

**PUBLIC PROCUREMENT POLICY FORUM  
THURSDAY 28 FEBRUARY 2008**

**Attendees:**

Paul McNulty, Scottish Procurement Directorate (Chair)  
Iain Moore, Scottish Procurement Directorate  
Jessie Laurie, Scottish Procurement Directorate  
Hazel Malcolm, Scottish Procurement Directorate  
Anne Friel, Scottish Procurement Directorate (secondee)  
David Wares, Scottish Prison Service  
David Alexander, Stevenson College, Edinburgh  
Colin Elliott, Stirling University  
Helen Foster, Advanced Procurement for Universities and Colleges  
David Taggart, NHS National Services Scotland  
Tommy Mann, Chief Fire Officers Association (Scotland)  
Gordon Beattie, Greater Glasgow and Clyde NHS  
Neil Dickson, VisitScotland  
Liz Thomson, National Procurement Centre of Expertise  
Calum Elliot, National Procurement Centre of Expertise  
Nikki Bell, National Procurement Centre of Expertise  
Dorothy Cowie, Scotland Excel  
Ian Kelly, Strathclyde Police

**Apologies:**

John Cosgrove, Fife Council  
Jim Miller, NHS National Services Scotland  
Ashley Gould, Highland Council  
Lesley Horne, Association of Directors of Social Work (ADSW) Contracts and Commissioning Group  
Barry Graham, Central Government Centre of Procurement Expertise

**Actions from meeting on 8 November**

1. Paul McNulty opened the meeting and thanked members for attending. He confirmed that the minutes from the meeting held on 8 November 2007 had been agreed in correspondence, and thanked members for contributions provided. One outstanding action for SPD was to review and index the SPPNs. SPD would be interested to receive feedback from members on shared services. OGC were currently reviewing their guidance on shared services and SPD would update members on this in due course.  
**Action: SPD to continue review and indexing of SPPNs. Members to provide examples of any shared services procurement issues to SPD.**

**Brief Policy Update – Paul McNulty**

2. Paul McNulty gave updates on the following policy issues:
  - The Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2008 had been put to the Minister for signature. The amendment regulations were

largely technical in nature but also clarified the requirements on contracting authorities under regulation 8(21): to ensure a degree of advertising and follow a procedure leading to the award of all contracts which meets the EC Treaty principles of equal treatment, non-discrimination and transparency.

- Care commissioning: SPD had been in discussion with Annie Gunner, Community Care Providers Scotland and had agreed to issue a circular clarifying previous guidance on advertising contracts that are exempt from the Scottish procurement regulations (SPPN 3/2006) and the Supporting People – Procurement Information Sheet which was issued in April 2007.
- Sustainable Action Plan: SPD had received comments from four members on the sustainable action plan. Work would now start on drafting the Action Plan.
- FOI: the FOI Commissioner issued a decision at the end of January which shifts the goalposts regarding commercial confidentiality. Following evaluation of that decision, SPD would revisit current FOI guidance.
- Community Benefits in Procurement: the guidance was launched on February 19, and is available via the SPD website. Hard copies are also available.

**Action: SPD to issue circular on care commissioning and to revisit FOI guidance.**

### **Category A supplies and services: collaborative procurement agreements – Nikki Bell, NPCoE**

3. Nikki Bell outlined the proposed structure for category A contracts, in particular the use of Framework Agreements. The proposed approach for office supplies would incorporate, as a schedule to the Framework Agreement, a Participation Agreement. Liz Thomson explained that Participation Agreements would be used at the initial call-off stage to capture information specific to end users. They would cover issues such as delivery requirements and contact details.

4. Participation Agreements would also facilitate the implementation and management of the contract on behalf of the Client. Nikki Bell said that Scottish Government legal advisers had recommended use of Participation Agreements because they clarified that the end user had accepted and understood the terms and conditions laid down in the Framework Agreement. She said that a few Local Authorities had indicated that it would be useful to have a document that defined responsibilities and liabilities. Ian Kelly, Tommy Mann and David Wares agreed that some form of Participation Agreement would be useful within their sectors. Nikki Bell clarified that a Participation Agreement would not be a legally binding document.

