
CHANGES TO PROCUREMENT LEGISLATION – THE COUNCIL’S RESPONSE

Report by Chief Financial Officer

SCOTTISH BORDERS COUNCIL

29 June 2016

1 PURPOSE AND SUMMARY

- 1.1 This report informs Members of the requirements and impact of the new Procurement Reform (Scotland) Act 2014 and the updated European Union Procurement Directives. The new legislation came into force on 18 April 2016, with some elements of the changes being phased during 2016.**
- 1.2 The overall ambition of the changes is to drive further procurement reform by establishing a national legislative framework for sustainable procurement, supporting economic growth by delivering economic, social and environmental benefits, supporting innovation and promoting processes and systems which are transparent, streamlined, standardised, proportionate, fair and business friendly.
- 1.3 In a number of these areas, the Council already operates in line with or beyond the practice proposed therefore existing governance achieves some of the requirements contained within the legislation.
- 1.4 However, the changes to the regulatory framework are complex and will require a significant amount of work, stakeholder engagement and training throughout 2016 to achieve full compliance by the end of the phased parts (December 2016).
- 1.5 This work creates a positive opportunity to dovetail with other governance changes required through the development of the new ERP system and, specifically, Internal Audit recommendations relating to Contract Management and associated new Standing Orders for Procurement.

2 RECOMMENDATIONS

- 2.1 It is recommended that Council;**
 - (a) Notes the update on the changes to procurement and the work underway to deliver a compliant service to the organisation;**

- (b) Approves the content of the general policy statements relating to Fair Working Practices and the Provision of Food;**
- (c) Approves the new Sustainable Procurement Charter and agrees for it to be published on the Council website and further distributed as appropriate; and**
- (d) Notes the development of a Corporate Contract Management approach which, in due course, will form part of new Procurement & Contract Standing Orders.**

3 BACKGROUND

- 3.1 The main elements of new legislation relating to the new Procurement Reform (Scotland) Act 2014 (the Act) and the new European Union Procurement Directives 2014 come into force on 18 April 2016.
- 3.2 The new and complex legal framework for procurement comprises the Public Contracts (Scotland) Regulations 2015 (which bring the EU directives into Scottish legislation), the Reform Act (as noted above) and the Procurement (Scotland) Regulations 2016.
- 3.3 The Scottish Government policy basis sets the reform of procurement legislation in the context of delivering sustainable economic growth, using the power of public spending to deliver greater public value, driving efficiencies and helping public bodies achieve their overarching purpose and strategic objectives.

4 THE EUROPEAN UNION PUBLIC CONTRACT DIRECTIVE 2014

- 4.1 The new rules brought in through the new Directives support making public procurement faster, less costly and more effective for businesses and procurers alike.
- 4.2 Directive 2014/24/EU is brought into Scottish legislation through The Public Contracts (Scotland) Regulations 2015.
- 4.3 There are a number of new requirements and other key changes including:
 - (a) The introduction of supplier self-declaration through the ESPD (European Single Procurement Document);
 - (b) Preliminary market consultation to shorten the process and to improve specifications and associated outcomes;
 - (c) A relaxation of the constraints around the negotiated procedure;
 - (d) Removal of the distinction between Part A & Part B, with the introduction of a new light touch regime for Social Care, Health and some other services;
 - (e) A new procedure – the Innovation Partnership, to allow scope for more innovative ideas to be considered through a partnership with the authority to, for instance, develop a new service;
 - (f) A reduction in minimum timescales – to speed up simple procurements;
 - (g) Full electronic communication mandatory by October 2018;
 - (h) Full life cycle costs can be taken into account when awarding contracts;
 - (i) Price cannot be the sole basis for the award of a contract.

5 THE PROCUREMENT REFORM (SCOTLAND) ACT 2014

- 5.1 This new Act enhances the delivery of sustainable public procurement in support of Scotland and the local areas economic growth, through statutory

consideration of social and environmental benefits, innovation and the promotion of public procurement processes that are transparent, streamlined, fair and business friendly.

5.2 The Act introduces a second layer of legislation into Scottish procurement beyond the EU Directives and this means new rules on lower value contracts. These thresholds will result in a greater proportion of Council contracts coming under regulation.

5.3 The Act includes two new statutory duties for procurement activities – a general duty and a sustainable procurement duty. A new defined term of “regulated contract” will be used to describe those contracts where the provisions of the Act apply. A “regulated” contract is created when the estimated value exceeds thresholds set by the Scottish Government.

5.4 The current thresholds are:

Type of Contract	Total Estimated Value of Contract
Good and Services	£50,000
Works	£2,000,000

5.5 The duties are:

- (a) A “general duty” (echoing fundamental EU Treaty principles) to treat economic operators equally and without discrimination, and to act in a transparent and proportionate manner;
- (b) A “sustainable procurement duty”, aimed at improving economic, social and environmental wellbeing, while boosting small/medium enterprises (SMEs), third sector and supported business involvement, and promoting innovation.

