

Changes to the Public Procurement rules in Scotland Consultation - An Analysis of the Responses



PUBLIC SERVICES AND GOVERNMENT

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Executive summary

Background overview

The consultation 'Changes to the Public Procurement rules in Scotland' ran from February 9th until April 30th 2015. One hundred and forty responses were received: seven from individuals and 133 from organisations.

Summary of findings

On the whole, the response to the consultation was very positive, with the majority of respondents agreeing with the proposals put forward in the consultation.

The main themes to emerge, across respondent groups and at the majority of the question areas, were the need for consistency, proportionality and transparency.

While most respondents supported allowing public bodies some flexibility or discretion, they also stressed that this would need to be accompanied by clear guidance so that this discretion is applied consistently and fairly.

Respondents also stressed the need for clear guidance to ensure that public bodies do not become liable to legal challenges because of decisions made under the new rules.

There were some differences in focus across the different respondent groups. For example:

- Local authorities were keen to ensure no additional bureaucracy or costs would be incurred from any proposals and also wanted the option of local arrangements to allow them to meet the needs of their own areas.
- NHS bodies, in particular, were keen to see procedural guidance put in place, particularly to ensure consistency across areas and bodies.
- Many third sector and union respondents commented on the need for public procurement to drive payment of the Living Wage with several also voicing their opposition to zero hours contracts and the need for public procurement to be used to ensure the fair treatment of workers. These groups also focussed on the need to use public procurement to tackle tax evasion or avoidance and other breaches. The need for uncomplicated rules and contracts was also important to respondents in the third sector / equality group as was ensuring that service users are consulted and their needs considered.
- Private companies, as well as others, wanted to ensure fairness and equity of treatment. This group felt that private companies should not be subject to any requirements unless these are also placed on public bodies. The need to ensure that no additional burdens are placed on bidders (short timescales, costs or additional bureaucracy, for example) also featured in responses from this group.

There were very few areas where large numbers disagreed with the proposal or position put forward by the Scottish Government.

The following paragraphs present the answers given by respondents to the questions posed in the consultation document.

Taking social, environmental and employment issues into account

There were strong consistent themes regarding what should be included in Statutory Guidance. Many respondents suggested templates, standard clauses or standard wording should be provided in the guidance. There were also consistent references to the need for flexibility, consistency and proportionality throughout.

Most respondents agreed with a statutory obligation on public bodies to include relevant clauses in their contracts to ensure that contractors comply with all relevant laws and collective agreements. Most also agreed with continuing to reserve contracts for supported businesses in Scotland.

The definition of a “disadvantaged person” prompted mixed reactions (although more agreed than disagreed with the definition proposed) and was widely considered to be very broad. Its broadness was felt to have both benefits and drawbacks. While all union and representative body for private sector respondents who addressed this question agreed with the definition proposed, other groups showed mixed opinions. More local authority and executive agency / NDPB respondents disagreed than agreed with the proposed definition.

There were mixed views on applying a provision for reserved contracts for health, social and cultural services for mutual and other non-public sector bodies in Scotland. No clear trends were evident and a range of advantages and disadvantages was mentioned.

Most respondents agreed with applying rules about labels which apply to contracts that are EU regulated procurements to lower value regulated procurement contracts covered by the Act. Most felt rules should be aligned on technical specifications for all regulated procurement, including those lower value procurements regulated by the Act.

While most respondents said that contracts should not be awarded on the basis of price or cost alone, a sizeable minority disagreed.

Making contracts more accessible for smaller businesses

The majority of respondents agreed with the proposals and position of the Scottish Government in respect of making contracts more accessible for smaller businesses.

Selection criteria and grounds for exclusion

While the majority of respondents agreed with the proposals put forward for selection criteria and grounds for exclusion, several of the issues discussed in this section attracted opposition from a sizeable minority. These included:

- That the same criteria should apply to lower value regulated contracts as applies to higher value EU regulated public contracts.
- That public bodies should 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.

- That public bodies should 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.
- That public bodies should retain the discretion to decide whether or not to exclude a business which is bankrupt, or is in insolvency proceedings from bidding.
- That public bodies should not be required to check that sub-contractors do not fail any of the exclusion criteria.

Views were mixed as to whether a public body should 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. Slightly more respondents felt this should be the case than did not and commented on the need for flexibility and proportionality. More NHS respondents, representative bodies for third sector / equality and for private sector organisations and unions than other groups opposed the proposal; respondents said that they could not envisage any circumstances that would make this option necessary.

Across all of the proposals in this section, most respondents said the same rules should apply to EU regulated contracts and to lower value regulated contracts.

When asked what should be contained in the Statutory Guidance, most respondents mentioned the need for clear, unambiguous guidance and for clarification including: detail on implementation; how to test proportionality; the need for non-subjective wording; and the need for case studies or examples.

Contracts for care, support and other specific services

A large majority of respondents supported the Scottish Government's position on contracts for care, support and other specific services and made a wide range of suggestions for points that could be included in Statutory Guidance.

Procedural rules

All respondents who answered this question said public bodies should be allowed to ask for supplementary or missing information and to ask a company to provide clarification of their bid. There was no disagreement.

Views were mixed as to whether the rules in the Directives about modifying contracts should not apply to contracts under the Act; slightly more respondents felt this should be the case, than did not. Those who felt the rules should not apply, included many executive agencies / NDPBs and statutory organisations, with comments that applying the rules to lower value contracts would increase the burden on organisations. More local authorities said that they should apply; one main reason was the need for consistency.

Rules about communication

Once again, there was broad support for all of the proposals put forward by the Scottish Government in the section relating to rules about communication. Just two of the proposals saw any notable opposition and these related to:

- Deferring the requirement to provide the European Single Procurement Document in electronic form only until 18 April 2018.
- Deferring until October 2018 the provision that says businesses should not have to submit supporting documents where the public body awarding the contract holds them.

Central purchasing bodies

A large majority of respondents agreed with the Scottish Government's position in respect of central purchasing bodies.

Enforcement and monitoring

In the section on enforcement and monitoring, although a majority did support the Scottish Government's proposals and positions, a sizeable minority did not. Issues where there was some opposition included:

- Whether a monitoring and enforcement body for Scotland should be the Scottish Ministers, acting through the existing Single Point of Enquiry (SPoE).
- That the Scottish Government should simply copy the provisions on applications to the court from the existing 2012 Regulations.
- Whether there is a need for a review body that sits beneath the national courts.

Views were relatively evenly split as to whether the review body should be established as a tribunal within the Scottish tribunals system and most of those who replied were opposed to this taking some other form, for example, a Scottish Procurement Ombudsman. Many of those who did support a Scottish Procurement Ombudsman were from the private sector.

Open contracting

There was broad support for the principles of openness and transparency and for the Scottish Government commitment to open contracting and working with civil society and wider stakeholder groups to improve transparency in procurement practices.

Conclusions

Responses to the Scottish Government consultation 'Changes to the Public Procurement rules in Scotland' were very positive with the majority of respondents, across respondent groups, supportive of the proposals put forward in the consultation document.

Findings from the analysis of responses will help inform the Scottish Government's plans to change the public procurement rules in Scotland.

The Consultation

Background

On February 9th 2015, the Scottish Government launched the consultation 'Changes to the Public Procurement rules in Scotland' looking at the changes needed to implement new EU legislation. The consultation also discussed elements of the Procurement Reform (Scotland) Act 2014 that have yet to be further described in Scottish Regulations or guidance. The consultation ran until April 30th 2015.

The Consultation

The consultation questions related to 9 key themes identified in the consultation document:

- Taking social, environmental and employment issues into account.
- Making contracts more accessible for smaller businesses.
- Selection criteria and grounds for exclusion.
- Contracts for care, support and other specific services.
- Procedural rules.
- Rules about communication.
- Central purchasing bodies.
- Enforcement and monitoring.
- Open contracting.

The consultation paper contained 63 questions and invited respondents to answer any or all of these questions. The questions are included in Appendix 1.

Respondent Profile

Respondents submitted their responses either by email or in hard copy. There were 140 responses to the consultation: 133 from organisations and 7 from individuals.

The consultation Respondent Information Form asked respondents to select from a list of respondent groups. These groups formed part of the analysis process, enabling analysis of whether differences, or commonalities, appeared across the various different types of organisations and / or individuals that responded. In a small number of cases, respondents did not self-classify and, for analysis purposes, the researchers assigned these responses to the respondent group that they judged best reflected each organisation. Two additional groups: Unions and Housing / Care were added to the list of respondent groups to better reflect the organisational types.

A list of all those organisations who submitted a response to the consultation is included in Appendix 2. The following table shows the numbers of responses in each analysis group.

Respondent groups	
	Number
Local authority	27
Third sector / equality organisation	20
Private sector organisation	18
Executive Agencies and NDPBs*	13
Representative body for third sector / equality organisations	12
Other statutory organisation	11
Representative body for private sector organisations	9
NHS	6
Representative body for professionals	6
Union	5
Housing / Care	4
Other	2
TOTAL ORGANISATIONS	133
INDIVIDUALS	7
TOTAL RESPONDENTS	140

*Non-departmental public bodies

The organisation categories with the highest numbers of respondents were the local authorities (27) and third sector / equality organisations (20). The local authority category includes local authorities as well as related bodies such as COSLA.

Analysis and reporting

It should be borne in mind that the number responding at each question is not always the same as the number presented in the respondent group table. This is because not all respondents addressed all questions; some commented only on those questions or sections of relevance to their organisation, sector or field of interest. The report indicates the number of respondents who commented at each question. It is important to note that at some questions there was a fairly high level of non-response.

Most consultation questions contained closed, tick-boxes with options for 'Yes or No' or 'Agree or Disagree'. Some respondents did not use the consultation questionnaire and, instead, presented their views in a report or letter format. Where respondents did not follow the questions but mentioned within their text that they agreed or disagreed with a point, these have been included in the relevant counts. In addition, in some cases the text provided by respondents indicated the

opposite view to the answer they had given to the closed question: this appears to have happened because of the way some questions were constructed. In these cases, where it was completely clear that the answer to the closed question was not the one the respondents had intended, the answer was changed to match the view expressed fully in the commentary.

Closed questions where a significant difference of opinion was evident have been included as tables within the report; where a large majority were in accord the findings have been included in the text. However, results from all of the closed questions are included in tables in Appendix 3.

The researchers examined all comments made by respondents at each open question and noted the range of issues mentioned in responses, including reasons for opinions, specific examples or explanations, alternative suggestions or other related comments. Grouping these issues together into similar themes allowed the researchers to identify whether any particular theme was specific to any particular respondent group or groups. When looking at group differences however, it must be also borne in mind that where a specific opinion has been identified in relation to a particular group or groups, this does not indicate that other groups did not share this opinion, but rather that they simply did not comment on that particular point.

While the consultation gave all who wished to comment an opportunity to do so, given the self-selecting nature of this type of exercise, any figures quoted here cannot be extrapolated to a wider population outwith the respondent sample.

The views presented in this analysis have not been vetted in any way for factual accuracy. Opinions and comments submitted to the consultation may be based on fact or on what respondents perceive to be accurate but which others may interpret differently. As it is important for the analysis to represent views from all perspectives, the report may contain analysis of responses that may be factually inaccurate or based on misunderstanding or misinformation but that, nevertheless, reflect strongly held views. In some instances, such inaccuracies and misunderstandings will be relevant findings in themselves.

A small number of verbatim comments, from those who gave permission for their responses to be made public, have been used in the report to illustrate themes or to provide extra detail for some specific points.

Findings from the analysis of responses will help inform the Scottish Government's plans to change the public procurement rules in Scotland.

Taking social, environmental and employment issues into account

Statutory guidance – Organisational Procurement Strategy

The consultation document explains that the Scottish Government will use the Public Procurement Reform Programme to learn from existing approaches to strategies and reporting. It will also ensure that statutory guidance meets the distinct requirements of the Procurement Reform (Scotland) Act 2014 (The Act) and will aim to produce guidance on form and content that contributes to the transparency aims of the legislation.

Q1 What are your views about what should be included in this Statutory Guidance? Please explain your answer.

Ninety-nine respondents, from across all organisation groupings as well as individuals, provided comments at this question. Three dominant themes emerged from across the range of respondent groups. The first key theme related to the need for some form of template to be provided with the Statutory Guidance, or at least a clear indication of expected format, length and typical standard wording that might be included in a procurement strategy. Several respondents noted that this would aid consistency.

The second significant theme was that the Statutory Guidance should not be overly prescriptive or mandatory and should allow for flexibility and tailoring to accommodate different organisational needs and take account of procurement strategies that may already be embedded and appropriate. An NHS respondent commented: “It is recommended that the Guidance is a ‘high level’ document in order that constant costly amendments are not required. It is recommended that more procedural guidance can flow from this overarching document. Essentially the Guidance should contain a statement of good practice and principles for each public body to consider when setting their strategy and completing the annual report”.

The third key theme, linking closely to the second, related to the need for proportionality according to the size, resources and sometimes the sector of the organisation affected. As one executive agency / NDPB commented: “Templates to promote consistency and help buying organisations. The proposed format and content of the Procurement Strategy should reflect the diversity of contracting authorities, i.e. it should not require the same level of detail from an authority spending £5m per annum compared to an authority spending several hundred millions pounds per annum”.

A number of respondents from different groupings also suggested a need for further clarification as to the specifics of what would constitute compulsory or optional requirements of Procurement Strategies. In particular, several local authorities amongst other respondents commented that the Statutory Guidance should clearly specify the “minimum” standards, in order to avoid imposing a disproportionate burden on public bodies.

At a lower level of mention, a recurring theme from across respondent groupings related to a need for guidance regarding general policy on ‘consultation and engaging with those affected by [its] procurements’. There was some comment that ‘those affected’ is too vague a term and needs clarification within the guidance, or that clarity is required as to how to undertake consultation per se. One or two respondents suggested specific stakeholders or categories of procurement for which consultation might be more appropriate. However, a local authority felt uncertain as to how guidance on consultation would add value to the process and felt this should be left to each public body to decide.

There were also recurring references to guidance regarding policy on ‘the payment of a living wage to persons involved in producing, providing or constructing the subject matter of regulated procurements’. These came in particular, although not exclusively, from unions and mostly related to clarity or lack of clarity regarding the legality of the living wage being stipulated as a condition of contract. Some respondents suggested that any guidance regarding the living wage should leave room for public bodies, that believe it can be included as a condition of contract, to disagree with the Scottish Government’s position based on their own legal advice. Other respondents commented more generally on the need for sensitivity to different economies across the EU, which might make stipulation of paying the living wage discriminatory. One or two respondents simply expressed support or otherwise for payment of the living wage.

The wider issue of EU regulated procurements was cited by representative bodies for the professional and third sectors as well as a third sector organisation. Concerns were expressed that compliance with national legislation and guidance would not eliminate the risk of non-compliance with EU law. Particular reference was also made to the fact that Housing Associations / Registered Social Landlords (RSLs) are subject to EU procurement law and the Procurement Reform (Scotland) Act 2014.

Several housing / care respondents suggested that specific guidance may be needed for RSLs and there were also suggestions that additional support would be welcomed in assisting RSLs to address new procurement challenges and responsibilities. A representative body commented they: “would urge Scottish Ministers to use the power to amend which organisations are included as ‘contracting authorities’. The diversity of the sector in size and scale means that adhering to the requirement to publish and report on a Procurement Strategy will be unduly onerous for smaller RSLs who may fall foul of the £5m threshold due to one-off housing improvement contracts for example. For RSL’s in this category, could an exemption be offered from this requirement as long as the housing association agrees to procure such contracts through Public Contracts Scotland?”

Several respondents from different groupings commented on the very specific references to procurement of food within the consultation document. Whilst some respondents welcomed this specificity and emphasis and suggested that particular guidance would be helpful in this area, a slightly more common theme related to suggestions that excessive burden should be avoided where expenditure on food may be of a low value. Three NHS respondents commented: “The Guidance should specify which of these areas are to be explicitly included in the annual report and

whether there will be any sanction for not doing so. For example there may be many organisations with an annual procured spend in excess of £5m of which total, there may only be a small percentage which is spent on food.” An executive agency / NDPB suggested that since many bodies will have little or limited activity in relation to food, the guidance might be clarified by adding “...where spend on food is significant, e.g. over an annual value of £[to be defined]”.

A small number of other themes were evident within specific sectors or respondent groupings.

Some private sector organisations and representative bodies commented specifically on issues relating to the construction sector. Three representative bodies suggested that the guidance should reference how affected public bodies are implementing the recommendations of the Review of Public Sector Construction and the progress that has been made on those recommendations. Some respondents also referenced the issue of prompt payment along supply chains in the construction industry and a representative body for professionals suggested: “The guidance should advise authorities that the use of project bank accounts will facilitate compliance with the requirement in section 15 of the Act to ensure 30 day payments in the supply chain.” One private sector organisation suggested that the guidance might include a specific section relating to the construction sector in order to address some of the complex areas pertaining to the sector in more detail.

There was also a suggestion from a small number of respondents that special attention is needed with regard to guidance affecting care and support services specifically. For example: “We would suggest that the Statutory Guidance on procurement strategies and reporting makes explicit reference to the (separate) Statutory Guidance on procurement of care and support services, and requires contracting authorities to set out in their strategies their approach to implementing that guidance, particularly with reference to the Act’s provisions relating to ‘engagement with those affected’ by procurement activity”.

Universities and Colleges were also singled out by a small number of respondents, particularly statutory organisations, as facing particular challenges that might need to be reflected in any guidance and subject to certain caveats. One respondent commented: “Guidance should reflect the fact that while public bodies have an “area” of operation at either the regional or Scotland level this is not the case for Universities which compete in a global environment, teaching students from around the world and collaborating in international research”. There were several references that colleges and universities might find new public procurement rules particularly burdensome due to limited procurement expertise and resource.

Statutory Guidance – Sustainable Procurement Duty

The Scottish Government is testing and refining a set of tools aimed at enabling a consistent approach to complying with the sustainable procurement duty and this is expected to form the basis of statutory guidance.

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

One hundred and one respondents, from across all respondent groupings, made comments at this question. A number of those who commented expressed their support for the emphasis given to sustainable procurement; some reiterated comments they had made at the previous question.

The main recurring themes related to a need for consistency of approach and a requirement for flexibility and proportionality, as well as suggestions that templates should be made available or minimum standards should be made clear. A very few respondents repeated that bespoke guidance for specific sectors would be welcomed.

There were positive comments regarding the idea of a Flexible Framework tool as long as it is genuinely flexible and proportionate. Several respondents with past experience of the Flexible Framework commented that it would definitely require improvement or upgrading to meet future needs. There were similar comments regarding a prioritisation methodology. Several respondents offered assistance with development and implementation of tools.

There were several comments that referenced links between sustainable procurement duty, climate change duties and also the EU directive and suggestions that the guidance should offer clarity on any relationships between these.

Statutory Guidance – Community Benefits in Procurement

The consultation document outlines the Scottish Government's proposal to produce statutory guidance on community benefits which will address:

- Defining the appropriate community benefit through stakeholder engagement.
- What to say in the contract notice and contract award notice.
- Circumstances where community benefits would not be relevant or proportionate.
- Reporting of expected and achieved benefits.

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

Ninety-nine respondents made comments at this question and recurring themes from earlier questions were once again in evidence. For example, many respondents suggested that inclusion of example or standard clauses in the guidance would be helpful, whilst there was also reference to the need for flexibility. There were comments regarding the need for consistency and also comments that non-statutory best practice guidance would be preferable.

The need for proportionality was again highlighted. Linked to this, there was relatively frequent reference to the threshold value and opinions on the most appropriate contract value for community benefit clauses were mixed; some respondents emphasised that they would not wish to see the threshold reduced below £4 million, whilst others would welcome a lower threshold or applicability to all contracts. In particular, local authorities amongst other respondent groupings suggested that a lower threshold would be appropriate. There were also some

suggestions that greater clarity regarding exceptions in contracts over £4million would be usefully included in guidance.

There were wide-ranging suggestions as to the definition of community benefits and specific conditions that might be deemed appropriate in assessing and valuing community benefits. There were also some requests for guidance on calculating a financial value for different forms of community benefits.

Once again, a small number of respondents commented that guidance may impact on EU regulated procurements and highlighted the need for care in avoiding discrimination against non-UK contractors.

Principles of procurement

The Public Procurement Directive and the Utilities Directive require all countries in the European Union to take appropriate measures to comply with environment, employment and social laws when they are working on a public contract. The Scottish Government believes 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.

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.

Ninety-five respondents from across all groupings agreed 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; six respondents, comprising local authorities and respondents from the private sector, disagreed. Ninety-one respondents, the six who disagreed, 84 who agreed and one other, went on to add comments.

The major themes in responses to this question related to the benefits of ensuring consistency, enabling enforcement and allowing public bodies to terminate contracts if a contractor does not meet requirements. Several respondents, particularly unions, welcomed the specification of collective agreements within the suggested requirements. There were also suggestions from unions that Article 18.2 should be implemented in Scottish procurement regulations

Whilst a capacity to terminate contracts where a contractor fails to meet requirements was widely welcomed, several respondents suggested a need for alternative options in circumstances where it would not be practical or appropriate to terminate a contract due to wider negative impacts of doing so.

A key secondary theme raised by respondents related to the need for guidance to be provided regarding the monitoring of contractual requirements. A small number of respondents specifically suggested that there should not be an onus on public bodies to actively monitor compliance or that self-certification by contractors would be appropriate, whilst others expressed the opposite view.

One other recurring theme emerged in responses and this related to the sharing of information between public bodies if a contractor failed to meet requirements, for example when other bodies have agreements with the same contractor. It was suggested that guidance would be helpful in this regard.

Reserved contracts for supported businesses

Current procurement rules allow public bodies to ‘reserve’ contracts to businesses where more than half of the workers are disabled people. These are known as supported businesses. The consultation explains that the Scottish Government plans to continue to allow public bodies to reserve contracts in this way.

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

Ninety-one respondents from across all groupings answered ‘yes’, that there is still a case for reserving contracts for supported businesses in Scotland and seven respondents, including three private sector organisations, answered ‘no’. Seventy-four respondents went on to add further comment.

The most consistent recurring theme, coming from a majority of those that commented, was affirmation of support for reserved contracts for supported businesses in Scotland. Several respondents noted that they already successfully use such provisions.

The next most common theme related to the change to the type of business which this applies to and the threshold of workers who must meet the disabled or disadvantaged description. Mixed views were expressed regarding both the inclusion of disadvantaged workers and the shift from 50 per cent to 30 per cent of workers who must meet the description.

