



Law Society
of Scotland

Consultation response

Green Paper: Transforming public procurement

March 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Competition Law Sub-committee welcomes the opportunity to respond to the consultation on the *Green Paper on Transforming Public Procurement*.¹ We have the following comments to put forward for consideration.

General remarks

In Scotland, the law relating to public procurement is a matter of devolved competence. However, the new UK level procurement framework is of relevance from the perspective of Scottish suppliers who may tender for public contracts across the UK, including Scottish law firms tendering for legal services work from eg UK central and local government.

We have responded to those questions of most relevance in this context below. In addition, we offer some general remarks on issues important to us which are not fully explored in the consultation questions.

Application (Paragraph 14)

The Green Paper states that the UK Government, “*anticipates that the new rules proposed in this Green Paper would apply in respect of contracting authorities undertaking wholly or mainly reserved functions. We will continue to engage with the Welsh Government, Northern Ireland Executive and Scottish Government about the application of these proposed reforms.*”

It is clear that the proposals set out in the Green Paper would only apply to the procurement regulations in force in England, Wales and Northern Ireland. As procurement is a devolved matter in Scotland, the proposed reforms will not directly affect the Regulations transposed into Scots law from the EU Directives, mainly the Public Contracts (Scotland) Regulations 2015, the Utilities Contracts (Scotland) Regulations 2016, and the Concession Contracts (Scotland) Regulations 2016. The Defence and Security Public Contracts Regulations 2011 are UK-wide. However, there is a concern that the proposals could lead to regulatory divergence within the UK internal market. The procurement rules could become overly complex, with potentially four different

¹ <https://www.gov.uk/government/consultations/green-paper-transforming-public-procurement>

sets of rules depending on whether a contracting authority was exercising wholly or mainly reserved or devolved functions. It is unclear how the proposals set out in the green paper are intended to interact with Scottish procurement rules.

International Obligations

We note the importance of ensuring that the new rules are in line with our international obligations, for example those under the UK-EU Trade and Cooperation Agreement and WTO law.

In addition, we note that the Green Paper refers to the possibility of using public procurement to further social and environmental objectives in line with other strands of government policy. We note that this will also support international commitments, for example under the Paris Climate Change Agreement, or to the UN Sustainable Development Goals.

It is nevertheless important to ensure that these provisions cannot be challenged as economic nationalism. The specification of requirements and Pre-Qualification Questionnaire will therefore need to be underpinned by clear objective indicators of the way in which a particular requirement will make a genuine contribution to those objectives.

Response to questions

Chapter 1: procurement that better meets the UK's needs

Q1. Do you agree with the proposed legal principles of public procurement?

We are unclear as to the rationale for proposing to introduce legal principles beyond those currently contained in the Public Contracts Regulations 2015 (the PCR), and specifically the inclusion of policy driven initiatives such as “public good” and “value for money” into the legislation.

At the same time, we note that in Scotland, the Procurement Reform (Scotland) Act 2014 includes “a sustainable procurement duty”. This duty, which aims to make best use of public money, was entrenched in the legislation to contribute and align to Scotland’s overarching purpose and strategic objectives. Research was commissioned by the Scottish Government to analysis the impact and value of the sustainable procurement duty within the Act.

Q2. Do you agree there should be a new unit to oversee public procurement with new powers to review and, if necessary, intervene to improve the commercial capability of contracting authorities?

We agree that a dedicated unit with powers to review and intervene in procurements is welcomed, particularly where it benefits suppliers across the whole of the UK public sector and improves the quality and reliability of procurement processes.

Chapter 2: a simpler regulatory framework

Q3. Where should the members of the proposed panel be drawn from and what sanctions do you think they should have access to in order to ensure the panel is effective?

We note that at paragraph 51, it states that “the Government proposes consolidating the PCR, UCR, CCR and DSPCR into a single set of regulations specifically designed for the UK market and priorities. This would reduce complexity and give greater clarity to contracting authorities on which processes and behaviours are or are not permitted during contract awards.” We are concerned that this wording may generate confusion, as it indicates that the proposed reforms to the procurement legislation covering England, Wales and Northern Ireland will cover the whole of the UK. However, as noted above, procurement law is a devolved matter and contracting authorities from all parts of the UK must adhere to the Scottish specific procurement regulations and the Procurement Reform (Scotland) Act 2014 when tendering for public contracts in Scotland. (See comments at 2.3 and note that the exclusion of Scotland from The Public Contracts Regulations 2015 is explicit and differs from the treatment of Wales and Northern Ireland.)

