

**PUBLIC PROCUREMENT POLICY FORUM
FRIDAY 4 SEPTEMBER 2008**

Attendees:

Gordon Beattie, Greater Glasgow and Clyde NHS
Douglas Bell, Advanced Procurement for Universities and Colleges
John Cosgrove, Fife Council
Dorothy Cowie, Scotland Excel
Colin Elliott, Stirling University
Campbell Forsyth, VisitScotland
Ashley Gould, Highland Council
Kevin Harrison, Office of Government Commerce
Jessie Laurie, Scottish Procurement Directorate
Eric Livingston, Association of Directors of Social Work (ADSW) Contracts and Commissioning Group
Hazel Malcolm, Scottish Procurement Directorate
Paul McNulty, Scottish Procurement Directorate (Chair)
Iain Moore, Scottish Procurement Directorate
Liz Thomson, Procurement Scotland
David Wares, Scottish Prison Service

Speakers

Alan Boyd, McGrigors
Gordon Dickson, Scottish Procurement Directorate
Jo Mitchell, Scottish Procurement Directorate
Iain Murphy, Scottish Procurement Directorate

Apologies:

David Alexander, Stevenson College, Edinburgh
Neil Dickson, VisitScotland
Calum Elliot, Procurement Scotland
Helen Foster, Advanced Procurement for Universities and Colleges
Barry Graham, Central Government Centre of Procurement Expertise
Lesley Horne, Association of Directors of Social Work (ADSW) Contracts and Commissioning Group
Ian Kelly, Strathclyde Police
Stephen McDonagh, Chief Fire Officers Association (Scotland)
Jim Miller, NHS National Services Scotland
Steve Patterson, Scottish Procurement Directorate

Actions from meeting on 30 May 2008

1. Paul McNulty opened the meeting and thanked members for attending. He confirmed that the minutes from the meeting held on 30 May 2008 had been agreed in correspondence, and thanked members for contributions provided.
2. Jessie Laurie gave an update on the action points from the 30 May meeting. Members had received copies of the Best Practice Indicators and an SPPN containing the Office of Fair Trading press release into alleged anti-competitive behaviour in the construction industry.

The presentation slides on the Scottish Sustainable Procurement Action Plan had been circulated to members with the minutes of the last meeting. The final draft of the Procurement Policy Handbook would be submitted to the Reform Board for members' consideration in correspondence. A summary of the policy recommendations in the McClelland Review had been issued to members with papers for the 4 Sept meeting.

3. Iain Moore said that SPD was still clarifying advice on contracts for water supply/timing of a national contract with Robert Leask, Utilities Portfolio Manager, Procurement Scotland. John Cosgrove confirmed that initial research indicated that a market did exist. **Action: SPD to issue advice to members.**

Policy Update – SPD

4. Paul McNulty said that the following policy notes had been issued since the 30 May meeting:-

SPPN 07 2008: information on OFT's statement of objections concerning alleged anti-competitive behaviour in the construction industry. OFT is expected to publish its final conclusions early in 2009.

SPPN 08 2008: consultation paper on our approach to the implementation of the EU Remedies Directive. The consultation period runs to 31 October.

SPPN 09 2008: notification that OGC/HMT has issued further advice on the use of the competitive dialogue procedure.

SPPN 10 2008: social care procurement: advertising and competition, to clarify the application of Public Contracts (Scotland) Regulations 2006 to social care procurement/contracts.

SPPN 11 2008: information on changes to the CPV codes which will come into force on September 15. New codes will be available on Public Contracts Scotland and SIMAP etc. The Public Contracts (Scotland) Regulations 2006 will be updated through amending legislation and a SPPN issued once this comes into force.

SPPN 12 2008: information on the roll out of Public Contracts Scotland, the National Advertising Portal.

