

**PUBLIC PROCUREMENT POLICY FORUM  
FRIDAY 30 MAY 2008**

**Attendees:**

Paul McNulty, Scottish Procurement Directorate (Chair)  
Iain Moore, Scottish Procurement Directorate  
Jessie Laurie, Scottish Procurement Directorate  
Hazel Malcolm, Scottish Procurement Directorate  
Steve Patterson, Scottish Procurement Directorate  
Peter Bennett, OGC  
David Wares, Scottish Prison Service  
Barry Graham, Central Government Centre of Procurement Expertise  
Gordon Beattie, Greater Glasgow and Clyde NHS  
Liz Thomson, Procurement Scotland  
Ian Kelly, Strathclyde Police  
Ricky Dover, Association of Directors of Social Work (ADSW) Contracts and Commissioning Group  
John Cosgrove, Fife Council  
Jane Burr, Chief Fire Officers Association (Scotland)

**Apologies:**

Dorothy Cowie, Scotland Excel  
Calum Elliot, Procurement Scotland  
David Alexander, Stevenson College, Edinburgh  
Colin Elliott, Stirling University  
Helen Foster, Advanced Procurement for Universities and Colleges  
Neil Dickson, VisitScotland  
Jim Miller, NHS National Services Scotland  
Ashley Gould, Highland Council  
Lesley Horne, Association of Directors of Social Work (ADSW) Contracts and Commissioning Group

**Actions from meeting on 28 February**

1. Paul McNulty opened the meeting and thanked Members for attending. He confirmed that the minutes from the meeting held on 28 February 2008 had been agreed in correspondence, and thanked Members for contributions provided.
2. Jessie Laurie gave an update on the action points from the 28 February meeting. To allow SPD to assess how the Policy Handbook would complement existing procurement policy documentation, Members were asked to send in any locally held documentation. This had been received with thanks from APUC. John Cosgrove said that in light of developments nationally, most Local Authorities were in the process of reviewing their procurement documentation. Members were invited to send in documentation, where available.
3. SPD had completed the indexing of SPPNs but it was recognised that reviewing the content of some SPPNs, for example SPPN 13 2004 offering advice on FOI, would be an ongoing action. SPD was continuing to work on guidance on the requirement for

advertising/competition in the context of care commissioning, with input from Lesley Horne. Liz Thomson thanked Members for the comments she received on the draft Participation Agreement. Procurement Scotland was consulting further with legal advisers on the final content of the Participation Agreement.

4. A number of Members had forwarded copies of letters issued by their organisations to comply with the Alcatel judgment. Iain Moore confirmed that he was in discussion with legal advisers on the revision of the Scottish Government's standard letters. Paul McNulty said that work on the consultation on the Remedies Directive was ongoing. He confirmed that the draft consultation document would be circulated to Members for their comments prior to publication. Finally, an outline of the issues to be discussed at subsequent Forum meetings in 2008 had been circulated to Members. **Action: Members to provide examples of locally held procurement documentation, where available.**

### **Brief Policy Update – Paul McNulty**

5. Paul McNulty gave updates on the following policy issues:

- Best Practice Indicators for Public Procurement in Scotland (BPIs) were published on 29 May. The first quarterly report was due from contracting authorities on 13 June; the FE/HE BPI reports were due later to coincide with the end of the academic year. The BPIs were based on a balanced scorecard approach and focussed on four main areas: efficiencies; collaboration; compliance; and skills. Members requested a hard copy of the BPI documentation. Paul McNulty confirmed that the BPIs had been signed off by PPRB and Ministers.
- National advertising portal: the contract for the portal had been awarded to Millstream Associates. It was intended that the portal – *Public Contracts Scotland* – would go live in August 2008 (it will be possible to access the portal via the following link: <http://www.publiccontractsscotland.gov.uk/>).
- Policy notes: the following policy notes had been issued:-

SPPN 04 2008: summary of 2008 Amendment Regulations dealing primarily with the accession of Bulgaria and Romania and amendment to Regulation 8(21).

SPPN 05 2008: summary of Amending Regulations to date, including the 2007 Amendment Regulations revising the threshold values and the 2008 Amendment Regulations as above.