5.6 The Act creates other new obligations for contracting authorities. These include:

- (a) A requirement to maintain and publish online a contracts register for all regulated contracts;
- (b) The preparation and publishing of an annual procurement strategy setting out how the Council intends to carry out its regulated procurements and including various statements of policy across a range of matters including:
 - (i) Community benefits;
 - (ii) Fair Work Practices including the Living Wage;
 - (iii) Consulting and engaging with those affected by its procurements;
 - (iv) Compliance with Health and Safety legislation;
 - (v) Fairly and ethically traded goods and services.
- (c) The preparation and publishing of an annual procurement report, to include a summary of contracts awarded, a review of how these contracts have complied with the procurement strategy, a summary of any community benefit requirements imposed, a summary of steps taken to facilitate the involvement of supported businesses and a summary of the regulated procurements the Council expects to commence in the next two financial years.

- (d) Compliance with specific rules relating to community benefits. These rules apply to all regulated procurements with an estimated contract value in excess of £4 million.
- 5.7 A number of commencement orders relating to the Reform Act have already come into force. The first created statutory guidance to "*Address Fair Work Practices, including the Living Wage, in Procurement*" was issued in October 2015. This guidance requires consideration of a bidder's approach to Fair Work Practices where those practices may have a direct impact on the quality of the service or performance of the contract.
- 5.8 A full suite of statutory guidance covering the full Act has now been published by the Scottish Government describing what is required of contracting authorities when undertaking regulated procurement activities. This extensive guidance will be fully reviewed as part of the work required over the coming months.

6 THE PROCUREMENT (SCOTLAND) REGULATIONS 2016

- 6.1 The final set of new regulations makes further provisions for regulated contracts under the Reform Act.
- 6.2 The aim of this third piece of legislation is to mirror some of the requirements of the EU Directives with "regulated" contracts created through the Reform Act.
- 6.3 The main areas include:
 - (a) The calculation of the estimated value of a contract and the circumstances in which such a contract can be awarded without seeking offers;
 - (b) What constitutes a health or social care service;
 - (c) The requirements for the publication of notices on the Public Contracts Scotland advertising portal;
 - (d) Requirements for mandatory exclusion relating to criminal activity, as well as in cases of blacklisting.

7 TRAINING & DEVELOPMENT

- 7.1 For procurement professionals, the Scottish Government has developed a comprehensive e-learning reference pack which has been designed with a dual purpose: it provides detailed information on the key changes to Procurement Legislation in Scotland and is a reference pack for on-going use. Each member of the Procurement team has completed this training.
- 7.2 In addition, face-to-face seminars are taking place for public sector purchasers. These seminars are targeted at professional procurement officers within Scottish public bodies. Again, the team are all booked onto one of the available courses.
- 7.3 Once the formal training is fully delivered, the Procurement Service will arrange to develop and deliver workshops to those colleagues across the organisation that have responsibility for purchasing goods, services or

works on behalf of the organisation.

- 7.4 Consideration will be given to keeping the Council's suppliers informed about the changes to legislation particularly around any subsequent impact on the Councils processes.

8 THE IMPACT OF THE CHANGES

- 8.1 As previously noted, more contracts will come into the scope of the regulation. The wide ranging nature of the new legislative framework means that there is significant amount of work to do to adopt the changes into the organisation. An action plan is being developed to bring together the various strands of work required.
- 8.2 This plan will comprise:
- (a) A full review of the legislation and supporting statutory guidance;
 - (b) Consideration of the associated changes to existing internal procedures and processes;
 - (c) Reporting and approval of any proposed changes to governance, including procurement threshold levels (see 8.3);
 - (d) Publishing a new contract register (by 18 April 2016);
 - (e) Provision of information and training to colleagues;
 - (f) Internal and external stakeholder consultation on a new Procurement Strategy;
 - (g) Reporting mechanism to produce a new annual procurement report – based on compliance with the content and ambitions of the Procurement Strategy.
- 8.3 All changes will require to be reflected in the overarching governance across the Scheme of Delegation, Council Standing Orders (including procurement thresholds) and Financial Regulations.
- 8.4 While the main date for adoption is 18 April 2016, two requirements of the Reform Act are being phased. The Sustainable Procurement Duty is to commence from 1 June 2016 and the new approach to the Council's Procurement Strategy is due for December 2016.
- 8.5 The external procedural changes will be adopted by the Procurement Service and applied to all new procurement projects after 18 April.
- 8.6 There is an opportunity to consider the governance changes alongside the development of the new ERP system. This approach will allow one set of updates to the overarching documents including the Scheme of Delegation, Standing Orders and Financial Regulations.
- 8.7 The new procurement landscape also creates an opportunity to move forward a new corporate approach to contract management within the context of these new regulations, the new ERP system and the Transformation Programme projects.

