

## Annex B – Respondent Information Form



### Public Procurement: A Consultation on Changes to the Public Procurement Rules in Scotland

#### RESPONDENT INFORMATION FORM

**Please Note** this form **must** be returned with your response to ensure that we handle your response appropriately

#### 1. Name/Organisation

##### Organisation Name

Stop Climate Chaos Scotland

**Title** Mr  Ms  Mrs  Miss  Dr  **Please tick as appropriate**

##### Surname

Wilson

##### Forename

Gail

#### 2. Postal Address

2<sup>nd</sup> Floor, Thorn House

5 Rose Street

Edinburgh

**Postcode** EH2 2PR

**Phone** 0131 243

**Email**

#### 3. Type of Respondent

**Please tick as appropriate**

Executive Agencies and NDPBs

Local authority

NHS

Other statutory organisation

Representative body for private sector organisations

Representative body for third sector/equality organisations

Representative body for community organisations

Representative body for professionals

Private sector organisation

Third sector/equality organisation

Community group

Academic

Individual

#### 4. Permissions - I am responding as...

**Individual / Group/Organisation**

Please tick as appropriate

**(a)** Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

**Please tick as appropriate**

Yes  No

**(b)** Where confidentiality is not requested, we will make your responses available to the public on the following basis

**Please tick ONE of the following boxes**

Yes, make my response, name and address all available

**or**

Yes, make my response available, but not my name and address

**or**

Yes, make my response and name available, but not my address

**(c)** The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

**Please tick as appropriate**

Yes  No

**(d)** We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

**Please tick as appropriate**

Yes

No

## Questions

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

No comment

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

Stop Climate Chaos Scotland (SCCS) welcomes the opportunity to respond to this consultation. As the Procurement Reform Bill made its way through the Scottish Parliament, SCCS was part of the civil society grouping calling for the Scottish Government to put sustainability at the heart of public procurement<sup>1</sup>. An updated version of civil society's ten procurement priorities has been produced, again supported by SCCS<sup>2</sup>.

The then Deputy First Minister, Nicola Sturgeon MSP, stated at Stage 3 of the Bill process, that the sustainable procurement duty "is the linchpin of the bill". It is therefore imperative that the guidance enables sustainability to be at the heart of the procurement process. Sustainability must be considered by procurers not as a nice 'add on' but as a fundamental requirement of all public purchasing.

We welcome the intention to develop a set of tools to 'to analyse the opportunity to maximise social, economic and environmental outcomes through their procurement activity'. A key question is how the tool will be developed and what procurers are then expected to do with this analysis. As there is no stated hierarchy among the 16 National Outcomes, it is unclear how these priorities will be determined.

All procurement activity will promote or improve one or more of economic, social, health and environmental well-being. It is essential that measurable value is attributed to social and environmental benefits, to encourage a move away from procurers automatically pursuing the cheapest option available or focusing purely on economic factors.

The guidance should clarify the linkages between the sustainable procurement duty and the three part duty on all public bodies set under the Scottish Climate Change Act, requiring them to act: i) in the way best calculated to contribute to the delivery of the Act's emissions reduction targets; ii) in the way best calculated to help deliver any statutory adaptation programme; and iii) in a way that it considers is most sustainable.

While the consultation document notes that public bodies have been developing, since 2011, 'a consistent approach to sustainable public procurement', it should be noted that the latest greenhouse gas emissions figures for Scotland show that public sector emissions increased 4% from the previous year (2011 to 2012).

With all annual emissions targets for greenhouse gases, set under the Scottish Climate

<sup>1</sup> [www.stopclimatechaos.org/sites/default/files/Procurement-10asks-final.pdf](http://www.stopclimatechaos.org/sites/default/files/Procurement-10asks-final.pdf)

<sup>2</sup> [http://www.unison-scotland.org.uk/publicworks/Procurement-10asks-regs+guidance\\_Apr2015.pdf](http://www.unison-scotland.org.uk/publicworks/Procurement-10asks-regs+guidance_Apr2015.pdf)

Change Act, having been missed, much more effort across all sectors will be required if we are to meet our ambitious but necessary emissions goals in future. Public procurement has a crucial role to play in making this happen.