The main theme in comments from the small number of respondents who do not believe there is still a case for reserving contracts for supported businesses in Scotland was that they preferred an open and flexible approach or that there were alternative ways of better achieving the same objectives.

Other recurring themes, each from only a very small numbers of respondents, included the need to make reserved contracts clear from the outset and the need for guidance on actions required in situations where, for example, only one supported business might be available to bid.

Disadvantaged workers

While there is no clear definition of a ‘disadvantaged worker’ in any of the Directives, the Public Procurement Directive does give examples and the Scottish Government wishes to know whether these examples could form a definition.

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”? If not, what do you think the definition should be and why?

As the following table shows, 51 respondents answered ‘yes’, 33 respondents answered ‘no’ and seven respondents made comments without giving a direct ‘yes’ or ‘no’ answer. All unions and a large majority of representative bodies for third sector / equality organisations answered ‘yes’, whilst views were very mixed amongst all other respondent groupings.

Question 6: 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	Other	No reply
Local authority (27)	10	13	3	1
Executive Agencies and NDPBs (13)	3	4	2	4
NHS (6)	4	1	1	-
Other statutory organisation (11)	5	3	-	3
Third sector / equality organisation (20)	4	1	-	15
Private sector organisation (18)	6	5	-	7
Representative body for third sector / equality organisations (12)	6	2	-	4
Representative body for private sector organisations (9)	2	-	-	7
Representative body for professionals (6)	3	1	-	2
Union (5)	4	-	-	1
Housing / Care (4)	1	1	-	2
Other (2)	1	1	-	-
Individuals (7)	2	1	1	3
TOTAL (140)	51	33	7	49

Seventy-one respondents, 30 who answered ‘yes’, 33 who answered ‘no’ and eight others, went on to make comments. One very dominant theme emerged from all

comments, regardless of whether a 'yes' or 'no' answer had been given, namely that the definition is very broad or even vague. Some respondents who had answered 'yes' welcomed this broadness as offering flexibility of interpretation. A much larger number of those who commented felt it was too broad or even vague. Several respondents, notably but not exclusively local authorities, felt there was a risk that the broadness of definition would create potential for legal challenge.

It is perhaps because of the perceived broadness of the definition that almost one in three of the respondents who commented made suggestions for specific additions or alternative definitions per se. The suggestions were varied and wide ranging and the most common, albeit from a minority of respondents, was that the protected characteristics defined by the Equality Act might somehow be incorporated. There were also a small number of suggestions that a definition of social businesses might provide a better alternative.

A small number of respondents commented that a register of supported businesses would be a helpful resource going forward.

Reserved contracts for health, social and cultural services

Some specific types of organisation can bid for a contract which a public body has 'reserved'. The consultation document explains that, while there is a provision to extend this option for mutual and other non-public sector bodies, the Scottish Government is not aware of any reason for doing so in Scotland.

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.

Twenty-eight respondents answered that they saw 'advantages' and 12 respondents answered that they saw 'disadvantages' to applying this provision; a further 30 respondents made comments without stating that they saw advantages or disadvantages specifically. A total of 66 respondents included comments at this question.

The largest number of respondents that commented had indicated neither advantages specifically nor disadvantages specifically to applying this provision in Scotland; in the main their comments suggested that they had insufficient knowledge or detail to come to a clear view or that they could see potential advantages and disadvantages in applying the provision. A small number simply indicated support for the view expressed in the consultation that there were no obvious arguments that support reserving contracts in this way and / or that this is less of an issue in Scotland.

Comments from those respondents who had indicated that they saw advantages in such a provision were relatively fragmented and a small number simply indicated that they could see no reason not to apply the provision and that it offered flexibility if contracting authorities wished to take up the opportunity. A very few respondents highlighted the opportunities that this creates for some institutions in the higher and

further education sectors; one or two others saw benefits of allowing initial reservation of an initial 3 years for public “trusts” which have taken on direct delivery of public services from their parent public bodies. In contrast, one or two respondents who cited disadvantages commented that this should not be used as an alternative to employment through direct services.

A more consistent theme, in comments from respondents who cited disadvantages, as well as some of those who indicated neither advantages nor disadvantages, was that procurement should be transparent, fair and open in the interests of best value.

Labels

The consultation notes that, under the EU Directives, public bodies can ask for the works, goods or services which they are buying to have been given a label which certifies that these meet specific environmental, social or other characteristics and the Scottish Government feels this should be applied to lower value contracts.

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.

Seventy-three respondents from across all groupings answered ‘yes’ that the rules about labels which apply to contracts that are EU regulated procurements should also apply to lower value regulated procurement contracts covered by the Act, and ten respondents, from across six respondent groupings, answered ‘no’. Four other respondents made comments without answering ‘yes’ or ‘no’. A total of eighty-six respondents commented on this question.

A clear dominant theme emerged in comments at this question, predominantly from those respondents that answered ‘yes’, that applying rules about labels to lower value regulated procurement contracts covered by the Act would provide consistency, and that consistency and transparency is welcomed. Smaller sub-themes that emerged suggested this should be optional or allowed rather than prescriptive, and that it should be proportionate.

Around a fifth of respondents, including those who answered ‘yes’ as well as those who answered ‘no’, commented that this could be onerous and burdensome on SMEs. A small number of respondents suggested that it simply added complexity.

Several respondents indicated their approval for the encouragement this provides to consider environmental and social factors and a number of comments referred to fairly and ethically traded goods specifically.

A small number suggested potential difficulties in terms of compliance with EU Treaty principles and / or that if a need to pay for accreditation creates a financial burden this could be discriminatory.

Technical specifications

Legislation allows for new rules about the technical specifications for lower value regulated contracts and the Scottish Government feels it would be simpler and easier for everyone if the same rules are applied to all contracts, regardless of value.

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.

Seventy-nine respondents from across all groupings answered 'yes' that the rules on technical specifications for all regulated procurements, including those lower value procurements regulated by the Act, should be aligned, and 11 respondents answered 'no'. Three respondents made comments without answering 'yes' or 'no'. A total of eighty-six respondents made comments.

Once again the predominant theme from a large majority of those that commented, and particularly the large number that answered 'yes', was that this would create consistency and simplicity. A small number once again highlighted the need for proportionality.

Six respondents who answered 'no' and a small number of those that answered 'yes' expressed concerns regarding the burden and complexity for SMEs and a few of these respondents expressed a preference for simplicity.

A very small number of respondents indicated that they believed that life cycle costs should not only take account of financial costs but also social and environmental life cycle impacts.

Contract award criteria

At present, public bodies can award contracts either on the basis of the lowest price, or to the 'most economically advantageous tender' (MEAT). The Scottish Government believes it is important to balance cost, quality and sustainability to get the best value for money and plan to make rules to ensure contracts are not awarded on the basis of lowest price or lowest cost alone.

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.

Eighty-six respondents from across all groupings agreed that contracts should not be awarded on the basis of price or cost alone and 26 respondents disagreed. Ten local authorities disagreed compared with 16 who agreed and executive agencies / NDPBs were divided equally in their views. Three respondents made comments without either agreeing or disagreeing.

A total of one hundred and ten respondents made comments and two major themes emerged. The first related to the view that procurement based solely on lowest price is inappropriate and / or ineffective and that a wide range of other factors – predominantly quality and value for money – should be taken into account. A few respondents also felt this would help to improve perceptions of public sector procurement.

The second major theme related to a need for some flexibility, and a requirement to recognise that there are exceptions to the premise that contracts should not be awarded on the basis of price or cost alone.

A variety of related sub-themes were evident. Many respondents expressed the view that there are cases where it is sufficient for suppliers to meet minimum requirements or pass / fail conditions, whereby price becomes the only consideration thereafter. Some suggested that guidelines should clarify that competition with mandatory pass / fail criteria and a scoring aspect based solely on price or cost does not constitute a “cost only” award.

Whilst some respondents commented that MEAT affords flexibility to weight price above other factors, effectively creating a price-based decision, a number of respondents felt this inappropriate and unnecessary. There were several comments that a simpler process is sometimes required and that alternative options should be kept open.

A few respondents also requested clarity regarding framework agreements and the capacity for call-off purchases on the basis of cost alone, since quality would already have been evaluated when appointing suppliers to a framework.

Summary : Taking social, environmental and employment issues into account

A majority of respondents that answered each question supported:

- A statutory obligation on public bodies to include relevant clauses in their contracts to ensure that contractors comply with all relevant laws and collective agreements.
- Continuing to reserve contracts for supported businesses in Scotland.
- Applying rules about labels which apply to contracts that are EU regulated procurements to lower value regulated procurement contracts covered by the Act.
- Aligning rules on technical specifications for all regulated procurement, including those lower value procurements regulated by the Act.
- Ensuring contracts should not be awarded on the basis of price or cost alone.

There were strong consistent themes evident in responses regarding what should be included in Statutory Guidance. Many respondents suggested templates, standard clauses or standard wording should be provided in the guidance. There were also consistent references to the need for flexibility, consistency and proportionality throughout.

The definition of a “disadvantaged person” prompted mixed reactions and was widely considered to be very broad. Its broadness was felt to have both benefits and drawbacks.

There were mixed views on applying a provision for reserved contracts for health, social and cultural services for mutual and other non-public sector bodies in Scotland. No clear trends were evident and a range of advantages and disadvantages was each mentioned by relatively small numbers. Some respondents felt they had insufficient information to come to a clear view.

Making contracts more accessible for smaller businesses

Breaking contracts into smaller lots

Legislation requires public bodies to consider splitting contracts into lots and states that public bodies could be required to split certain types of contracts in this way. The Scottish Government feels that public bodies should retain discretion in this matter as well as in awarding more than one lot to the same bidder.

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.

Ninety-nine respondents agreed and four disagreed that public bodies should retain discretion to split requirements into smaller lots and to award more than one lot to the same bidder. Two made comments without giving an indication of specific agreement or disagreement. One hundred and three respondents made any comments.

The dominant theme across a very large majority of responses was that flexibility and discretion is appropriate and should be maintained. Many respondents indicated support for the use of smaller lots as a means of improving opportunities for SMEs and a small number also highlighted increased opportunities for third sector organisations. A large number also suggested that compulsory requirements to split into smaller lots in all instances would be potentially disadvantageous; for example, creating complex contract chains, being less cost effective and losing economies of scale.

A small number of respondents commented specifically that the capacity to award more than one lot to the same business would be beneficial. The consultation notes that this should be made clear in advertising a contract and this links to a sub-theme that emerged across a number of responses. Some respondents stressed the importance of public bodies making their intentions clear 'up-front' or in their procurement strategy if they choose not to split contracts or to potentially award multiple lots to one bidder.

A few respondents commented that guidance would be welcomed on what would be appropriate use of discretion regarding decisions not to split contracts or to award multiple lots to one business.

Asking for information about sub-contractors

There are some circumstances where public bodies are required to ask businesses for some information about their sub-contractors and this requirement could be extended. The Scottish Government feels extending the rule to additional contract types could remove flexibility, create additional work and potentially create confusion.

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?

Ninety-five respondents made comments in response to this question, of which 75 indicated broad agreement that discretion should remain with public bodies as to whether to request additional information about sub-contractors. The key themes from those that expanded on their answers related to agreement with the reasons given in the consultation or more generally on the basis of proportionality and avoiding unnecessary burden.

A number of private sector organisations and representative bodies felt it should be mandatory for public bodies to request this information; a very small number within this cohort, with a focus on the construction sector, suggested that a threshold of £50,000 should be set for this requirement to avoid unnecessary administrative burden. These respondents suggested that the gathering of information on sub-contractors would help to avoid potential for lead contractors to try and impose new or different conditions for sub-contractors after a contract has been awarded.

A small number of respondents, notably unions, commented on the importance of sub-contractors being subject to the same rules as main contractors, particularly with regard to fair treatment of workers. Some suggested that responsibility for ensuring this should lie with the main contractor and others that responsibility should be shared by the public body.

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?

Eighty-nine respondents made comments at this question, of which 72 indicated broad agreement that responsibility for obtaining information about sub-contractors from the main contractor should remain with public bodies. The remaining 17 respondents put forward a variety of suggestions, most commonly that it would be more appropriate to transfer this responsibility to the main contractor or that there should be the option to do so on a case-by-case basis.

As the Scottish Government is not planning to implement the optional rules outlined above, they do not believe it would be proportionate to apply similar provisions on sub-contracting to contracts covered by the Act.

Q14 We believe that we should not apply similar provisions on subcontracting to contracts covered by the Act, as we do not think this would be proportionate. Do you agree or disagree with this?

Seventy-three respondents agreed that similar provisions on subcontracting to contracts covered by the Act should not be applied and 15 disagreed. All of the four unions that answered disagreed. Four respondents made comments without giving an indication of specific agreement or disagreement. A total of 54 respondents made any comments.

The key theme from respondents who agreed at this question was affirmation that applying similar provisions on sub-contracting to contracts covered by the Act would be disproportionate. A small number of respondents noted that there might be occasions where further information would be necessary and that it would be possible to request that information if appropriate.

A variety of points emerged from the smaller number of respondents that commented and did not explicitly agree. Not surprisingly, their points reflected concerns they had already raised at the previous two questions.

Paying sub-contractors directly

The Scottish Government is committed to ensuring prompt payment of commercial debt and also encouraging ways of ensuring that sub-contractors benefit from the same prompt payment as main contractors. Direct payment to sub-contractors could be one means of ensuring prompt payment but could also be complicated and result in public bodies assuming responsibilities that should sit with the main contractor.

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 subcontractors 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?

Eighty-one respondents agreed that public bodies should be able to make direct payments to sub-contractors only where the contract allows this to happen and parties agree, whilst 13 disagreed. One made comments without giving an indication of specific agreement or disagreement. A total of 77 respondents made comments at this question.

A number of recurring themes were evident from across respondent groupings. Many respondents included comments regarding their broad support for measures that help to encourage and facilitate prompt payments to small suppliers or sub-contractors specifically.

A very large number of respondents indicated that they felt it should not widely or generally fall to public bodies to pay sub-contractors or that this would be appropriate only in very exceptional / specific circumstances. There were many

suggestions that to apply direct payment on a widespread or mandatory basis would be clumsy and complex and potentially lead to disputes.

There were a number of suggestions for alternative or additional measures to help ensure prompt payment of sub-contractors, most commonly that prompt payment terms should be included as a condition of contract. However, not all respondents who commented regarding prompt payment terms as a condition of contract were in agreement that it would be beneficial.

There were a number of references to Project Bank Accounts, some respondents indicated support for further roll-out, some reserved judgment and a tiny number indicated reservations about their use.

Summary : Making contracts more accessible for smaller businesses

There were consistent and widespread comments across all questions in support of making contracts more accessible for smaller businesses. Respondents also indicated support for measures to encourage and facilitate prompt payment to sub-contractors, albeit many respondents do not perceive direct payment from public bodies to sub-contractors on a widespread or mandatory basis as an appropriate route.

Most respondents agreed that public bodies should retain discretion to split requirements into smaller lots and to award more than one lot to the same bidder.

A majority of respondents indicated broad agreement that discretion should remain with public bodies as to whether to request additional information about sub-contractors.

A majority of respondents indicated broad agreement that responsibility for obtaining information about sub-contractors from the main contractor should remain with public bodies.

Most respondents agreed that similar provisions on sub-contracting should not be applied to contracts covered by the Act as it would not be proportionate.

Most respondents agreed that public bodies should be able to make direct payments to sub-contractors only where the contract allows this to happen and parties agree.

Selection criteria and grounds for exclusion

Selection criteria

The Directives set out selection criteria; the things public bodies can ask businesses to have or to provide that demonstrate they are reputable and able to deliver the contract. The Scottish Government feels it would be sensible to also include these in the rules for lower value regulated contracts.

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.

Most respondents (60) who addressed this question agreed that the same criteria should apply to lower value regulated contracts as to higher value EU regulated public contracts, 17 (across most respondent groups) did not agree. A further 21 respondents commented without giving a 'yes' or 'no' response.

Ninety-three respondents commented further, and this included 12 of those who answered 'yes' at this question making general supportive comments.

The key theme to emerge, amongst those that said 'yes', those that said 'no' and those who did not specify, related to the use of turnover as a selection criteria.

Around a third of respondents to this question, from across most respondent groups, commented on turnover with many voicing support for the use of turnover as a criterion or commenting that the requirement for a cap on the minimum level of turnover a public body can require, of no more than two times the value of the contract, is welcome.

Several respondents, particularly from local authorities, commented that turnover must not be the only means used to assess financial ability, supported a move to minimise the use of turnover or commented that turnover is not a good measure of ability. There were also comments, from private businesses and various other groups, that turnover criteria must be coupled with, or is less important than, ability to deliver.

A number of respondents, particularly from the local authority and representative body for professionals groups, said that the rules regarding turnover will make it easier for smaller or new businesses to bid for public contracts.

There were also requests, from various groups, for set criteria or guidance on assessing financial fitness, vulnerability and ability. The need for clear guidance, including standards and accreditations, was also mentioned.

Looking at those respondents who answered 'no' to the question, two (one NHS and an individual) disagreed with the use of turnover with a further seven, from various groups, saying that public bodies should have discretion over whether to use turnover as a criteria.

Another theme to emerge at this question, in responses from those who answered 'yes', related to conflict of interest. While a small number welcomed the approach set out in the consultation document, several others, from various groups, asked how a conflict of interest is to be measured, defined or treated. One local authority suggested that companies should have to demonstrate how they would manage any conflict of interest. A respondent from the executive agency / NDPB group suggested: "Conflict of interest should be scored and allowed to exclude if the organisation can't demonstrate that it could manage it properly."

Around half of those who said 'yes' at this question specifically welcomed the proposed approach of applying the same rules to lower value contracts; the following comment from a local authority is typical of those made on the subject of consistency: "This provides a consistent, transparent approach and helps ensure Best Value".

Eight respondents who answered 'no', including four private organisations, said that the criteria should not be applied to lower value contracts; the main reason given was that this could exclude some able, but small, organisations.

A further 21 respondents commented without giving a 'yes' or 'no' response and many of these respondents indicated that different options could have been provided in relation to turnover and conflict of interest as they could not give a yes / no answer to the combined question.

Various permutations were suggested: the main answer, from eight respondents from a range of respondent groups, was support for the turnover criteria but opposition (or requests for clarification or guidance) in relation to conflict of interest. A small number disagreed with the proposed turnover criteria with some saying this will rule out some small, new or social organisations. There were again comments that ability to deliver the contract is of prime importance.

Groups of businesses

For some contracts, various businesses will come together as a group to bid and the Directives state that the Scottish Government may legislate national standards of tests (of economic and financial standing and technical and professional ability) that such groups of businesses need to meet. However the Scottish Government feels that setting standards would introduce complexity.

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.

Seventy-four of those who replied said they agreed, 12 disagreed and five made other comments.

The key theme amongst the 68 respondents who agreed and went on to give their reasons, was that flexibility is required to ensure that differing joint delivery models can be considered to ensure the best fit for each particular contract. Many of these respondents commented that the public body will be best placed to assess the risks and requirements involved. There were also many comments that it would be very difficult to produce standards to cover every situation, and especially difficult for assessing technical and professional ability. Respondents also felt that such a move could discourage or restrict innovation. One local authority said: “Each situation is different and cannot be regulated; flexibility is essential.” A number of respondents commented that guidance, rather than standards, would be of most use.

Eleven of those who disagreed went on to comment further and the key theme from these responses, many of which came from the private sector, was the need for consistency.

Five other respondents commented without specifying whether they agreed or disagreed and most of these respondents, from various groups, felt that there could be national standards but with public bodies still retaining the flexibility required to address local needs.

Criminal convictions

As well as selection criteria there are also grounds for exclusion; things that could lead to a business not being allowed to bid for a contract. Some, such as a senior person in an organisation having some types of criminal conviction, are mandatory. In other cases, public bodies can decide whether to use specific criteria as grounds for exclusion. The Scottish Government feels it is important to make things as simple and as consistent as possible, and so plans to list the same offences as are listed in the Directives.

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.

Eighty-seven respondents said ‘yes’ and 78 of these respondents went on to give their reasons. Two disagreed and five made other comments.

Two key themes emerged from responses from those who answered ‘yes’.

The first was that using the same list, regardless of value, would be in the best interest of consistency, transparency and simplicity.

The second key theme to emerge was that if there has been a serious conviction then the contractor should be excluded; the value of a contract is irrelevant or immaterial.

Other comments included:

- The need for consideration as to when a conviction should become spent; particularly in order to support the rehabilitation of offenders.

- That public bodies should be allowed to consider other offences, for example those which would bar people from working with children or vulnerable adults under the Protecting Vulnerable Groups Scotland Act.
- The need for guidance and clarification on how public bodies can check this information, on information sharing and on how the rules will be implemented.
- The need for a maintained list of excluded businesses.
- Calls for police to be allowed to share relevant information with public bodies.
- Comments that the list is limited and somewhat arbitrary and the need for more offences to be included.

Two respondents said ‘no’; one, from the private sector felt this should be decided by the buyer. The other, an individual, asked that public procurement be used to help in the prevention of domestic abuse and other violence against women and girls by individuals with a history of domestic violence being prevented from bidding.

Five other respondents commented without specifying a ‘yes’ or ‘no’ answer. One statutory organisation felt that the public body should have some discretion in the matter. Another, from the same group, wanted to see the exclusion widened to include any person with control over, or benefit from, the bidding firm. Two local authorities said that the conviction should be relevant to the contract. A representative body for professionals asked that the list of convictions be consistent between the Act and the Directive.

The Scottish Government also plans to make new rules that a public body must also 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 certain offences listed in the rules for lower value regulated procurement.

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?

Eighty said ‘yes’ and eleven said ‘no’ (this included five statutory organisations).

Fifty-five of those who said ‘yes’ commented further and the key themes to emerge in these responses were as in the previous question: consistency, transparency and simplicity; and that, where there have been serious convictions, the value of the contract is irrelevant.

Other comments included:

- The need for clarification over what constitutes a senior position.
- Queries over how this can be checked or implemented; queries over what information will be available to public bodies.
- The need for clarification over spent convictions.
- That the list of offences is too restrictive and should be extended to include offences under child or vulnerable adult protection legislation.

All eleven of those who answered 'no' commented further; all five statutory organisations and two local authorities said that the public body should have discretion in the matter. Other comments included the need for guidance or clarification, particularly around when a conviction becomes spent.

