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East Lothian Council

Additional information:

Copy of response to the Scottish Government on their proposals for a Procurement Reform Bill.

Authorised By	Angela Leitch
Designation	Chief Executive
Date	02/11/12

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Procurement Reform Bill Consultation

Respondent Information Form

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1. Name/Organisation

Organisation Name

East Lothian Council

Title Mr Ms Mrs Miss Dr Please tick as appropriate

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3. Type of respondent Please tick appropriate box

- Executive Agencies and NDPBs
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- 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

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/

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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 website).

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

CONSULTATION QUESTIONNAIRE

AIM OF THE BILL

Q1. Do you agree with the proposed aim of the Bill?

Yes No Don't know/No view

– If you do not agree with the proposed aim, why not?

We support the general aims of the Bill including the need to minimise bureaucracy. However we do not see that introducing another layer of legislation is the best way of achieving those aims. We are concerned that it might instead increase bureaucracy and stifle innovation.

It would be more appropriate to encourage and facilitate best practice rather than to add more legislative requirements.

It is also not at all clear that the proposals as formulated would do anything to deliver increased economic growth, especially at local level.

PART I: PUBLIC PROCUREMENT PROCESSES ARE TRANSPARENT, STREAMLINED, PROPORTIONATE, STANDARDISED AND BUSINESS-FRIENDLY

Q2. Should we place upon public sector bodies a general duty to conduct procurement in an effective, transparent and proportionate manner?

Yes No Don't know/No view

If yes to Q2 –

a) To support this general duty and other requirements being proposed for public bodies, would it be appropriate for public bodies to be required to publish annual strategic procurement plans?

Yes No Don't know/No view

Q3. Should public sector bodies be required to use a specified standard pre-qualification system?

Yes No Don't know/No view

Q4. Should the Bill be used to require public bodies to observe limits on minimum standards?

Yes No Don't know/No view

If yes to Q4 –

a) Should the annual turnover requirement be limited to no more than three times the annual contract value?

Yes No Don't know/No view

Q5. Should the Bill require public bodies to provide de-brief information to suppliers which bid for public contracts in Scotland in situations not covered by the 2012 regulations?

Yes

No ✓

Don't know/No view

If yes to Q5 –

- a) In what circumstances should public bodies be required to provide de-brief information – to all suppliers which bid or only to suppliers which submit a written request for such information?

It is good practice to provide this information to those who ask for it, as we do. However we cannot see the need to provide this information to all in every case: if the supplier has not requested this information it is unlikely they would use it, and it would therefore constitute another layer of bureaucracy.

For some types of contract or for some types of supplier, for example in the social care sector or in the third sector and for smaller businesses, in the spirit of continuous improvement it might be useful to supply this information to help some suppliers improve their capacity to tender successfully. However there is no need to require public bodies to do this in legislation: it only needs to be encouraged as best practice.

- b) Should any requirement apply only to contracts of a certain value, for example contracts above £50k?

Yes ✓

No

Don't know/No view

- c) What de-brief information should public bodies provide to suppliers? Should suppliers be given an option to receive information in writing or face to face?

It should be proportionate to the value and nature of the contract, and we must be careful not to give the expectation that the commercial details of the successful bid will be supplied. Given inevitable time and resource constraints, the only practical way for a standard de-brief is likely to be by email. Priority for face to face debriefing should be given to high value or close decisions.

- d) What timescales should apply?

Basic debrief info should be sent with the unsuccessful letter with offer of more detailed info if required.

The period for requesting further info could usefully be shortened so as to expedite the award of the contract: to seek requests for debrief within 5 days for contracts below EU thresholds.

- e) Should exemptions apply?

Yes

No

Don't know/No view ✓

– If yes, what exemptions should apply?

We cannot think of circumstances where exemptions should apply.

f) What are the potential costs/benefits?

Main additional cost is in terms of time. Benefits would be mainly for the suppliers to help them improve – but in the long term the authority could benefit from improved tenders and the encouragement of best practice. However we do not see a need to legislate for this.

g) Should there be separate limits for construction?

Yes

No

Don't know/No view

– If yes, what limits should apply?

N/A

Q6. Should the Bill prohibit charges being levied for the issue of tender documents to tenderers?

Yes

No

Don't know/No view

Q7. How could any new arrangements outlined in Part I be fully enforced?

No view.

Q8. Please use this space to give reasons for your responses or if you have any further comments on the proposals in Part I. Please also use this space to give your thoughts on any definitions or potential impacts you would like us to consider in relation to this part of the Bill.

