



**BSA - The Business Services Association**

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27<sup>th</sup> April, 2015

*Nesta,*

**Public Procurement Consultation**

**Response from the Business Services Association**

This is a response to the Government's consultation on Changes to the Public Procurement Rules in Scotland.

The Business Services Association is a policy and research organisation. It brings together all those who are interested in delivering efficient, flexible and cost-effective service and infrastructure projects across the private and public sectors.

Our members have had constructive meetings with ministers and officials dealing with public procurement policy. This response reflects, and follows on from, points made during these meetings.

Looking at five categories - FM, Business Process Outsourcing, IT and digital services, construction services and front-line public services - the business services sector is a major contributor to the economy, accounting for £21 billion turnover in Scotland, 8.8 per cent of the total. 275,000 jobs in Scotland are supported by the business services sector, 10.5 per cent of the total (compared with 10.2 per cent in the UK as a whole).

Across the UK, more than two thirds of these services are provided for the private sector, with the remainder provided for the public sector.

The industry therefore has a crucial role to play - as an engine of growth and prosperity; contributing to the delivery of public services; and achieving wider social value objectives.

As our response makes clear, it is important that people in Scotland receive maximum value for the £10 billion a year they contribute to buying goods, works and services. Value considerations include social value, and we share the Scottish Government's view of the importance of social, environmental and employment considerations.

At a time when demand for public services continues to rise and funding continues to be squeezed, achieving social value through the provision of services matters more than ever. At such times it is particularly important that shared responsibility to achieve social objectives is recognised.

Providers of service and infrastructure projects have long been delivering added social value, both through individual contracts and as part of their overall work. This includes supporting apprenticeships; working with local communities; providing local employment opportunities; focusing such jobs and training specifically on young people, long-term unemployed people, and those from disadvantaged backgrounds; partnering with SMEs and local businesses; and behaving in a sustainable way towards the environment.

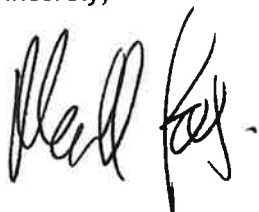
For example, a survey in Spring last year showed BSA full members were supporting over 11,500 apprentices and providing 845,000 days of training each year across the UK.

The commissioning and procurement process is the foundation on which much of this work is built. For social value to be achieved, contracts should be awarded on the basis of wider value considerations, beyond cost alone, including social, local economic and environmental considerations. Social value needs to become an inherent part of the normal commissioning cycle, embedded throughout the analysis, planning, implementation and review stages. "Commissioning" and "procurement" teams need to buy equally into this common objective.

Our response covers these and other issues in more details, with replies to the specific questions asked.

We are grateful for the opportunity to contribute to the Scottish Government's work in this area.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Mark Fox', with a horizontal line extending from the end of the signature.

**Mark Fox**  
Chief Executive  
BSA - The Business Services Association

## 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

Business Services Association (BSA)

Title Mr  Ms  Mrs  Miss  Dr  Please tick as appropriate

##### Surname

Fox

##### Forename

Mark

#### 2. Postal Address

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#### 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.

### Background

It is important that people in Scotland receive maximum value for the £10 billion a year they contribute to buying goods, works and services. Value considerations include social value, and we share the Scottish Government's view of the importance of social, environmental and employment considerations.

At a time when demand for public services continues to rise and funding continues to be squeezed, achieving social value through the provision of services matters more than ever. At such times it is particularly important that shared responsibility to achieve social objectives is recognised.

Providers of service and infrastructure projects have long been delivering added social value, both through individual contracts and as part of their overall work. This includes supporting apprenticeships; working with local communities; providing local employment opportunities; focusing such jobs and training specifically on young people, long-term unemployed people, and those from disadvantaged backgrounds; partnering with SMEs and local businesses; and behaving in a sustainable way towards the environment.

For example, a survey in Spring last year showed BSA full members were supporting over 11,500 apprentices and providing 845,000 days of training each year across the UK.

The commissioning and procurement process is the foundation on which much of this work is built. For social value to be achieved, contracts should be awarded on the basis of wider value considerations, beyond cost alone, including social, local economic and environmental considerations. Social value needs to become an inherent part of the normal commissioning cycle, embedded throughout the analysis, planning, implementation and review stages. "Commissioning" and "procurement" teams need to buy equally into this common objective.

### Guidance

Statutory guidance on the operation of the sustainable procurement duty and on the preparation of procurement strategies should reflect these points, as it is important that all commissioning authorities comply with these principles.

The BSA agrees that procurement strategies must contain information on how procurements meet the criteria set out on pages 12 and 13 of the consultation document, to meet legal requirements and provide clarity and a level playing field for service providers. It is also important to leave sufficient discretion for authorities, so they can put these requirements into effect in way which reflects local circumstances and priorities and the needs and wishes of local citizens.

There are also broader improvements which all parties to the process can introduce in order to encourage social value objectives. Commissioners need to have meaningful dialogue with service providers early in the process to ensure that providers' ideas for innovation in social and wider value can be adopted, and new ways of providing services developed. Service users themselves need to be given a greater say in what they want from a particular service. Commissioners should encourage longer-term relationships with partners. In turn, providers should embed social value throughout the organisation, in operations, behaviours and culture.

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

In light of the principles outlined above, the BSA supports the approach set out in the consultation document.

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

In light of the principles outlined above, the BSA supports the approach set out in the consultation document.