Tax evasion

The Directives say that public bodies must exclude a business if a court, tribunal or administrative decision has found that it has breached its obligations to do with paying tax or social security. They also say a public body can exclude a business if it can demonstrate, by any 'appropriate means' that it has breached these obligations. While the Scottish Government does not believe that tax evaders should win public contracts, it does not propose to make this a mandatory ground for exclusion as there may be the risk of legal challenge for public bodies.

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?

Seventy-six respondents said 'yes', 18 (mainly local authorities, private firms, NHS and union respondents) said 'no' and two made other comments.

Forty-six of those who said 'yes' gave their reasons; in half of these comments, respondents simply reiterated their support. The main themes to emerge in the remaining responses were:

- The need for definitions, clarification and guidance over the phrases 'can demonstrate' and 'appropriate means'.
- That flexibility is required for proportionality and for fairness.
- The need for some form of guidance to ensure public bodies act in a consistent manner; this is required to guard against the risk of legal challenge to decisions.
- That public bodies will have to be able to clearly demonstrate, without subjectivity, that the business has breached its obligations.

All 18 of those that said 'no' gave their reasons:

- That discretion may not be consistently applied; that there should not be discretion as decisions may be made subjectively or inconsistently.
- That while public bodies should retain discretion, there should still be a requirement for proof; that a court or tribunal decision is needed in order for safe decisions to be made; that decisions will be subject to challenge where there has been no court finding.
- That businesses who have breached their obligations should not receive public monies; that any contract should be able to be terminated should breaches be proven following the award of a contract.

- Support for the Fair Trade Mark; that this should be used to assess tax behaviour.
- That tax avoidance should be included in the list of reasons for exclusion.

Two third sector / equality organisations made other comments without giving a 'yes' or 'no' response. These respondents felt that public procurement should be used as part of the effort to tackle tax evasion and tax avoidance; this could include disclosure of company tax policies.

The consultation went on to explain that the Scottish Government can also choose to allow public bodies to decide not to exclude a business which has breached its tax obligations if it would be disproportionate to do so. The Scottish Government accepts that there will be times when it would not be proportionate to exclude businesses for tax offences.

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?

Seventy-two respondents said 'yes', 19 (across most groups) said 'no' and four made other comments.

Looking at those respondents who answered 'yes', 48 went on to give their reasons; the majority of these respondents simply restated their agreement that public bodies should be given discretion. The main themes to emerge in the remaining (14) responses were:

- The need to ensure proportionality and also consistency; the need for a national approach to determining exclusions.
- The need to define what is proportionate or disproportionate.
- The need for a list of excluded businesses or of exclusion decisions, or other support for public bodies to identify such businesses.

Sixteen of those who answered 'no' also commented and the main theme in these responses was that businesses that evade tax should always be excluded. A small number were concerned about consistency of application or the potential for legal challenges.

Four respondents made other comments including: the need to use public procurement alongside other efforts to tackle tax avoidance or evasion; and that discretion could lead to discrimination.

For reasons of consistency, the Scottish Government plans to make regulations which say that a public body may also exclude a business from bidding for lower value regulated contracts if it has breached its obligations in relation to the payment of tax.

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?

Eighty-two respondents answered 'yes' to this question while ten (including four from the NHS) said 'no' and two made other comments.

The main themes to emerge in comments from the 48 respondents who answered 'yes' and commented further were as, in the previous questions, that this was supported for reasons of consistency, proportionality and fairness. Once again, respondents requested guidance and other assistance in identifying and obtaining relevant information. The need to ensure public bodies make decisions consistently and proportionately was again mentioned.

A small number suggested that there should also be a reference to social security as there was in previous questions.

All ten of those who answered 'no' commented on their answer and again, as at previous questions, many of these respondents were opposed to this suggestion as, they felt, any organisation evading or avoiding tax should not be awarded public contracts. NHS bodies wanted to see further guidance and detail on information sharing and stressed the need for consistency in decision making.

Bankrupt or insolvent businesses

The Directives say that if a business is bankrupt or is in insolvency proceedings, a public body can choose to exclude it. The Scottish Government believes that the best approach is to give public bodies as much discretion in this area as the Directives allow.

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?

Sixty-seven respondents said 'yes', 21 said 'no' and six made other comments.

Fifty-five of those who answered 'yes' gave reasons for their reply and most simply said that there should be discretion; that public bodies should be able to judge each case on its merits.

The main point made in the remaining responses was that, while the default in such cases should be to exclude, nevertheless there will be some exceptional circumstances where this would not be appropriate and so discretion should be retained.

There were also comments that this discretion would be particularly important in cases where businesses are in short term difficulties, or are in the process of being rescued. A small number also mentioned cases where a contract contained specific requirements or where community benefit considerations apply.

The need for clear guidance was also raised; for example one housing / care respondent asked what could be taken into account in the decision-making process.

Twenty respondents who answered 'no' at this question commented further. The main reasons for this view were: that public bodies might not apply discretion

consistently; that using insolvent businesses could have a knock-on effect on others in the supply chain; or that using a business involved in bankruptcy or insolvency proceedings would be a financial risk for a public body. A small number commented that insolvent companies should not be awarded contracts if they have outstanding debts to former employees.

There were six respondents, from various groups, who commented but did not give a 'yes' or 'no' answer. The main points from these responses were that: more information is required before an answer could be formulated; that any discretion allowed would need to be used with extreme caution or subject to specific requirements; or that while using a business going through insolvency may be appropriate, using a bankrupt business would not be.

The Scottish Government believes that, in order to make things as simple and as consistent as possible, the same rules should apply to the award, by public bodies, of public contracts, concession contracts, utilities contracts and to lower value regulated contracts.

Q24 Should the same rules apply to EU regulated contracts and to lower value regulated contracts? Please explain your answer.

Seventy-nine respondents answered 'yes', six said 'no' and five repeated other comments that they had made at previous questions in this section.

Sixty-two of those who answered 'yes' commented further. Around half of these respondents said they supported the same rules applying to EU regulated contracts and to lower value regulated contracts, for reasons of consistency. The main themes from others who answered 'yes' was that public bodies should have the discretion to assess each case on its merits. Once again, a small number commented that the rules should specify that public contracts should not be awarded to bankrupt or insolvent businesses.

All six who said 'no' commented and this included respondents from the third sector / equality groups who said they would prefer contracts under the EU threshold to be kept as simple as possible; this would help third sector and SMEs to participate. Several of the NHS respondents who addressed this question were concerned that discretion may not be consistently applied.

Exceptional circumstances

The consultation explained that there may occasionally be exceptional circumstances where businesses that would otherwise be excluded might be allowed to bid, for example contracts relating to public health or the protection of the environment. The Scottish Government plans to allow public bodies to decide not to exclude businesses in exceptional circumstances, when this would be in the overriding public interest.

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.

As shown in the following table, 48 respondents said 'yes', 31 said 'no' and 12 made other comments.

Question 25: 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?

	Yes	No	Other	No reply
Local authority (27)	18	4	3	2
Executive Agencies and NDPBs (13)	4	1	2	6
NHS (6)	1	5	-	-
Other statutory organisation (11)	6	2	1	2
Third sector / equality organisation (20)	3	2	1	14
Private sector organisation (18)	8	5	-	5
Representative body for third sector / equality organisations (12)	1	3	1	7
Representative body for private sector organisations (9)	-	3	2	4
Representative body for professionals (6)	2	1	1	2
Union (5)	-	3	1	1
Housing / Care (4)	3	1	-	-
Other (2)	1	-	-	1
Individuals (7)	1	1	-	5
TOTAL (140)	48	31	12	49

Forty-one of the 48 who answered 'yes' commented on their support for this proposal and the main reasons given were: that flexibility may be required in some cases; or that this would be a proportionate approach.

Many respondents, however, asked for clear guidance or definition as to what exceptional circumstance might be or on what justification would be required before allowing an exception; any guidance should include examples. The phrase 'overriding public interest' was viewed as subjective, broad and potentially open to abuse. A small number said they felt exclusions should not be allowed for criminal convictions but should be allowed for tax issues.

Twenty-nine of those who answered 'no' commented; most of these respondents, from across groups, said that they could not envisage any circumstances that would make this option necessary. Other comments included that it would be wrong, or not in the public interest, to allow any exceptions. A small number asked for clarification or guidance on what might constitute an exceptional circumstance,

as did many of the 12 respondents who commented without giving a 'yes' or 'no' answer. Other comments from this group of respondents included: the need for safeguards; the need for mandatory guidance or ministerial approval; or that there is no reason to change current obligations.

The consultation then asked about exceptional circumstances in relation to EU regulated contracts and to lower value regulated contracts.

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

Eighty-two said 'yes', four said 'no' and five made other comments.

The majority of the 70 respondents who said 'yes' and then commented further said they support applying the same rules to EU regulated contracts and to lower value regulated contracts for reasons of consistency and clarity. A small number, particularly those opposed to allowing exceptions, reiterated the views they had expressed at the previous questions, in particular that they could not envisage any circumstances that would make this option necessary.

Other comments, from three of the respondents who answered 'no' and from those who did not specify agreement or disagreement, included: that no exceptions should be allowed; that lower value contracts should not have the same rules applied as this could lead to lengthier procurement timescales; the need for discretion; or the need for clarification and guidance as to what might constitute an exceptional circumstance.

Other grounds for exclusion

There are circumstances in which, under the Directives, public bodies can choose to exclude businesses and the consultation paper explains that the Scottish Government proposes to continue to allow public bodies the discretion to exclude or not.

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.

Eighty-one respondents said 'yes', 12 (from various groups) said 'no' and four made other comments.

Seventy-two of those who answered 'yes' gave their reasons; these are similar to comments made at other questions in this section and included:

- Reiteration of support for allowing discretion.
- That flexibility is required to allow public bodies to make decisions on a case by case basis.
- The need for guidance.

- That any decisions should be proportionate and evidence-based; there were calls for clarification as to what evidence would be appropriate.

The phrase ‘significant failure’ was seen as subjective and several respondents asked for clarification and guidance on this. Respondents also asked for clarification on what is meant by ‘poor past performance’, including what timeframes should be applied. There were also calls for some form of information, for example a database of exclusion decisions, to be made available to public bodies.

One key point, raised by respondents, was the need for contracts to be awarded in such cases only when the company is able to show that the issues have been addressed.

Once again, a number of respondents, across groups, felt that serious breaches should result in mandatory exclusion.

The 12 respondents who answered ‘no’ also commented. Most of these respondents (mainly private sector, unions and third sector / equality organisations) were in favour of automatic exclusion for breaches mentioned in the consultation.

Other respondents who commented called for clear guidance for public bodies.

The consultation then asked about exclusions in relation to EU regulated contracts and to lower value regulated contracts.

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

Eighty-six respondents said ‘yes’, four said ‘no’ and two made other comments.

Seventy-two of those who said ‘yes’ provided further comments, with the majority of these respondents commenting on the need for consistency.

Two other themes emerged (in small numbers of responses); both came from various respondent groups. The first, noted in responses from a variety of respondent groups, was the need for guidance and information to ensure a consistent approach across public bodies. The other was the need to exclude businesses that have breached their obligations; this comment was also noted in two responses where the respondents did not specify a ‘yes’ or ‘no’ answer. In particular, unions commented on the need to exclude those businesses that have breached labour law obligations, in order to protect workers.

Three of those who said ‘no’ also commented. Two felt discretion should not be allowed while a statutory organisation felt it should.

The length of time a business can be excluded

The consultation explained that, at present, grounds for exclusion last indefinitely. Businesses can take steps to put right any breach (known as self-cleansing) but, where this has not happened, the Scottish Government can specify in regulations the maximum length of time a business can be excluded from bidding for contracts. The Directives state that this can be up to five years for criminal offences and up to three years in other cases. The Scottish Government plans to make the maximum length of exclusion the longest allowed by the Directives.

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

Eighty-three respondents agreed, seven disagreed and two made other comments.

Sixty-six respondents who agreed gave their reasons for doing so and the main points made, across respondent groups, were that this length of exclusion would act as a deterrent to breaching requirements or illegal activity and that three years (or five years for criminal convictions) is a reasonable exclusion period given the seriousness of the offences listed. Several respondents, however, also asked for clarification as to which cases should attract the three year exclusion.

While there was also wide-spread support for businesses being given the opportunity to self-clean, there were also calls for strong rules around what would be acceptable. Respondents were keen to ensure that businesses would be required to prove they had taken steps to rectify any breaches or remove the cause of the breach or offence.

Smaller numbers made other comments including:

- That indefinite exclusion is disproportionate and is also at odds with the concept of criminal convictions being 'spent'.
- The need for public bodies to have some discretion in these cases and for clear guidance for public bodies on assessing risk.
- The need for clear guidance on all areas relating to self-cleaning and exclusions.

The seven respondents who disagreed also gave their reasons and comments included:

- The need for longer exclusion periods, including some indefinite exclusions, for certain offences.
- That having a maximum exclusion period is too restrictive and that public bodies should have discretion depending on the offence or breach.

Two respondents who did not state agreement or disagreement made other comments:

- A query over how the use of exclusions would be applied consistently across public bodies (local authority).
- "We would suggest that public bodies should treat an applicant who was granted leniency by a relevant UK competition authority as having 'self-cleansed' in relation to that infringement" (statutory organisation).

The consultation then asked about maximum periods of exclusion in relation to EU regulated contracts and to lower value regulated contracts.

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

Eighty-eight respondents said 'yes' and two said 'no'.

Seventy-two of the respondents who said 'yes' commented further; most simply said that this was supported for reasons of consistency. One theme to emerge, amongst a small number across respondent groups, was that the same rules should apply regardless of contract value because of the serious nature of the offences listed.

A small number said that there should be longer or indefinite exclusions allowed.

The two respondents who said 'no' also commented: one said that there should not be a maximum exclusion period but this should be reviewed in relation to each tender, the other commented that the exclusion should apply until self-cleaning had been verified.

Excluding sub-contractors

At present, public bodies are only required to check that there are no grounds to exclude potential main contractors; however, the Directives allow for public bodies, where they choose, to also verify whether grounds exist to exclude sub-contractors. The Scottish Government feels that this would lead to a large amount of additional work for public bodies and also that main contractors should generally be responsible for managing their supply chain; the Scottish Government, therefore, does not feel public bodies should be required to check sub-contractors.

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

Seventy-one respondents agreed with the position taken by the Scottish Government (answering 'no to the question') while 23 disagreed (answering 'yes'); a statutory organisation made another comment.

In almost all respondent groups, with the exception of the union group, more respondents said 'no' than said 'yes'.

Question 31: Should public bodies be required to check that sub-contractors do not fail any of the exclusion criteria?

	Yes	No	Other	No reply
Local authority (27)	2	23	-	2
Executive Agencies and NDPBs (13)	-	7	-	6
NHS (6)	-	6	-	-
Other statutory organisation (11)	1	7	1	2
Third sector / equality organisation (20)	3	3	-	14
Private sector organisation (18)	6	8	-	4
Representative body for third sector / equality organisations (12)	1	4	-	7
Representative body for private sector organisations (9)	3	4	-	2
Representative body for professionals (6)	2	3	-	1
Union (5)	4	-	-	1
Housing / Care (4)	-	4	-	-
Other (2)	-	1	-	1
Individuals (7)	1	1	-	5
TOTAL (140)	23	71	1	45

Twenty-one of those who answered 'yes' commented, these respondents came mainly from the private sector, third sector / equality organisations or unions. A number of themes emerged in these responses:

- That it would be incongruous to check contractors but not sub-contractors.
- That responsibility for checks on sub-contractors should not be abdicated to the contractor.
- That this should be the case for certain types of contracts (such as large tenders).
- That this will encourage contractors to take care in choosing sub-contractors.
- That any sub-contractors should be subject to the same checks, criteria (and, if relevant, exclusions) as the main contractor.
- The need for guidance on what checks public bodies should make.
- Guidance on what checks main contractors should be required to make (and what evidence should be produced).

Sixty-eight of those who said 'no' commented further, with most saying that responsibility for checking sub-contractors should be placed on the main contractor.

A key concern, from many respondents and across various respondent groups, was the administrative burden that would be placed on public bodies if they were required to make these checks. One housing / care organisation commented: "The number of sub contractors on any project can be significant. The workload against value in this task is not proportionate for an organisation. In many instances sub-contractors will not be identified at PQQ stage which would make the assessment of them at this stage of the process impossible".

Several respondents commented that the main contractor would have to be advised of their responsibilities, perhaps under the terms of the contract, with a small number suggesting that standards or good practice guidance be developed.

A small number suggested that public bodies could be given discretion to check sub-contractors if they wished to do so; some suggested this may depend on the potential risk or the type of contract.

One statutory organisation did not give a 'yes' or 'no' response but commented that sub-contractors should have to meet the same requirements as a main contractor.

Statutory guidance - Selection of tenderers and award of contracts

The Scottish Government proposes to include in Statutory Guidance a range of principles, standards and values which should be applied when considering a business's suitability to deliver a public contract.

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

One hundred and three respondents commented; 12 of these respondents simply voiced support for the proposals in the consultation document. The remaining respondents, from across all respondent groups, asked for clarification on some aspects of the proposed guidance and / or suggested additions. Many recurrent suggestions or queries emerged from these responses and these are summarised below.

The main theme to emerge from responses, across respondent groups, was the need for clear, unambiguous guidance and for clarification including: detail on implementation; how to test proportionality; the need for non-subjective wording; and the need for case studies or examples. For example, one housing / care respondent suggested: "Clarity on what can and cannot be taken into consideration and guidance would be helpful on how to practically consider the things that can".

There was some concern over the possibility of legal challenges; respondents stressed the need to ensure that any requirements placed on public bodies would be defended and a representative body for professionals commented: "We consider that the Scottish Ministers should reflect carefully on whether statutory guidance on this point is necessary or desirable. Our concern is legal certainty. Guidance requiring public bodies to have regard to various considerations is apt to promote legal challenges and hence uncertainty". One specific example came from a statutory organisation:

“The consultation refers to businesses behaving “dishonestly”. We note that there is no concept in UK or EU competition law of whether a business has been “dishonest”, and such a term does not form part of the test for whether a business has infringed competition law. We believe that introducing such a term here and / or in any future guidance is liable only to exacerbate challenges for public bodies in considering whether or not a business should be excluded under this ground of exclusion.”

One main area where the possibility of legal challenge was raised was around the issue of pay and conditions. Several respondents wanted to see the guidance oblige contractors to pay the Living Wage and to prohibit the use of zero hours contracts but there were concerns that, under the terms of the Local Government Act 1988 (section 17 (1)), public bodies are unable to take non-commercial considerations such as rate of pay into account. Others, however, commented that this was not the case “Like Unison and others, we disagree with the Scottish Government in that we have seen Unison’s legal advice which states that it is in fact possible to stipulate payment of the Living Wage as a condition for performance of the contract. We therefore believe that the procurement guidance should leave room for contracting authorities to choose to stipulate the payment of the Living Wage as a condition for performance” (representative body third sector).

Another area, discussed by two respondents from the third sector, who demonstrated opposing views, was on the issue of requirements in respect of illegal settlements and the legal position around this.

Respondents also asked for clarification as to what can and cannot be taken into account as selection and award criteria for above EU threshold contracts and on those below the EU threshold.

A number of respondents, from both the public and private sectors, stressed the need for some flexibility or discretion. One public sector respondent, for example, commented: “The statutory guidance in this area should be light touch to allow public bodies to determine what are priority issues for their own areas, and what can realistically be achieved in the particular market from which they are procuring.” However, many respondents also wanted to see precise details of the extent of discretion available to public bodies in respect of each requirement (and how this should be applied in order to ensure consistency).

Other respondents commented that there needs to be clarity between what constitutes overarching standards and values that must be met and what are other selection requirements where discretion can be applied.

Amongst responses there were many specific requests for clarification and these included the need for detail on:

- Payment regimes.
- PQQs.
- Risk assessment.
- Proportionality.
- How value for money is to be assessed.

- Balancing exclusions with a need for rehabilitation.
- How to assess whether a business has self-cleansed.
- Grounds for exclusion and the level of evidence required.
- Detailed advice on the selection and rejection of contractors based on their financial and economic standing.
- Definitions for many of the words or phrases used, examples include “grave professional misconduct” and “community”.

Respondents, from various sectors, also voiced concern over the amount of red-tape and potential cost burden that could be involved in compliance checking. For example, a private sector company commented: “that the burden of matters such as being forced to provide flexi-time or career breaks will fall heaviest on SMEs due to their size. The more exclusion criteria of this sort that are in the rules, the less likely SMEs are going to be able to bid (or participate in the supply chain, if these rules are required to be pushed through the supply chain of a main contractor)”. Further, a respondent from the third / equality sector commented: “The guidance must be clear that contracting authorities have a major responsibility in this respect, and that they cannot introduce criteria for the selection of tenderers or award of contracts that they are not prepared to underwrite by applying adequate contract values”.

Many respondents, especially those from the third sector, commented on payment of the Living Wage with several also voicing their opposition to zero hours contracts. While there was acknowledgement that current legislation means public bodies cannot require contractors to pay the Living Wage, one local authority respondent asked “that the statutory guidance stemming from the Procurement Reform (Scotland) Act on this matter goes as far as possible within the bounds of the law to allow procuring authorities to ensure payment of the living wage, and utilise ethical standards such as living wage employer status to strengthen the public sector’s ability to make work pay”.

There were calls for this aspect to be taken into consideration when looking at the cost of a bid in order that bids from those companies paying a Living Wage, with therefore higher employment costs, were not rejected in favour of those not paying the Living Wage (who could therefore submit a cheaper bid). Others commented: “It is absolutely imperative that if the Statutory Guidance says that businesses with public contracts should (for example) pay the Living Wage, then it must also say that contracting authorities need to offer contract values that will enable businesses to pay it”.

There were some queries relating to the payment of a Living Wage:

- Whether this requirement would apply to the entire supply chain.
- What evidence will companies be required to produce.
- Whether broader remuneration arrangements such as employee share plans would be taken into account.

The other main requirements discussed by respondents were the need for companies to show how they manage their environmental impact and to show how they ensure that they, and their supply chain, respect human rights.