5. Nikki Bell said that Participation Agreements should not be confused with 'Intent to Participate' documents, which would be issued to potential Clients by NPCoE to establish upfront who was interested in participating in the framework and thereby give NPCoE a stronger voice with suppliers when it went to market. The Intent to Participate documentation would not form part of the framework structure. Currently 40% of Local Authorities had submitted Intent to Participate documents for the office supplies contract. Intent to Participate documents had already been sent to fire and police organisations and would shortly be sent to health boards and the FE/HE sector.

6. Helen Foster expressed concern that the NPCoE Category A model would be different to the models employed by the CoEs in procuring category B contracts. Nikki Bell stated that models were being developed in tandem and that the NPCoE model was consistent with the

OGC model. Paul McNulty stated that the NPCoE model may be different to other CoE models as NPCoE needed a model that would work across the whole public sector.

7. Neil Dickson asked whether it would be appropriate to use one Framework Agreement to cover such a diverse range of end-users. For example, transportation costs would be much higher for end-users in the Islands. Nikki Bell said that unique circumstances such as these could be covered in the Participation Agreement.

8. Gordon Beattie asked how end users would place call-off contracts under the category A frameworks. NHS bodies would not want to hold a mini competition every time they needed to place an order. Liz Thomson said that these issues would depend on the particular Framework Agreement in question, as different approaches would be appropriate for different commodities. Participation Agreements would be drawn up between the end-user and the supplier which has been chosen to perform the call-off, either by mini competition or because there is one single supplier under the Framework. In the case of a mini competition, Paul McNulty clarified that the Participation Agreement would form part of the mini competition.

9. David Wares suggested that the Framework Agreement for office suppliers might have three suppliers and asked if organisations would need to have Participation Agreements with all three suppliers. Liz Thomson said that Participation Agreements would have to be signed by the client and any supplier they intended to use.

10. Neil Dickson said that OGC's Framework for lease cars allowed for 'spot' buying of that month's best car model and asked if NPCoE Frameworks would have a similar capability. Nikki Bell said that the Frameworks would be different dependent on the requirement.

11. David Wares asked how contract management requirements would be dealt with under Category A Framework Agreements. Nikki Bell said that contract management requirements would be set out in the Service Level Agreement, also forming part of the proposed Framework Agreement structure. Dorothy Cowie asked if a Participation Agreement could ever override the requirements of the Service Level Agreement. Liz Thomson and Nikki Bell stated that a Participation Agreement would clarify the Service Level Agreement with regard to the particular needs of the end user. However, the Participation Agreement could not radically vary the terms of the Service Level Agreement.

12. Dorothy Cowie asked whether members could have sight of a standard template for a Participation Agreement. Nikki Bell and Liz Thomson agreed to circulate a draft Participation Agreement.

13. Paul McNulty asked how Category B Framework Agreements operated or would operate. Dorothy Cowie said that Scotland Excel's framework structure included a Minute of Agreement – a legal document which covered much of the same information as the proposed Participation Agreement. Helen Foster said that APUC's approach was to include information particular to an individual organisation in the first purchase order. David Taggart said that NHS National Procurement use compliance letters. Gordon Beattie added that the NHS tended to use contracts rather than framework agreements.

14. Forum members agreed, in principle, to the inclusion of Participation Agreements in the proposed Framework Agreement structure for Category A contracts. As Participation Agreements may not be relevant to all sectors, Nikki Bell suggested further dialogue would

take place as required with the sectors concerned. **Action: NPCoE to circulate a draft Participation Agreement. NPCoE to organise further discussion and workshops where appropriate**

### **Procurement Policy Handbook**

15. Paul McNulty said that there was some concern among PPF members regarding the title of the Handbook.

16. Helen Foster suggested that the name of the Handbook should reflect its function. The first sentence in the Introduction stated that “The Procurement Policy Handbook sets out a framework of fundamental rules, behaviours and standards applicable to public procurement activity in Scotland”. She suggested that “Framework” was a better description of the document. Gordon Beattie said that use of the word Framework in the title added strength. Paul McNulty agreed that SPD would revisit the title of the Handbook. **Action: SPD to consider options for the title of the Handbook.**

17. Paul McNulty said that the The Review of Public Procurement in Scotland by John McClelland recommended a public sector wide handbook which provided a standard approach for use across all of the public sector. The handbook should provide an overarching framework and should not be duplicated at local level. It was intended to be a “tier 1” document. This would ensure consistency and avoid duplication of effort. For example, Scottish Government intended to revisit its internal policy manual and to take out text which was now included in the Policy Handbook.

