

Clause 38 of the Small Business, Enterprise and Employment (SBEE) Bill

Regulations about procurement – policy statement provided by the Cabinet Office

Introduction - This policy statement is provided by the Cabinet Office for the purpose of the debate on Clause 38 of the SBEE Bill in Grand Committee. It is accompanied by draft illustrative regulations on two of the policy measures described below.

The SBEE Bill includes a clause (clause 38) that provides an enabling power, which would allow the Government to make secondary legislation relating to public procurement. The Cabinet Office carried out a four-week public consultation on reforms to public procurement and how this power could be used, which ended on 13th November 2014. This statement and the draft illustrative regulations on the two policy measures take account of the findings of the consultation.

The two policy measures covered in the draft illustrative regulations, better pre-procurement engagement with suppliers and giving due consideration to applying Lean sourcing principles, were both addressed by stakeholders in the consultation responses.

Furthermore, the following policy areas were not reflected in the draft illustrative regulations but were key themes suggested in consultation responses for how public sector procurement can improve and how the needs of small businesses (SMEs¹) can be better considered in the procurement process:

- giving more and better feedback to suppliers bidding for contracts;
- adopting standard documentation and processes;
- ensuring free access to contract documents and information; and
- ensuring procurement timescales are robust and proportionate.

The Government published online a summary of responses to the consultation on Monday 12th of January 2015. This summary can be found at the link below:

<https://www.gov.uk/government/consultations/reforms-to-public-procurement>

We intend to undertake further consultation with stakeholders to refine the policy choices that we would intend to implement through the regulation making power. This statement explains the policy direction that may be taken in these broad policy areas, and what regulations we may make in the future using the power in clause 38. In two areas, the detail of the policy is sufficiently settled so as to have enabled illustrative regulations to be drafted.

¹ The abbreviation "SME" is used in this policy statement to refer to both Small and Medium Enterprises (SMEs) and Voluntary Community and Social Enterprises (VCSEs). Both of those concepts are used and defined in the draft illustrative regulations. Their definitions appear in regulation 1(1) of the regulations.

Areas covered in draft illustrative regulations - The following areas of procurement are addressed in the draft regulations. These would place duties on public sector contracting authorities for higher value procurements to:

- Where pre-procurement market engagement has taken place, demonstrate that it has been carried out in a manner calculated to increase awareness of, and interest in, bidding for public contracts, by relevant SMEs and other economic operators;
- Have due regard to Lean sourcing principles when carrying out a procurement, to make doing business with government more efficient and cost effective for buyers and suppliers

As set out in regulation 3 of the draft, the two areas covered in the illustrative regulations would both apply to procurements above the financial thresholds covered by the Public Contract Regulations 2006. The financial thresholds, derived from the thresholds used by the 2004 EU Procurement Directive are currently set at £112,000 for contracts in central government and £173,000 in local government and the wider public sector. However, it is important to note that the power in clause 38 can also be used to make regulations that would apply to procurements below these stated financial thresholds.

Providing more and better pre-procurement engagement with suppliers was suggested in several responses to the consultation question asking about which areas of procurement by the public sector could be improved.

The draft regulatory provision in the illustrative regulations regarding Pre-procurement market engagement (Regulation 4) states in paragraph (1) that where a contracting authority decides to carry out market engagement before commencing a procurement procedure, that engagement must be carried out in a manner calculated to increase awareness of and interest in bidding for the procurement by relevant SMEs and other economic operators, and lists examples of what the pre-procurement market engagement might involve. This list is not exhaustive and a contracting authority might demonstrate it has met the obligation in other ways.

Regulation 4 does not require a contracting authority to engage in pre-procurement market engagement, but places duties on those contracting authorities that do carry it out.

Regulation 4(2) makes clear that the requirement in paragraph (1) does not require the contracting authority to do anything that is disproportionate to the value or complexity of the procurement.

Regulation 4(3) allows the outcome of the pre-procurement market engagement to be used in planning and conducting the procurement procedure as long as it does not distort competition or violate the EU principles of non-discrimination and transparency. This mirrors provisions in Article 40 of the 2014 EU Procurement Directive. Article 40 permits allows contracting authorities to carry out preliminary market consultations, including seeking or accepting advice from independent experts or authorities or market participants. Article 40 allows a contracting authority to use that advice in planning and conducting the procurement procedure provided it does not distort competition or violate the EU principles of non-discrimination and transparency. The wording of regulation 4(3) has therefore been chosen to operate consistently with Article 40.

Regulation 4(4) provides for the Minister for the Cabinet Office to issue guidance to which contracting authorities will have regard when meeting the duty in regulation 4 and highlights what this guidance may include.

The majority of consultation responses that addressed the Cabinet Office's specific consultation question about Lean sourcing, supported the premise that Lean sourcing principles should be applied across all public sector procurements.

