This could allow for greater flexibility within the Reform Act (and the Public Contracts (Scotland) Regulations) to allow for a more flexible approach to public procurement, albeit within the bounds of the WTO Government Procurement Agreement.

Procurement Act 2023 - It remains to be seen what impact the new procurement regulations used in the rest of the UK will have on public procurement in Scotland. But there may be some issues if it appears that public procurement is heavily regulated in Scotland compared to the rest of the UK – both in terms of the supply market and the procurement profession.

Reporting – the requirement to produce an annual procurement report has had a positive impact. I think there needs to be greater use of the reported data in order to shape and drive future direction. Otherwise over time organisations may start to feel it is not worthwhile completing their reports.

Stephen Connor
6 March 2024

Wider views

As part of this statement views have also been sought from within the sector. This has been reproduced below.

- The 50k threshold is now counter-productive. The level of resource required to undertake compliant procurement at Route 2 does not justify the outcomes. Greater flexibility needs to be offered.
- It's become very clear to most in the public sector that better service levels can be achieved through robust Contract & Supplier Management. But resource is rarely dedicated to this because the compliance aspect of the tendering takes precedence. If some of the lower-value tendering activity can be taken away, then it could redirect the resource onto contract managing the high value, high risk areas.
- On the best practice front, the Government should be taking much more of a lead when it comes to developing an all-encompassing sustainability/social impact tool as well as a contract management module. Every institution is doing something different and it's a wildly ridiculous waste of resource.
- If we are taking sustainability seriously and they are happy to refer to the 'climate emergency', then our procurement routes should allow for quick avenues to markets that offer greener alternatives. A 'climate emergency NCA' allowance for example. Providing you can objectively demonstrate that the supplier/solution offers a greener solution than competitors.
- Policy priorities are often thrown onto Procurement activity with very little thought as to how it affects on the ground operational procurement. But then policies rarely do this anyway, so doubt anything will change on that front.