SPPN 06 2008: revised note on the Remedies Directive.

SPAN 01 2008: the first award of damages for breach of the procurement regulations by a Scottish court (*Aquatron Marine v Strathclyde Fire Board*). The Court found that the exclusion of Aquatron Marine from the tendering process at the first stage of determining compliance with the specification amounted to a breach of the regulations and the principle of equal treatment.

SPAN 02 2008: Annual Statistical Returns on public contracts awarded in 2007. A reminder from the Scottish Government this is a legal requirement and that the Commission intends to take a harder line (including threat of legal proceedings) against member states which have failed to complete the statistical return on time or which have submitted incomplete or inaccurate information.

- Sustainable Procurement Action Plan: Dave Cook would be presenting at the Scottish Sustainable Procurement Conference on 4 June and his presentation would include reference to the 10 key steps in the draft Scottish Sustainable Procurement Action Plan

**Action: SPD to issue hard copy of the BPIs to Members.** *Secretary's note: hard copies of the BPIs have been sent to Members.*

### **Roundtable policy update - Members**

6. Ricky Dover said that the key policy issue in the care sector related to the operation of the National Care Homes Contract and the role of COSLA. There had been interest within the sector in the judgment in Aquatron Marine v Strathclyde Fire Board.

7. Liz Thomson reported that the governance model determining how Procurement Scotland would work with the other CoEs was at sign-off stage. A Delivery Group sub-group was looking at business case alignment across CoEs. A further issue related to the participation of SMEs within national contracts. Feedback from suppliers indicated that some SMEs had declined to bid because of the size of the lots. Procurement Scotland had held two seminars on the EU Public Procurement Directives which had been well attended.

8. Barry Graham said that CGCoPE had issued a Sustainable Procurement Toolkit for buyers. The Toolkit would complement the Sustainable Procurement Action Plan. CGCoPE was working with Scottish Enterprise on measures to reduce barriers to participation by SMEs. CGCoPE believed that SPD could improve on the guidance provided in the toolkit on the price:quality ratio. CGCoPE was testing a new model whereby commercial evaluation would be broken down into five or six headings. This model could be adapted for different procurements and perhaps could be used as an example in the toolkit.

9. Ian Kelly said that Strathclyde Police had revised its ITT following a challenge that it had evaluated suppliers on the basis of their financial standing without making this sufficiently clear in its supporting documentation. The revised ITT had been subject to external legal advice and now set out the minimum threshold required of tenderers, based on annual turnover. It required more information from suppliers but was not considered to be more complex. Strathclyde Police had been using the revised ITT since March.

10. John Cosgrove queried the amount of information now required for the initial OJEU advert. This was increasingly difficult to service given the wording was limited to 650 words. Paul McNulty said that it meant that contracting authorities' procurement strategies must be in place from the outset and that the purchasing team should be involved at the earliest stage.

11. Ian Kelly said that "collaboration" within the police sector was interpreted as involving two or more forces. He expressed concern about the resource implication of servicing the BPIs. Steve Patterson said that every effort had been made to minimise the resource needed to service the BPIs, including alignment with the Information Hub.

12. John Cosgrove raised the issue of contracts for water with the opening up of the market to competition. He queried whether, given that the national contract for water was two years away, contracting authorities could legally wait for the national contract or should go out to competition. Iain Moore stated that current advice was that there is an obligation to compete. However if contracting authorities have a business case which states that

continuing with their existing supplier is an interim measure, pending the award of the national contract, that should be sufficient. Liz Thomson said she would discuss the issue with Robert Leask the Utilities Portfolio Manager for Procurement Scotland. **Action: SPD to issue summary of current advice.**

13. John Cosgrove asked if there was any information that SPD could release to Members about the Office of Fair Trading investigation into cartels in the construction industry. Paul McNulty said that OFT had issued a press notice and an Information Note to Local Authorities and other procuring entities. He would arrange for these to be circulated to Members. He stated that at this stage it was too early in the OFT investigation to take any measures against the companies involved. Peter Bennett said OGC were asking the European Commission to consider more joined up activity on suppliers excluded under the mandatory exclusions in the consolidated Directive. **Action: SPD to issue OFT press release and guidance for purchasers.** *Secretary's note: SPD issued a SPPN on 7 July on the OFT investigation into alleged anti-competitive behaviour in the construction industry.*