9 SUSTAINABLE PROCUREMENT CHARTER

- 9.1 The Council has an existing and strong commitment to sustainable procurement with a clear policy introduced in 2012. There are further policies and standards in place to make sure the Council works in an ethical, responsible and sustainable way.
- 9.2 A new Sustainable Procurement Charter, building upon the clear benefits of such an approach, has been developed to play a key role in the promotion of social, economic and environmental best practice. It is intended that this charter will be an important part of a new Procurement Strategy as it will lay out the Council's position for a number of the areas required by the Act.
- 9.3 The charter will become an integral part of the Council's procurement approach and will support compliance with the new sustainable procurement duty required from June 2016. It will outline the Council's commitment to suppliers in terms of its own practices – such as payment terms and the principles and standards that are sought from suppliers – such as Health & Safety, Equalities and Data Protection considerations.
- 9.4 With the exception of two areas all content is drawn from existing policy statements. No policy position currently exists for the headings "Fair Working Practices" and "The Provision of Food".
- 9.5 Following discussion with colleagues across the organisation, a position statement for Fair Working Practices (including the Living Wage) has been developed and is included in the Charter (provided as separate document) for consideration. A similar approach, through engagement directly with the Catering Manager, has resulted in the development of the statement relating to the strategy underpinning food procurement.
- 9.6 While Procurement legislation does not allow for the mandating of the Scottish Living Wage, public bodies can encourage it. This includes exploring ways in which the Council might encourage contractors to commit to the Living Wage as part of a procurement process, while remaining within the rules.
- 9.7 The Council has previously agreed a position of encouraging payment of the Living Wage by partners and suppliers alike, subject to overall affordability and value for money considerations.

10 CORPORATE CONTRACT MANAGEMENT

- 10.1 The potential benefits of improving contract management arrangements have been identified as part of the wider Transformation Programme.
- 10.2 A recent Internal Audit Report contains recommendations relating to the production of a business case for Corporate Contract Management and for any new arrangements to be brought into corporate governance through the development of a new set of Procurement and Contract Standing Orders.

- 10.3 Undertaking the work required to review contract management arrangements during the development of the ERP system will have the benefit of bringing into force a single new set of local rules around procurement and contract management in line with new ways of working.
- 10.4 Effective contract management can deliver many benefits; not least ensuring suppliers meet their contractual obligations, identify and so manage risks, achieve savings and create a cycle of continuous improvement during the lifetime of a contract.

11 CHANGES TO THE PROCUREMENT ASSESSMENT FRAMEWORK

- 11.1 A new procurement assessment framework has been developed by the Scottish Government. The new framework (replacing the Procurement Capability Assessment – PCA) is the Procurement and Commercial Improvement Programme (PCIP).
- 11.2 Historically, the Council has performed well under the PCA, achieving 65% for the final assessment in 2014. The main areas identified for improvement were contract management and performance reporting.
- 11.3 The new PCIP focuses more on the policies and procedures driving procurement performance and the results they deliver. Key points to note are:
 - (a) Organisations will be assessed every two years;
 - (b) New question set will be used across four themes;
 - (c) New scoring and Performance Bandings;
 - (d) The assessment results will not be comparable in any way to the previous Procurement Capability Assessment (2009-2014);
 - (e) New Assessment methodology, including information being submitted and assessed in advance of the assessment day.
- 11.4 The Council's assessment date is scheduled for 20 September 2016.

12 IMPLICATIONS

12.1 Financial

There are no direct costs attached to any of the recommendations contained in this report.

12.2 Risk and Mitigations

- (a) Delivering the changes noted in this report will ensure the Council remains compliant with the new procurement legislation and the associated statutory guidance.
- (b) Delivering sustainable contracts will reduce service delivery risk.
- (c) Developing and adopting a corporate contract management approach will ensure the appropriate monitoring of contracts.

12.3 Equalities

An Equalities Impact Assessment has been carried out by the Scottish

Government on the changes to Procurement. A separate assessment will be undertaken on the Sustainable Procurement Charter and it is anticipated that there will be no adverse equality implications.

12.4 Acting Sustainably

The proposal contained in this report will generate greater social, environmental and economic benefits, through effective, efficient and sustainable procurement.

12.5 Carbon Management

The proposal contained in this report should have a positive impact on carbon management through effective, efficient and sustainable procurement.

12.6 Rural Proofing

There is no impact on rural areas contained in the recommendations in this report.

12.7 Changes to Scheme of Administration or Scheme of Delegation

Not at this time.

13 CONSULTATION

13.1 The Corporate Transformation and Services Director, the Monitoring Officer, the Chief Legal Officer, the Chief Officer Audit and Risk, the Chief Officer HR and the Clerk to the Council have been consulted and any comments received have been incorporated into the final report.

Approved by

David Robertson
Chief Financial Officer

Signature

Author(s)

Name	Designation and Contact Number
Kathryn Dickson	Procurement & Payment Services Manager 01835 826646

Background Papers:
Previous Minute Reference:

Note – You can get this document on tape, in Braille, large print and various computer formats by contacting the address below. Kathryn Dickson can also give information on other language translations as well as providing additional copies.

Contact us at 01835 826646, kathryn.dickson@scotborders.gov.uk