

Annex B – Respondent Information Form



Public Procurement: A Consultation on Changes to the Public Procurement Rules in Scotland

RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

The Moray Council

Title Mr Ms Mrs Miss Dr **Please tick as appropriate**

Surname

Palmer

Forename

Mark

2. Postal Address

Council Offices

High Street

Elgin

Postcode IV30 1BX

Phone 01343 563616

Email

3. Type of Respondent

Please tick as appropriate

Executive Agencies and NDPBs

Local authority

NHS

Other statutory organisation

Representative body for private sector organisations

Representative body for third sector/equality organisations

Representative body for community organisations

Representative body for professionals

Private sector organisation

Third sector/equality organisation

Community group

Academic

Individual

4. Permissions - I am responding as...

Individual / **Group/Organisation**

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate

Yes No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick **ONE** of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate

Yes No

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate

Yes

No

Questions

Q1 What are your views about what should be included in this Statutory Guidance? Please explain your answer.

The requirement is reasonable. The difficulty will be achieving consistency in terms of the content of strategies and annual reports. It is recommended that the government should work with the public procurement profession to develop appropriately detailed guidance.

Q2 What are your views about what should be included in this Statutory Guidance? Please explain your answer.

Given the focus of sustainability and community benefits contained with the Reform Bill it is essential that the guidance will reflect the priority these areas are to be given. As the national focus on these areas increases, one challenge that will be faced is for the guidance to keep pace with developing changes.

Q3 What are your views about what should be included in this Statutory Guidance? Please explain your answer.

£4M de minimis appears to be reasonable given the level of input that will be required to comply

Q4 We believe that a statutory obligation on public bodies to include relevant clauses in their contracts is the best way to ensure that contractors comply with all relevant laws and collective agreements. This should also ensure that public bodies are able to end contracts where a contractor does not meet these requirements. Do you agree or disagree with this position? Please explain your answer.

Agree Disagree

Compliance to existing laws is fundamental and therefore it makes sense to include a rule that ensures relevant clauses are included in our contracts. The effectiveness of such a rule however remains to be tested.

Q5 Is there still a case for reserving contracts for supported businesses in Scotland?

Yes No

Q6 Do you think that the definition of a “disadvantaged person” in this context should be “the unemployed, members of disadvantaged minorities or otherwise socially marginalised groups”?

Yes No

If not, what do you think the definition should be and why?

Clarity is required in section 2.6 of the consultation document – is a reserved business one which employs disabled people or disadvantaged people ?

Q7 Our view is that we are not aware of any arguments that currently support reserving contracts for mutual and other non-public sector bodies in Scotland, and we believe this is less of an issue in Scotland. Do you think there are any advantages or disadvantages to applying this provision to the procurement activities of public bodies in Scotland? Please explain your answer.

Advantages Disadvantages

Not aware of a situation where this may apply - therefore difficult to determine whether there would be any advantage. Therefore it would be helpful for the government to expand on this point further.

Q8 Should the rules about labels which apply to contracts that are EU regulated procurements also apply to lower value regulated procurement contracts covered by the Act? Please explain your answer.

Yes No

Consistency of approach

Q9 Do you think we should align the rules on technical specifications for all regulated procurements, including those lower value procurements regulated by the Act? Please explain your answer.

Yes No

Consistency of approach

Q10 We believe that contracts should not be awarded on the basis of price or cost alone? Do you agree or disagree? Please explain why.

Agree Disagree

Best value is not simply about the lowest price. Incorporating other aspects, such as quality, into procurement assessments are now well proven in this regard.

Q11 We believe that public bodies should retain discretion to split requirements into smaller lots and to award more than one lot to the same bidder. Do you agree or disagree with this? Please explain your answer.

Agree Disagree

Flexibility for buyer and bidder - has the potential to open an opportunity to wider audience regardless of size. Keeping the discretion, however will ensure that organisations will obtain "best fit" depending on requirement.

Q12 To avoid creating unnecessary confusion, we believe that public bodies should have the discretion to decide whether to request additional information about sub-contractors. What are your views about this?

Each procurement process is unique and the requirement for supply chain information will vary for each contract. Having discretion allows for flexibility.