The draft regulatory provision in the illustrative regulations regarding Lean sourcing (Regulation 5) states in paragraph (1) that "a contracting authority, when exercising its functions relating to procurement, must have due regard to the following principles ("Lean sourcing principles") applying them in a way proportionate to the complexity and value of the contract".

Regulation 5(1)(a) to (f) sets out individual Lean sourcing principles. The Lean sourcing principles included in the draft regulation reflect the drafted published principles that underpin Government policy in this area. Because, however, those principles were published in 2012, the Cabinet Office intends to consult on those principles later this year, to ensure that their wording remains up to date and consistent with best practice before any final regulations are made. The broad areas covered by the individual principles set out in draft regulation 5(1) are therefore expected to remain the same, but the wording of them would be subject to the planned consultation. The draft regulation should therefore be read with this in mind.

Regulation 5(3) provides for the Minister for the Cabinet Office to issue guidance in relation to Lean sourcing principles, to which contracting authorities will have regard when meeting the duty in regulation 5.

Regulation 6 places a duty on contracting authorities to report about their compliance with the duties in regulations 4 and 5 if they apply to procurements the contracting authorities have carried out. A contracting authority will be required, every financial year, to publish a (single) report on the internet showing its compliance in relation to all procurements covered by a duty under the regulations. The report must be freely available and maintained on the internet until the following financial year. Again, regulation 6 provides for the Minister for the Cabinet Office to provide guidance on the reporting obligation, to which contracting authorities will have regard.

Other policy areas under consideration- This statement explains the Government's position on the further six areas listed below, which could also in due course be the subject of regulations made under clause 38. These would place obligations on contracting authorities to:

- Make appropriate use of electronic invoicing
- Make procurement advertisements, related documents and / or bidding processes accessible to potential bidders without charge (for example, electronically)
- Include the appropriate considerations of SMEs within procurement strategies
- Apply minimum and/or maximum timescales for carrying out procurements below the specified financial thresholds
- Debrief unsuccessful bidders for contracts
- Make appropriate use of standard terms and conditions.

Electronic invoicing - The Government wishes to increase the take-up of electronic invoicing (e-invoicing) by legislating to ensure that all public authorities are capable of accepting electronic invoices in public procurement, so that there is a more efficient environment for suppliers and improved payment performance.

In April 2014, the European Parliament and Council agreed the Directive on e-invoicing in public procurement. A data standard will be tested and formally referenced in the Official Journal of the European Union (OJEU) by the 27th of May 2017. The Directive sets no intermediate dates before May 2017 for development of a draft standard. The power being taken in Clause 38(5)(d) will allow the UK to take steps in advance of May 2017 to support the use of e-invoicing.

Responses to the recent consultation on the regulation making power in Clause 38 of the SBEE Bill generally supported the introduction of e-invoicing. However, the responses also emphasised the importance of getting this right. It is important that the regulations in this area are technically correct in order to help, not hinder, the longer-term policy on e-invoicing.

The imposition of an e-invoicing standard in the public sector that has not been agreed as acceptable, could impose costs and burdens on public bodies, suppliers and service providers. For example, care would need to be taken to ensure that any UK rules do not undermine the steps that organisations have already taken towards e-invoicing, or require significant system changes both when the Regulations come in and once the European standard has been adopted.

For these reasons we have not included in the illustrative Regulations provisions on duties relating to the acceptance of e-invoices. However, we envisage that Regulations on matters falling within clause 38(5)(d) will focus on enabling the UK to impose legislative requirements on contracting authorities for the use of e-invoicing systems (“structured e-invoices”) that remove the need for manual invoice processing. The purpose of this would be to make the processing of invoices more efficient and quicker.

Examples of work the government might undertake to help progress the introduction of effective e-invoicing systems, include exploring the e-invoicing standards currently used in the UK and matching those against the EU’s work as it develops. Alternatively, the government might consider piloting the extension of existing structured e-invoice systems.

Free access to public procurement opportunities - Charging suppliers to access public procurement opportunities and documentation may create a barrier to accessing procurement opportunities for SMEs. Therefore using the power in clause 38(5)(c) to make regulations in this area could help suppliers to access public sector business in a fair, open and transparent manner. Responses to the Cabinet Office’s four-week consultation on how clause 38 might be used, showed universal support for this policy, and no justification for charging bidders to access information and documents could be identified following analysis of the consultation responses by the Cabinet Office.