5. Paul McNulty said that the advertisement of below-threshold contracts on the Public Contracts Scotland portal was discussed at a recent meeting of the Public Procurement Reform Board. Members discussed whether there should be a standardised de minimis level – below which contracts did not need to be advertised – across the Scottish public sector. The legal position concerning the need to advert below-threshold and otherwise exempt contracts has been confirmed in the "*Telaustria*" (ECJ C-324/98), although the European Court of Justice declined in that case to specify a de minimis level. The European Court of Justice held that the requirement for adequate publicity should be determined on a case by case basis. Ashley Gould noted that threshold levels varied according to local authority. It would be helpful for suppliers, and SMEs in particular, to know the level at which quotations and formal tenders would be invited. Kevin Harrison noted that the European Commission and member States had discussed the possibility of setting a de minimis level, but had been unable to reach agreement on what that level should be. The Commission had since issued an

Interpretative Communication which confirmed that it is the responsibility of individual contracting authorities to decide whether EC Treaty principles require advertising and competition. Members agreed that it would be helpful for SPD to draft guidance for the advertising portal which would set out the legal position and explain why the level at which contracts were advertised varied. **Action: SPD to draft guidance for clearance by the Policy Forum.**

6. Iain Moore gave an update on the Sustainable Procurement Action Plan and Sustainable Food Guidelines. Dave Cook had delivered a speech on the Sustainable Procurement Action Plan to the Maintaining the Future Conference at which the Cabinet Secretary for Finance and Sustainable Growth was the keynote speaker.

7. Iain said Dave Cook was representing SPD on the 'Walking the Talk' work stream of the National Food and Drink Policy. The work stream was being chaired by Robin Gourlay of East Ayrshire Council who had been involved in a healthy food pilot which had received positive feedback. The group aimed to have a document available by the end of 2008.

8. Iain Moore said that SPD had been asked by APUC to comment on a recent Dutch case (*Douwe Egberts v Province of Groningen*). Although it seems that the case involved the requirement to supply fair trade coffee, full details surrounding the legal judgement are unclear as Scottish Government lawyers have been unable to locate an English version of the court transcript. The case involved a preliminary finding by a local district court in the Netherlands and is not therefore authoritative. Scottish Government legal advisers had confirmed that the advice contained in SPPN 02 2005 – that specifications cannot be framed in terms of mandating the FairTrade label – remains current.

9. Gordon Beattie said that he had attended a presentation by Traidcraft which had discussed the potential to develop a specification which was tailored to the sourcing of goods from less economically developed countries. Fairtrade guaranteed conditions in relation to the producer but not in relation to the supply chain. Traidcraft wanted to explore how authorities could avoid contracting with organisations which used bonded labour or with local agents which could be sub-contracting to sweat shops. Members agreed that Traidcraft should be invited to present at a future Forum meeting. **Action: SPD to invite Traidcraft to present at a future meeting.**

10. David Wares said the Scottish Prison Service had recently received a PQ about the checks carried out prior to it sourcing staff uniform garments from overseas (non EU countries). He had identified a lack of clear procurement guidance particularly relating to the issue of child labour. The response to the PQ had underlined that the Prison Service contracted through UK agents and relied on them to check supply chain conditions. Kevin Harrison said that the European Commission had produced high level guidance on social issues. John Cosgrove suggested that, by confining the debate around Fairtrade and ethical procurement to compliance issues, an opportunity was being lost to broaden the discussion to reflect the wishes of local communities. For example, it was possible for a local authority to pass a motion supporting the use of fair or ethically traded goods as a response to the expressed wishes of the local community thereby giving a legitimacy to the procurement function to seek fairtrade or ethically sourced commodities as alternatives or in addition to those presently purchased. The procurement decision could then be made on the basis of which option best met the aims and objectives of the local authority in meeting community needs. John said that the Sustainable Scotland Network was developing a procurement

toolkit; Dave Cook of SPD was working with the SSN to ensure consistency in the guidance under development.

12. Paul McNulty said that there was increasing pressure for targets around sustainability/fair trade and a need for debate on the relevancy of any potential targets. Paul added that Richard Wakefield, Director-General Environment at the Scottish Government, had joined the Reform Board and that in future there would be a voice on sustainability at Reform Board meetings.