Q13 The Directives also make clear that public bodies are responsible for obtaining any information about sub-contractors from the main contractor. There is an option to transfer this obligation (to deliver the information) to the main contractor. We do not plan to transfer that obligation to the main contractor. What are your views about this?

Public body contract - public body responsibility. To move it would still require a degree of involvement on the part of the buyer to ensure it happened and would only add to the overall cost of delivery for the main contractor, and ultimately, therefore, the taxpayer.

Q14 We believe that we should not apply similar provisions on sub-contracting to contracts covered by the Act, as we do not think this would be proportionate. Do you agree or disagree with this?

Agree Disagree

To an extent - some circumstances may benefit from additional information on sub contractors but a public organisation can still request this data should it be a requirement without it being part of this provision.

Q15 We believe that similar payment terms for sub-contractors, as for main contractors, is a good thing and there are some measures underway, or in place, to address this. We also believe that direct payments to sub-contractors could be complicated and could mean public bodies assuming some responsibilities that should arguably remain with the main contractor. In light of this, we believe that public bodies should be able to make direct payments to sub-contractors only where the contract allows this to happen and parties agree. Do you agree or disagree?

Agree Disagree

Would require a high degree of control and be resource intensive and therefore should only be used where the contract allows for it and there are clear benefits to all.

Q16 Do you think that the same rules on selection criteria should apply to lower value regulated contracts as to higher value EU regulated public contracts? In particular, should the same rules apply on:

- The use of turnover as a selection criterion?
- The right of a public body to assume that a business does not have the professional ability needed for the performance of a specific contract, if that business has a conflict of interest which might mean that it is less able to deliver the contract?

Please explain your answer.

Yes No

Consistency of approach

Q17 Do you agree or disagree that public bodies should retain the flexibility to decide for themselves the basis upon which groups of businesses will be able to meet tests of economic and financial standing and technical and professional ability that will be necessary to perform a particular contract or should there be national standards? Please explain your answer.

Agree Disagree

Unique nature of some contracts may result in differing company group structures (third sector entities, partnership arrangements, etc). As a first step the government could lead an initiative to develop best practice guidelines. If this is successful then there would be no need to set standards in legislation.

Q18 Should the list of criminal convictions which may result in exclusion from bidding be the same for all regulated contracts, regardless of value? Please explain your answer.

Yes No

Consistency of approach

Q19 Should public bodies be required to exclude a business from bidding for lower value regulated contracts if it, or someone who holds a senior position in it, has been convicted of any of the offences on the list?

Yes No

If the contractor is unsuitable due to convictions, the exclusions should apply at any level.

Q20 Should public bodies retain the discretion to decide whether or not to exclude a business from bidding for a contract where the body can demonstrate by appropriate means, short of a court, tribunal or administrative decision, that the business has breached its obligations to do with paying tax or social security contributions?

Yes No

Q21 Should public bodies be given the discretion not to exclude a business which has breached its obligations to do with paying tax or social security contributions, and where this has been established by a court, tribunal or administrative decision, if it would be disproportionate to do so?

Yes No

Allows for a proportionate view of any potential issue.

Q22 Should public bodies also have the discretion to exclude a business from bidding for lower value regulated contracts if it has breached its obligations in relation to the payment of tax?

Yes No

Allows for a proportionate view of any potential issue.

Q23 Should public bodies retain the discretion to decide whether or not to exclude a business which is bankrupt, or is in insolvency proceedings from bidding? Please explain your answer – in particular, if you think that public bodies should have discretion in these situations, do you think that discretion should apply in every circumstance?

Yes No

Q24 Should the same rules apply to EU regulated contracts and to lower value regulated contracts? Please explain your answer.

Yes No

Consistency of approach

Q25 Should a public body be allowed not to exclude a business with disqualifying criminal convictions, or which has breached its obligations to pay tax or social security, in exceptional circumstances? Please explain your answer.

Yes No

Allows for a proportionate view of any potential issue.

Q26 Should the same rules apply to EU regulated contracts and to lower value regulated contracts? Please explain your answer.

Yes No

Consistency of approach

Q27 Should the law allow public bodies the discretion to decide whether or not to exclude bidders in situations where there is evidence of a breach of environmental, social and labour law obligations, grave professional misconduct, distortion of competition, a conflict of interest, a significant failure to perform in an earlier contract, or a security risk (in the case of defence and security concessions)? Please explain your answer.