There were also calls for a range of specific requirements to be included, these included:

- Signing up to the 'Carers Positive' kite-mark.
- The use of the Fair Tax Mark.
- A general emphasis on family friendly policies and equalities.
- Ethical purchasing and the ethical principles that contractors apply in dealings with their supply chains.
- Consideration of the global impact of purchasing decisions and allowing the ability to prioritise fairly traded products.
- Excluding Contractors that have engaged in blacklisting or have been convicted of other employment infringements.
- Encouragement of joint-bidding and consortia bids.
- A positive approach to sub-contractors (e.g. payment of invoices within 30 days).
- That Scottish Procurement's standard PQQ should be used unless good reasons can be demonstrated for not using it.
- The need for a centralised database to store pre-qualification data supplied by economic operators and their sub-contractors.
- That the guidance could reference membership of self-regulatory schemes.

There were also calls for the guidance not to impose any requirements on contractors unless these were requirements already imposed on the public bodies themselves. In addition, a representative body for the private sector commented: "However we do not agree that law-abiding, responsible small businesses should be excluded for not meeting standards that much of the public sector is yet to achieve, for example in relation to flexible working or environmental performance. We must also emphasise that if extra requirements are to be placed on those bidding for work, then public bodies should be willing to pay more for the contract."

Other comments included:

- That companies involved in tax avoidance are excluded.
- That companies involved in anti-competitive practices are excluded.
- That companies involved in exploitative employment (including blacklisting, zero hours contracts or using umbrella companies to exploit workers) are excluded.

Summary : Selection criteria and grounds for exclusion

Most respondents:

- Agreed that the same criteria should apply to lower value regulated contracts as to higher value EU regulated public contracts.
- Agreed 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.
- Said that the list of criminal convictions which may result in exclusion from bidding should be the same for all regulated contracts, regardless of value.
- Said public bodies should 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.
- Said public bodies should 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.
- Said public bodies should 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.
- Said public bodies should 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.
- Said public bodies should retain the discretion to decide whether or not to exclude a business which is bankrupt, or is in insolvency proceedings from bidding.
- Said a public body should 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. However, a fairly large number said they should not.
- Said the law should 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).
- Agreed with the proposed maximum periods of exclusion.

Across all of the proposals in this section, most respondents said the same rules should apply to EU regulated contracts and to lower value regulated contracts.

Most respondents said public bodies should NOT be required to check that sub-contractors do not fail any of the exclusion criteria.

When asked what should be contained in the Statutory Guidance, most respondents mentioned the need for clear, unambiguous guidance and for clarification including: detail on implementation; how to test proportionality; the need for non-subjective wording; and the need for case studies or examples.

Throughout this section, consistency, proportionality and flexibility emerged as key factors for respondents.

Contracts for care, support and other specific services

'Light-touch' regime

The consultation explains that buying some services, such as social and other specific services requires special consideration because these services can have a big impact on the quality of life and health of service users. The new Directives introduce some changes and simplifications to the rules for the award of these contracts including a 'light-touch' regime for handling care and support service contracts.

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.

Sixty-two respondents said they agreed, five disagreed and eight made other comments.

Sixty respondents went on to comment further, with most making positive comments such as that this proposal seems clear, comprehensive, appropriate, sensible and retains the flexibility required for these types of contracts.

There were also calls for more specific guidance, for example one local authority said: "Many providers however are interpreting the light-touch regime to mean there will no further public tendering. Clear guidance is needed to refute this understanding and to explain the suite of procurement options available. The guidance should be about what 'does' apply rather than 'does not' apply and individual organisations must be able to make decisions based on each set of circumstances". Respondents also wanted to see guidance on a number of areas: to ensure standards are consistent across public bodies; and to ensure continuity and quality of care.

There was also a call, from a union respondent, to include other services that have a significant impact, for example youth work.

Other comments included one local authority voicing concern that more contracts may become subject to the full regulations.

Another from this group was concerned "that this could lead to complete absence of market testing in a complex area". Union respondents wanted to see contracts for health and social care, support and other services delivered by the public sector only.

Representative bodies for the third / equality sector felt there was confusion over how the 2014 Act and the EU Directive interact in respect of care and support services.

There were also calls for:

- Consideration of the position of the Scottish Legal Aid Board.
- Procurement to be a vehicle for maintaining and raising standards of care.
- A statutory organisation commented that blacksmithing should be removed from the list of services.
- The need to ensure providers demonstrate fair employment practices.
- That quality and not cost is the determining factor.

The last point, above, was discussed in the next consultation question.

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.

Seventy-four agreed, six disagreed and two made other comments.

Sixty-seven of those who agreed commented on this question, with the main theme emerging from respondents being the need to ensure quality of service.

Many respondents called for specific considerations; the main one being the use of a best price-quality ratio. Other factors that respondents felt should be taken into consideration included:

- Training.
- Continuity of care.
- A well paid workforce.
- Fair employment practices.
- Accessibility.
- Sustainability.
- Account management.
- Innovation.
- Social impacts.
- Environmental impacts.
- Fair trade.

One executive body / NDPB respondent, however, also noted that there may be some simple goods contracts where cost can be the most important factor.

There were concerns that public bodies will not base evaluations on quality, for example:

“We can cite an example where a contracting authority said its evaluation process for care at home services would be ‘100% on quality’, yet the price cap applied made it virtually impossible for any provider to offer a high quality service. We would therefore suggest that in ruling out the award of contracts on price alone, Scottish Government makes it clear that price-capping will, in effect, breach this rule”. (representative body for the third / equality sector)

There were some calls for the prohibition of reverse auctions in relation to service contracts.

Six respondents who disagreed, along with two who did not specify an answer, also commented.

Most of these respondents, and particularly local authority respondents, felt that lowest price contracts should be allowed in some circumstances and asked that public bodies retain some flexibility in this matter.

There was also a call for guidance to ensure service users are protected during any change in procurement rules.

Statutory guidance – procurements for health or social care services

The Scottish Government proposes to use guidance to set out the processes that should be followed leading to the award of a contract for social or health care services in more detail.

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

Sixty-five respondents, across respondent groups, answered this question, with eight commenting generally that they agree with the proposals contained in the consultation document.

A wide range of other factors were suggested for inclusion and these are summarised below.

Several public bodies suggested that the 2010 Procurement of Care and Support Services Guidance should be used as a basis for guidance; bodies are familiar with this guidance and it covers many of the factors mentioned in the consultation.

Several respondents commented that the guidance will need to take into account EU Treaty Principles; others said the guidance will have to allow public bodies some flexibility and discretion while still ensuring compliance with the principles.

The need for consistency and standardisation across public bodies was again mentioned.

A number of respondents mentioned the need to clarify the relationships between relevant legislation, EU Directives, EU thresholds and procurement rules. One respondent from the third / equality sector said: “We note the current special treatment of social care contracts under the 2014 Act. It will be important to separate proposed guidance for such below EU threshold contracts from the base-line guidance provided for above EU threshold procurement in this area (and indeed any below EU threshold regulated contracts that are not exempt under the 2014 Act.)”

Respondents again stressed the fact that quality is more important than cost, with some union respondents calling for awards based on lowest price to be prohibited. The need to ensure value for money was also raised in a small number of responses.

One representative body for professionals commented: “Contrary to the suggestion made on page 58 of the Consultation, we note that the terms of Article 76 of the Directive do not state that public bodies should consider quality, continuity, affordability, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of services users, the involvement and empowerment of service users and innovation. Rather, the terms of Article 76 oblige Member States to allow contracting authorities the ability to take such matters into account”.

A respondent from the third sector / equality group commented “Guidance MUST be clear on aligning social care with the SDS / personalisation agenda”. The issue of flexibility or discretion was seen as very important in ensuring a focus on outcomes and enabling public bodies to provide choice for individuals. One local authority said: “A definitive guide on the impact that personalisation has on the commissioning of social care services would be helpful. Examples of different scenarios would be very helpful”.

Other respondents also suggested that examples or case studies should be included with the guidance.

Other suggestions included:

- That advertising should be mandatory or the need for adequate advertising.
- That post-contract monitoring and management should be included.
- That bidders should have demonstrable, relevant experience.
- That guidance should refer to experience, suitability and qualifications of staff.
- The need for further consultation once the guidance has been developed.
- The need for service user involvement in compiling guidance.
- That guidance must focus on the needs of the service user and include end-user involvement.
- That guidance should also cover:
 - Equalities.
 - Continuity of care.
 - Client choice and personalisation of services.
 - Length of contract.
 - Employment practices.
 - Pay and conditions.
 - Employment standards.
 - Staffing levels and staff resources.
 - Safety.
 - Impact on health.
 - Strategic commissioning.

Many respondents wanted to see a minimum of guidance; there were also calls to ensure the guidance is concise, clear, and not too prescriptive nor excessively detailed. A small number of local authorities, however, asked for detailed guidance on all factors discussed in the consultation.

A small number of respondents raised concerns about the areas covered by the consultation document. One local authority felt the areas were too broad and may discourage market testing. A representative body for the third sector felt there could be “a conflict between seeking to apply only limited rules but still follow the treaty principles”. A representative body for professionals wanted to see guidance “drafted to be as specific as possible. General exhortations are likely to be ignored and would make it difficult to assess whether due regard has been given to the guidance”.

Summary : Contracts for care, support and other specific services

Most respondents:

- Agreed that the proposed rules will be sufficient for an effective light-touch regime.
- Agreed that contracts should not be awarded on the basis of price or cost alone.

A wide range of suggestions were made for inclusion in Statutory Guidance.

Procedural rules

Using a prior information notice as a call for competition

A Prior Information Notice (PIN) is used to tell people what a public body is planning to buy over the next year. The Directives say that a PIN could be used in the place of an advert, or contract notice, to invite bids and the Scottish Government plans to allow this.

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.

Seventy respondents agreed, eight disagreed and two made other comments.

Sixty respondents who agreed with this provision commented further; six of these simply made general supportive comments.

The main reason given for supporting the provision was that this will speed up the procurement process or reduce tendering timescales. Other reasons included:

- That this will simplify or streamline the process, make the process more business friendly, reduce bureaucracy and / or bring greater efficiency.
- That this will add more flexibility to the process.
- That this will help the supply chain to plan ahead or help businesses plan for the future.

There were some notes of caution, however, with respondents stressing the need to ensure that it is made clear in the Prior Information Notice (PIN) that there will be no advert. Some respondents were concerned that suppliers, who are used to the current process, might miss out on an opportunity by waiting for a contract notice. There were also queries as to how much of the detail presented in current notices would be included in a PIN.

Several respondents queried why central government and NHS bodies are to be excluded.

A small number commented that Public Contracts Scotland would need to be altered to accommodate closing dates for PINs and expressions of interest for PINs.

A small number commented that PINs may not be suitable for all contracts but that public bodies may choose to use a PIN as it is easier than the current process.

A representative body for the private sector said that construction will need separate guidance as it is more complex than other goods and services.

Eight of those who disagreed with the use of PINs also commented; several of these respondents felt that using PINs would cause confusion amongst buyers or may lead to a lack of consistency across public bodies. There was also concern that the maximum period may be too long, perhaps leading to some suppliers forgetting to bid.

A representative body for professionals commented that PINs do not bind the public body to anything and so are not useful.

Other comments included: that PINs should be published directly to suppliers; and that further discussion and clarification is required before a decision is made.

The consultation then asked about the use of Prior Information Notices in relation to lower value regulated contracts.

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.

Sixty-three respondents agreed, 15, including several local authorities and executive agencies / NDPBs, disagreed and a statutory organisation made another comment.

Forty-nine of those who agreed commented on their answer; the main theme to emerge, in around half of these responses, was that applying this provision to lower value regulated contracts was supported for reasons of consistency and / or simplification.

Once again, respondents commented that this provision will reduce procurement timescales and allow greater flexibility.

A small number called for discretion for public bodies. A small number asked for more clarity around the content of the PIN.

Fifteen respondents who disagreed also commented with several feeling that this would add complexity or bureaucracy and cause confusion. A small number commented that a year was too long a time. A small number felt that this process is not needed or would not be suitable for lower value contracts.

One statutory organisation did not agree nor disagree; they commented that guidance for advertising should not be overly complex.

Negotiated procedure without prior publication

The Directives allow for public bodies to negotiate the award of a contract without any advertisement, or call for competition, in specific circumstances. The Scottish Government plans to continue to allow public bodies to do so.

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.

Eighty-two respondents agreed, one local authority disagreed and four respondents made other comments.

Seventy-three commented, with many of these respondents saying they agreed for the reasons outlined in the consultation document, particularly that there may be cases where there is an emergency situation, where only one source of supply is available or where procurement may be hindered if the normal process was followed. Some stressed that guidance would be needed in order to ensure

consistency and proportionality and there were calls for a definition of 'reasons of extreme urgency'.

Respondents also stressed that this situation should only be used in exceptional circumstances and there were calls for the process to be tightly managed, the use justified and the circumstances and evidence documented to ensure transparency.

A small number commented that, in these cases, a Contract Award Notice should still be published. There were also some comments that public bodies should be obliged to check each time a contract is awarded to make sure that circumstances have not changed, for example that there is still only one possible supplier.

One local authority disagreed, saying they felt this would only be appropriate in cases where there has only been one bidder.

Four respondents made other comments including:

- Concern that the arrangements may favour arms-length external organisations.
- The need for clarification on how the proposal relates to Section 12 of the Act.
- That care must be taken to avoid a decline in measurable standards and of comparable results in equality outcomes (across similar areas, tendered differently)" (third / equality).
- The need for clarification over 'previous competition', specifically the length of time that would be classed as 'previous'.

Respondents were then asked about awarding contracts without competition in relation to lower value regulated contracts.

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.

Seventy-nine respondents agreed, two disagreed and one organisation made another comment.

Sixty-nine of those who agreed provided reasons for their answer; these were general support for the reasons outlined in the consultation document and specifically for reasons of consistency.

Once again, a small number added provisos: that there would need to be a sound rationale with evidence of justification; or that clear guidance is required.

A small number of respondents commented that it may be useful to expand the availability of this approach.

As with the previous question a very small number voiced concerns and these included: that the arrangement may favour arms-length external organisations; or the need for clarification over the terms 'previous competition' and 'suitable' bid.

Reduced timescales in a restricted procedure

The Utilities Directive and Public Procurement Directive allows a body and all the businesses invited to submit a bid to agree a deadline for submitting bids if they wish to do so. The consultation explains that the Scottish Government is in favour of this process.

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.

Seventy-five respondents agreed, five disagreed and a private sector respondent made another comment.

Sixty-five respondents who agreed 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 commented further. Many simply said this would allow more flexibility or that this would speed up the process for less complex contracts.

Several respondents stressed that this should only take place with the agreement of all bidders; a small number felt this may prove problematic.

A small number again queried why central authorities and NHS bodies were excluded (and some requested a definition of 'central authorities').

A small number of respondents, particularly from the private sector, commented that too short a time may put pressure on suppliers and that it may not be possible to collect all the data within the timescale.

There were also calls for clear guidance as to the circumstances in which a shorter period would be acceptable.

A small number said that care would be needed to ensure adequate time for the complexity of the contracts; particularly to ensure SMEs have enough time to respond to complex tenders.

The five respondents who disagreed were concerned: that there may be inconsistency across public bodies; that 10 days is too short; that timescales may be set too short; or that public bodies extending an agreed timescale may be open to legal challenge.

A private sector company gave a detailed response in relation to EU regulation timescales and potential problems with reduced timescales in relation to the clothing tenders where materials need to be sourced and a sample run produced and tested.

Examining tenders before verifying qualification criteria

At present public bodies may decide to evaluate all bids before checking if there are any grounds for exclusion and confirming the companies meet the selection criteria. The Directives allow public bodies, in some cases, to only check the qualification criteria for the business which submitted the highest scoring bid. The Scottish Government intends to leave the choice with public bodies.

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.

Seventy-one respondents said 'yes' and nine said 'no'.

Sixty-three of those who said 'yes' gave their reasons; these were mainly support for retaining flexibility, making the process simpler, quicker, more efficient or convenient and reducing time and cost associated with processing multiple tenders.

There were some additional comments and these included:

- The need for guidance to ensure public bodies use and apply this procedure in a fair, transparent and consistent manner.
- Queries over how feedback would be provided to unsuccessful bidders if bids are not fully evaluated.

Eight of those who said 'no' commented further and the reasons given included:

- Concern over the risk of discrimination or perception of discrimination or bias.
- That bids will have to be reassessed or the result altered if the highest scoring bid fails to qualify.
- That all information should be examined.

Incomplete or wrong information

The Directives allow public bodies to ask businesses to add to or clarify their tenders, for example if they have submitted incorrect information or have omitted to provide some information. The Scottish Government feels that public bodies should have the flexibility to ask businesses to clarify or add to their tender, so long as they do so in a way which does not discriminate, which is transparent, and which treats everybody equally.

Q42 Should public bodies be allowed to ask for supplementary or missing information and to ask a company to provide clarification of their bid?

Eighty-seven respondents said 'yes', no respondents said 'no'.

Respondents welcomed retaining this flexibility for public bodies which was seen as fair to suppliers and likely to produce better outcomes. Many pointed out that small errors can creep into bids for a variety of reasons including time pressures, misunderstandings and human error. However, a number of respondents stressed that this must be restricted only to missing information or clarification.

There were calls for guidance to ensure all are aware of the circumstances in which this would be allowed and that it is done in an appropriate and transparent matter. Several respondents commented that there would need to be documentation including evidence of the justification for asking for information.

Modifying contracts

The Public Procurement Directive describes when a public body can change or modify a contract without having to start a new procurement process. This can be

applied to lower value contracts. However, the Scottish Government feels that as the new rules are quite restrictive and could create unnecessary risk and burdens when applied to lower value contracts, that it would not be appropriate to do so.

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.

As can be seen in the following table, 47 respondents agreed, while 34 disagreed and two representative bodies felt more information was required on this issue. More local authorities disagreed than agreed.

Question 43: Do you agree or disagree that the rules in the Directives about modifying contracts should not apply to contracts under the Act?

	Agree	Disagree	Other	No reply
Local authority (27)	11	14	-	2
Executive Agencies and NDPBs (13)	6	1	-	6
NHS (6)	4	2	-	-
Other statutory organisation (11)	7	1	-	3
Third sector / equality organisation (20)	2	1	-	17
Private sector organisation (18)	7	5	-	6
Representative body for third sector / equality organisations (12)	3	3	-	6
Representative body for private sector organisations (9)	-	3	1	5
Representative body for professionals (6)	2	2	1	1
Union (5)	-	-	-	5
Housing / Care (4)	3	1	-	-
Other (2)	1	-	-	1
Individuals (7)	1	1	-	5
TOTAL (140)	47	34	2	57

Thirty-nine of those who agreed commented further. The main theme to emerge from these responses was that applying the rule to lower value contracts would increase the burden on organisations. One executive agency / NDPB respondent commented: “The reform act has already put in place large number of obligations on to public bodies and where further regulation is not required, then this should be avoided. There is a real danger of making all of the rules fit all of the circumstances and this may not be desirable or necessary. This runs the risk of making all procurements more complicated and difficult than they need to be”.

There were also comments on the need to allow public bodies flexibility; applying the rules to lower value contracts was seen as disproportionate and restrictive. A small number asked for guidance on 'modifying contracts', on the extent of flexibility that public bodies can apply or on what would happen if a modification brought the contract above the EU threshold value.

Two representative bodies for the third / equality sector commented on the importance of public bodies being able to modify contracts if this will better meet the needs of service users.

Thirty-three of those who disagreed commented further and the main theme from these responses was the need for consistency. One local authority respondent said: "This would introduce inconsistency of standards, would be confusing and contradictory, and give no certainty in regulated contracts". A small number commented that the rules did not seem overly restrictive and could, therefore, be applied to lower value contracts.

Summary : Procedural rules

Most respondents:

- Agreed that provision should 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.
- Agreed 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.
- Agreed that public bodies should be permitted to award a contract without competition in the circumstances permitted by the Directives.
- Agreed that public bodies should also be permitted to award lower value regulated contracts in similar situations.
- Agreed 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.
- Said that when using the open procedure, public bodies should retain the flexibility to determine whether to evaluate bids before evaluating qualification and exclusion criteria.
- Said public bodies should be allowed to ask for supplementary or missing information and to ask a company to provide clarification of their bid.
- Agreed that the rules in the Directives about modifying contracts should not apply to contracts under the Act. However, a fairly large number disagreed.

Rules about communication

Electronic communication

There are four decisions to be made in relation to the application of rules about electronic communication in Scotland; all of which apply to public contracts and utilities contracts.

Use of BIM

The first decision is about the use of technologies like tools for Building Information electronic Modelling (BIM). This is currently used in construction to design and manage buildings and other facilities.

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.

Seventy-three respondents agreed that the Scottish Government 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. Only two private organisations disagreed with this proposal, and another private organisation neither agreed nor disagreed but commented that they would support the best decision for the public and public funds.

Seventy-four respondents provided comments at this question. A key issue raised by respondents across most sub-groups, was in relation to time. Seventeen respondents simply referred to the need for time before this becomes mandatory, for example, to allow for time to embed electronic approaches or to allow consultants and contractors to adapt to the technology within their business processes. Other respondents, mostly in local authorities and private sector organisations, referred specifically to the need to allow time for SMEs to gain a better understanding of the BIM process.

Several respondents, primarily within local authorities and statutory organisations, referred to the current review underway and suggested that there is a need to await the outcome of this so as to allow for more detailed consideration. As noted by one local authority: “ there needs to be much more clarity of understanding and consistency of approach in the BIM process, to enable it to become compulsory within construction procurement on all public works contracts and design contests.”

There were some comments that BIM is not appropriate for all public sector construction projects and that the contracting authority should be able to decide when the use of BIM is appropriate. Allied to this, there were a small number of suggestions that BIM should be retained for larger, more complex projects.

A small number of respondents commented on the advantages of the approach suggested in the consultation document; the key ones being that this approach allows for flexibility or will reduce duplication across the sector.

A small number of respondents noted concerns and these included:

- The costs associated with using BIM.
- That the use of BIM could disadvantage some bidders because of its implementation in terms of costs, training or support.
- There should be a review as to whether BIM should apply to all types of organisation and size of project.
- That use of BIM can restrict an organisation's ability to meet the required standards.

There was also a request from a statutory organisation for ongoing dialogue and engagement with procurement and estates specialists, and public sector and industry specialists.

Security levels

The consultation paper points out that decisions also need to be taken in relation to security levels. There is an option to either set out precise levels of security that are needed for electronic communication for every contract or to set general rules, within which public bodies can act appropriately; and when advanced electronic signatures should be used, or to set general rules. It is the view of the Scottish Government that because of the wide range of contract types that are awarded, one set of rules on electronic security would not work and that public bodies should be able to choose to act appropriately on a case-by-case basis, with no set specific rules. Instead, a set of rules making up a general framework would be developed, which public bodies must stay within.