Q2 Re General Duty – this should be current practice everywhere and our view is that legislation is not required. It should be borne in mind that it could lead to unexpected consequences such as increased legal activity as the interpretation of what is “proportionate” could be subjective.

Q3 Yes to a standard PQQ but this must be user friendly and fit for purpose. The current system is onerous for buyers and suppliers. East Lothian Council would prefer to see something much more intuitive, to take it further and have pre-accreditation with central controls over basics such as financial health and insurance. All documents would be stored once and available for buyers to see should they wish to do so.

Q4 One size does not fit all.

Q4 a) This question is very confusingly worded. We are not sure why this limit would be imposed? It could be overly restrictive and may not be something that buyers or suppliers would benefit from. It could even be anti-competitive. We do not currently use turnover limits.

PART II: Making it easier for business, particularly newer businesses, SMEs and Third Sector organisations, to access public contract opportunities and sub-contracting requirements

Q9. Should the Bill include a general duty on public bodies to consider, for each and every requirement, how the specification of requirements may impact on the ability of newer businesses, SMEs and Third Sector organisations to compete?

Yes

No

Don't know/No view

Q10. How, in conducting the procurement process, might public bodies act to facilitate access by newer businesses, SMEs and Third Sector organisations?

To ask for this for every requirement will be too onerous. It is part of the Procurement Journey's Commodity Strategy and therefore good practice and that is enough.

In terms of facilitating we should perhaps take a risk-based and proportionate approach e.g. are 2 years accounts always required or only sometimes? What risks do small businesses carry that medium and large businesses don't? We already split requirements into lots where appropriate and one method we have used recently is to limit the number of lots a company can apply for. One thing to look into is the national and sectoral (A & B) contracts because small businesses certainly feel locked out of those.

We need to think about removing barriers, for example to conduct pre-tender meetings.

The Council is supportive of the local business base, providing training and specialist workshops, standardised PQQs and being more flexible with insurance requirements through a risk-based approach. All should be relevant and proportionate to the contract.

Would it be possible to sponsor a collaborative approach among third-sector organisations – for example for requirements such as insurance?

Q11. What in your view are the potential costs/benefits associated with such a duty?

If such a duty were imposed by legislation, there would be a resource implication in supporting new arrangements. Also, potentially there might be a higher risk of failure for SMEs and certainly for newer businesses.

There is a potential benefit from opening up opportunities for small and third sector organisations, especially from the social care sector. We rely on this type of organisation to deliver much of the social care work in East Lothian.

Q12. How could such a duty be enforced?

No view.

Q13. Do you agree that public sector bodies should be required to use a single specified online portal to advertise and award all contracts?

Yes ✓

No

Don't know/No view

If yes to Q13 –

a) What level do you think the threshold should be set for:

- goods and services contracts

- works contracts.

Above £50k for goods and services and above £100k for works contracts

Q14. Should the Bill place a duty on public bodies to publish contract documentation?

Yes

No ✓

Don't know/No view

Q15. What do you see as the advantages/disadvantages to requiring that public bodies publish contract documentation?

“Contract documentation” implies contract documents which include specifications and pricing. This should not be publicly available as it is commercially sensitive.

If however we are talking about an overview of contracts – title, start and end date etc, then there would be no harm in having this published. This info is held in PCS anyway and therefore this could be achieved through that means (without any additional work)

Q16. What are the resource implications for buyers/suppliers if commercially sensitive information had to be removed from every contract prior to publication?

It would be very time consuming and not at all practical. However, if it is limited to the information published in PCS then that would be fine.

Q17. Could a requirement to publish contract documentation¹ inhibit competition by deterring suppliers from bidding for public contracts, and subsequently have a detrimental effect on the value for money achieved on behalf of taxpayers?

Yes ✓

No

Don't know/No view

Q18. Would the publication of contract registers by public bodies be a better alternative to publishing full contract documentation?

Yes ✓

No

Don't know/No view

Q19. Would publication of contract documentation lead to greater transparency in the procurement process?

Yes

No ✓

Don't know/No view

¹ The documentation between the public body and the supplier that form the contract

Q20. Would publication of contract documentation improve value for money by ensuring that public bodies took greater care to ensure that contracts are of a high standard?

Yes

No

Don't know/No view

Q21. Should all "major contracts" be defined as one which is a public contract as defined by the EU procurement Directives and has a total estimated value over the contract duration that matches or exceeds the threshold applicable to public works contracts as defined by the EU public procurement Directive (currently £4.3m)?