The new Public Contract Regulations are due to be made in early 2015, transposing the 2014 EU (Classic) Procurement Directive. The Government intends that the Public Contract Regulations 2015 will include provisions requiring contracting authorities that choose to advertise certain lower value procurement opportunities, to ensure that they are advertised electronically free of charge. The provisions would mean that, with limited exceptions,

procurement opportunities above £10,000 in central government, and above £25,000 (or the local authority's standing order limit) outside central government that are advertised would need to be advertised without charge on a new Contracts Finder website and links provided to relevant contract information (electronically, again without charge).

We will assess the impact of the reforms being introduced through the Public Contracts Regulations 2015 before giving consideration to using the power provided by clause 38 to make regulations about providing further free access to public procurement opportunities. We are exploring in particular how the power might be used to ensure that there are effective alternatives to requiring interested bidders to pay for expensive accreditation processes to be eligible for lower value contract opportunities.

We wish to ensure that an appropriate balance is struck between opening up opportunities to SMEs and ensuring that where accreditation is required, contracting authorities can continue to be satisfied that bidders have met the standards required to be eligible to bid.

Consideration of SMEs – The power in clause 38 could be used to make regulations that would require a contracting authority to have as part of its procurement strategy, due regard to whether and if so, how, it can promote the effective participation of SMEs in its procurement processes.

As well as the aspiration set by the Government in 2010 that 25% of central government spending (direct and indirect) should go to SMEs by 2015, since 2010 there have been a number of reforms to public procurement to help ensure that small companies, charities and voluntary organisations are no longer shut out by excessive bureaucracy and poor procurement practices. These include the issuing of Procurement Policy Notes with guidance that Pre-Qualification Questionnaires are to be removed for lower value procurements (i.e. those below the EU financial thresholds) and guidance that departments must not rule out SMEs who are financially sound simply because their turnover is low. Legislation in this area would help promote the effective participation of SMEs across the wider public sector and not just in central government.

It is proposed that the regulations could include a non-exhaustive list of examples of how a contracting authority might demonstrate it had given due regard to facilitating appropriate participation by SMEs in its procurement processes. Examples might include the appropriate sub-dividing of contracts into smaller lots, appropriate pre-procurement engagement with potential bidders including SMEs, and consideration of existing procurement practices and whether they act as a barrier for the effective participation of SMEs in procurement. This would be supported by the reporting requirement in regulation 6 of the draft regulations, by which a contracting authority would have to report annually on its progress against this duty, for example by identifying how it had given due regard to the use of SMEs in its procurement processes and strategy.

However, the Government's position is that further consideration and consultation on the detail of this policy is required before regulations could be formally drafted in this area. There are a wide range of different strategies, procedures or processes that might fall within the concept of "procurement strategy" and further work is required before the Government would be satisfied it had been able to capture all of these effectively, together with identifying appropriate examples of how a contracting authority might demonstrate it had given due regard to facilitating appropriate participation by SMEs within that strategy.

The Government does not intend that regulating in this area should have the effect of creating additional processes for contracting authorities to carry out without providing practical benefits for SMEs.

Any regulations that are introduced should also lead to more efficient procurement processes across the public sector that benefit suppliers to government more widely, and not just small businesses. Therefore the Government's position is that further consideration, and consultation on the detail of this policy is required before using the power in clause 38 to make regulations in this area.

Minimum/maximum timescales – The consultation exercise on use of the power, and evidence from the Government's Mystery Shopper service, identified that disproportionately short timescales for providing a full tender response may often disadvantage SMEs in comparison to larger competitors who are able to draw on larger bid team resources to overcome the challenges presented by a short timescale. Examples were also provided where timescales were excessively long and disproportionate, which also created additional burdens for SMEs.

Whilst the Public Contract Regulations 2006 already specify minimum timescales for procurements above the stated financial thresholds, those regulations do not impose minimum timescales for procurements below the threshold. However, the Government intends that the new Public Contract Regulations 2015 will require any procurements below the stated financial threshold that are advertised on the Contracts Finder website to allow economic operators sufficient periods of time.

The Government will assess the impact of the new legislation introduced in the new Public Contract Regulations and will consult further before using the power in clause 38 to specify minimum and/or maximum timescales.

Debriefing - The power in clause 38 could be used to require contracting authorities to provide information to unsuccessful bidders for contracts below the financial thresholds covered by the Public Contract Regulations 2006. The financial thresholds are currently set at £112,000 for contracts in central government and £173,000 in local government and the wider public sector.

Under the Public Contracts Regulations 2006, for contracts above the financial thresholds, in addition to giving general reasons for its decision about awarding a contract, the contracting authority is required to inform any unsuccessful tenderer, on request, of the reasons why another tender has been selected, and the name of the successful tender. This information may include the relative advantage of the successful tender compared to another tender, based on the scoring system for that procurement exercise. The 2014 EU Directive maintains these obligations on a contracting authority for contracts above the financial thresholds.