13. Jessie Laurie said SPD would shortly be consulting on amending regulations which would bring postal services within the scope of the Utilities Regulations. Kevin Harrison said that OGC were undertaking a similar consultation.

Roundtable policy update - Members

14. Eric Livingston said that the key policy issue in the care sector involved tension between the modernising agenda and traditional approaches to commissioning. The personalisation agenda, under which budgets for social care were devolved to users, added a further dimension. There was also a trend towards greater collaboration. There had also been discussion around the professional development of staff – whether staff should be following CIPS training or working towards the National Commissioning Standards. John Cosgrove asked how the roles of CoSLA and the other bodies involved in this issue were being co-ordinated to ensure a cohesive and common outcome. Dorothy Cowie said there were well developed links between COSLA and ADSW. COSLA had set up a development group to examine how the National Care Home Contract was managed. Scotland Excel was helping with that contract management process. Ashley Gould said the Local Authority Procurement Forum was opening up dialogue with the ADSW Contracts and Commissioning Group.

15. David Wares highlighted that SPS had been asked to respond to a Scottish Government consultation about the proposed changes to the Freedom of Information (Scotland) Act which could in future mean the provision of the FOI Act covered contractors performing the functions of a public authority, for example Reliance which provides prisoner transfer services for the Scottish Prison Service. Iain Moore said there were four potential extensions to the coverage of the Freedom of Information (Scotland) Act:

- contractors performing the functions of a public authority, e.g. under a PFI contract;
- Registered Social Landlords;
- ports;
- Local Authority Trusts set up to run leisure facilities etc.

Iain said that the Scottish Government would be consulting on the proposed changes in a discussion paper later in 2008. **Action: SPD to alert members to the discussion paper when available.**

16. Gordon Beattie said that if the Act was extended as proposed, there would be a need for guidance for suppliers on their responsibilities under the legislation. Paul McNulty said SPD would produce guidance if the proposals were adopted. Any guidance would need to make clear that contracting authorities were not responsible for ensuring that suppliers complied with the legislation. **Action: SPD to produce guidance if proposals adopted.**

17. Gordon Beattie asked about the legal position on extending contracts. Paul McNulty said that if an existing contract allowed for an extension and was compliant, that option could be exercised. If, however, a contracting authority sought to do something that was not covered by the existing contract, that would amount to a new contract in legal terms. Contracting authorities may be able to invoke the negotiated procedure without further competition (Regulation 14, Public Contracts (Scotland) Regulations 2006). In the case of a contract for works or services, a contracting authority could purchase additional works or services up to 50% of the original estimated value if the need for such works or services could not have been foreseen. In SPD's view, this allowed contracting authorities to extend the term of the contract as well as extending its scope. The contract notice relating to the original contract had to state that a further contract for similar works/services may be awarded; the procedure for the award of the new contract must be commenced within three years of the original contract being entered into. Kevin Harrison said that OGC policy required that the potential for an extension to a contract had to be made clear in the contract notice and specification.

EU Update – Kevin Harrison

18. Kevin Harrison stated that France currently held the EU presidency. The French were keen to pursue the SME agenda and were expected to bring forward proposals for quotas or targets in relation to SMEs. The UK Government had appointed the Glover Committee to consider the practicality of setting "an aspirational target" for 30% of public sector contracts to be awarded to SMEs. The consultation was now closed and a report on the consultation findings was to be presented before the pre-budget report in the Autumn. Paul McNulty said that SPD was preparing advice for Ministers in relation to the SNP's manifesto commitment to introduce a target for at least 20% of public sector contracts by value to be sourced from SMEs. SPD would monitor the proposals from the French Presidency and was collating information from the Scottish Procurement Information Hub, from which two years' data would soon be available.