Yes

No

Don't know/No view

Q22. Should the Bill place a duty on those in receipt of major contracts to advertise sub-contract opportunities on a single specified online portal?

Yes

No

Don't know/No view

If yes to Q22 –

a) Should the duty extend to all contractors through the supply chain to do the same?

Yes

No

Don't know/No view

Q23. Are there other ways in which the Bill could achieve the desired policy objective (making it easier for SMEs and Third Sector organisations to access and compete effectively for contracts)?

Re Third Sector organisations, we don't see anything here that makes it easier for them.

There is also no mention of local businesses.

The PQQ needs to be improved and made easier. The mandatory requirements should be reviewed and should be proportionate in every case.

Suppliers of all types should be encouraged to join the Supplier Development Programme and to attend the courses that they put on. Suppliers should take every opportunity to attend events organised by contracting authorities. There needs to be greater clarity on Part B services and what exactly is permitted and what is not.

Q24. How could any new arrangements outlined in Part II be fully enforced?

No view.

Q25. Please use this space to give reasons for your responses or if you have any further comments on the proposals in Part II. Please also use this space to give your thoughts on any definitions or potential impacts you would like us to consider in relation to this part of the Bill.

Q21: £4.3m possibly too small for “major” contracts

Q22 In practice contractors tend to have established supply chains and do not wish to advertise on every occasion. They may need to do so if moving into a geographical area they have not worked in previously. We do not think forcing them to advertise would be popular with suppliers. Often contractors need to know their supply chain at the time of bidding so this could lead to requiring longer to submit bids. It also introduces additional risk to the delivery of the contract. However we do wish to encourage the use of local subcontractors.

PART III: SMARTER USE OF PUBLIC PROCUREMENT TO ENCOURAGE INNOVATION AND GROWTH

Q26. How could the Bill help businesses develop and commercialise new or novel goods, services and works for internal and international markets?

We are not convinced that the Bill is the correct vehicle to encourage business innovation and growth. We support measures to stimulate new business opportunities and inward investment but these should be kept apart from procurement.

Q27. Do you support our proposals to stimulate new businesses opportunities and inward investment in facilities to provide new, sustainable products and services for the public sector?

Yes

No

Don't know/No view

Q28. Should the Procurement Reform Bill make it a requirement that purchasers must permit the submission of variant bids?

Yes

No

Don't know/No view

Q29. How could any new arrangements outlined in Part III be fully enforced?

No view.

Q30. Please use this space to give reasons for your responses or if you have any further comments on the proposals in Part III. Please also use this space to give your thoughts on any definitions or potential impacts you would like us to consider in relation to this part of the Bill.

Q28 – It is not always desirable to get variant bids which can make comparisons and evaluation more difficult, time consuming and more likely to be challenged. It should be left to the purchaser's discretion to seek variant bids depending on the nature of the contract. Therefore we do not support the proposal to make it a requirement that purchasers must permit submission of variant bids.

PART IV: TAKING ACCOUNT OF SOCIAL AND ENVIRONMENTAL SUSTAINABILITY ISSUES THROUGH PUBLIC PROCUREMENT

Q31. Should those awarding major contracts² be required to consider including community benefits clauses?

Yes No Don't know/No view

If yes to Q31 –

a) Should those awarding major contracts be required to publish details of the benefits those clauses are intended to deliver and the outcomes **or** a statement explaining why the contract is not considered suitable for the inclusion of community benefit clauses?

Yes No Don't know/No view

b) Should those awarding major contracts be required to consult communities regarding Community Benefits they would wish to see delivered?

Yes No Don't know/No view

c) Should those awarding major contracts be required to consider extending community benefit clauses to sub-contractors?

Yes No Don't know/No view

Q32. Should those in receipt of major contracts be required to publish training and apprenticeship plans for those contracts?

Yes No Don't know/No view

Q33. Should we use the Procurement Reform Bill to promote greater use of supported businesses by the public sector?

Yes No Don't know/No view

If yes to Q33 –

a) How can we ensure that public bodies consider use of supported businesses as part of their approach to procurement?

b) Should we make it a statutory requirement that public bodies have at least one current contract with a supported business?

Yes No Don't know/No view

Q34. Should we use the Bill to place a legal requirement that public bodies nominate a “Champion” for supported business to act as a focal point for enquiries and liaison?

Yes No Don't know/No view

² A question on defining a “major contract” features earlier in the document.

Q35. Should public sector bodies be placed under a general duty which requires them to demonstrate the extent to which what is being procured will promote or improve the economic, social, health and environmental well-being of the relevant area?

