

Procurement Reform Bill Consultation

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

Scottish Information Commissioner

Title Mr Ms Mrs Miss Dr Please tick as appropriate

Surname

Agnew

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3. Type of respondent Please tick appropriate box

- 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

If other please specify

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 website)?

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?

As Scottish Information Commissioner, I am responsible for the promotion and enforcement of the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs). I have restricted my comments to those matters which fall within my statutory remit.

I agree with the aim of the Bill insofar as it promotes transparent public procurement processes. The other aims of the Bill are outwith my remit.

Applications under FOISA and the EIRs frequently relate to access to procurement information, including tendering information and the award of contracts. Since the access to information legislation came into force we, in my office, have developed a substantial body of decisions which look at transparency within procurement through access to information, for example:

Decision 149/2011 Mr Thomas Reilly and North Lanarkshire Leisure Ltd which ordered release of information about the cost of fitting out a sports facility.

Decision 104/2009 UNISON Scotland and the Scottish Prison Service which ordered release of a financial model relating to the PFI contract for Kilmarnock Prison

Decision 104/2008 Streetwork and Glasgow City Council which ordered the release of information about the successful bid for the council's street outreach service for homeless people.

In responding to the current consultation I will draw on this body of experience and will refer to the Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the EIRs (issued December 2010) <http://www.scotland.gov.uk/Resource/Doc/933/0109425.pdf>.

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?

FOISA and the EIRs give contractors the right to make a request for any recorded information held by a Scottish public authority. In this context, this will include copies of other tenders and information on the tendering exercise itself. The Commissioner has judged on a number of such cases. This right is subject to a number of exemptions (addressed in the response to (e) below).

Authorities may therefore find it easier to be proactive in disclosing information to contractors than waiting for a formal information request to be made by a contractor.

If this were not made a requirement, it would help authorities to have the powers to adopt such good practice should they wish to do so. It would potentially avoid the risk associated with accidental disclosure as there would be a lawful reason to be processing such information and data.

- 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?

- d) What timescales should apply?

-

- e) Should exemptions apply?

Yes No Don't know/No view

– If yes, what exemptions should apply?

It should be noted that both FOISA and the EIRs give contractors (or any other person) the right to ask for recorded information held by a body which is a Scottish public authority for the purposes of FOISA or the EIRs. The information to be given is subject to the exemptions in Part 2 of FOISA or in regulation 10 of the EIRs. FOISA has been in force since January 2005 and public authorities have experience in applying these exemptions. It is therefore recommended, with reference to paragraph 76 of the consultation paper, that the exemptions should mirror as closely as possible the exemptions in FOISA or the EIRs, or ideally make direct reference to them.

For example, public authorities may be able to withhold information the disclosure of which would, or would be likely to, prejudice substantially law enforcement or a person's commercial interests. In both of these cases, the information should, however, be disclosed where the public interest in disclosing the information outweighs the public interest in maintaining the exemption, even if the exemption applies.

Additionally, information may be able to be withheld where the information has been obtained from a third party and disclosure would constitute an actionable breach of confidence.

Aligning the exemptions in the Bill to exemptions which are already used by public authorities in dealing with information requests made under FOISA and the EIRs would reduce potential confusion and would ensure that a consistent public interest test is applied.

I would be happy to assist further in assisting the drafting of any exemptions or references to existing information legislation.

- f) What are the potential costs/benefits?

-

g) Should there be separate limits for construction?

Yes

No

Don't know/No view

– If yes, what limits should apply?

-

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?

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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. asks whether it would be appropriate for public bodies to be required to publish annual strategic procurement plans. It should be noted that section 23 of FOISA requires public authorities to adopt and maintain a publication scheme and publish information in accordance with that scheme. In considering what should be published through the scheme, authorities are required to have regard to the public interest in allowing public access to information which (i) relates to the provision of services by it, the cost of providing them or the standards attained by services so provided and (ii) consists of facts, or analyses, on the basis of which decisions of importance to the public have been made by it (section 23(3)(a)).

If public authorities are required to publish procurement plans, they should also be made available under the authority's publication scheme. I would be pleased to ensure that my own Guidance on publication schemes encourages authorities to comply with the new statutory responsibility.

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?

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

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Q12. How could such a duty be enforced?

-

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.

I do not have a view on whether there should be an *obligation* on all to use a single specified online portal to advertise and award all contracts. I do consider that there would be a likely value to the public in being able to access such information from a single source, provided that the information is accessible. I also consider that there would be a potential saving for authorities which use the portal as a way to fulfil some of their obligations under s23 of FOISA (if it removes the need to replicate the information on their own websites).