19. Kevin said that work was ongoing on the Defence Directive. OGC wanted to ensure that it contained rules that the defence sector could follow and that it was consistent with the Procurement Directives. Work was also ongoing in relation to green public procurement. The Commission was seeking a consistent approach across Europe and had proposed the introduction of an aspirational 50% target. Kevin confirmed that the Clean Transport Directive applied to any public vehicle, including buses which have a public service obligation. The Directive will apply to above-threshold procurement only.

20. OGC was also contributing to work to update the Government Procurement Agreement (GPA). Due to the amount of countries involved, this was proving to be a slow process and there were issues around reciprocity relating to the extent to which GPA signatory countries would open their markets to each other. Kevin also reported on a Commission proposal to simplify the statistical returns – which is a legal requirement on all public bodies - for 2009.

21. Kevin said that OGC was updating its guidance on mandatory exclusions of contractors convicted of certain criminal offences and had shared a copy of the latest draft with the Commission. There were two types of disclosure: basic disclosure provided information on unspent convictions and was sufficient in 99% of cases; standard disclosure

also provided information on spent convictions. The updated guidance would examine where the line should be drawn i.e. when it would be appropriate to request a standard disclosure.

22. OGC was also working on guidance on selection and award criteria following the *Lianakis* case (C-532/06). That case had confirmed that in applying award criteria, contracting authorities must not apply sub-criteria which tenderers were unaware of. Secondly, selection criteria and award criteria should not be confused. In the Commission's view, suppliers' experience should be assessed at the selection stage, not at the award stage. However, Paul McNulty pointed out that there may be circumstances where it may be appropriate to look again at experience at the award stage e.g. if a contracting authority was seeking a service which relied on the quality of the person delivering the service, experience may be linked to the quality assessment of the bid..

23. Kevin confirmed that OGC was currently consulting on implementation of the Remedies Directive and the Postal Services amendments.

Supplier Development – Jo Mitchell

24. Jo Mitchell said that SPD was working with Business Gateway to ensure the smooth roll-out of the Public Contracts Scotland advertising portal to suppliers. SPD had produced draft guidance '*Working with Small and Medium-sized Enterprises – a Buyer's Guide*' to prompt purchasers to consider the potential impact on SMEs on a contract by contract basis. John Cosgrove commented that the guide was very useful, but that it focussed exclusively on the procurement process. It would be helpful for the guidance to address practical methods of communicating with suppliers with a view to generating real business opportunities. It was important for contracting authorities to find out about their local market, to build relationships with SMEs, and to tailor meet the buyer events. For example, Fife Council had been focussing on the IT sector, in partnership with Business Gateway. John also suggested that the text relating to lots should be revisited.

25. Paul McNulty said that SPD was examining how data from the Scottish Procurement Information Hub could be shared with suppliers without identifying individual contracting authorities. John Cosgrove said that Fife Council also had its own management information which showed where business had gone over the last 10 years.

26. John Cosgrove said that there was a potential tension between the placing of Category A and B contracts and the SME agenda. It would be helpful to expand the advice in the Guide to include further guidance on the creation of partnering/sub-contracting opportunities within framework agreements. David Wares said that it would be helpful for the Guide to cross-refer to existing guidance for suppliers on doing business with the public sector. It was also suggested that the guidance should more clearly reflect a SME's own role in accessing published guidance and developing its understanding of public procurement processes.

Action: Jo Mitchell to revise the Buyer's Guide.

Single Point of Enquiry – Iain Murphy

27. Iain Murphy said the Single Point of Enquiry (SPoE) had (since its launch in January 2008) so far received a mix of enquiries, some looking for advice and guidance and some enquiries from suppliers looking for access to Central Government markets. About 50

enquiries had been received in total, covering all stages of the procurement cycle. The SPoE had received 16 substantive cases, 4 of which had yet to be resolved. Enquiries had been received from large and small companies and from 2 legal firms. The enquiries involved contracting authorities across the public sector. In two cases, contracting authorities had decided to stop procurement exercises on a voluntary basis following the intervention of the SPoE. SPD believed that in approximately 50% of cases, suppliers could have had a case to pursue formal remedies through the courts. In practice, if a supplier decided to pursue formal remedies, SPD would step back. Co-operation and support for the SPoE from the procurement Centres of Expertise (CoE) had been positive.