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.

Seventy-one of those responding agreed with this position. Four respondents disagreed and three provided a neutral comment.

Sixty-five respondents provided additional commentary to support their answer. A significant number of respondents commented that this approach would offer consistency or that it is good to have a standardised approach. Many respondents also commented that it is beneficial to have an approach based on an overall framework but which offers flexibility to public bodies to adopt their own approach, particularly as there is a wide range of differing types of contract. As one local authority commented: "We would support the establishment of an overall framework within which councils can design measures appropriate to their particular circumstances. This is an area where technology is outstripping legal development and practice and an overarching framework should assist councils to harmonise their approach thereby improving efficiency of communication and certainty in the execution of contract documents".

A small number of respondents commented that they would welcome general guidance and a policy perspective on what is considered best practice and legally compliant, with some specific reference to electronic signatures.

Other respondents provided qualifying comments to their response and these included that:

- This needs to fit with other government security and confidentiality requirements that already exist.
- There needs to be clarity, consistency and information to minimise unnecessary cost and uncertainty arising from variations in requirements between contracts.
- This needs to be simple for all suppliers to work with.
- This should be developed over time and evaluated before being introduced.
- Public bodies need to be able to comply with the proposed security requirements.
- If a common framework approach is adopted, it needs to be achievable by all suppliers, as well as taking account of the sector infrastructure and security policies.
- This would have to be a central or national government framework so as to avoid duplication of effort, time, resource and cost.
- This should be aligned to the PSN code of connection requirements.
- Suppliers need assurance that everything communicated electronically is secure.
- There needs to be consultation on what is in the framework.

Those who disagreed had concerns that too onerous a framework could be difficult for all organisations to comply with, that the existing PCS-T could be modified and adopted, that public bodies should be able to do this in a way that suits them, or that the framework is only useful if everything is on one system.

Time available for implementation of fully electronic procurement processes

The consultation paper went onto explain that a decision is also needed for making sure all communication about procurement is electronic. There is an option for all communication to be electronic on the day that new rules come into force.

Alternatively, there is an option to delay this deadline until 18 October 2018 for all public bodies, with the exception of central purchasing bodies (this deadline can be delayed until 18 April 2017 for central purchasing bodies). There is also an acknowledgement of the need to ensure that all public bodies' systems can cope with this change, so the Scottish Government is planning to delay these deadlines for the longest possible time period.

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?

Sixty-nine respondents agreed with the Scottish Government's proposals for delay, eight disagreed and two made other comments. Sixty respondents, across most sub groups, also provided further commentary in support of their answer.

Of those agreeing with the proposal, many noted that more time would be beneficial. For example, that it would allow for better preparation and training for the required systems, or that it would allow for proper planning and implementation and to ensure that new systems and processes are fit for purpose. A small number referred specifically to suppliers and SMEs who they felt might be disadvantaged without delays to implementation.

A small number, mostly local authorities, commented specifically that public organisations currently operate at different levels of capacity and need time to achieve fully electronic procurement or that rapid adoption would be challenging for some organisations and public bodies. As noted by one organisation in the executive agency / NDPB sub group and summing up the views of a number of these respondents: “Implementing the Procurement Reform Act, Procurement Regulations and a new procurement Capability Assessment Regime will place significant burden on the Scottish procurement community and suppliers themselves who engage with public sector buyers. The systems and process changes required are significant and will take time to establish, enact and embed. Buyers, the internal customers and suppliers themselves also need time to become ready for this”.

Other comments made by those in agreement with the proposal included:

- The need to consult with suppliers.
- That there will be cultural resistance to change that will need to be counteracted.
- The maximum time period will allow for more informed introduction of changes to processes and will help to minimise costs.
- That consistency within public bodies will help to assist the supply chain.

While there was majority support for this proposal, eleven respondents provided some qualifying commentary. For example, three statutory organisations requested clarity on the definition of ‘central purchasing bodies’. A small number of organisations requested support or guidance on what will be required, with some reference to SMEs and suppliers specifically. One Statutory organisation requested Scottish Government funding for public authorities so they could meet any additional costs from introducing the required legislative changes; they also had concerns over the potential for different standards across different European countries and the impact these might have on international collaborative work.

The small number disagreeing with this proposal were primarily in the private sector, local authorities, or representative bodies. The key issue raised by these respondents was that the maximum permissible time should not be needed, given that electronic communication is common to all businesses already; and that this would lead to reduced efficiency benefits for a longer period of time. A small number felt that an option to delay would simply mean that some businesses will delay making the necessary changes until the latest possible time. One private sector business noted that Scotland should be leading the way in the use of digital technology in creating a more competitive economy.

Electronic communication in concession contracts

The Concessions Directive says that public bodies must use electronic communication for sending concession notices, concession award notices and notices about changes to a concession contract. Under Article 29 of the Concessions Directive, the Scottish Government is allowed to make rules to say that all other communication must also be electronic.

The consultation paper noted that concession contracts are largely complex, high economic value contracts that are more likely to be handled through an electronic procurement system. Also that electronic communication helps to make procurement simpler, faster and more transparent.

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

Fifty-nine respondents agreed that all communications about concession contracts in a procurement exercise should be by electronic means, eight disagreed. Thirty-six respondents, across most sub-groups, went onto provide commentary in support of their response. Many of those in agreement with this proposal echoed the reasons given in the consultation paper, namely, that this would offer a simple, efficient and transparent system. A number also commented that this would offer consistency in approach. Other advantages cited for this approach included that electronic communications are less open to challenge and more secure than other forms of communication.

A small number of respondents also commented that the approach for concession contracts should not differ from other types of contract and that all contracts should use electronic communications.

As with some previous questions, there was a degree of qualified support for this. Some local authorities and executive agencies / NDPBs commented that this should have a timescale in place similar to that suggested for the time available to implement fully electronic procurement processes (question 46), or that it is necessary to have a timescale allowing for the appropriate systems and procedures to be put in place. There were also concerns from a small number of respondents that businesses should not be disadvantaged in applying for public contracts, with one executive agency / NDPB suggesting support should be provided to SMEs.

Of the eight respondents disagreeing with this proposal, most were local authorities. There were comments that a degree of flexibility and choice should be retained, with some discretion being offered for public bodies to use other forms of communication. For example, one local authority suggested that: "There should be an opt-out allowing the procuring authority discretion to have other communications by non-electronic means where it would be disproportionate (in the opinion of the authority) to do otherwise; that decision and the reasons for it to be communicated in the concession notice. As is recognised in the consultation document, not all concession contracts will be high value and the rules should accommodate a lighter-touch approach in those circumstances."

There was also comment that some degree of flexibility and choice should be offered, mostly in relation to lower value concession contracts, although one

respondent noted flexibility was needed for complex and high value concession contracts.

Two local authorities commented that all communications about concession contracts should be electronic, although an organisation within the third sector commented that all forms of communication for procurement need to be inclusive.

Electronic catalogues

The consultation paper noted that an electronic catalogue is an electronic list of things which a business sells and the prices which it charges. The Scottish Government can, if it wishes, say that electronic catalogues must be used for some types of procurement, although it is not the intention to make this a rule. The Scottish Government thinks public bodies should be able to choose when it is appropriate to use electronic catalogues.

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.

Sixty-eight respondents across most sub-groups agreed that public bodies should retain the flexibility to decide when the use of electronic catalogues is appropriate. Three organisations gave a negative response to this question.

Seventy organisations commented further. The reasons for saying 'yes' to this question were largely that electronic catalogues are not appropriate for all contracts and flexibility needs to be retained to make decisions on a contract-by-contract basis. A number of these respondents also noted that public bodies are best placed to make the decision on whether or not to use an electronic catalogue.

A small number of organisations commented that technology is not sufficiently developed or understood for electronic catalogues to be used on all contracts. A small number also noted that this approach does not disadvantage the supplier community, with one local authority noting that in their experience many suppliers are not in a position to be able to tender using electronic catalogues.

Other advantages cited by respondents included:

- This will help to further e-commerce objectives.
- For contracts suitable for electronic catalogues, it will save time, resources and cost.
- When electronic catalogues are used, there will be a visible electronic audit trail.

A small number of organisations felt that support would be needed to help with implementation.

For two of the organisations opposed to this, there was a perception that there should be consistency across the marketplace and that all catalogues should be submitted, shared and used in an electronic format.

European single procurement document

The consultation paper noted that Article 59 of the Public Procurement Directive says there should be a European Single Procurement Document (ESPD) which allows businesses to declare that they meet the selection criteria set out for a contract and that they are not in any of the situations which would mean they should be excluded from bidding. It is intended that this makes it easier and faster to bid for public contracts. The Scottish Government can choose to delay the need to provide the ESPD in electronic format only until 18 April 2018.

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.

Sixty-five respondents agreed that the requirement to provide the ESPD in electronic form only should be deferred until 18 April 2018. Fourteen disagreed with this proposal.

Eighty respondents commented further with over half of those agreeing with this proposal echoing the need for delay so as to give public bodies enough time to prepare and change their systems appropriately. There were also comments from a small number of respondents that rapid adoption of this change would be challenging for many businesses and public sector bodies. Other comments raised by small numbers of respondents included:

- This requirement should be deferred as ESPD is not yet in circulation and this will take time to be agreed and embedded.
- There are so many changes going on at present that it would be useful to defer this one aspect of procurement.
- There needs to be time to align the ESPD and SPQQ.
- Time is needed for bidders to fully understand the implications and requirements of the new Act.

Three Statutory Organisations noted there is a need to consider whether it will cause confusion if the ESPD is adopted by other European countries before it is adopted in Scotland; and an executive agency / NDPB respondent commented on the need to ensure that Scotland is not disadvantaged if other European countries adopt the ESPD earlier.

There were also a small number of requests for guidance or support on implementation of the ESPD.

Two executive agency / NDPB respondents suggested that consideration needs to be given to other legislation, namely, Digital Transformation Planning Scotland Strategy and the Scotland's Digital Future: Delivery of Public Services Strategy. The same two organisations also asked if ESPD applies to Regulated procurement and whether it will be necessary for sub-OJEU activity.

Of the 14 organisations – mainly private sector organisations or representative bodies – disagreeing with this proposal, a key theme was that ESPD should be implemented as quickly as possible, as this will help to make procurement easier

for businesses. The ESPD was seen by these organisations as a means by which the burden on businesses in completing lengthy and often repetitive PQQs could be reduced, for example, in reducing the time that suppliers and SMEs have to provide information to numerous contracting authorities or in speeding up the tender process.

The Directives also say that when a public body already holds documents from a business, the business should not have to send these documents to the public body again. The Scottish Government can delay this provision coming into force until 18 October 2018. As with the ESPD, the Scottish Government thinks it would be sensible to delay this to give public bodies time to prepare and change their systems.

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.

Sixty-one agreed while 21 disagreed.

Of the 83 respondents who provided commentary on this question, most gave largely the same response as at the previous question. The key reason given by many who supported a delay was that time is needed to enable businesses to plan and prepare systems in line with the requirements of the Directive. This comment came from most sub-groups of respondent. Again, there were a small number of requests for guidance or support, or for links into other strategies.

Of the 21 respondents disagreeing with the delay, the key comments were that this should not need to take as long as three years to implement or that the bureaucratic burden placed on businesses should be reduced as quickly as possible. A small number of these organisations also noted that public bodies should already be well enough organised to be able to avoid asking for the same information more than once.

E-Certis

E-Certis will provide online information about the types of certificates and documents which businesses might be asked to provide in each Member State of the EU to demonstrate they meet the criteria needed to bid for a contract. Article 61 of the Public Procurement Directive says that public bodies should mainly ask for certificates or documents that are included in e-Certis. The Scottish Government can choose to delay the deadline for public bodies to have to use e-Certis until 18 October 2018 and is considering deferring this obligation on public bodies to allow time to prepare for this change.

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

Seventy-five respondents agreed that the obligation on public bodies to use e-Certis should be deferred until October 2018. Three disagreed and two made other comments.

Seventy-eight respondents commented further on this question and the key reason given for agreement to defer this echoed that provided in the consultation paper; namely, that time is needed for organisations to adapt to the new regime or to embed new ways of working and systems that accommodate this.

Once again, a small number of respondents commented that businesses will need support to help with the obligation to use e-Certis. A small number of respondents also noted that time is needed for e-Certis to align with other systems such as ESPD, SPQQ or PCS.

Of the three organisations disagreeing with the option to defer the obligation on public bodies to use e-Certis, comments were that this should be introduced as quickly as possible, or that because it will provide clarity on various issues, it makes sense to introduce this quickly.

Award notices when calling-off a framework

The consultation paper noted that the Act says that public bodies have to publish award notices for call-off contracts that are worth at least £50,000 for goods and services and at least £2 million for works, on the Public Contracts Scotland website. However, this Act does not apply to utilities contracts. The Scottish Government thinks that call-off contracts which are worth more than the relevant threshold set out in Article 15 of the Utilities Directive should also be published.

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

Fifty-six respondents agreed that this option should be adopted for utilities contracts, three disagreed and four made other comments.

Sixty-one respondents commented on this question and once again, of those who provided commentary, there was broad agreement with the reasons provided in the consultation paper. Many of those agreeing noted that this would promote consistency and uniformity as well as fairness.

A small number of consultees, mainly statutory organisations noted they did not have a view on this and three statutory organisations commented they did not understand the implications of this as the question was not worded clearly.

Only two consultees who disagreed with this option provided any additional commentary; one noting they were unsure as to who this would benefit, and the other noted that any perceived increased transparency would be negligible against the administrative burden placed on the contracting authority.

Dynamic purchasing systems

The consultation paper noted that the new Public Procurement Directive simplifies the rules around how a dynamic purchasing system (DPS) will work. Section 7 of the Act allows Scottish Ministers to introduce regulations about DPS for procurements regulated under the Act.

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

Seventy-one respondents said 'yes', one said no and one made another comment.

Fifty respondents also opted to provide additional commentary to explain the reason for their response. A significant number, many of which were local authorities, noted that this would be a useful addition to the procurement toolkit or that it should be available as an option in the procurement toolkit. A small number of respondents also noted other advantages to dynamic purchasing systems in respect of regulated procurements and these included:

- These will offer flexibility.
- They will provide consistency, clarity or simplification.
- They will allow lower value regulated procurements to benefit from the advantages of DPS.

While most of those provided a 'yes' response to this question, a significant number of these respondents provided qualifying commentary, most of whom noted that support and guidance in using the tool will be needed. Examples given included the need for when and how to implement a DPS or the types of procurement for which this procedure is suitable. One organisation in the private sector commented: "In certain circumstances this process can provide a useful 'live' framework option, to allow new providers to enter the market, however there is a need for some robust guidance around how a DPS can and cannot be used as the public sector is very unclear on how to undertake this option."

Three statutory organisations specifically commented on the need to illustrate the use of DPSs by the use of examples in guidance.

Three organisations within the NHS sector noted that the cost effectiveness of this approach may be difficult to show a positive benefit. A small number of organisations were also concerned that this approach could disadvantage suppliers, specifically SMEs. The one local authority saying 'no' noted that this would disadvantage SMEs and cause additional administrative work.

The consultation paper also noted that the Scottish Government proposes to extend those provisions in relation to DPSs, which are contained in Article 34 of the Public Procurement Directive, to lower valued regulated procurements, in order to provide purchasers with an additional tool to support their procurement activity.

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?

Sixty-six respondents said 'yes' while six respondents replied 'no'. Forty-eight then went on to provide additional commentary to support their answer.

Of those replying 'yes' to this question, a key comment from many respondents – many of which were local authorities – was that this would offer consistency of approach. A small number also commented that this could be a useful additional option in the procurement toolkit.

Other advantages were:

- This would offer improved flexibility.
- This will provide clarity.
- It will make things legislatively simple.
- It will help to reduce costs and bureaucracy for smaller contracts.

A small number of organisations noted that the same principles should apply below and above the EU threshold so there is a standardised approach in place for all DPS procurements.

A small number of respondents made qualifying comments, the key comment being that there needs to be training and support offered or the DPS needs to be better explained in terms of policy guidance and practice.

Of the six respondents replying 'no', a local authority had concerns that this approach may disadvantage SMEs or cause additional administrative burdens. A representative body for professionals and a private sector organisation commented that Article 34 should not be applied to regulated procurements.

Summary : Rules about communication

There was majority support from respondents for:

- Continuing 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.
- The establishment of an overall confidentiality and security framework which individual public bodies would use to inform their own approach to the security handling of electronic communication.
- Maximising the time available to implement fully electronic procurement processes and deferring the requirement for full electronic communication for the maximum permissible time.
- All communication about concession contracts in a procurement exercise should be by electronic means.
- Public bodies to retain the flexibility to decide when the use of electronic catalogues is appropriate.
- Deferring the requirement to provide the European Single Procurement Document in electronic form only until 18 April 2018.
- Deferring until October 2018 the provision that says businesses should not have to submit supporting documents where the public body awarding the contract holds them.
- Deferring the obligation on public sector bodies to use e-Certis until October 2018.
- Publishing award notices for call-off contracts, which are worth more than the relevant threshold set out in Article 15 of the Utilities Directive.

- Have dynamic purchasing systems as a tool for purchasers in respect of regulated procurements.
- Extending provisions in the Public Procurement Directive in relation to dynamic purchasing systems (DPS) to lower value regulated procurements.

Across responses to all these questions there were requests for time to allow organisations to adapt to new ways of working and embed new systems to allow change to their working practices.

There were requests from some respondents for guidance, support and training to be provided. There were also some concerns that SMEs could be disadvantaged by these changes.

Central purchasing bodies

Organisations which purchase things on behalf of more than one public body are called central purchasing bodies. In Scotland there are four of these and together, they are known as Centres of Expertise.

Central purchasing bodies in Scotland

The consultation paper noted that three decisions need to be taken in relation to central purchasing bodies, which apply to public contracts and utilities contracts, but not to concession contracts. The first decision is whether or not to allow public bodies to ask central purchasing bodies to buy goods and services for them. The second decision is whether or not to allow public bodies to buy goods, services and works using dynamic purchasing systems or framework agreements put in place by central purchasing bodies.

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?

There were 85 responses to this question, almost all (84) of which agreed that public bodies in Scotland should be allowed to use central purchasing bodies as described in this section of the consultation paper. Only one organisation disagreed with this.

The greatest number of organisations commented that this allows flexibility for organisations to decide whether to use a central purchasing body or not. As noted by one executive agency / NDPB: “There are marked differences of organisational activity within the Central Government sector which perhaps do not lend themselves as readily to central purchasing body activity. Central purchasing bodies also do not have the organisational understanding, responsiveness, or resource model to flexibly meet local objectives across the spectrum of procurement conducted”.

Nine organisations, primarily local authorities noted that central purchasing bodies are an important part of strategic procurement improvement and offer best value in terms of efficiencies and savings, to the public bodies using them. A further nine organisations – mostly local authorities and executive agency / NDPBs – commented that central purchasing bodies can offer savings for public bodies and are a useful resource. In the words of one local authority: “The Council strongly agree that public bodies must be able to purchase from central purchasing bodies (Scotland Excel, APUC, ESPO and Scottish Procurement in particular) in order to continue to benefit from economies of scale. Centralised expertise allows for development of “fit for purpose” contracts and central purchasing bodies provide invaluable assistance to public bodies in terms of contract management”.

Once again, there were a small number of requests for guidance on usage of central purchasing bodies or access to information about who can use the frameworks.

A similar number of respondents made reference to the use of specific sectoral central purchasing bodies, pointing out that some sectors are very different and need central purchasing bodies with expertise and experience in that specific sector.

The third decision faced by the Scottish Government is whether or not to force public bodies to use central purchasing bodies in some situations and allow public bodies to choose whether or not to use them on a case-by-case basis. There is some concern that forcing public bodies to use central purchasing bodies might not allow sufficient flexibility to meet their own local objectives or to deliver value for money in all instances.

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?

Eighty respondents agreed that public bodies should be allowed to exercise discretion as to when and which central purchasing body to use, six disagreed. Sixty-two respondents provided further commentary.

A majority of those providing comments noted that it is sensible to offer discretion to public bodies or that decisions should be based on a case-by-case basis based on best value. Several respondents – primarily local authorities – also made reference to the need for local arrangements for specific contracts. A small number of respondents also commented that central purchasing bodies do not always have the necessary procurement expertise in specific sectors or that they do not always offer value for money. A small number simply noted that the current system works well.

A few respondents also noted their support for discretion to be offered but felt that a public body should also be required to demonstrate it has achieved best value for money when not using a central purchasing body.

Other comments, each made by small numbers of respondents were that:

- The central purchasing body should be informed when they are not used so that they can consider including the necessary specific expertise in further frameworks.
- Guidelines will be required to note when it is appropriate or otherwise to use central purchasing bodies.
- There is a need to ensure inclusion of a wide range of larger and smaller suppliers in frameworks.

Of those disagreeing, only three (private sector organisations or representative bodies of private sector organisations) provided any additional commentary. Two of these noted that the use of central purchasing bodies should be required unless a public body can demonstrate it can get better value for money elsewhere; the other commented that a mandatory system ensures consistency in standards and a centralised knowledge base that is accessible to all.

Central purchasing bodies in other countries

The consultation paper noted that the new Public Procurement Directive at Article 39(2) allows public bodies to use central purchasing bodies in other EU countries. The Scottish Government is keen to make the European market as open as possible to allow Scottish businesses to win work in other countries. There may also be occasions when a Scottish public body could obtain best value for money by procuring from a foreign central purchasing body. Question 57 asked;

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.

Sixty-six respondents agreed that the Scottish Government should not restrict access by Scottish public bodies to European centralised purchasing activities. Nine respondents disagreed with this proposal. Sixty-one respondents went on to provide additional commentary in support of their response.

Many of those in support of this proposal and providing further commentary noted that this widens options, choice and opportunities and allows more competition, with the aim of achieving best value for money. A small number also noted that this would allow Scottish companies to bid for and / or win European contracts.

A small number of respondents also made specific reference to this offering greater flexibility to gain value for money or that it increases flexibility in procurement options that are available.

Some respondents also noted that this is in line with the principles of the European Union. Three local authorities commented that in reality this may have little impact in Scotland as European centralised purchasing bodies are relatively unknown to Scottish purchasing bodies and thus are not likely to be widely used.

There were a small number of qualifying comments or concerns noted by a few respondents. These included:

- The potential for Scottish firms to be disadvantaged by this move.
- The potential for adverse impacts and the need for monitoring to ensure there are no adverse impacts.
- The need to demonstrate the benefits of this approach.