14. John Cosgrove said that it would be helpful to have a summary of the policy recommendations from the McClelland review into Public Procurement in Scotland. **Action: SPD to issue a summary of the McClelland policy recommendations to Members.**

15. John Cosgrove said that one of the main policy issues for Local Authorities concerned the involvement of SMEs in collaborative contracts. SMEs in the Highlands were concerned that contracts would increasingly be awarded to businesses in the central belt. The move towards larger collaborative contracts had the potential to disenfranchise local companies Paul McNulty said that the next Forum meeting in September would be devoted to SME issues. SPD was due to put advice to Ministers on the SNP manifesto commitment to introduce a target for the percentage of public sector spend with SMEs. Any such target would be informed by data from the Information Hub, which would deliver figures for overall spend with SMEs by Scottish contracting authorities for 05/06 and 06/07 by September this year.

16. John Cosgrove said that there could be tension between contracting authorities' policy aims and what could be delivered through national contracts, For example, on a policy level, Fife Council supported electricity sourced entirely from renewable sources. However, it was likely that the national contract for electricity would consist of a lower percentage of "green" electricity.

17. Jane Burr said that there had been collaboration within the fire sector for four years. The main problem had been ensuring that all forces were included from the outset. At present, procurement policies existed at force level and these were now needed at sector level. A workshop had been organised to discuss where fire services wanted to get to.

18. David Wares suggested that there was a need to improve cross sectoral dialogue on policy in CGCoPE. He reported that SPS Contract Award Recommendation documentation had been amended to include an affirmative declaration by those making and approving the contract award that they have no personal interest which may result in a conflict of interest, and that SPS's procurement manual had been updated to reflect this. The change followed an audit recommendation and is designed to enhance standards of public accountability and transparency. He also reported on FOI requests received by SPS which were clearly seeking

information for business purposes, some of which had been received from as far afield as Australia and New Zealand.

19. Iain Moore confirmed that all requests for information must be considered, regardless of their origin. He said that the Information Commissioner had recently considered two requests from Scottish SMEs which appeared to be using the FOI legislation as a means of gaining a commercial advantage over each other. The public body concerned considered the requests to be market research and declined to disclose the information requested. The Information Commissioner held that the information should be disclosed on the basis that the public body did not present evidence that any real and substantial harm would be caused by disclosure. Public bodies seeking to rely on this exclusion should therefore ensure that they are able to demonstrate that real and substantial harm would be caused by disclosure. Gordon Beattie said that in applying the public interest test, his organisation considered the wider impact on other public bodies where competition was ongoing, although this approach had not been tested. Iain Moore confirmed that SPD adopted a similar position.

20. Gordon Beattie said that Health Boards had undertaken an assessment process to review the level of compliance with the McClelland recommendations which had proved very useful. The process had identified supplier management as a weakness within Health boards. He believed that similar tools were being developed in other sectors. Steve Patterson confirmed that the Best Practice Forum would be looking at the various assessment tools with a view to developing a standard tool. Paul McNulty said that, although he wanted to avoid duplication, it would be helpful to have an update on development/best practice at future policy meetings. **Action: Steve Patterson to provide an update on development/best practice at future meetings.**

21. Gordon Beattie said that he had been looking at Glasgow City Council's Supplier Development Programme. He noted that the supplier information held on the third sector/social firms database was not vetted and that suppliers were charged to register. He questioned how information on the database would fit with the advertising portal. Paul McNulty said that SPD would like to adopt such information in a wider context but confirmed that the portal would not be an accreditation site.

22. Gordon Beattie said that there was an opportunity to co-ordinate 'meet the buyer' days. Ian Kelly reported that there was a real appetite for such events but that suppliers were frustrated that contracting authorities all had different processes. Paul McNulty said that BIP had commenced a series of roadshows for suppliers about the reform programme. He agreed that the Scottish public sector was not as joined up as it should be on supplier development.