Yes No

Having insisted on the conditional clause in the contract regarding adherence to laws (Q4), this does allow for careful consideration in exceptional circumstances and therefore flexibility
In order to exclude, however, should be backed up with clear (appropriate) evidence, allowing the contract to challenge where appropriate.

Q28 Should the same rules apply to EU regulated contracts and to lower value regulated contracts? Please explain your answer.

Yes No

Consistency of approach

Q29 Do you agree or disagree with our proposed maximum periods of exclusion? Please explain your answer.

Agree Disagree

If "self cleansing" is not being applied by a company they should not have access to public contracts and 5 years is not unreasonable. To extend beyond this however would not allow for spent convictions.

Q30 Should the same rules apply to EU regulated contracts and to lower value regulated contracts? Please explain your answer.

Yes No

Consistency of approach

Q31 Should public bodies be required to check that sub-contractors do not fail any of the exclusion criteria?

Yes No

Whilst it is our responsibility to seek relevant information for our contract requirement on sub contractors (Q13) the relationship between main contract and their sub contractors is key and it makes sense for them to ensure that exclusions would not apply. Highly unlikely that a public organisation would have the resources to cope with administration of these checks - in the future wider use of the proposed ESPD (Q49) may assist this aspect of supply chain management

Q32 What are your views about what should be included in this Statutory Guidance? Please explain your answer.

The council supports the items identified for inclusion as statutory guidance.

Q33 We expect to apply only limited rules to contracts for social and other specific services to the person. These will require compliance with the basic Treaty Principles and publication of contract opportunity and award notices as described in this section. Do you agree or disagree that these rules will be sufficient for an effective light-touch regime? Please explain your answer.

Agree Disagree

We agree with the proposed changes - basic procurement principles will still apply but with consideration for the unique service requirement. Concerned about the description "light touch" - some may see this as a short cut without applying the overall guidance. The wording should therefore be amended to avoid the potential for inconsistency of application.

Q34 We believe that contracts should not be awarded on the basis of price or cost alone? Do you agree or disagree with this position? Please explain why.

Agree Disagree

As for Q10- no different for care and support contracts

- Q35 What are your views about what should be included in this Statutory Guidance? Please explain your answer

As a guide the principles are good, the statutory guidance should have detailed clarification of the issues listed to avoid each public organisation having to interpret for their own use.

Q36 Should provision be made for the use of a Prior Information Notice by non-central authorities (where they choose) as the call for competition in restricted procedures and competitive procedure with negotiation? Please explain your answer.

Agree Disagree

The prior information notice (PIN) is an extremely useful tool and allowing it to be used in this way will help as it will reduce the process time taken in certain circumstances. However, it may lead to confusion on the part of companies (which to some extent is already evident) , public organisations will have to make it clear in the PIN that no advert will follow.

Q37 Do you agree or disagree that this provision should also apply to lower value regulated contracts, that is, those that are below European regulated thresholds and are regulated by the Act? Please explain your answer.

Agree Disagree

Consistency of approach

Q38 Do you agree or disagree that public bodies should be permitted to award a contract without competition in the circumstances permitted by the Directives? Please explain why.

Agree Disagree

Whilst this is rarely used across Scotland and has not been used recently within Moray it would be preferred that we retain the potential should it be needed. Internal controls need to be in place to ensure that this is not used inappropriately.

Q39 Do you agree or disagree that public bodies should also be permitted to award lower value regulated contracts in similar situations? Please explain why.

Agree Disagree

Consistency of approach

Q40 Do you agree or disagree that all non-central authorities using the restricted procedure should be able to set the time limit for the receipt of tenders by agreement with candidates? Please explain why.

Agree Disagree

Will support urgent or emergency requirements. It will have to be clear in the instructions that a shortened period for response is required.

Q41 When using the open procedure, should public bodies retain the flexibility to determine whether to evaluate bids before evaluating qualification and exclusion criteria? Please explain your answer.

Yes No

This option can reduce the time required to process tenders as it removes the need for unnecessary administration for unsuccessful bidders.

Q42 Should public bodies be allowed to ask for supplementary or missing information and to ask a company to provide clarification of their bid?

Yes No

Avoids frustration caused by misunderstanding. Gives clarity for submission and allows for a true evaluation.