From the nine respondents who disagreed with this proposal, there was one key concern; namely, that there is no assurance that public bodies will apply best practice or that activities will promote community benefits within Scotland.

There were suggestions from three organisations in the private sector (a representative body and two businesses) that the Scottish Government should undertake consultation with business representatives prior to any decision being taken.

There were also a small number of comments that this could disadvantage some Scottish businesses, particularly SMEs; and a perception that only large UK and Scottish businesses would be appointed to European frameworks.

Summary : Central purchasing bodies

A majority of respondents agreed that:

- The Scottish Government should continue to allow public bodies in Scotland to use central purchasing bodies as described in the consultation paper.
- The Scottish Government 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.
- The Scottish Government should allow for Scottish public bodies procuring from a foreign central purchasing body.

A key theme raised by respondents to these questions was the need for flexibility to meet local objectives and achieve value for money, although the potential for central purchasing bodies to achieve efficiencies and savings was noted.

There were some concerns that SMEs could be disadvantaged.

Enforcement and monitoring

The consultation paper noted that Article 83 of the Public Procurement Directive, Article 99 of the Utilities Directive and Article 45 of the Concessions Directive require that one or more organisations in Scotland should monitor how the procurement rules are being followed and publish the results of any monitoring. There is also a requirement for public contracts and utilities contracts to be reported on every three years to the European Commission.

Options

The Scottish Government has to make a choice on how to meet these requirements and which organisation(s) should be nominated to carry out monitoring. It would be possible to create a new public body although this would require new resources to establish. Another option would be to use and develop existing functions, for example, the Single Point of Enquiry (SPoE).

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.

Sixty-nine respondents agreed and 18 disagreed that the monitoring and enforcement body for Scotland should be the Scottish Ministers, acting through the existing Single Point of Enquiry. A further four respondents provided a neutral answer. Seventy-two then provided additional comments in support of their response.

Of those agreeing with this proposal, over half noted that it would be sensible to use the Single Point of Enquiry as it is already an established body, or that it would make the most of the existing expertise and resources rather than channel new resources into a new body. While this was supported across almost all sub-groups of respondent, around half of those supporting this option were local authorities.

However, the responses to this question demonstrate concern from some respondents over the issue of independent scrutiny, with some of those agreeing with the proposal also noting the need to separate the monitoring and audit role from that of giving advice and information. A small number of respondents wanted to see an independent scrutiny body or an ombudsman or tribunal to be put in place. For example, one local authority respondent wondered how judicial independence would be managed if a complaint was made about a procuring body which formed part of central government. As noted by one local authority agreeing with this proposal: "We think it shouldn't be the SPoE in its current form. There would need to be a clear separation of responsibilities between its existing and proposed roles in order to reflect the fundamental new areas the body would require to be responsible for."

Most of those disagreeing and providing commentary in support of their response also commented that there would be a conflict of interest if there were not a separate body or noted the need for a body separate from Ministers to avoid conflict of interest. One third party organisation suggested a separation of powers with a tribunal with statutory powers to carry out investigations.

Two representative bodies of private organisations noted the monitoring of compliance would be needed.

Three representative bodies in the private or professional sectors also suggested a role modelled on the Federal Procurement Ombudsman in Canada, and provided information on how such a body could be structured and its remit.

Remedies Directives

The consultation paper noted that the Regulations that will transpose the new Directives will also need to give effect to the associated EU directives on remedies. These Directives are given effect in the existing Public Contracts (Scotland) Regulations 2012 and Utilities Contracts (Scotland) Regulations 2012 by Part 9 Applications to the Court in each of the Regulations.

There needs to be a continued availability of a remedies regime. In setting out the provisions for remedies the Scottish Government could copy the approach taken in the existing Regulations, although some stakeholders have previously asked for a different approach to be taken in Scotland.

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.

Of the seventy-five respondents providing an answer to this question, more agreed (43) than disagreed (25); while seven provided a neutral response. Agreement and disagreement with this proposal came from across most sub-groups. Sixty-six respondents went on to provide commentary to support their response.

Of those agreeing that the Scottish Government should simply copy the provisions on applications to the court from the existing 2012 Regulations, most commented that the current system appears to be working or that it would be a waste of resources to create a new approach. A small number also commented that the existing system is understood well. There were concerns from one or two respondents that there would be an increase in challenges and appeals, thus creating delay in contract awards, if a new review body is established.

Of those providing a neutral response to this question, there was once again, reference to the Federal Procurement Ombudsman in Canada, and the need for a similar approach of an ombudsman to be adopted in Scotland. A small number of organisations were less concerned about the approach to be adopted, and simply noted a need for a robust and speedy system that offers a balance between providing remedies and ensuring the flow of contracts. There were some references to the low level of court action in comparison to the volume of public procurement activity.

Many of those disagreeing with the proposal noted the need for an additional review body in the dispute process that sits below the court.

A small number noted the need to move to a faster or improved system of remedies solutions, with some respondents commenting that the current process can be lengthy. In line with this, a small number of respondents commented that a new system could make things more simple and less time consuming.

Once again, there was a degree of concern that the current legal process can deter SMEs from making a challenge, with some comment that some suppliers have little confidence in the impartiality of the current process.

The Remedies Directives make specific provision for the establishment of an independent review body that reviews complaints regarding compliance with EU procurement law. The Scottish Government is considering the establishment of an administrative review body with statutory powers to act as the first point of escalation for complaints.

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

Fifty respondents agreed there is a need for a review body which sits beneath the national courts, 26 disagreed. Five respondents provided a neutral view and neither agreed or disagreed. Sixty-two went on to provide additional commentary in support of their response.

Of those in agreement with this proposal, a key theme was that this would resolve issues more quickly and effectively and reduce the need to use Sheriff Courts. A small number of respondents referred to the need for an ombudsman. There was also some reference to this being of benefit for lower value contracts and / or SMEs. There was also a preference from some statutory organisations for a tribunal rather than an administrative review body.

However, there were a number of qualifying comments made by respondents, which included;

- This needs to be a faster option than using the Sheriff court.
- This needs to be able to discourage speculative or malicious challenges.
- It might simply add another layer of bureaucracy and reduced inefficiency, particularly if there is still recourse to Sheriff court for a number of challenges.
- It would need sufficient powers to ensure it can deliver binding decisions.

A key theme from respondents, primarily from local authorities, opposed to the setting up of a review body that sits under the national courts was that the existing provision works well and has a clear defined process to be followed.

Some of the qualifying commentary from those in favour of this proposal was echoed by respondents not in favour, namely, that this could result in delays and increased costs, that there could be an increase in unnecessary challenges or appeals or that it would add another layer of bureaucracy. Some local authorities also noted that Sheriff courts currently offer the required level of expertise and scrutiny which would not be available from a new review body.

Question 61 then went on to ask,

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

Seventy-two respondents provided a response to this question. Views were relatively mixed, with 35 respondents in favour, and 29 against the establishment of

a review body as a tribunal within the Scottish tribunals system. Eight respondents provided a neutral response, neither in favour nor against this proposition.

Some of those who had not agreed with the establishment of a review body at the previous question still opted to provide a response at this question.

Forty-eight respondents provided commentary in support of their response.

Those in favour of this proposal noted a number of benefits, the key one being that this would provide quicker decision making. Alongside this, other benefits included that it would be less bureaucratic, it would be cheaper than using the court process, that it would be more accessible to businesses and might help to increase SME engagement in the procurement process overall. It was also seen to be a means of developing specialist expertise within the procurement process.

Regardless of whether respondents were in favour of this proposal or not, there were some calls for further consultation. There were also some queries in relation to the set up and composition of the review body, and the powers that this body would have.

There were some concerns over the potential this could create for an increased number of challenges to the procurement process, or that this could be expensive to set up.

The key comment emerging from those against this proposal was that the current system works well enough and that this change is not needed.

Question 62 went on to ask about another option that could be considered;

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

Seventy-five respondents opted to provide an answer to this question. As shown in the following table, 49 said 'no', compared to 18 who said 'yes'. Eight respondents gave a neutral answer. Among those responding, a far higher number of local authorities responded 'no' than 'yes' (21 compared to one who said 'yes').

Question 62: Do you think it should take some other form, for example, a Scottish Procurement Ombudsman?

	Yes	No	Other	No reply
Local authority (27)	1	21	1	4
Executive Agencies and NDPBs (13)	1	4	2	6
NHS (6)	-	5	-	1
Other statutory organisation (11)	1	5	-	5
Third sector / equality organisation (20)	1	2	-	17
Private sector organisation (18)	6	3	1	8
Representative body for third sector / equality organisations (12)	2	1	2	7
Representative body for private sector organisations (9)	2	2	1	4
Representative body for professionals (6)	-	3	-	3
Union (5)	-	-	-	5
Housing / Care (4)	3	1	-	-
Other (2)	1	-	1	-
Individuals (7)	-	2	-	5
TOTAL (140)	18	49	8	65

Fifty-three respondents went on to provide additional comments.

The key comment from those replying 'no' to this question was that they would prefer the option of a tribunal established within the Scottish tribunals system, created by the Tribunals (Scotland) Act 2014.

Five respondents, mostly local authorities, commented that existing channels should be utilised as a defined process is already in place; another five – again mostly local authorities – commented that the option to complain via the Scottish Public Sector Ombudsman already exists; and a small number noted that the existing process has the necessary expertise to perform this role. Other concerns noted by those replying 'no' included:

- This would be too costly to set up.
- This could lead to an increase in challenges or appeals; with some concern that these could be spurious and expensive.
- That this is not needed or not appropriate.
- This would simply add another layer of bureaucracy.

- A concern that there are a wide range of ombudsmen across the UK; and interpretation of the rules they are monitoring varies a lot, leading to a lack of cohesion in decision-making.

A small number of respondents also noted there needs to be further consultation and more information provided before a decision can be taken; for example, more information on the proposed powers.

While most sub-groups were represented among respondents replying 'yes' to this question, a significant number were from representative bodies and organisations in the private sector. Key reasons given in support of this, each by small numbers of respondents were that this is a proportionate approach to reduce the risk of excessive legal fees to public bodies, that it would provide a more specialist approach or that it would enable faster decision-making.

Three organisations outlined a number of roles that could be undertaken by a Scottish Procurement Ombudsman and these included:

- Being an independent review body to act in cases of non-compliance, and having powers to impose penalties in respect of non-compliance.
- Having statutory powers to require information in relation to procurement.
- Driving good practice in public sector procurement.
- Having the power to impose sanctions required by Remedies Directive.

However, some of these respondents noted that more consideration is needed before a decision can be taken. A small number of respondents commented that while they had no specific preference, they would like to see a robust and speedy process in place.

Summary : Enforcement and monitoring

There was majority agreement for:

- A monitoring and enforcement body for Scotland which is the Scottish Ministers, acting through the existing Single Point of Enquiry (SPoE). There were concerns over the issue of independent scrutiny and a conflict of interest, with some calls for the separation of a monitoring and audit role from that of giving advice and information.
- The Scottish Government to simply copy the provisions on applications to the court from the existing 2012 Regulations. There was some perception that the current system works well and that additional resources should not be spent on creating a new approach. Overall, a need was defined for a robust and speedy system.
- A review body that sits beneath the national courts. There was a perception that this would need to have sufficient powers to ensure binding decisions can be delivered and to avoid the need to still have recourse to the Sheriff court. However, there were some comments that the current system works well and has a clearly defined process to be followed.

Views were relatively split as to whether the review body should be established as a tribunal within the Scottish tribunals system.

There was a perception that this would provide quicker decision making and be cost efficient in comparison to the court process, although there are also concerns that this could lead to a higher number of challenges. There were again comments that the current system works well and does not need to be changed.

There was limited support for this to take some other form, for example, a Scottish Procurement Ombudsman, with 49 respondents against this option, and only 18 for.

Across these questions, there were some concerns that there could be an increase in the number of challenges and appeals if changes are introduced, and some comments that the existing structures work well and additional resource should not be spent in creating changes to the system.

Open contracting

The consultation paper noted that the Scottish Government is supportive of open contracting, that promotes openness and transparency in procurement and refers to practices which allow for increased disclosure and citizen participation in public contracting.

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?

Eighty-seven respondents provided commentary to this question, most of whom endorsed the principles of openness and transparency and / or the Scottish Government commitment to the principles of open contracting and commitment to work with civil society and wider stakeholder groups to improve transparency in procurement practices.

A small number of organisations – mostly statutory organisations – commented that the Scottish model of procurement already embraces the spirit of open contracting and that no further legislation is needed.

There were a number of concerns stated, each by relatively small numbers of respondents (10 or fewer). A number of respondents noted the need to consider commercial sensitivities and confidentiality when providing information in relation to the procurement process. Some others commented on the need to strike a balance between what constitutes value to the public and the amount of resources needed to produce information which may in actuality offer little benefit to the public, with some suggestion for proportionality in information provision in order to achieve value for money.

There were also concerns from some respondents that this will place an additional burden on public bodies in terms of resources and reporting, and a small number of respondents noted that there could be an unrealistic expectation of what can be delivered within available budgets. Indeed, once again, there were some references to SMEs being at a disadvantage in this process.

Allied to this, there were some calls for public bodies to have a degree of discretion in terms of what information they have to provide, with some commenting that the Freedom of Information (Scotland) Act (FoISA) already allows for the general public to obtain information they request. There were one or two calls for a balance between openness and transparency and rigorous and robust regulation.

Summary : Open contracting

There was broad support for the principles of openness and transparency and for the Scottish Government commitment to open contracting and working with civil society and wider stakeholder groups to improve transparency in procurement practices. There was some concern over the issue of commercial sensitivities and confidentiality when providing information and some requests for proportionality.

Other comments

Comments on Equalities Impact Assessments (EQIA)

Five respondents commented on Equalities Impact Assessments.

One executive body / NDPB along with two NHS respondents felt that the definition of a supported business may not be clear enough. The executive body / NDPB commented: “The move from a very clearly defined set of circumstances which previously established what a supported business was to the looser definition above could both advantage and disadvantage people with protected characteristics under the Equality Act 2010.” While the NHS bodies welcomed a wider definition, they and the other respondent felt that a fuller Equality Impact Assessment was needed.

A representative body from the third / equality sector voiced concerns in respect of proposals on ‘A potential supplier’s conduct in business’, and in particular any possible exclusion of businesses which supply “Jewish faith related goods and services, for example, kosher foods”. This respondent was concerned over the legality and impact of wording relating to “assets in illegal settlements’ as this would exclude any business active in Israel or the Gaza Strip. They added: “In this regard we also wonder about the relevance of the application of the associated (partial) Equality Impact Assessment”.

A third / equality sector organisation asked for additional information regarding public bodies ‘opting out’ of Community Benefit Clauses. They said: “Equality and access are factors to be considered across every area of society and any exemption from Community Benefit Clauses should have appropriate supporting evidence (eg. EqIA, direct engagement with equality based organisations)”.

Comments on Business Regulatory Impact Assessment (BRIA)

Three respondents commented on the Business Regulatory Impact Assessment.

One executive body / NDPB, while supportive of reform, felt that the proposals would increase the costs and burden on contracting authorities adding: “The Business & Regulatory Impact Assessment indicates that the costs to individual authorities will be minimal. There does not appear to be any evidence to substantiate this claim and we are concerned that the implementation of new rules and regulations will add more costs than envisaged.”

A local authority commented on the need to assess the impact of the Concessions Directive saying: “While the UK Government is of the view that this will have limited impact, the European Commission’s own official Impact Assessment estimates that there are 8,000 PPPs in the UK liable to be regarded as ‘concessions’ as defined in the new Directive”. They asked the Scottish Government to assess whether PPPs and PFI need to be modified to comply with the Concessions Directive.

One statutory body commented on the need to take account of the costs of evidencing Community Benefit; they felt that this could have an added administration cost which would then be passed on from contractors to the purchasing body.

Comments on the Living Wage

Thirty-four respondents commented on the Living Wage in various answers to the consultation questions and, in addition, five of these respondents commented on the Living Wage in their supplementary information. The main theme from these responses, from an organisation from the third / equality group along with three union respondents, was support for businesses that do not pay the minimum wage to be excluded from public contracts. There were also calls for “a duty on public bodies to ensure that all contracted staff are paid at least the Living Wage” (third / equality). A representative body for the third / equality sector welcomed the fact that procurement will be used to tackle poverty and inequalities and commented that in a move away from ‘lowest cost’ procurement, the Living Wage is one tool that can help to bring about social equality.

In addition, seven respondents (from the union and third / equality groups) voiced their support for the ‘10 asks’ on procurement; a set of priorities produced by a group of civil society coalitions that call for a ‘strong, healthy and just society, living within climate limits.’ These ‘asks’ include the Living Wage and, in full, call for action in the following priority areas:

- Sustainable and ethical intent.
- A strong healthy and just society.
- Reducing greenhouse gas emissions.
- Person-centred procurement.
- Scottish living wage.
- Blacklisting / umbrella companies.
- Employment standards.
- Tax dodging.
- Ethical and fair trade.
- Promoting positive social outcomes.

General comments

Forty-six responses included other comments. These were predominantly background information on the respondent’s organisation or supplementary information or documents in support of a respondent’s views.

There were comments that some questions were difficult to answer; for example where a yes or no answer was sought to a question with multiple parts, or where a question included a negative (for example ‘We believe that contracts should not be awarded on the basis of price or cost alone? Do you agree or disagree?’) In some cases, respondents felt more detail was needed before they could reply.

Several respondents voiced their thanks for being invited to respond or welcomed the consultation, there was also some welcome for the use of plain English throughout the document.

Conclusions

On the whole, the response to the consultation was very positive, with the majority of respondents agreeing with the proposals put forward in the consultation document.

The consultation contained a large number of very specific questions and not all respondents addressed all questions; some commented only on those questions or sections of relevance to their organisation, sector or field of interest.

There was some difference in focus across the different respondent groups. For example:

- Local authorities were keen to ensure no additional bureaucracy or costs would be incurred from any proposals and also wanted the option of local arrangements to allow them to meet the needs of their own areas.
- NHS bodies, in particular, were keen to see procedural guidance put in place, particularly to ensure consistency across areas and bodies.
- Many third sector and union respondents commented on payment of the Living Wage, with several also voicing their opposition to zero hours contracts and the need for public procurement to be used to ensure the fair treatment of workers. These groups also focussed on the need to use public procurement to tackle tax evasion or avoidance and other breaches. The need for uncomplicated rules and contracts were also important to respondents in the third sector / equality group as was ensuring that service users are consulted and their needs considered.
- Private companies, as well as others, wanted to ensure fairness and equity of treatment. The need to ensure that no additional burdens are placed on bidders (short timescales, costs or additional bureaucracy for example) also featured in responses from this group.

While, on average, around two-thirds of the total number of respondents gave an answer at each question, one question in particular attracted widespread interest. This related to whether contracts should be awarded on the basis of price or cost alone and was answered by 115 out of the 140 respondents. A large majority felt that contracts should not be awarded on the basis of price or cost alone, although a sizeable number felt they should. This was largely due to a split in opinion amongst local authorities where slightly more felt contracts should not be awarded on the basis of cost or price and were more likely to advocate using existing systems, processes and structures than introducing new ones.

There were very few areas where large numbers disagreed with the proposal or position put forward in the consultation document.

- The definition of a “disadvantaged person” prompted mixed reactions (although more agreed than disagreed with the definition proposed) and was widely considered to be very broad. Its broadness was felt to have both benefits and drawbacks. While all union and representative bodies for private sector respondents who addressed this question agreed with the definition proposed, other groups showed mixed opinions. More local

authority and executive agency / NDPB respondents disagreed than agreed with the proposed definition.

- There was also some difference of opinion as to whether a public body should 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. While more said 'yes' a public body should be allowed not to exclude, in some respondent groups more said 'no' than said 'yes'. These included NHS respondents, representative bodies for third sector / equality and for private sector organisations and unions. Those who supported the proposal commented on the need for flexibility and proportionality. Many of those who opposed the proposal said that they could not envisage any circumstances that would make this option necessary.
- There was also a difference in opinion as to whether the rules in the Directives about modifying contracts should not apply to contracts under the Act. While more felt agreed that they should not, a sizeable number said they should. Those who felt they should not, included many executive agencies / NDPBs and statutory organisations with comments that applying the rule to lower value contracts would increase the burden on organisations. More local authorities said that they should apply; one main reason was the need for consistency.
- There were mixed views as to whether a review body should be established as a tribunal within the Scottish tribunals system. And, in addition, there were mixed views as to whether a review body should take the form of a Tribunal, although more supported this type of body than supported a Scottish Procurement Ombudsman. Many of those respondents who did support a Scottish Procurement Ombudsman were from the private sector.

The main themes to emerge, across respondent groups and at the majority of the question areas, were the need for consistency, proportionality and transparency.

While most respondents supported allowing public bodies some flexibility or discretion they also stressed that this would need to be accompanied by clear guidance so that this discretion is applied consistently and fairly.

Respondents also stressed the need for clear guidance to ensure that public bodies did not become liable to legal challenges because of decisions made under the new rules.

Appendix 1 – Consultation questions

Statutory guidance – Organisational Procurement Strategy

Q1 What are your views about what should be included in this Statutory Guidance? Please explain your answer.

Statutory Guidance – Sustainable Procurement Duty

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

Statutory Guidance – Community Benefits in Procurement

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

Principles of procurement

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.

Reserved contracts for supported businesses

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

Disadvantaged workers

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”? If not, what do you think the definition should be and why?

Reserved contracts for health, social and cultural services

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.

Labels

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.

Technical specifications

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.

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.

Breaking contracts into smaller lots

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.

Asking for information about sub-contractors

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?

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?

Q14 We believe that we should not apply similar provisions on subcontracting to contracts covered by the Act, as we do not think this would be proportionate. Do you agree or disagree with this?

Paying sub-contractors directly

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 subcontractors 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?

Selection criteria

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.

Groups of businesses

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.

Criminal convictions

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.

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?

Tax evasion

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?

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?

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?

Bankrupt or insolvent businesses

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?

Q24 Should the same rules apply to EU regulated contracts and to lower value regulated contracts? Please explain your answer.

Exceptional circumstances

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.

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

Other grounds for exclusion

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.

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

The length of time a business can be excluded

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

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

Excluding sub-contractors

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

Statutory guidance - Selection of tenderers and award of contracts

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

'Light-touch' regime

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.

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.

Statutory guidance – procurements for health or social care services

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

Using a prior information notice as a call for competition

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.