23. Gordon Beattie asked how SPPNs and SPANs were disseminated. Paul McNulty said that SPD had now appointed a Communications Manager and work was underway to overhaul SPD's website. SPPNs and SPANs were circulated widely, but it was difficult to maintain an up-to-date distribution list. He recognised that SPD needed to be more forthcoming with information. He asked Members to suggest any items that they felt should be covered in a SPPN/SPAN and to provide a single contact point for their organisations. **Action: Members to notify SPD of any issues they think should be covered in SPPNs/SPANs. Members to provide a single contact point for their organisations.**

## Procurement Policy Handbook – Paul McNulty

24. Paul McNulty confirmed that further comments on the draft policy handbook had been received from David Wares and APUC. A revised draft of the handbook would be circulated to Members incorporating those comments.

25. David Wares said that he had circulated a paper covering outstanding issues for discussion. SPS was concerned that the handbook as drafted stated that “Contracts should only be awarded on the basis of the lowest price in exceptional circumstances”. SPS considered that the current drafting would effectively stifle debate and ‘close down’ use of the lowest price method. The handbook should not overtly favour one evaluation methodology (MEAT) ahead of another valid methodology (lowest price) when both were permitted by the EU Public Procurement Directive. Contract award decisions based on lowest price were a two stage process – only bids assessed as fully technical compliant progressed to the stage where contract determination was then based on lowest price. Both methodologies had strengths and weaknesses. David suggested that developing the practical application and appreciation of these methodologies amongst procurement practitioners could be usefully discussed by a sub-group of the Forum.

26. Steve Patterson said that the toolkit stated that “As the aim of any procurement exercise should be to achieve Value for Money, it is recommended that the “most economically advantageous” evaluation be employed”. Barry Graham said that the award of contracts on the basis of lowest price still required an evaluation that the goods or services were fit for purpose. Award on the basis of lowest price was a valid route for some low-risk procurements and should not be ruled out. Paul McNulty said that the public sector could be criticised for awarding contracts on the basis of lowest price as this implied that it did not care about quality. The presumption in the Scottish Public Finance Manual was that contracts would be awarded on the basis of Value for Money. “Lowest price” required contracting authorities to describe the goods or services that they wanted to buy in such detail that the potential for innovative solutions was stifled.

27. Gordon Beattie recommended revising the text in the handbook to make a more balanced statement about the benefits of evaluation on the basis of the most economically advantageous tender, whilst not discounting the validity of the lowest price bid evaluation methodology. Paul McNulty agreed that the handbook should be revised accordingly and said that SPD would establish a cross-sector sub-group to discuss bid evaluation models and to develop good practice guidelines to assist procurement practitioners to make an informed choice about the correct use and application of an appropriate (lowest price or MEAT) evaluation methodology. David Wares, Liz Thomson, Steve Patterson, Ian Kelly, John Cosgrove, and Barry Graham volunteered to join the sub-group. Barry Graham said that it would be helpful also to have representation from the HE/FE sector and from Health. **Action: SPD to set up sub-group to discuss bid evaluation models.** *Secretary’s note: Helen Foster has offered to represent the HE/FE sector on the sub-group.*

28. David Wares said that a more measured approach was needed to equalities in the handbook; in his view it did not merit a separate section. Paul McNulty said he felt that it was important to retain a separate section on equalities. He did, however, agree that other areas, for example health and safety, should be covered in the handbook. **Action: SPD to draft text on health and safety.**

29. David Wares also questioned the mandatory nature of the Construction Procurement Manual. Paul McNulty said that Ministers had decided that compliance with the Construction Manual was mandatory for the Scottish Government, its Agencies and those contracting authorities which are subject to the Scottish Public Finance Manual. John Cosgrove asked how compliance with the handbook would be measured. Paul McNulty said that he expected compliance to be measured through internal audit. Barry Graham said he had some comments on the handbook which he would email.