The financial thresholds for procurements to be covered by EU requirements are quite high. This means that for a relatively high value contract valued at £100,000 in central government i.e. just below the financial threshold in the regulations, the contracting authority is under no obligation to explain to an unsuccessful bidder why its bid failed or how it might take steps to bid more successfully in the future. Having a similar requirement for lower value procurements could be seen as helping SMEs become more competitive when bidding for public sector contract opportunities.

The Government considers unsuccessful bidders, including SMEs, might benefit from some form of debriefing by a contracting authority that allows them to understand what a successful bid might have contained. The Government wants to ensure, however, that any obligation to debrief is targeted most appropriately, balancing the benefits for unsuccessful bidders against avoiding placing unnecessary burdens on contracting authorities.

Therefore further consideration of the impact of other reforms to help SMEs will be assessed first, and consultation on the detail of this policy will take place before the power is used to make regulations in this area. Further consultation on this policy area could consider the level of detail any debriefing should go into, the information which SMEs require in order to improve their bid and whether there are practical examples of debriefing for lower value procurements e.g. contracts which fall just below the EU financial thresholds helping SMEs gain better access to public sector contract opportunities.

Standard terms and conditions - The power in clause 38 could be used to require contracting authorities to consider, or make appropriate use of, standard terms and conditions for major service and/or low value goods and services contracts. The introduction of standardised documents for public procurement was suggested during the consultation exercise on use of the enabling power.

The Cabinet Office and Government Legal Service have developed a set of model terms and conditions for major services contracts. In accordance with a Procurement Policy Note issued on the 3rd of March 2014, these are published for government departments and other public sector organisations to use.

A set of short form terms and conditions of contract have also been developed for use by government departments and many other public sector organisations, in accordance with a Procurement Policy Note issued on the 8th of April 2014. Organisations may use the short form terms and conditions for the low value procurement of goods and services where the contract value is likely to be below the relevant procurement thresholds in the Public Contracts Regulations 2006.

With both sets of contract terms and conditions, organisations defined as being in-scope by the March 2014 Procurement Policy Note (i.e. all Central Government Departments including their Executive Agencies and Non Departmental Public Bodies) are advised to assess whether the model contracts are appropriate in each case.

It would not be appropriate at this stage to use the power in clause 38 to require contracting authorities to make use of standard contract terms and conditions, because the model contract terms and conditions introduced by the Cabinet Office may require adjustment for use in individual contracts, have been available for less than a year, are subject to ongoing continuous improvement and require feedback on their use in practice since March 2014.

However, the use of standard terms and conditions could be an opportunity to present a united front to industry and potential suppliers, and promote improved standards of procurement across the public sector. The Cabinet Office already strongly recommends that contracting authorities consider making use of the standard terms and conditions where appropriate.

Therefore, before deciding to exercise the power in clause 38 to place a duty on contracting authorities to make use of these terms and conditions, the Cabinet Office will consult on the potential benefits of requiring appropriate use of standard contract terms and conditions across the public sector.

Impact on contracting authorities - The procurement measures in the SBEE Bill will apply to “contracting authorities” as defined in the Public Contracts Regulations 2006 (clause 38(3)). The clause, however, excludes from the definition of contracting authority, public bodies whose functions are wholly or mainly devolved functions (clause 38(4)). Regulation 2 (Extent) of the draft illustrative regulations repeats that exclusion for the benefit of readers of the regulations.

For the definition of contracting authorities, clause 38 currently refers to the Public Contracts Regulations 2006, which are in force at the time this statement is made. When the Public Contracts Regulations 2006 are repealed and replaced by the Public Contracts Regulations 2015, clause 38 will need to be amended so that the definition of contracting authorities will be based on the new regulations.

The draft illustrative regulations provide in regulation 3 (Scope of Part 2) for exclusions of certain types of procurement from regulations 4 and 5. Those exclusions include where the procurement would be above the EU financial threshold in the 2014 EU Directive but the 2014 Directive itself states that it would not apply to the procurement (for example, specific types of service contracts or procurements that fall within the scope of EU Directive 2009/81/EC as contracts relating to certain types of procurements in the field of defence and security).

The exclusions also include the procurement of health care services for the NHS that are already regulated by the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 and contracts awarded by Academies or maintained schools.

Key stakeholders who will be consulted - Key stakeholders who have been, and will continue to be, consulted on the details of any draft secondary legislation include but are not limited to;

- Central government contracting authorities
- Local authorities and the wider public sector (Police, Fire and Health bodies)
- Education, qualification and professional bodies
- Trade bodies
- Broadcasting and media organisations
- Organisations representing Voluntary, Community and Social Enterprises (VCSEs)
- Suppliers to government, private businesses and entrepreneurs
- Trade bodies
- Universities and academics specialising in public procurement
- Lobbying organisations.