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.

Negotiated procedure without prior publication

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.

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.

Reduced timescales in a restricted procedure

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.

Examining tenders before verifying qualification criteria

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.

Incomplete or wrong information

Q42 Should public bodies be allowed to ask for supplementary or missing information and to ask a company to provide clarification of their bid?

Modifying contracts

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.

Electronic communication

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.

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.

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?

Electronic communication in concession contracts

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

Electronic catalogues

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.

European single procurement 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.

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.

E-Certis

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

Award notices when calling-off a framework

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

Dynamic purchasing systems

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

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?

Central purchasing bodies in Scotland

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?

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?

Central purchasing bodies in other countries

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.

Options

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.

Remedies Directives

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.

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

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

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

Open contracting

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?

Appendix 2 – Respondent list

Executive Agencies and NDPBs

Scottish Enterprise

Scottish Natural Heritage

Sport Scotland

Forestry Commission

Scottish Qualifications Authority

Construction Scotland Limited

EHRC

Scottish Prison Service

Scottish Prison Service (Enterprise and Employment)

Scottish Legal Aid Board on behalf of Central Government Sector

Highlands and Islands Enterprise

Scottish Social Services Council (SSSC)

Scottish Water

Housing / Care

Hanover (Scotland) Housing Association

Loreburn Housing Association

Bield Housing and Care

Caledonia Housing Association

Local authority

Moray Council

The Highland Council

South Ayrshire Council

South Lanarkshire Council

Royal Strathclyde Blindcraft Industries (RSBi)

Comhairle nan Eilean Siar

COSLA

Scotland Excel

Falkirk Council

Shetland Islands Council

Glasgow City Council

East Ayrshire Council

Fife Council

Tayside Procurement Consortium on behalf of Angus Council, Dundee City Council, Perth & Kinross Council and Tayside Contracts

Orkney Islands Council

North Ayrshire Council

Stirling Council

Argyll and Bute Council

North Lanarkshire Council

Scottish Borders Council

Aberdeen City Council

Aberdeenshire Council

City of Edinburgh Council

Renfrewshire Council

West Lothian Council

East Lothian Council

West Dunbartonshire Council

NHS

Health Procurement Delivery Group (NSS)

Scottish Ambulance Service

NHS National Services Scotland

NHS Tayside

NHS Lothian

NHS Greater Glasgow and Clyde (Procurement Steering Group)

Other

Scottish Council for Development and Industry (SCDI)

Community Resources Network Scotland (CRNS)

Private sector organisation

MM Miler - Building & Civil Engineering Contractors

Anderson Bell Christie Architects

Fair Trade Scotland Ltd

Lightways (Contractors) Limited

Procurement for Housing

Janssen-Cilag Ltd

SSE plc

Whistl UK Ltd

Keppie Design

Dunira Strategy

Keela (part of the Ardmel Group)

The Institute for Collaborative Working - Scotland

Scottish Building Federation

BiP Solution Limited

Pfizer Ltd

MacRoberts LLP

BT Group plc

Morrison Construction Scotland

Representative body for private sector organisations

SELECT

Specialist Engineering Contractors' Group Scotland

Civil Engineering Contractors Association Scotland

Business Services Association (BSA)

National Federation of Roofing Contractors

Market Research Society

Scottish Contractors Group (represents major construction contractors)

Federation of Small Businesses

British Generic Manufacturers Association

Representative body for professionals

The Law Society of Scotland

Association of Transport Co-Ordinating Officers (Scotland)

Association of Consultancy and Engineering

Procurement Lawyers Association (PLA)

Royal Incorporation of Architects in Scotland

The Faculty of Advocates

Representative body for third sector / equality organisations

Camphill Scotland

Ready for Business Procurement LLP

Community Transport Association

CCPS - Coalition of Care and Support Providers in Scotland

Voluntary Action South Lanarkshire

Scottish Independent Advocacy Alliance
Glasgow Jewish Representative Council
Scottish Federation of Housing Associations
East Dunbartonshire Voluntary Action
SCVO

Social Firms Scotland
Sporta (Sport and Recreation Trust Association)

Other statutory organisation

Competition and Markets Authority
Advanced Procurement for Universities and Colleges (APUC)
Strathclyde Partnership for Transport
Edinburgh University
University of Stirling
Glasgow Regional Procurement Team (Glasgow Kelvin College, City of Glasgow College and Glasgow Clyde College)
West College Scotland
Police Scotland
Scottish Parliamentary Corporate Body
LHC
Scottish Information Commissioner

Third sector / equality organisation

Mytime Active Ltd
Highland BlindCraft
Scottish Friends of Palestine
British Association for Supported Employment
Haven Enterprises, Haven Sign Factory
Community Union
Stop Climate Chaos Scotland
SCIAF (Scottish Catholic International Aid Fund)
Citizens Advice Scotland
Link Group Ltd
Scottish Fair Trade Forum
Royal National Institute of Blind People (RNIB) Scotland
Soil Association Scotland

Coalition for Racial Equality and Rights

SEAG (South Edinburgh Amenities Group - Community Transport)

Nourish Scotland

Scottish Disability Equality Forum

Living Wage Campaign

Wheatley Group

WWF Scotland

Unions

UNISON Scotland

GMB Trade Union

Unite the Union

NUS Scotland

STUC

7 individuals

Appendix 3 – Results from closed questions

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?

	Agree	Disagree	Other*	No Reply
Local authority (27)	22	3	-	2
Executive Agencies and NDPBs (13)	7	-	-	6
NHS (6)	6	-	-	-
Other statutory organisation (11)	9	-	-	2
Third sector / equality organisation (20)	9	-	-	11
Private sector organisation (18)	13	2	-	3
Representative body for third sector / equality organisations (12)	8	-	-	4
Representative body for private sector organisations (9)	4	1	-	4
Representative body for professionals (6)	5	-	-	1
Union (5)	5	-	-	-
Housing / Care (4)	4	-	-	-
Other (2)	1	-	-	1
Individuals (7)	2	-	1	4
TOTAL (140)	95	6	1	38

*Respondents included in the 'Other' column commented on the question but did not state their agreement or disagreement.

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

	Yes	No	Other	No Reply
Local authority (27)	26	1	-	-
Executive Agencies and NDPBs (13)	9	-	-	4
NHS (6)	5	1	-	-
Other statutory organisation (11)	8	-	-	3
Third sector / equality organisation (20)	10	-	-	10
Private sector organisation (18)	8	3	-	7
Representative body for third sector / equality organisations (12)	8	-	-	4
Representative body for private sector organisations (9)	3	-	1	5
Representative body for professionals (6)	2	1	-	3
Union (5)	4	-	-	1
Housing / Care (4)	2	1	-	1
Other (2)	2	-	-	-
Individuals (7)	4	-	-	3
TOTAL (140)	91	7	1	41

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	Other	No Reply
Local authority (27)	10	13	3	1
Executive Agencies and NDPBs (13)	3	4	2	4
NHS (6)	4	1	1	-
Other statutory organisation (11)	5	3	-	3
Third sector / equality organisation (20)	4	1	-	15
Private sector organisation (18)	6	5	-	7
Representative body for third sector / equality organisations (12)	6	2	-	4
Representative body for private sector organisations (9)	2	-	-	7
Representative body for professionals (6)	3	1	-	2
Union (5)	4	-	-	1
Housing / Care (4)	1	1	-	2
Other (2)	1	1	-	-
Individuals (7)	2	1	1	3
TOTAL (140)	51	33	7	49

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?				
	Adv.	Disadv.	Other	No Reply
Local authority (27)	12	4	9	2
Executive Agencies and NDPBs (13)	3	-	3	7
NHS (6)	1	-	3	2
Other statutory organisation (11)	4	1	3	3
Third sector / equality organisation (20)	1	-	3	16
Private sector organisation (18)	1	3	-	14
Representative body for third sector / equality organisations (12)	3	1	3	5
Representative body for private sector organisations (9)	-	-	1	8
Representative body for professionals (6)	1	1	1	3
Union (5)	-	1	3	1
Housing / Care (4)	-	-	-	4
Other (2)	1	-	-	1
Individuals (7)	1	1	1	4
TOTAL (140)	28	12	30	70

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?				
	Yes	No	Other	No Reply
Local authority (27)	25	-	-	2
Executive Agencies and NDPBs (13)	4	3	-	6
NHS (6)	4	1	1	-
Other statutory organisation (11)	8	-	-	3
Third sector / equality organisation (20)	7	-	1	12
Private sector organisation (18)	7	2	-	9
Representative body for third sector / equality organisations (12)	3	3	-	6
Representative body for private sector organisations (9)	3	-	1	5
Representative body for professionals (6)	2	1	-	3
Union (5)	4	-	-	1
Housing / Care (4)	3	-	-	1
Other (2)	1	-	-	1
Individuals (7)	2	-	1	4
TOTAL (140)	73	10	4	53

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?				
	Yes	No	Other	No Reply
Local authority (27)	25	-	-	2
Executive Agencies and NDPBs (13)	6	1	-	6
NHS (6)	6	-	-	-
Other statutory organisation (11)	8	-	-	3
Third sector / equality organisation (20)	5	1	1	13
Private sector organisation (18)	8	3	1	6
Representative body for third sector / equality organisations (12)	3	3	-	6
Representative body for private sector organisations (9)	5	1	-	3
Representative body for professionals (6)	3	2	-	1
Union (5)	4	-	-	1
Housing / Care (4)	3	-	-	1
Other (2)	1	-	-	1
Individuals (7)	2	-	1	4
TOTAL (140)	79	11	3	47

Q10. We believe that contracts should not be awarded on the basis of price or cost alone? Do you agree or disagree?				
	Agree	Disagree	Other	No Reply
Local authority (27)	16	10	-	1
Executive Agencies and NDPBs (13)	4	4	-	5
NHS (6)	6	-	-	-
Other statutory organisation (11)	6	1	1	3
Third sector / equality organisation (20)	11	1	-	8
Private sector organisation (18)	13	3	-	2
Representative body for third sector / equality organisations (12)	9	1	1	1
Representative body for private sector organisations (9)	8	-	-	1
Representative body for professionals (6)	3	2	1	-
Union (5)	5	-	-	-
Housing / Care (4)	1	3	-	-
Other (2)	2	-	-	-
Individuals (7)	2	1	-	4
TOTAL (140)	86	26	3	25

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?				
	Agree	Disagree	Other	No Reply
Local authority (27)	25	-	-	2
Executive Agencies and NDPBs (13)	7	-	-	6
NHS (6)	6	-	-	-
Other statutory organisation (11)	8	-	-	3
Third sector / equality organisation (20)	7	1	-	12
Private sector organisation (18)	13	2	-	3
Representative body for third sector / equality organisations (12)	6	1	1	4
Representative body for private sector organisations (9)	8	-	1	-
Representative body for professionals (6)	6	-	-	-
Union (5)	4	-	-	1
Housing / Care (4)	4	-	-	-
Other (2)	2	-	-	-
Individuals (7)	3	-	-	4
TOTAL (140)	99	4	2	35

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	Other	No Reply
Local authority (27)	24	1	-	2
Executive Agencies and NDPBs (13)	5	1	1	6
NHS (6)	6	-	-	-
Other statutory organisation (11)	7	1	1	2
Third sector / equality organisation (20)	4	1	-	15
Private sector organisation (18)	10	2	-	6
Representative body for third sector / equality organisations (12)	4	1	-	7
Representative body for private sector organisations (9)	4	2	1	2
Representative body for professionals (6)	2	2	-	2
Union (5)	-	4	-	1
Housing / Care (4)	4	-	-	-
Other (2)	1	-	-	1
Individuals (7)	2	-	1	4
TOTAL (140)	73	15	4	48

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	Other	No Reply
Local authority (27)	19	5	1	2
Executive Agencies and NDPBs (13)	6	1	-	6
NHS (6)	6	-	-	-
Other statutory organisation (11)	8	-	-	3
Third sector / equality organisation (20)	4	1	-	15
Private sector organisation (18)	12	3	-	3
Representative body for third sector / equality organisations (12)	5	-	-	7
Representative body for private sector organisations (9)	6	2	-	1
Representative body for professionals (6)	5	1	-	-
Union (5)	3	-	-	2
Housing / Care (4)	4	-	-	-
Other (2)	1	-	-	1
Individuals (7)	2	-	-	5
TOTAL (140)	81	13	1	45

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?

	Yes	No	Other	No Reply
Local authority (27)	21	1	3	2
Executive Agencies and NDPBs (13)	4	2	1	6
NHS (6)	1	2	3	-
Other statutory organisation (11)	4	-	4	3
Third sector / equality organisation (20)	5	2	-	13
Private sector organisation (18)	8	4	1	5
Representative body for third sector / equality organisations (12)	2	2	4	4
Representative body for private sector organisations (9)	3	-	1	5
Representative body for professionals (6)	5	1	-	-
Union (5)	2	-	2	1
Housing / Care (4)	3	1	-	-
Other (2)	-	1	1	-
Individuals (7)	2	1	1	3
TOTAL (140)	60	17	21	42

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?

	Agree	Disagree	Other	No Reply
Local authority (27)	24	1	-	2
Executive Agencies and NDPBs (13)	6	1	-	6
NHS (6)	5	-	1	-
Other statutory organisation (11)	8	-	-	3
Third sector / equality organisation (20)	4	2	1	13
Private sector organisation (18)	7	4	1	6
Representative body for third sector / equality organisations (12)	5	-	1	6
Representative body for private sector organisations (9)	3	2	-	4
Representative body for professionals (6)	5	1	-	-
Union (5)	1	-	-	4
Housing / Care (4)	3	-	1	-
Other (2)	1	1	-	-
Individuals (7)	2	-	-	5
TOTAL (140)	74	12	5	49

Q18. Should the list of criminal convictions which may result in exclusion from bidding be the same for all regulated contracts, regardless of value?				
	Yes	No	Other	No Reply
Local authority (27)	23	-	2	2
Executive Agencies and NDPBs (13)	7	-	-	6
NHS (6)	6	-	-	-
Other statutory organisation (11)	7	-	2	2
Third sector / equality organisation (20)	7	-	-	13
Private sector organisation (18)	12	1	-	5
Representative body for third sector / equality organisations (12)	5	-	-	7
Representative body for private sector organisations (9)	5	-	1	3
Representative body for professionals (6)	4	-	-	2
Union (5)	4	-	-	1
Housing / Care (4)	4	-	-	-
Other (2)	1	-	-	1
Individuals (7)	2	1	-	4
TOTAL (140)	87	2	5	46

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	Other	No Reply
Local authority (27)	22	3	-	2
Executive Agencies and NDPBs (13)	6	1	-	6
NHS (6)	6	-	-	-
Other statutory organisation (11)	4	5	-	2
Third sector / equality organisation (20)	5	1	-	14
Private sector organisation (18)	13	-	-	5
Representative body for third sector / equality organisations (12)	5	-	-	7
Representative body for private sector organisations (9)	5	-	-	4
Representative body for professionals (6)	4	-	-	2
Union (5)	4	-	-	1
Housing / Care (4)	3	1	-	-
Other (2)	1	-	-	1
Individuals (7)	2	-	-	5
TOTAL (140)	80	11	-	49

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	Other	No Reply
Local authority (27)	20	5	-	2
Executive Agencies and NDPBs (13)	7	-	-	6
NHS (6)	2	4	-	-
Other statutory organisation (11)	7	1	-	3
Third sector / equality organisation (20)	6	-	2	12
Private sector organisation (18)	10	4	-	4
Representative body for third sector / equality organisations (12)	5	-	-	7
Representative body for private sector organisations (9)	7	-	-	2
Representative body for professionals (6)	5	-	-	1
Union (5)	-	4	-	1
Housing / Care (4)	4	-	-	-
Other (2)	1	-	-	1
Individuals (7)	2	-	-	5
TOTAL (140)	76	18	2	44

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	Other	No Reply
Local authority (27)	24	1	-	2
Executive Agencies and NDPBs (13)	6	-	1	6
NHS (6)	2	4	-	-
Other statutory organisation (11)	7	1	-	3
Third sector / equality organisation (20)	3	1	3	13
Private sector organisation (18)	10	4	-	4
Representative body for third sector / equality organisations (12)	4	1	-	7
Representative body for private sector organisations (9)	6	-	-	3
Representative body for professionals (6)	4	1	-	1
Union (5)	-	4	-	1
Housing / Care (4)	2	2	-	
Other (2)	1	-	-	1
Individuals (7)	3	-	-	4
TOTAL (140)	72	19	4	45

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	Other	No Reply
Local authority (27)	24	1	-	2
Executive Agencies and NDPBs (13)	7	-	-	6
NHS (6)	2	4	-	-
Other statutory organisation (11)	8	-	-	3
Third sector / equality organisation (20)	5	1	1	13
Private sector organisation (18)	11	2	-	5
Representative body for third sector / equality organisations (12)	6	-	-	6
Representative body for private sector organisations (9)	6	-	-	3
Representative body for professionals (6)	5	-	-	1
Union (5)	2	2	-	1
Housing / Care (4)	3	-	1	-
Other (2)	1	-	-	1
Individuals (7)	2	-	-	5
TOTAL (140)	82	10	2	46

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	Other	No Reply
Local authority (27)	24	1	-	2
Executive Agencies and NDPBs (13)	4	2	1	6
NHS (6)	3	3	-	-
Other statutory organisation (11)	7	-	1	3
Third sector / equality organisation (20)	4	2	-	14
Private sector organisation (18)	9	6	-	3
Representative body for third sector / equality organisations (12)	3	1	1	7
Representative body for private sector organisations (9)	2	3	1	3
Representative body for professionals (6)	3	1	1	1
Union (5)	1	2	1	1
Housing / Care (4)	4	-	-	-
Other (2)	1	-	-	1
Individuals (7)	2	-	-	5
TOTAL (140)	67	21	6	46

Q24. Should the same rules apply to EU regulated contracts and to lower value regulated contracts?

	Yes	No	Other	No Reply
Local authority (27)	23	2	-	2
Executive Agencies and NDPBs (13)	6	-	1	6
NHS (6)	4	2	-	-
Other statutory organisation (11)	7	-	1	3
Third sector / equality organisation (20)	6	-	-	14
Private sector organisation (18)	12	-	1	5
Representative body for third sector / equality organisations (12)	3	2	-	7
Representative body for private sector organisations (9)	5	-	-	4
Representative body for professionals (6)	4	-	-	2
Union (5)	2	-	2	1
Housing / Care (4)	4	-	-	-
Other (2)	1	-	-	1
Individuals (7)	2	-	-	5
TOTAL (140)	79	6	5	50

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?

	Yes	No	Other	No Reply
Local authority (27)	18	4	3	2
Executive Agencies and NDPBs (13)	4	1	2	6
NHS (6)	1	5	-	-
Other statutory organisation (11)	6	2	1	2
Third sector / equality organisation (20)	3	2	1	14
Private sector organisation (18)	8	5	-	5
Representative body for third sector / equality organisations (12)	1	3	1	7
Representative body for private sector organisations (9)	-	3	2	4
Representative body for professionals (6)	2	1	1	2
Union (5)	-	3	1	1
Housing / Care (4)	3	1	-	-
Other (2)	1	-	-	1
Individuals (7)	1	1	-	5
TOTAL (140)	48	31	12	49

Q26. Should the same rules apply to EU regulated contracts and to lower value regulated contracts?				
	Yes	No	Other	No Reply
Local authority (27)	23	2	-	2
Executive Agencies and NDPBs (13)	7	-	-	6
NHS (6)	5	1	-	-
Other statutory organisation (11)	8	-	1	2
Third sector / equality organisation (20)	5	-	1	14
Private sector organisation (18)	13	-	-	5
Representative body for third sector / equality organisations (12)	4	1	-	7
Representative body for private sector organisations (9)	4	-	1	4
Representative body for professionals (6)	4	-	-	2
Union (5)	2	-	2	1
Housing / Care (4)	4	-	-	-
Other (2)	1	-	-	1
Individuals (7)	2	-	-	5
TOTAL (140)	82	4	5	49

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)?				
	Yes	No	Other	No Reply
Local authority (27)	25	-	-	2
Executive Agencies and NDPBs (13)	7	-	-	6
NHS (6)	3	2	1	-
Other statutory organisation (11)	8	1	-	2
Third sector / equality organisation (20)	4	2	-	14
Private sector organisation (18)	13	3	-	2
Representative body for third sector / equality organisations (12)	4	-	-	8
Representative body for private sector organisations (9)	5	1	1	2
Representative body for professionals (6)	5	-	1	-
Union (5)	1	3	-	1
Housing / Care (4)	3	-	1	-
Other (2)	1	-	-	1
Individuals (7)	2	-	-	5
TOTAL (140)	81	12	4	43

Q28. Should the same rules apply to EU regulated contracts and to lower value regulated contracts?				
	Yes	No	Other	No Reply
Local authority (27)	25	-	-	2
Executive Agencies and NDPBs (13)	7	-	-	6
NHS (6)	5	1	-	-
Other statutory organisation (11)	8	1	-	2
Third sector / equality organisation (20)	4	-	1	15
Private sector organisation (18)	14	-	-	4
Representative body for third sector / equality organisations (12)	3	1	-	8
Representative body for private sector organisations (9)	5	-	-	4
Representative body for professionals (6)	6	-	-	-
Union (5)	2	1	1	1
Housing / Care (4)	4	-	-	-
Other (2)	1	-	-	1
Individuals (7)	2	-	-	5
TOTAL (140)	86	4	2	48

Q29. Do you agree or disagree with our proposed maximum periods of exclusion?				
	Agree	Disagree	Other	No Reply
Local authority (27)	22	2	1	2
Executive Agencies and NDPBs (13)	7	-	-	6
NHS (6)	6	-	-	-
Other statutory organisation (11)	9	-	1	1
Third sector / equality organisation (20)	5	1	-	14
Private sector organisation (18)	13	1	-	4
Representative body for third sector / equality organisations (12)	4	-	-	8
Representative body for private sector organisations (9)	4	1	-	4
Representative body for professionals (6)	4	-	-	2
Union (5)	2	2	-	1
Housing / Care (4)	4	-	-	-
Other (2)	1	-	-	1
Individuals (7)	2	-	-	5
TOTAL (140)	83	7	2	48

Q30. Should the same rules apply to EU regulated contracts and to lower value regulated contracts?				
	Yes	No	Other	No Reply
Local authority (27)	24	-	-	3
Executive Agencies and NDPBs (13)	7	-	-	6
NHS (6)	6	-	-	-
Other statutory organisation (11)	10	-	-	1
Third sector / equality organisation (20)	4	1	-	15
Private sector organisation (18)	14	-	-	4
Representative body for third sector / equality organisations (12)	4	-	-	8
Representative body for private sector organisations (9)	5	-	-	4
Representative body for professionals (6)	4	-	-	2
Union (5)	3	1	-	1
Housing / Care (4)	4	-	-	-
Other (2)	1	-	-	1
Individuals (7)	2	-	-	5
TOTAL (140)	88	2	-	50

Q31. Should public bodies be required to check that sub-contractors do not fail any of the exclusion criteria?				
	Yes	No	Other	No Reply
Local authority (27)	2	23	-	2
Executive Agencies and NDPBs (13)	-	7	-	6
NHS (6)	-	6	-	-
Other statutory organisation (11)	1	7	1	2
Third sector / equality organisation (20)	3	3	-	14
Private sector organisation (18)	6	8	-	4
Representative body for third sector / equality organisations (12)	1	4	-	7
Representative body for private sector organisations (9)	3	4	-	2
Representative body for professionals (6)	2	3	-	1
Union (5)	4	-	-	1
Housing / Care (4)	-	4	-	-
Other (2)	-	1	-	1
Individuals (7)	1	1	-	5
TOTAL (140)	23	71	1	45

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?