Yes

No

Don't know/No view

If yes to Q35 –

a) In conducting the process of procurement, should public sector bodies act with a view to securing that improvement?

Yes

No

Don't know/No view

b) What are the key issues that should be set out in the guidance?

There should be guidance on how procurement can be used to support wider economic, social, health and environmental aims. However, this should not be legally binding guidance linked to legal requirements.

Any guidance needs to target service managers within contracting authorities. There would need to be current case studies (covering large and small contracts) and on-site training on these matters.

Q36. How could any new arrangements outlined in Part IV be fully enforced?

No view.

Q37. Please use this space to give reasons for your responses or if you have any further comments on the proposals in Part IV. Please also use this space to give your thoughts on any definitions or potential impacts you would like us to consider in relation to this part of the Bill.

Sustainable procurement should become embedded in good procurement practice and not an “add on”.

One important factor is the documentation required for the tendering process, which can be off-putting for smaller suppliers. Simplification of the documentation would be desirable.

Re Q31 (c), we are concerned that extending community benefits clauses to subcontractors might exclude SMEs from tendering, as they may not have the same capacity as larger suppliers. We would wish to avoid larger suppliers being enabled in effect to “pass on” their responsibility for community benefits to smaller subcontractors.

Community benefits expectations should be proportionate, flexible and realistic.

We would like to see more thought given to accommodating and encouraging “co-production” between public authorities and 3rd sector/ social enterprises to determine the kind of service we want to provide.

Re Q33: The Council accepts and respects the wider social value of using supported businesses. However there can be in practice a tension between upholding that principle in the arena of procurement, versus the requirement to achieve cost-effectiveness and best value.

There is already provision being made within Scottish Government policy to encourage and enable the use of Supported Businesses for public service contracts. The 2006 Public Contracts (Scotland) Regulations (Regulation 7) can restrict the tendering process for goods or services to supported businesses only. Increased marketing of supported businesses such as Blindcraft and Remploy to the public sector would raise awareness of the types of services Scottish supported businesses could offer.

Re Q36 - We are supportive of, and taking action to put into practice, the concept of using procurement to support the Council's wider aims and objectives (e.g. through community benefits in procurement).

However, we do not believe it is necessary to impose a legal requirement on local authorities to demonstrate the extent to which what is being procured will promote the economic, social, health and environmental well-being of their area. Local authorities are already under a duty to act in the best interests of their area and to meet various legal requirements to demonstrate how they are fulfilling their duties. The new duty proposed would only add to an already complex landscape of duties and requirements.

A legal requirement such as that proposed in the consultation paper could potentially open the way to time consuming and expensive legal challenges.

PART V: DEALING WITH INAPPROPRIATE CONDUCT AND POOR PERFORMING SUPPLIERS

Q38. Should the Bill include measures to ensure that the public sector deals appropriately with poor performance and poor standards of business ethics on the part of contractors?

Yes ✓

No

Don't know/No view

Q39. Should contractors that fail to adhere to appropriate standards of conduct, performance and business ethics be excluded from competing for public contracts?

Yes ✓

No

Don't know/No view

If yes to Q39–

a) What should that form of exclusion be?

This could be part of the supplier accreditation ie suppliers should only be allowed to register and remain on PCS if they have “passed” these tests. This would be preferable to the contracting authority having to do these checks every time.

Q40. How could any new arrangements outlined in Part V be fully enforced?

See response above in Q39

Q41. Please use this space to give reasons for your responses or if you have any further comments on the proposals contained in Part V. Please also use this space to give your thoughts on any definitions or potential impacts you would like us to consider in relation to this part of the Bill.

Although we are broadly in agreement with the proposals referred to in Q38 (measures to deal with poor performance and poor business ethics), some aspects such as overcharging and under-performance may be difficult to define and in some cases may have been contributed to by both parties. Early termination of contracts might be looked at but it must be recognised that in some cases this may be an isolated or a geographical issue and would not justify exclusion from future contracts. In addition, any arrangements would have to apply to suppliers from outside Scotland as well as Scottish suppliers. Arrangements should be centrally-managed to make sure they are demonstrably consistent and fair across the country. This strengthens the case for a pre-accreditation process.

PART VI: APPLICATION AND COMPLIANCE

Q42. Should the Bill adopt the same approach to defining public contracts as in the EU Directive and implementing Scottish Regulations?

Yes ✓ No Don't know/No view

If yes to Q42 –

a) What should our approach be to local exemptions?