30. Paul McNulty asked Members whether further consultation was necessary within their sectors or whether the handbook should now proceed to the Public Procurement Reform Board. Members agreed that the handbook should now be put to the Reform Board. **Action: SPD to circulate revised draft to Members at the same time as submitting the Handbook to the Reform Board.**

### **EU Update – Peter Bennett (OGC)**

31. Peter Bennett described the work of OGC within Europe. The International Team at OGC represents the UK on procurement matters at the EU level and was a proactive contributor to the development of the EU's position on the negotiations to revise the WTO Government procurement Agreement. OGC attends the EU's Advisory Committee on Public Contracts which meets four times a year and has representation from all 27 Member States. Attending the Advisory Committee meetings provides an opportunity to try to influence other Member States. OGC also worked hard on bilateral contacts with the European Commission.

32. The UK also has a seat on the European Council Working Group, which considers and negotiates proposals put forward by the Commission. Negotiations on the Consolidated Procurement Directives took eight years and involved two readings of the European Parliament. The European Parliament can have a significant influence on final proposals and in this instance tabled a number of amendments. Through the process of negotiation, the UK was successful in getting the key things it wanted. Negotiations on the Remedies Directive were more technical and the UK had worked hard to gain the support of other Member States in making sure that a second mandatory standard period was not required where there had been further competition under framework agreements.

33. OGC was currently involved in discussions on defence procurement, clean transport and green public procurement. The Ministry of Defence was leading on the Commission's defence procurement proposal. OGC had taken an active part in developing the UK negotiating position and attended the Council Working group discussions. . Proposals on clean transport originated in a different part of the Commission - DG Tren (public procurement falls to DG Markt) – and this meant that there was a need for co-ordination between the different parts of the Commission. For example, initial proposals on mandatory award criteria relating to clean vehicles did not align with the Public Procurement Directives and this needed to be resolved during the negotiations. Further work would also be needed on green public procurement to make sure that proposals were consistent with the Public Procurement Directives.

34. Peter Bennett reported that OGC has recently established a Centre of Expertise for Sustainable Procurement. A Supplier Feedback Service, similar to the Single Point of Enquiry in Scotland, had also been set up. It was too early to identify any commonality in the issues dealt with by the Supplier Feedback Service. OGC had also published a Procurement

Policy Standards Framework on its website: [http://www.ogc.gov.uk/procurement - the bigger picture policy and standards framework.asp](http://www.ogc.gov.uk/procurement_the_bigger_picture_policy_and_standards_framework.asp).

35. Paul McNulty said that OGC's role in Europe was an important one and that, through lobbying the Commission, OGC had achieved greater clarity in European procurement legislation. Barry Graham said that it would be helpful for SPD to provide a regular update on EU policy issues. **Action: SPD to consider the best way to provide a European update.**

### **Scottish Sustainable Procurement Action Plan – Dave Cook (SPD)**

36. Dave Cook explained that sustainable procurement includes taking account of the social, environmental, and economic aspects of development when defining requirements and thereafter throughout the procurement process. The draft Action Plan outlines 10 key steps to encourage and promote sustainable procurement, including commitment; making the commitment public; organisational buy-in; benchmarking and progression; prioritising; specifying sustainability; the formal procurement process; de-mystifying the process for suppliers; measuring performance and publicising your successes.

37. Paul McNulty asked if the Action Plan would include targets. Dave Cook said that the Action Plan would not include targets as the plan was intended to be transportable so that each public body could prioritise according to its own needs and objectives. There would be pressure from lobby groups for the introduction of targets. Contracting authorities were encouraged to follow the steps in the Action Plan and develop their own targets. Barry Graham agreed that targets should not be imposed.

38. Paul McNulty said that Ministers were committed to introducing environmental BPIs. Richard Wakeford, Director-General Environment at the Scottish Government, had been invited to join the Public Procurement Reform Board. **Action: SPD to send presentation slides to Members.** *Secretary's note: presentation slides have been sent to Members.*

### **AOB**

39. There was no further business.

### **Date of next meeting**

40. Members are invited to note the dates of the next meetings, both of which will be held at Meridian Court, 5 Cadogan Street, Glasgow G2 6AT from 10am to 1pm with lunch provided:

Thursday 4 September

Thursday 4 December

**Scottish Procurement Directorate  
June 2008**