18. Gordon Beattie and Helen Foster questioned whether the Handbook could replace existing documentation and suggested that it should guide internal documentation and provide a standard of consistency. Dorothy Cowie said that she agreed with the principle of one document but suggested that there were some of the text in the current draft was not applicable to all sectors. Neil Dickson pointed out that from a contractor’s point of view the use of one document avoided confusion. Liz Thomson and Ian Kelly also supported the concept of one, standardised document. Paul McNulty asked members to provide SPD with copies of their organisations’ policy documentation. SPD would then be able to review existing documentation with a view to clarifying the application of the Handbook. **Action: members to provide SPD with copies of their organisations’ policy documentation. SPD to revisit the draft to ensure that the text/requirements are applicable across all sectors.**

19. Gordon Beattie said that some information contained within the Policy Handbook was “of the moment” and needed to be revisited. For example, the information on Spikes Cavell should be replaced with more generic text on the importance of management information. **Action: SPD to future-proof text.**

20. Jessie Laurie thanked David Wares for commenting on the draft Handbook in advance of the meeting. The Handbook had been revised significantly with the assistance of sub-group members. She asked members to submit any further comments on the text and to flag any areas which they felt were not applicable to all sectors. **Action: members to submit any further comments on 14 February draft.**

## **Standstill Period**

21. Iain Moore provided a summary of the Alcatel judgment and its implementation within SPD. In 2005, following the Alcatel judgment of the European Court of Justice, a new template award letter was drafted to incorporate a suspensive condition, with the result that the contract would not come into effect until a period of ten days had elapsed. Iain informed the forum that this letter had recently been revisited and that, to ensure legal certainty, it was SPD's intention to replace it with a two stage process. At stage one, a letter would be sent to all tenderers to inform them of the award decision and outline the 10 day standstill period. A second letter would be issued to the successful tenderer at the end of the standstill period (stage 2) and would bring the contract into effect. Ian Kelly, Gordon Beattie, and David Taggart said that their organisations already used two letters. Iain Moore invited members of the forum to forward copies of the letters issued by their organisations to comply with the Alcatel judgment. **Action: members to forward letters issued by their organisations to comply with the Alcatel judgment.**

## **Remedies**

22. Paul McNulty informed the forum that SPD would shortly be consulting on the options for implementing the new EC Remedies Directive. He informed the forum that thought would be given to introducing a new procedure for challenging breaches of the Regulations, such as a tribunal system which would substantially lower the costs of bringing a challenge. This was as a result of pressure from the European Commission to improve the remedies system in Scotland given the very small number of challenges brought in the Scottish courts in comparison with other EU Member States. He added that the small number of challenges in the Scotland was not necessarily indicative of good practice or a high level of compliance, as there was evidence which highlighted poor practice and areas of real concern. For example, advice to MSPs from business was that practice was poor; there were a significant number of complaints to the Commission and questions to Ministers about procurement practices in Scotland every year.

23. Dorothy Cowie, Gordon Beattie, and Tommy Mann said that it was important to understand the root cause of the problem before trying to tackle it. They suggested that SPD undertake analysis of why so few suppliers were willing to challenge alleged infringements in the courts. Dorothy Cowie suggested that this could be carried out through the consultation process. Gordon Beattie suggested that SPD undertake an analysis of current procedures to identify barriers to bringing challenges in the courts. Gordon Beattie asked if information could be collected as part of the Best Practice Indicator (BPI) process. Paul McNulty said that the BPIs would not provide a complete picture for another 3 to 5 years.

24. Tommy Mann suggested that a solution may be to strengthen the role of the Single Point of Enquiry as a complaints function, and to give it the power to take corrective action where there had been an infringement. Paul McNulty concluded that there would be a consultation on remedies during the summer, indicating a range of options and inviting views. The consultation document would be circulated to members for their views prior to publication. **Action: SPD to draw up consultation document on remedies and to circulate it to members for their views prior to publication.**

## **AOB**

25. Helen Foster asked for the Policy Forum's business objectives for the rest of the year. **Action: SPD to provide members with business objectives for the rest of the year.**

### **Date of next meeting**

26. The next meeting would be held at the end of May. **Action: SPD to inform members of date of next meeting.**

**Scottish Procurement Directorate  
March 2008**