Q43. Should we include specific provisions which explicitly exclude from coverage, contracts between public bodies which are non-commercial? (e.g. those that are in pursuit of shared service initiatives.)

Yes ✓ No Don't know/No view

Q44. Should all of the proposals discussed in this consultation paper apply to the procurement of health and social services?

Yes No ✓ Don't know/No view

If no to Q44 –

a) From which of the proposals should the procurement of health and social services be exempt and why?

All of the aspects here - use of third sector; SMEs; past performance - apply equally to social care. However there is an argument for treating **Self-Directed Support** differently: the main principle should be to enable flexibility and independence for the individual.

b) Should the Bill include additional provisions which apply only to the procurement of health and social services?

Yes as the provision of health and social care services is different: –

- Self-Directed Support;
- requirements for consultation with users in specifying the service required;
- co-production between public authorities and 3rd sector/ social enterprises to determine in the first place the service level we want to provide.

If yes to Q44 –

- c) What should be included in the Bill to deliver its proposed aims in the context of health and social care procurement?

The Council would wish to be able to approach providers and work with them in a partnership way without going through a tender process. They would like the flexibility to enter into longer-duration contracts, and the ability to extend contracts if quality is acceptable. The very nature of social care services means that local authorities are the dominant purchasers. This needs to be balanced against the legal duty to demonstrate Best Value and the ability to contract manage through appropriate review and monitoring mechanisms. Local authorities and local service users would benefit from opportunities to drive up quality.

There is a view that the current regulations do not serve Health and Social Care clients well; the regulations do not fit with the personalisation agenda.

We would like to suggest instead there should be a National Code of Practice for procurement in social care.

- Q45.** Should the Bill apply to utility activities conducted by Private Sector bodies?

Yes

No

Don't know/No view ✓

- Q46.** Should the Procurement Reform Bill apply in full or in part to contracts awarded by public bodies in furtherance of utility activities as defined in Directive 2004/17/EC, given effect in Scotland by the Utilities Contracts (Scotland) Regulations 2012?

No view.

- Q47.** How could any new arrangements be fully enforced?

No view.

- Q48.** What sanctions might be appropriate for failure to comply?

In relation to two possible different types of sanction:

1. **Dealing with suppliers** - we do not think the proposed legislative requirements are necessary, but if it is progressed then we think existing sanctions are appropriate, given that legislation is arguably broadening the ability of contractors to raise claims against procuring bodies.
2. **Any new duties on public authorities** - we have serious concerns about additional resources required to ensure and monitor compliance by local authorities, and any financial sanction would be to the detriment of the communities served by local authorities.

- Q49.** Should the Single Point of Enquiry have a role in relation to enforcement of the provisions of the Bill?

Yes No Don't know/No view ✓

If yes to Q49 –

a) Should it do so on the basis of statutory powers?

Yes No Don't know/No view ✓

Q50. Please use this space to give reasons for your responses or if you have any further comments on the proposals in Part VI. Please also use this space to give your thoughts on any definitions or potential impacts you would like us to consider in relation to this part of the Bill.

We do not think “reform” is the right title for this Bill. The elements of best practice referenced in this Bill are not “Reform”. We would like to emphasise that we do not believe there is a need for legislation of this nature.

Living Wage through procurement

Q51. Should procurement activity be used to encourage contractors to pay the living wage to their employees engaged in the delivery of public sector contracts?

Yes No Don't know/No view

If yes to Q51 –

a) To what extent, in what form and at what stage should contractors be encouraged through procurement processes to pay a living wage?

Difficult to see how it can be “encouraged” – and if it can't be mandatory then it has to be discretionary. If discretionary then authorities would have to be allowed to take this into account through the evaluation of quality.

b) Would it be appropriate to promote payment of the living wage in all public contracts or only contracts of a certain type or of a certain value?

We think it should be all or nothing.

- c) What are the potential benefits and costs associated with promoting payment of the living wage through procurement activity?

Benefits –Very low-paid workers will be better off than before. We could aim for all staff employed, directly or indirectly, in delivering public services being paid the living wage. Recruitment and retention of an appropriately-qualified and well-motivated social care workforce would presumably be easier if the workers were paid the Living Wage.

Costs – this will push costs up when budgets are going down and the impact will be service cuts.

- d) What are the implications for private and voluntary sector suppliers, public bodies and the market?

Higher costs or service cuts in the public sector.

- e) How can public bodies determine the wider social and economic implications of promoting payment of the living wage in a particular procurement process?

This question is difficult to understand. See our previous responses.