Q43 Do you agree or disagree that the rules in the Directives about modifying contracts should not apply to contracts under the Act? Please explain why.

Agree Disagree

Whilst consistency across all procurement could be seen as the ideal, the case argued in the consultation document about the Directive being too restrictive is supported.

Q44 We believe we should continue to progress the work plan from the Construction Review report, rather than requiring the use of BIM or similar in works contracts and design contests. Do you agree or disagree? Please explain your answer.

Agree Disagree

The review currently underway will allow for more wider, detailed consideration and hopefully wider and more detailed benefits in the medium term

Q45 Do you agree or disagree that we should establish an overall confidentiality and security framework which individual public bodies would use to inform their own approach to the security handling of electronic communication? Please explain your answer.

Agree Disagree

A general framework is a good idea- too often one rule is applied that cannot be effectively or even possible for all. In time, ICT developments may allow for more precise rules

Q46 Do you agree or disagree that we should maximise the time available to

implement fully electronic procurement processes and defer the requirement for full electronic communication for the maximum permissible time?

Agree Disagree

At present public organisations at different levels of capability and need to be given time to achieve full electronic procurement.

Q47 Do you agree or disagree that all communications about concession contracts in a procurement exercise should be by electronic means?

Agree Disagree

Consistency of approach

Q48 Do you think that public bodies should retain the flexibility to decide when the use of electronic catalogues is appropriate? Please explain your answer.

Yes No

Although good for a number of contracts - not all, need the flexibility

Q49 Do you agree or disagree that we should defer the requirement to provide the European Single Procurement Document in electronic form only until 18 April 2018? Please explain your answer.

Agree Disagree

Need time to align ESPD and SPQQ

Q50 Do you agree or disagree that we should defer until 18 October 2018 the provision that says businesses should not have to submit supporting documents where the public body awarding the contract holds these? Please explain your answer.

Agree Disagree

Need time to align ESPD and SPQQ

Q51 Do you agree or disagree that we should defer the obligation on public bodies to use e-Certis until October 2018?

Agree Disagree

Need time to align ESPD and SPQQ

Q52 Do you agree or disagree that we adopt this option for utilities contracts? Please explain your answer.

Agree Disagree

Consistency of approach

Q53 Do you think that dynamic purchasing systems should be available as a tool for purchasers in respect of regulated procurements?

Yes No

To maximise the options available

Q54 Do you think that the same rules which apply in Article 34 of the Public Procurement Directive should be extended to lower value regulated procurements under the Act?

Yes No

Consistency of approach

Q55 Do you agree or disagree that we should continue to allow public bodies in Scotland to use central purchasing bodies as described in this section?

Agree Disagree

Q56 Do you agree or disagree that we should not require the use of central purchasing bodies for particular types of procurement, thereby allowing public bodies to exercise discretion as to when, and which, central purchasing body to use?

Agree Disagree

Only after careful consideration and assessment

Q57 Do you agree or disagree that we should not restrict access by Scottish public bodies to European centralised purchasing activities? Please explain your answer.

Agree Disagree

Why restrict choice if it is a genuine open market?

Q58 Do you agree or disagree that the monitoring and enforcement body for Scotland should be the Scottish Ministers, acting through the existing Single Point of Enquiry? Please explain your answer.

Agree Disagree

It makes sense to build on existing arrangements

Q59 Do you agree or disagree that we should simply copy the provisions on applications to the court from the existing 2012 Regulations? Please explain your answer.

Agree Disagree

They seem to be working as they stand

Q60 Do you think there is a need for a review body which sits beneath the national courts?

Yes No

There isn't enough volume to justify a separate review body.

Q61 If so, do you think the review body should be established as a tribunal within the Scottish tribunals system?

Yes No

If the decision was for a separate review body then this seems reasonable. The infrastructure is already in place.

Q62 Or do you think it should take some other form, for example, a Scottish Procurement Ombudsman?

Yes No

On cost grounds. Ombudsmen tend to be standards enforcers. This function is being carried out successfully by the Scottish government right now.

Q63 What is your view of the Scottish Government's position to broadly endorse the principles of open contracting and commitment to work with civil society and wider stakeholder groups to improve transparency in its procurement practices as part of its continuing programme of procurement reform?

The council broadly supports the Scottish Government Position.