Q4. Do you agree with consolidating the current regulations into a single, uniform framework?

In principle, we believe it could be useful to streamline the regulations into a single framework of procurement rules, particularly if this creates greater access for SMEs across the UK to participate in all aspects of the procurement process. However, we are unsure from the Green Paper what evidence there is to suggest that different regulations give rise to problems. Contracting Authorities are generally clear on which set of regulations they should follow, and this is indicated on the Contract Notice so that suppliers are aware whether the procurement is governed by, for example, the UCR rather than PCR. Consolidation may therefore complicate rather than simplify the experience of suppliers if they are no longer directed to a specific set of rules.

Chapter 3: using the right procurement procedures

Q7. Do you agree with the proposal to include crisis as a new ground on which limited tendering can be used?

We believe this proposal is unnecessary and that the current rules on extreme urgency are sufficient to deal with crisis situations. The proposed rules could be seen as giving too much discretion to Cabinet Office to decide what constitutes a national or local emergency on a case-by-case basis, therefore reducing legal certainty. It could also lead to discrepancies across the UK in how public contracts are awarded on the basis and level of ‘crisis’, particularly where these rules will not cover Scotland.

We note that paragraph 78 refers to “ambiguities” in the current regulations. However, in our view the current regulations are sufficiently clear and we would therefore welcome further explanation as to those parts of the regulations, which are regarded as ambiguous. We are concerned that the proposed changes might in fact lead to greater ambiguity.

Q11. What further measures relating to pre-procurement processes should the Government consider to enable public procurement to be used as a tool to drive innovation in the UK?

We consider that procurement strategies present an opportunity to influence the behaviours of the many and varied businesses in the market, which are, or could become, involved in servicing the public sector. There may be ways in which pre-procurement questionnaires can be used to drive innovation and fulfil other government objectives – for example by including environmental criteria. It could therefore be helpful to set out some objective criteria aligned with wider governmental objectives for use in procurement processes.

Chapter 4: awarding the right contract to the right supplier

Q13. Do you agree that the award of a contract should be based on the “most advantageous tender” rather than “most economically advantageous tender”?

We understand that the suggested move from MEAT to MAT is not intended as a substantial change but is intended to give greater clarity and reinforce the principle that cost in absolute terms does not need to be the most heavily weighted criteria. We note that under the Public Contracts (Scotland) Regulations 2015, a contract cannot be awarded on the basis of the lowest price alone.

Q16. Do you agree that, subject to self-cleaning fraud against the UK’s financial interests and non-disclosure of beneficial ownership should fall within the mandatory exclusion grounds?

Yes, we agree that where this concerns fraud against the UK’s financial interests, it should be a mandatory exclusion.

Chapter 5: using the best commercial purchasing tools

Q25. Do you agree with the proposed new DPS+?

Generally, we welcome the use of the DPS+ for straightforward procurements as it allows for more engagement and involvement of SME suppliers. However, we question whether it should be utilised for all procurements beyond common goods and services. We have some concerns that there is no limit to the number of suppliers, which can be admitted to the DPS+ at any time. Greater clarity is needed as to how the contracting authority will effectively manage to run competitions amongst potentially large collections of suppliers in a particular industry.

Q26. Do you agree with the proposals for the Open and Closed Frameworks?

We are of the view that closed frameworks would not provide anything new but rather remain in line with the existing rules on framework agreements. If anything, this proposal may reduce flexibility as it imposes a strict four-year limit. We also believe there could be some confusion of authorities over when to best use Open Framework and when to use DPS. Further guidance to address this issue will be needed if the proposal is implemented.

Chapter 6: ensuring open and transparent contracting

Q27. Do you agree that transparency should be embedded throughout the commercial lifecycle from planning through procurement, contract award, performance and completion?

In general, we agree that transparency should be embedded through the lifecycle of the procurement. We note that the current system is very transparent, particularly due to freedom of information laws in the UK. We would, however, welcome greater levels of transparency at the point of contract award to fully help suppliers understand the outcome of the procurement.

For further information, please contact:

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