	Agree	Disagree	Other	No Reply
Local authority (27)	23	2	-	2
Executive Agencies and NDPBs (13)	4	-	-	9
NHS (6)	6	-	-	-
Other statutory organisation (11)	7	-	1	3
Third sector / equality organisation (20)	3	-	2	15
Private sector organisation (18)	7	1	-	10
Representative body for third sector / equality organisations (12)	4	1	2	5
Representative body for private sector organisations (9)	1	-	-	8
Representative body for professionals (6)	2	-	1	3
Union (5)	1	1	2	1
Housing / Care (4)	3	-	-	1
Other (2)	-	-	-	2
Individuals (7)	1	-	-	6
TOTAL (140)	62	5	8	65

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?

	Agree	Disagree	Other	No Reply
Local authority (27)	21	3	1	2
Executive Agencies and NDPBs (13)	6	-	-	7
NHS (6)	6	-	-	-
Other statutory organisation (11)	7	1	-	3
Third sector / equality organisation (20)	5	-	-	15
Private sector organisation (18)	7	1	-	10
Representative body for third sector / equality organisations (12)	8	-	1	3
Representative body for private sector organisations (9)	1	-	-	8
Representative body for professionals (6)	4	1	-	1
Union (5)	4	-	-	1
Housing / Care (4)	3	-	-	1
Other (2)	1	-	-	1
Individuals (7)	1	-	-	6
TOTAL (140)	74	6	2	58

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?				
	Agree	Disagree	Other	No Reply
Local authority (27)	21	4	-	2
Executive Agencies and NDPBs (13)	7	-	-	6
NHS (6)	6	-	-	-
Other statutory organisation (11)	8	-	-	3
Third sector / equality organisation (20)	2	-	-	18
Private sector organisation (18)	8	3	-	7
Representative body for third sector / equality organisations (12)	4	-	1	7
Representative body for private sector organisations (9)	5	-	-	4
Representative body for professionals (6)	3	1	-	2
Union (5)		-	-	5
Housing / Care (4)	4	-	-	-
Other (2)		-	1	1
Individuals (7)	2	-	-	5
TOTAL (140)	70	8	2	60

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?				
	Agree	Disagree	Other	No Reply
Local authority (27)	21	4	-	2
Executive Agencies and NDPBs (13)	2	5	-	6
NHS (6)	6	-	-	-
Other statutory organisation (11)	7	-	1	3
Third sector / equality organisation (20)	2	-	-	18
Private sector organisation (18)	8	3	-	7
Representative body for third sector / equality organisations (12)	3	2	-	7
Representative body for private sector organisations (9)	5	-	-	4
Representative body for professionals (6)	3	1	-	2
Union (5)	-	-	-	5
Housing / Care (4)	4	-	-	-
Other (2)	-	-	-	2
Individuals (7)	2	-	-	5
TOTAL (140)	63	15	1	61

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?				
	Agree	Disagree	Other	No Reply
Local authority (27)	24	1	-	2
Executive Agencies and NDPBs (13)	7	-	-	6
NHS (6)	5	-	1	-
Other statutory organisation (11)	8	-	-	3
Third sector / equality organisation (20)	2	-	1	17
Private sector organisation (18)	13	-	-	5
Representative body for third sector / equality organisations (12)	4	-	1	7
Representative body for private sector organisations (9)	5	-	-	4
Representative body for professionals (6)	5	-	-	1
Union (5)	2	-	-	3
Housing / Care (4)	4	-	-	-
Other (2)	1	-	1	-
Individuals (7)	2	-	-	5
TOTAL (140)	82	1	4	53

Q39. Do you agree or disagree that public bodies should also be permitted to award lower value regulated contracts in similar situations?				
	Agree	Disagree	Other	No Reply
Local authority (27)	24	1	-	2
Executive Agencies and NDPBs (13)	7	-	-	6
NHS (6)	6	-	-	-
Other statutory organisation (11)	8	-	-	3
Third sector / equality organisation (20)	2	-	-	18
Private sector organisation (18)	11	1	-	6
Representative body for third sector / equality organisations (12)	4	-	-	8
Representative body for private sector organisations (9)	4	-	-	5
Representative body for professionals (6)	5	-	-	1
Union (5)	1	-	-	4
Housing / Care (4)	4	-	-	-
Other (2)	1	-	1	-
Individuals (7)	2	-	-	5
TOTAL (140)	79	2	1	58

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?				
	Agree	Disagree	Other	No Reply
Local authority (27)	24	1	-	2
Executive Agencies and NDPBs (13)	7	-	-	6
NHS (6)	4	2	-	-
Other statutory organisation (11)	8	-	-	3
Third sector / equality organisation (20)	5	-	-	17
Private sector organisation (18)	10	2	1	5
Representative body for third sector / equality organisations (12)	4	-	-	8
Representative body for private sector organisations (9)	4	-	-	5
Representative body for professionals (6)	4	-	-	2
Union (5)	-	-	-	5
Housing / Care (4)	4	-	-	-
Other (2)	1	-	-	1
Individuals (7)	2	-	-	5
TOTAL (140)	75	5	1	59

Q41. When using the open procedure, should public bodies retain the flexibility to determine whether to evaluate bids before evaluating qualification and exclusion criteria?				
	Yes	No	Other	No Reply
Local authority (27)	21	4	-	2
Executive Agencies and NDPBs (13)	7	-	-	6
NHS (6)	6	-	-	-
Other statutory organisation (11)	7	-	-	4
Third sector / equality organisation (20)	2	1	-	17
Private sector organisation (18)	10	2	-	6
Representative body for third sector / equality organisations (12)	3	-	-	9
Representative body for private sector organisations (9)	3	2	-	4
Representative body for professionals (6)	5	-	-	1
Union (5)	-	-	-	5
Housing / Care (4)	4	-	-	-
Other (2)	1	-	-	1
Individuals (7)	2	-	-	5
TOTAL (140)	71	9	-	60

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	Other	No Reply
Local authority (27)	25	-	-	2
Executive Agencies and NDPBs (13)	7	-	-	6
NHS (6)	6	-	-	-
Other statutory organisation (11)	7	-	-	4
Third sector / equality organisation (20)	4	-	-	16
Private sector organisation (18)	13	-	-	5
Representative body for third sector / equality organisations (12)	5	-	-	7
Representative body for private sector organisations (9)	6	-	-	3
Representative body for professionals (6)	5	-	-	1
Union (5)	1	-	-	4
Housing / Care (4)	4	-	-	-
Other (2)	1	-	-	1
Individuals (7)	3	-	-	4
TOTAL (140)	87	-	-	53

Q43. Do you agree or disagree that the rules in the Directives about modifying contracts should not apply to contracts under the Act?				
	Agree	Disagree	Other	No Reply
Local authority (27)	11	14	-	2
Executive Agencies and NDPBs (13)	6	1	-	6
NHS (6)	4	2	-	-
Other statutory organisation (11)	7	1	-	3
Third sector / equality organisation (20)	2	1	-	17
Private sector organisation (18)	7	5	-	6
Representative body for third sector / equality organisations (12)	3	3	-	6
Representative body for private sector organisations (9)	-	3	1	5
Representative body for professionals (6)	2	2	1	1
Union (5)	-	-	-	5
Housing / Care (4)	3	1	-	-
Other (2)	1	-	-	1
Individuals (7)	1	1	-	5
TOTAL (140)	47	34	2	57

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?				
	Agree	Disagree	Other	No Reply
Local authority (27)	25	-	-	2
Executive Agencies and NDPBs (13)	5	-	-	8
NHS (6)	6	-	-	-
Other statutory organisation (11)	8	-	-	3
Third sector / equality organisation (20)	2	-	-	18
Private sector organisation (18)	8	2	1	7
Representative body for third sector / equality organisations (12)	4	-	-	8
Representative body for private sector organisations (9)	5	-	-	4
Representative body for professionals (6)	4	-	-	2
Union (5)	-	-	-	5
Housing / Care (4)	4	-	-	-
Other (2)	1	-	-	1
Individuals (7)	1	-	-	6
TOTAL (140)	73	2	1	64

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?				
	Agree	Disagree	Other	No Reply
Local authority (27)	23	1	-	3
Executive Agencies and NDPBs (13)	7	-	-	6
NHS (6)	5	1	-	-
Other statutory organisation (11)	7	1	-	3
Third sector / equality organisation (20)	2	-	-	18
Private sector organisation (18)	12	-	-	6
Representative body for third sector / equality organisations (12)	2	-	2	8
Representative body for private sector organisations (9)	4	-	-	5
Representative body for professionals (6)	4	-	-	2
Union (5)	-	-	-	5
Housing / Care (4)	3	1	-	-
Other (2)	1	-	-	1
Individuals (7)	1	-	1	5
TOTAL (140)	71	4	3	62

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	Other	No Reply
Local authority (27)	23	2	-	2
Executive Agencies and NDPBs (13)	7	-	-	6
NHS (6)	4	1	-	1
Other statutory organisation (11)	7	-	1	3
Third sector / equality organisation (20)	3	-	-	17
Private sector organisation (18)	8	4	-	6
Representative body for third sector / equality organisations (12)	4	-	-	8
Representative body for private sector organisations (9)	3	1	1	4
Representative body for professionals (6)	4	-	-	2
Union (5)	-	-	-	5
Housing / Care (4)	3	-	-	1
Other (2)	1	-	-	1
Individuals (7)	2	-	-	5
TOTAL (140)	69	8	2	61

Q47. Do you agree or disagree that all communications about concession contracts in a procurement exercise should be by electronic means?				
	Agree	Disagree	Other	No Reply
Local authority (27)	20	5	-	2
Executive Agencies and NDPBs (13)	5	1	-	7
NHS (6)	5	-	-	1
Other statutory organisation (11)	6	-	-	5
Third sector / equality organisation (20)	1	1	-	18
Private sector organisation (18)	7	-	-	11
Representative body for third sector / equality organisations (12)	3	-	-	9
Representative body for private sector organisations (9)	4	-	-	5
Representative body for professionals (6)	3	-	-	3
Union (5)	-	-	-	5
Housing / Care (4)	2	1	-	1
Other (2)	1	-	-	1
Individuals (7)	2	-	-	5
TOTAL (140)	59	8	-	73

Q48. Do you think that public bodies should retain the flexibility to decide when the use of electronic catalogues is appropriate?				
	Yes	No	Other	No Reply
Local authority (27)	25	-	-	2
Executive Agencies and NDPBs (13)	6	1	-	6
NHS (6)	6	-	-	
Other statutory organisation (11)	8	-	-	3
Third sector / equality organisation (20)	3	1	-	16
Private sector organisation (18)	6	1	-	11
Representative body for third sector / equality organisations (12)	4	-	-	8
Representative body for private sector organisations (9)	2	-	-	7
Representative body for professionals (6)	2	-	-	4
Union (5)	-	-	-	5
Housing / Care (4)	4	-	-	
Other (2)	-	-	-	2
Individuals (7)	2	-	-	5
TOTAL (140)	68	3	-	69

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?				
	Agree	Disagree	Other	No Reply
Local authority (27)	24	1	-	2
Executive Agencies and NDPBs (13)	7	-	-	6
NHS (6)	4	1	-	1
Other statutory organisation (11)	8	-	-	3
Third sector / equality organisation (20)	1	1	-	18
Private sector organisation (18)	6	6	-	6
Representative body for third sector / equality organisations (12)	4	-	-	8
Representative body for private sector organisations (9)	2	2	-	5
Representative body for professionals (6)	2	2	1	1
Union (5)	-	-	-	5
Housing / Care (4)	3	1	-	-
Other (2)	2	-	-	-
Individuals (7)	2	-	-	5
TOTAL (140)	65	14	1	60

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?				
	Agree	Disagree	Other	No Reply
Local authority (27)	20	6	-	1
Executive Agencies and NDPBs (13)	6	1	-	6
NHS (6)	4	1	-	1
Other statutory organisation (11)	8	-	-	3
Third sector / equality organisation (20)	2	1	-	17
Private sector organisation (18)	6	6	-	6
Representative body for third sector / equality organisations (12)	3	1	-	8
Representative body for private sector organisations (9)	2	3	-	4
Representative body for professionals (6)	3	2	1	-
Union (5)	-	-	-	5
Housing / Care (4)	4	-	-	-
Other (2)	1	-	-	1
Individuals (7)	2	-	-	5
TOTAL (140)	61	21	1	57

Q51. Do you agree or disagree that we should defer the obligation on public bodies to use e-Certis until October 2018?				
	Agree	Disagree	Other	No Reply
Local authority (27)	25	-	-	2
Executive Agencies and NDPBs (13)	7	-	-	6
NHS (6)	4	1	1	-
Other statutory organisation (11)	8	-	-	3
Third sector / equality organisation (20)	3	-	-	17
Private sector organisation (18)	10	-	-	8
Representative body for third sector / equality organisations (12)	4	-	-	8
Representative body for private sector organisations (9)	3	1	-	5
Representative body for professionals (6)	4	1	-	1
Union (5)	-	-	-	5
Housing / Care (4)	4	-	-	-
Other (2)	1	-	1	-
Individuals (7)	2	-	-	5
TOTAL (140)	75	3	2	60

Q52. Do you agree or disagree that we adopt this option for utilities contracts?				
	Agree	Disagree	Other	No Reply
Local authority (27)	21	-	-	6
Executive Agencies and NDPBs (13)	3	1	-	9
NHS (6)	5	-	-	1
Other statutory organisation (11)	2	-	3	6
Third sector / equality organisation (20)	1	-	-	19
Private sector organisation (18)	8	2	-	8
Representative body for third sector / equality organisations (12)	4	-	-	8
Representative body for private sector organisations (9)	4	-	-	5
Representative body for professionals (6)	4	-	-	2
Union (5)	-	-	-	5
Housing / Care (4)	3	-	-	1
Other (2)	-	-	-	2
Individuals (7)	1	-	1	5
TOTAL (140)	56	3	4	77

Q53. Do you think that dynamic purchasing systems should be available as a tool for purchasers in respect of regulated procurements?				
	Yes	No	Other	No Reply
Local authority (27)	22	1	1	3
Executive Agencies and NDPBs (13)	7	-	-	6
NHS (6)	5	-	-	1
Other statutory organisation (11)	8	-	-	3
Third sector / equality organisation (20)	3	-	-	17
Private sector organisation (18)	9	-	-	9
Representative body for third sector / equality organisations (12)	5	-	-	7
Representative body for private sector organisations (9)	1	-	-	8
Representative body for professionals (6)	4	-	-	2
Union (5)	-	-	-	5
Housing / Care (4)	4	-	-	-
Other (2)	1	-	-	1
Individuals (7)	2	-	-	5
TOTAL (140)	71	1	1	67

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	Other	No Reply
Local authority (27)	21	3	-	3
Executive Agencies and NDPBs (13)	7	-	-	6
NHS (6)	6	-	-	-
Other statutory organisation (11)	8	-	-	3
Third sector / equality organisation (20)	3	-	-	17
Private sector organisation (18)	7	2	-	9
Representative body for third sector / equality organisations (12)	3	-	-	9
Representative body for private sector organisations (9)	1	-	-	8
Representative body for professionals (6)	3	1	-	2
Union (5)	-	-	-	5
Housing / Care (4)	4	-	-	-
Other (2)	1	-	-	1
Individuals (7)	2	-	-	5
TOTAL (140)	66	6	-	68

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	Other	No Reply
Local authority (27)	25	-	-	2
Executive Agencies and NDPBs (13)	7	-	-	6
NHS (6)	6	-	-	-
Other statutory organisation (11)	8	-	-	3
Third sector / equality organisation (20)	4	-	-	16
Private sector organisation (18)	12	1	-	5
Representative body for third sector / equality organisations (12)	5	-	-	7
Representative body for private sector organisations (9)	6	-	-	3
Representative body for professionals (6)	3	-	-	3
Union (5)	-	-	-	5
Housing / Care (4)	4	-	-	-
Other (2)	1	-	-	1
Individuals (7)	3	-	-	4
TOTAL (140)	84	1	-	55

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	Other	No Reply
Local authority (27)	25	-	-	2
Executive Agencies and NDPBs (13)	7	-	-	6
NHS (6)	5	1	-	-
Other statutory organisation (11)	8	-	-	3
Third sector / equality organisation (20)	3	1	-	16
Private sector organisation (18)	11	2	-	5
Representative body for third sector / equality organisations (12)	6	-	-	6
Representative body for private sector organisations (9)	4	1	-	4
Representative body for professionals (6)	2	1	-	3
Union (5)	-	-	-	5
Housing / Care (4)	4	-	-	-
Other (2)	2	-	-	-
Individuals (7)	3	-	-	4
TOTAL (140)	80	6	-	54

Q57. Do you agree or disagree that we should not restrict access by Scottish public bodies to European centralised purchasing activities?				
	Agree	Disagree	Other	No Reply
Local authority (27)	23	2	-	2
Executive Agencies and NDPBs (13)	7	-	-	6
NHS (6)	6	-	-	-
Other statutory organisation (11)	8	-	-	3
Third sector / equality organisation (20)	2	-	-	18
Private sector organisation (18)	6	4	-	8
Representative body for third sector / equality organisations (12)	4	-	-	8
Representative body for private sector organisations (9)	2	2	-	5
Representative body for professionals (6)	2	1	-	3
Union (5)	-	-	-	5
Housing / Care (4)	4	-	-	-
Other (2)	-	-	-	2
Individuals (7)	2	-	-	5
TOTAL (140)	66	9	-	65

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?				
	Agree	Disagree	Other	No Reply
Local authority (27)	23	3	-	1
Executive Agencies and NDPBs (13)	6	1	-	6
NHS (6)	6	-	-	-
Other statutory organisation (11)	4	4	-	3
Third sector / equality organisation (20)	3	1	-	16
Private sector organisation (18)	9	3	-	6
Representative body for third sector / equality organisations (12)	5	1	1	5
Representative body for private sector organisations (9)	3	2	1	3
Representative body for professionals (6)	-	2	2	2
Union (5)	2	-	-	3
Housing / Care (4)	3	1	-	-
Other (2)	2	-	-	-
Individuals (7)	3	-	-	4
TOTAL (140)	69	18	4	49

Q59. Do you agree or disagree that we should simply copy the provisions on applications to the court from the existing 2012 Regulations?				
	Agree	Disagree	Other	No Reply
Local authority (27)	17	8	-	2
Executive Agencies and NDPBs (13)	4	2	-	7
NHS (6)	4	1	-	1
Other statutory organisation (11)	3	4	-	4
Third sector / equality organisation (20)	2	1	1	16
Private sector organisation (18)	4	6	-	8
Representative body for third sector / equality organisations (12)	2	-	2	8
Representative body for private sector organisations (9)	1	1	4	3
Representative body for professionals (6)	2	1	-	3
Union (5)	-	-	-	5
Housing / Care (4)	2	1	-	1
Other (2)	-	-	-	2
Individuals (7)	2	-	-	5
TOTAL (140)	43	25	7	65

Q60. Do you think there is a need for a review body which sits beneath the national courts?				
	Yes	No	Other	No Reply
Local authority (27)	11	13	1	2
Executive Agencies and NDPBs (13)	5	2	-	6
NHS (6)	1	4	-	1
Other statutory organisation (11)	4	3	-	4
Third sector / equality organisation (20)	5	-	-	15
Private sector organisation (18)	10	-	-	8
Representative body for third sector / equality organisations (12)	3	-	2	7
Representative body for private sector organisations (9)	3	1	1	4
Representative body for professionals (6)	2	1	-	3
Union (5)	1	-	-	4
Housing / Care (4)	2	1	1	-
Other (2)	2	-	-	-
Individuals (7)	1	1	-	5
TOTAL (140)	50	26	5	59

Q61. If so, do you think the review body should be established as a tribunal within the Scottish tribunals system?				
	Yes	No	Other	No Reply
Local authority (27)	13	8	1	5
Executive Agencies and NDPBs (13)	3	2	1	7
NHS (6)	1	4	-	1
Other statutory organisation (11)	3	1	1	6
Third sector / equality organisation (20)	3	1	-	16
Private sector organisation (18)	5	5	-	8
Representative body for third sector / equality organisations (12)	2	1	2	7
Representative body for private sector organisations (9)	1	3	1	4
Representative body for professionals (6)	2	1	-	3
Union (5)	1	-	-	4
Housing / Care (4)	-	2	1	1
Other (2)	-	-	1	1
Individuals (7)	1	1	-	5
TOTAL (140)	35	29	8	68

Q62. Or do you think it should take some other form, for example, a Scottish Procurement Ombudsman?				
	Yes	No	Other	No Reply
Local authority (27)	1	21	1	4
Executive Agencies and NDPBs (13)	1	4	2	6
NHS (6)	-	5	-	1
Other statutory organisation (11)	1	5	-	5
Third sector / equality organisation (20)	1	2	-	17
Private sector organisation (18)	6	3	1	8
Representative body for third sector / equality organisations (12)	2	1	2	7
Representative body for private sector organisations (9)	2	2	1	4
Representative body for professionals (6)	-	3	-	3
Union (5)	-	-	-	5
Housing / Care (4)	3	1	-	-
Other (2)	1	-	1	-
Individuals (7)	-	2	-	5
TOTAL (140)	18	49	8	65



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