28. John Cosgrove asked how many of the suppliers which approached SPoE had in the first instance contacted the relevant contracting authority and whether this indicated that suppliers had a lack of confidence in the contracting authority or alternatively preferred to contact SPoE as the “arm of the law”. Iain Murphy said that only a handful of suppliers had contacted the contracting authority in the first instance. Feedback suggested that suppliers found it frustrating trying to engage with some contracting authorities. Poor communication flows between authorities and suppliers appeared to be at the root of many complaints and led to some complaint issues then being elevated to the SPoE. SPoE’s advice was always that a supplier should make contact with the relevant contracting authority in the first instance. John Cosgrove said that if communication with suppliers was an issue, it would be helpful to have this information fed back to the local authority concerned in order that the appropriate action could be taken.

29. Iain Murphy said that he would be producing a formal report on the SPoE’s first year of operation by the end of 2008. The report would identify issues dealt with by the SPoE, although trends had not yet materialised. . Some issues reflected supplier disappointment at an award decision or a misunderstanding/lack of clarity by suppliers about public procurement processes. Other issues dealt with to date concerned: authorities application of procurement processes e.g. the content of specifications; the application of award criteria; issues around pricing; failure to observe timescales; issues around de-briefing; and several allegations of malpractice. In general, SPD had received positive feedback on the operation of the SPoE, although there were concerns that it took too long to close out cases and that its powers were limited. SPD recognised that more needed to be done to publicise the SPoE. **Action: SPD to produce a report on cases brought before the SPoE before the end of 2008.**

30. Kevin Harrison said that OGC’s Supplier Feedback Service had received 29 enquiries, 5 of which were ongoing. The Service was limited in what it could do: it could provide advice but did not operate as a tribunal.

Annual Conference – Gordon Dickson

31. Gordon Dickson said that year’s National Public Procurement Conference was being run alongside Procurex, Scotland’s first dedicated private and public sector procurement exhibition on 29 and 30 October at the SECC. The first day would consist of an exhibition (open to the general public) running alongside the conference (delegates only). The second day was being billed as a business summit for the private sector, with the objective being to showcase the opportunities offered by the public sector. The whole event was being managed by BIP.

Clarification and Negotiation – Paul McNulty

32. Paul McNulty said SPPN 02/2004 “**Discussions/negotiation with candidates or tenderers in open or restricted procedures**” had been agreed with the European Commission and provided the current position on post-tender negotiation. It referred to a joint statement by the Council of European Ministers and European Commission in 1989 that:

“in open and restricted procedures all negotiation with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices, shall be ruled out; however, discussions with candidates or tenderers may be held but only for the purpose of clarifying or supplementing the content of their tenders or the requirements of the contracting authorities and provided this does not involve discrimination.”

Although the statement referred to open and restricted procedures, it was equally applicable to the competitive dialogue procedure.

33. It is clear from this that the main concern is ensuring that there is no discrimination during under an open or restricted process leading to contract award. Whilst a competition is still live and therefore before a decision has been reached as to who will be awarded the contract, any discussion with a tenderer(s) must be limited to asking them to clarify/explain/supplement their bid. Once a decision has been reached as to the winner then the competitive element of the competition is over, which gives the contracting authority more scope to enter into dialogue with the winner. Provided that the competition is genuinely over i.e. the contracting authority is prepared to enter into contract with the ‘winner’ irrespective of whether or not the ‘negotiation’ results in a better bid and negotiations do not constitute or result in a material change to either the requirement or the bid submitted by the winner, then it would be difficult to argue that discussions at this stage would be contrary to the Council and Commission statement above. If a contracting authority received a number of bids, none of which were acceptable, it could invoke the negotiated procedure. Paul said that members might wish to review the report of a procurement exercise undertaken by the Scottish Fisheries Protection Agency (SFPA): <http://www.sfpa.gov.uk/article.asp?ID=78>.