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

We agree that clarity and certainty is required for the benefit of service users, employees, taxpayers, and service providers alike. Given the wide range and size of contracts there may be room for a degree of discretion as to how to ensure compliance. Especially if a statutory approach is adopted, it would be helpful to spell out in full the terms of the relevant collective agreements and specified international agreements in the interests of transparency and clarity, including any legal opinion on their implementation.

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

Yes  No

We support the Government's approach on these issues

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?

We support the Government's approach on these issues

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

There are both advantages and disadvantages to taking this route. We would like to see decisions on procurement taken in accordance with the principles set out in response to Question 1 - which may involve a wide variety of service providers including mutuals, the voluntary sector, social enterprises, the private sector, the public sector, and a combination of two or more of these.

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

We agree that public bodies should be encouraged to think about environmental and social factors, and labels provide clarity and a level playing field. However we are also aware of the need to enforce these requirements in a way which does not add unnecessarily to the bureaucratic requirements of SMEs or any other organisations.

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

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

We support the Scottish Government's general approach on this issue, as set out in response to Q1. There may be a case for allowing a degree of local discretion in exceptional cases, for example for commoditised services, as to the point in the process at which quality and wider value considerations are specified.

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

We agree with the Government's position on this, recognising the need for a balance between ensuring a level playing field for SMEs and other providers and enabling a degree of local discretion as to how that objective is achieved. However there should be recognition that to bid for numerous lots attached to the same contract would increase bidding costs for contractors/providers, stretching available capacity and reducing the scope to generate efficiencies. In some cases this could have a negative effect either by making an opportunity unattractive or uncompetitive for the contractor.

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?

We agree with the approach set out in the consultation document, for the reasons specified

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?

We agree with the approach set out in the consultation document, for the reasons specified

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

We agree with the approach set out in the consultation document, for the reasons specified

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

We agree with the approach set out in the consultation document, for the reasons specified



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

We agree with the approach set out in the consultation document, for the reasons specified

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

We agree with the approach set out in the consultation document, for the reasons specified. Consideration could be made to the use of ConstructionLine and a single financial check organisation to minimise cost to all bidders for any size of contract through minimal expenditure on membership to numerous accreditation bodies.

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

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

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

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

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

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

There may need to be further detail on what these exceptional circumstances might be

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

Yes  No

See above

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

We agree with the approach set out in the consultation document, for the reasons specified

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

Yes  No

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

Agree  Disagree

We agree with the approach set out in the consultation document, for the reasons specified

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

Yes  No

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

Yes  No

We understand the points made in the consultation document and generally agree, especially in cases where there are large numbers of sub-contractors, but not requiring public bodies to check this information should not remove their ability to do so where possible and appropriate

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

We support the approach set out in the consultation document. It is important that, in relation to all the areas specified, including such issues as paying at least the living wage, commissioners provide clarity as to what is expected in each individual case and a level playing field for service providers - so those who put in bids which rightly reflect a positive approach to workforce and remuneration issues are not rejected in favour of those who put in lower-priced bids which do not.

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 approach set out in the consultation document, for the reasons specified, but also think that provisions to reduce procurement timescales should be referenced in the light touch regime.

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

We support the Scottish Government's general approach on this issue, as set out in response to Q1. There may be a case for allowing a degree of local discretion in exceptional cases, for example for commoditised services, as to the point in the process at which quality and wider value considerations are specified.

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

We agree with the approach set out in the consultation document

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

We agree that a reduction in the length of time for, and complexity of, the procurement process is beneficial for all

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

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

We understand the points made in the consultation document, but emphasise the exceptional circumstances involved and the need to take great care in exercising this power, for the reasons also set out

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

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

We agree with the approach set out in the consultation document

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

We agree with the approach set out in the consultation document

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

We agree with the approach set out in the consultation document, with the provisos set out

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

We understand the points in the consultation document, but believe that further detail is required on how contracts under the Act can be modified, if the rules in the Directives are not applied, in the interests of clarity and equity

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 BSA recognises the benefits to all parties of BIM, but we understand the need for proper preparation under the timetable already set out in response to the Construction Review report

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

We understand the reasons for the approach set out in the consultation document, but believe that as much clarity and consistency as possible should be applied in order to minimise unnecessary cost and uncertainty arising from variations in requirements between contracts

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

We understand the need for proper preparation

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

Agree  Disagree

We agree with the approach set out in the consultation document

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

We agree with the approach set out in the consultation document

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

We understand the need for proper preparation, in light of the new nature of the ESPD, but believe this should be introduced as soon as it is feasible to do so

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

While we understand the need for proper preparation, it is difficult to see why introducing this reduction in unnecessary bureaucracy should take the maximum length of time allowed

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

Agree  Disagree

Once again we understand the need for proper preparation, but believe this should be introduced as soon as it is feasible to do so

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

Agree  Disagree

We agree with the approach set out in the consultation document

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

Yes  No

We agree with the approach set out in the consultation document

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

We agree with the approach set out in the consultation document

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

We agree with the approach set out in the consultation document

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

We agree with the approach set out in the consultation document

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

We agree with the approach set out in the consultation document



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

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

We have no strong opinions on the precise mechanism by which the remedies regime is put into effect as long as it is robust and as speedy as possible

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

Yes  No

See above

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

Yes  No

See above

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

Yes  No

See above

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?

We agree with the approach set out in the consultation document