

Procurement Reform Bill and EU Procurement Directive

Purpose

1. To update the Executive Group on the current progress with the Procurement Reform (Scotland) Bill and EU Public Procurement Directive. In addition to, summarising the findings of a recent Local Government and Regeneration Committee report regarding the role of procurement in developing new ways of delivering services for members comment.

Recommendations

2. The Executive Group is invited to:
 - i. Welcome the decision by the Scottish Government to defer introduction of the Procurement Reform (Scotland) Bill to align with the introduction of the EU legislation;
 - ii. Provide comment on the currently proposed contents of the draft Bill;
 - iii. Comment upon the impacts on Councils of the agreed EU Public Procurement Directive; and
 - iv. Consider the findings of the Local Government and Regeneration Committee regarding Procurement and Best Value.

Procurement Reform (Scotland) Bill

3. The Deputy First Minister notified the Scottish Parliament on 23 May 2013 of the Scottish Government's decision to defer introduction of the Procurement Reform (Scotland) Bill until after Autumn. The slippage in the timetable for adoption of a revised EU Directive from December 2012 to Autumn 2013 has made it difficult for any domestic legislation to be framed compatibly with the parameters of EU Procurement law.
4. COSLA's understanding is that when the draft bill is introduced it will include the following duties:
 - General Duty to demonstrate how what is being procured will improve economic, social, health and environmental well-being of the relevant area;
 - Duty to facilitate access to contracts by SMEs and Third Sector bodies;
 - A duty extending the requirement to provide debrief information;
 - Insertion of Community Benefit Clauses in the award of "major" contracts; and
 - Advertising procurement opportunities on a single online portal.
5. The DES Spokesperson spoke to the Deputy First Minister regarding proposed duties earlier this year outlining a number of previously agreed COSLA positions and in general welcoming the objectives for the Bill proposed by Scottish Government. In terms of the proposed general duty, the need for the wording to reflect councils existing duty of best value and not add further complexity to the existing landscape was made. Alongside our desire to support where legally possible as many local firms through procurement of goods and services and ensure community benefit in a fair and proportionate manner.

6. The DES Spokesperson also highlighted the concern of councils that procurement is a complex landscape and that any new duties could have unintended consequences, resulting in an increased and unclear burden on the public sector. A particular point made to the Deputy First Minister was that any amendments made through the Parliamentary process may not have been subject to the same level of consultation with stakeholders and that they could run the risk of raising expectations of what the bill could actually achieve.
7. The original August 2012 consultation also proposed a number of other potential duties on those public sector bodies procuring goods and services, which Scottish Government officials have advised will not feature in the Draft Bill introduced later this year for Parliamentary consideration:
 - A requirement to consider variant bids for the same tender opportunity;
 - Requirement to have a contract with a supported business;
 - A duty to ensure extension of community benefit clauses to sub-contractors;
 - Requirement to consult with communities on community benefit clauses; and
 - Requirement for sub-contracts to be advertised on a single portal.
8. Scottish Government officials have outlined that there are still a number of areas which may or may not be included in the Draft Bill introduced to Parliament and indeed some of the proposed included/excluded duties may be altered through the process of Parliamentary scrutiny. The main areas of current contention are around:
 - Living Wage: Ministers are keen to promote the living wage and are seeking ways to do this in harmony with EU legislation;
 - Environmental Reporting: pressure to include more duties/reporting requirements on environmental issues, given Bill's original status as the Sustainable Procurement Bill; and
 - Supported Businesses: Ministers are keen to continue to promote some variant of the original idea that all public bodies must have a contract with a supported business, despite there being no support expressed in the 2012 Bill consultation.

EU Public Procurement Directive

9. The EU Public Procurement Directive is a piece of legislation that will influence significantly the way Councils tender for goods and service but also how and whether they can provide and share services. Recent lobbying by COSLA Europe officers has sought to ensure that Councils get the most freedom possible to organise and deliver local services. The legislative outcomes agreed in mid-July look like being a mixed picture for Scottish councils.
10. One of our key concerns, the first ever EU rules on shared services have been made less restrictive than originally proposed including the participation of private capital under certain circumstances. On the other hand, there will now be an obligation not only based on cost alone but also on the wider notion "most economically advantageous tender" (qualitative, lifetime costs) as well as introducing green procurement criteria.
11. The Directive will also introduce tougher rules regarding sub-contracting, enabling public authorities to have a closer oversight of the way the contractor is delivering the project/service. There will also be a requirement for a harmonised/uniform procurement process and reporting obligations, with special provisions to encourage small-to-medium enterprises participation.

12. A general summary of the situation would be that some of the key concerns of Scottish Councils have been addressed but that the adaptation of existing procurement processes will be a challenging task. Moving forward COSLA understand that the UK Government is keen to start implementation as soon as end of 2013 and special support will be devoted to help Local Authorities transition to these new arrangements. COSLA have made representation these supporting resources should also benefit Scottish Councils.

Local Government and Regeneration Committee

13. COSLA was invited to provide an assessment to the Scottish Parliament's Local Government and Regeneration Committee on the interaction between EU legislation, current/future practice and forthcoming domestic legislation.
14. The Committee recognised in their report¹ the principal concern raised in COSLA's evidence concerning the potential limitations this could place upon shared service arrangements for local government and anticipated in their final report that the Scottish Government will do everything it can within legal frameworks to ensure that barriers are not created to the effective delivery of shared services as a result of any procurement reform.
15. The Committee also expressed concern over current procurement practice within public bodies being seen as very risk-averse, given increasing complex rules and reducing budgets, which has been perceived by some to have created a least cost/lowest price approach to procuring goods and services by public bodies, especially local authorities, and regulated quality and indeed Best Value considerations de-prioritised in pursuit of saving money.
16. The Committee expressed concern that Best Value and Public Sector Reform themes now have a substantial body of practice and practitioners for each policy area focussed largely on their own objectives, which may not always be compatible with or may even be contrary to, working in partnership across public bodies.
17. The Committee have invited the Scottish Government, COSLA and other relevant professional bodies to reflect on these findings and consider whether a co-ordinated view on issues around procurement and best value needs to be developed to inform the consideration at working level.

Conclusion

18. The Executive Group are requested to note the update provided on Scottish and EU legislative proposals governing procurement and to provide comment on the emerging proposals and views expressed by the Scottish Parliament Local Government and Regeneration Committee.

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¹ http://www.scottish.parliament.uk/S4_LocalGovernmentandRegenerationCommittee/Reports/lgr-13-09w.pdf