34. Gordon Beattie asked at what point negotiation with the winning bidder should be undertaken. Ashley Gould referred to an earlier exchange with SPD which confirmed that negotiation with the winning bidder should take place once a decision has been reached on awarding the contract and prior to notification of the award decision. Iain Moore confirmed that the mandatory standstill period begins the day after the award decision is notified to all tenderers in writing. A contracting authority should seek to establish agreement in principle with the winning bidder before the standstill. A contracting authority which notified tenderers and then sought to negotiate with the winning bidder would effectively have lost any negotiating position that it had. Negotiation with the winning bidder during the standstill period could also create difficulties in relation to de-briefing.

35. Paul McNulty said that contracting authorities should have an auditable reason for asking the winning bidder to revise its offer, for example evidence to suggest that the pricing submitted is not competitive. John Cosgrove said that there was a perception that some authorities would, as a matter of course, try to reduce the price following an open or restricted procedure. In his view, this was inconsistent with the spirit and ethos of the public

procurement regulations and could encourage inflated bids once the practice became known to the marketplace. This in turn could distort competition and make achieving value for money from public procurements more difficult. Paul McNulty agreed that any perception that there would always be another opportunity to revise the price would be problematic. Contracting authorities should revisit price only if they had a particular reason for doing so and believed that it would deliver better value.

36. Gordon Beattie said that it would be helpful to develop guidance on the distinction between clarification of bids before a competition has concluded and negotiation following the conclusion of the competition. Paul McNulty said that SPD would consider how to develop further guidance on clarification and negotiation. **Action: SPD to consider how to develop further guidance on clarification and negotiation.** *Secretary's note: Ashley Gould has requested that the guidance addresses clarification and negotiation in below threshold competition.*

AOB – All

37. Iain Moore asked members if they were content with remit for the proposed sub-group on evaluation methodologies. John Cosgrove suggested that the sub-group should also consider evaluation in relation to below threshold contracts. Colin Elliott suggested that pre-qualification questionnaires should also be discussed by the sub-group. Gordon Beattie said that it would be helpful for health to be represented on the sub-group.

38. John Cosgrove asked if any research was being undertaken on the potential impacts of collaborative contracts on SMEs. Liz Thomson said that each category team within Procurement Scotland conducted analysis of the current supply base and potential impact of establishing national contracts. *Secretary's note: Procurement Scotland will be presenting on this work at the Procurex conference and is considering whether it could inform more general guidance. Procurement Scotland is also currently tendering for a piece of research to investigate opportunities and barriers to consortia bidding.*

Remedies and recent case law – Alan Boyd – McGrigors

39. Alan Boyd, Director of Public Law at McGrigors LLP gave a very interesting and informative presentation on the Remedies Directive and recent case law. Alan described how a challenge may be brought to court, and what could constitute a challenge. Alan then talked through the details of some recent cases. The cases concerned: the incorrect use of award criteria; lack of transparency; the incorrect exclusion of bidders; bids not properly considered; contracts not properly advertised; and favouritism shown to certain bidders. Alan described who would be affected by the Remedies Directive and what the new provisions in the remedies directive relating to the standstill period and ineffectiveness mean. Alan said that he had looked at a sample of contract advertisements published in the Official Journal of the European Union (OJEU) and identified errors in many of them. This was one area where there was considerable room for improvement by contracting authorities. David Wares said that it would be helpful for SPD to publish guidance on the correct completion of advertisements on the Public Contracts Scotland advertising portal. **Action: SPD to issue presentation slides to members. SPD to publish guidance on the completion of advertisements on the Public Contracts Scotland advertising portal.**

Date of next meeting

34. Members are invited to note the date of the next meetings, which will be held on Thursday 4 December at Meridian Court, 5 Cadogan Street, Glasgow G2 6AT from 10am to 1pm with lunch provided.

Scottish Procurement Directorate
September 2008