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?

As noted above, section 23 of FOISA already requires public authorities to publish certain information proactively in addition to publishing information in response to information requests made under the legislation. I have developed an approved a 'Model Publication Scheme' which sets out the types of information, including procurement information, that I would expect authorities to publish in fulfilment of their obligations under s23.

As section 4 of Part 2 of the Scottish Ministers' Code of Practice on the discharge of functions under FOISA and the EIRs explains, the guiding principles of our freedom of information legislation include transparency in the use of public funds and demonstrable diligence in managing contractors to ensure best value for money. The Code lists, in detail, the types of information that should be publicly available about contractual and procurement-related information, including:

- How much money is spent and with whom
- The nature of the services, goods or works procured
- The checks and balances in place for managing contracts and what intervention may be made by the client authority.

At the same time, the Code explains that authorities must respect commercial interests.

The compilation of information for publication from a range of contracts could be quite arduous. In practice, authorities are likely to find it more efficient to simply publish contracts in whole or in part (redacting commercially sensitive information). Indeed, it is now becoming increasingly common for public authorities to publish contract documentation, both promoting transparency and allowing tax payers to understand how their money is being spent and to understand the standard of services which the contractor is required to provide.

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

Sitting alongside FOISA and the EIRs is the Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the EIRs. The Code contains detailed guidance to public authorities on disclosing information relating to contracts or procurement processes and advises (at 4.1.1) that, when beginning any new procurement exercise, public authorities should ensure that bidders/suppliers understand the extent to which their information may be disclosed by the authority either proactively or in response to an information request.

The Code recommends that authorities and contractors identify, at the tendering / contracting stage, information which is considered to be sensitive by either party. Experience indicates that it is much easier to agree these boundaries at an early stage in the contracting process than subsequently when an information request is received.

As such, public authorities subject to the legislation should, in order to comply with the Scottish Ministers' Code, already be carrying out this work.

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

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)?

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

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)?

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

In my answer to Q16, I make reference to the Code of Practice issued by the Scottish Ministers. Where a public authority fails to comply with the Code, I have the right, under section 44 of FOISA, to give the authority a practice recommendation specifying the steps which I consider the authority ought to take in order to conform with the Code. Practice recommendations are not enforceable through the courts. Thought would be required on whether additional powers are needed and where they should lie. Should it be decided that 'fully enforceable' means the courts, the provisions in the Bill might more appropriately amend existing legislation, rather than create it from new.

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.

Q17 asks whether a requirement to publish contract documentation could inhibit competition by deterring suppliers from bidding for public contracts, leading to a detrimental effect on the value for money achieved on behalf of taxpayers. This was an argument put forward before FOISA came into force in January 2005, but I am unaware of any evidence that suggests this has been the outcome.

For illustration purposes, I would point to the many cases considered by the Commissioner in which authorities have argued that release of information would cause substantial prejudice to the commercial interests of any person or organisation. Many of these cases have been decided in favour of authorities, but in others, such as **Decision 066/2006 - Mr John Robertson, Aberdeen Journals Ltd., and the Chief Constable of Northern Constabulary**, the Commissioner has ordered release of the information. In no case are we aware that the harm

envisaged has come to fruition. On the basis of this experience I would recommend that any concerns require careful exploration.

FOISA has almost been in force for almost eight years, and contractors are aware that details of contracts may already be made available. As the introduction to the paper notes (paragraph 22), in 2010/11, the scale of public procurement spending in Scotland is likely to have been nearer £11 billion. It is very hard to believe that contractors would chose not to contract with the public sector simply because bodies were required to publish contract documentation.

Q20. asks whether publication of contract information would improve value for money. It is difficult to assess the potential impact of such a step, but an inevitable benefit of greater transparency is enabling civil society and the wider public to form their own views about the activity of the public sector. In many freedom of information jurisdictions, the key aspiration for greater openness is to reduce corruption. If greater openness in Scotland would achieve better value for money, then I am all in favour of it. There is also the possibility that publication would lead to greater consistency in practice – both by authorities and by contractors bidding for work, which in turn could lead to opportunity benefits. I suspect that we will not know the benefits until the approach is tried.

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?

-

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?

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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.

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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

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

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

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?

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

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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.

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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?

-

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

-

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.

-

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?

-

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

-

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?

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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?

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Q47. How could any new arrangements be fully enforced?

-

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

-

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.

While I have no view on the specific questions, I would urge drafters of the Bill to ensure that any provisions in place do not conflict with existing information legislation or place conflicting requirements on authorities.

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?

-

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?

-

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

-

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

-

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

-