The level of emissions savings that is expected from this sector through to 2020 and beyond is considerably more challenging than it is at present. Indeed, the Government's plan for delivery on commitments under the Climate Change (Scotland) Act 2009 (RPP2) states an intention to 'ramp up emission reductions in the public sector'.

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

No comment

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.

Agree  Disagree

No comment

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

Yes  No

No comment

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

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

No comment

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.

Advantages  Disadvantages

No comment

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.

Yes  No

We agree that it would be useful for public bodies to be encouraged to focus on fairly and ethically produced goods, including labels indicating lower embodied carbon footprints, higher levels of energy efficiency, peat-free landscaping materials, FSC certified (or equivalent) wood products, reused or recycled products etc. We would also support this being applicable to lower value contracts to encourage all procurers to consider ethical and environmental factors as an integral part of the procurement process.

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.

Yes  No

In line with the sustainable procurement duty, the technical specifications should not only refer to the life cycle financial costs, but to social and environmental life cycle impacts. We can see no reasonable justification for this life cycle analysis being required only in terms of financial cost. As stated in our answer to Q2 above, cost must not override the requirement on procurers to give proper consideration to social and environmental factors.

For example, if procuring computers or other IT hardware, a procurer could consider not only the life cycle financial costs of buying, maintaining and disposing of the item/s in question, but could equally consider the embedded carbon emissions of the product, employment rights of those involved in manufacturing or recycling processes etc.

It seems reasonable for this to be applicable to lower value contracts to encourage all procurers to consider ethical and environmental factors as an integral part of the procurement process.

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.

Agree  Disagree

We agree that contracts must never be awarded on the basis of lowest price or lowest cost alone, and that the rules being developed should apply in all circumstances. However, as stated in our answer to Q9, the life cycle financial cost should not be the only consideration but must be widened to take into account the life cycle implications for social and environmental impacts.

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.

Agree  Disagree

No comment

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?

No comment

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?

No comment

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

No comment

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

No comment

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.

Yes  No

No comment

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.

Agree  Disagree

No comment

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.

Yes  No

No comment

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

No comment

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

No comment

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

No comment

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

No comment

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

No comment

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

Yes  No

No comment

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.

Yes  No

No comment

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

Yes  No



No comment

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.

Yes  No

All companies should be excluded from contracts, at any value, if they are found to have breached environmental, social and labour law obligations, along with the other activities listed above. Public funds should not be accessible to any company which has undertaken any of these activities.

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

Yes  No

No comment

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

Agree  Disagree

No comment

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

Yes  No

No comment

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

Yes  No

It makes sense to ensure that important criteria are met throughout the supply chain. It would undermine the requirement of such criteria if a loophole allows access to public contracts to companies which fail the exclusion criteria further down the supply chain.

Guidance should set out the types of reasonable checks public bodies are expected to

make on this, including pre-qualification disclosures and checklists/assessment criteria. There are some responsibilities that can also be placed on the main contractor.

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

In light of the challenging targets set out in the Scottish Climate Change Act, we believe bidders for public contracts should show how they manage their environmental impact. One way of illustrating this would be for companies to declare the level of greenhouse gas emissions – direct and indirect - that result from their business activities.

**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.

Agree  Disagree

No comment

**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.

Agree  Disagree

We agree that contracts must never be awarded on the basis of lowest price or lowest cost alone, and that the rules being developed should apply in all circumstances. However, as stated in our earlier answers, the life cycle financial cost should not be the only consideration but must be widened to take into account the life cycle implications for social and environmental impacts.

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

No comment

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.

Agree  Disagree

No comment

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.

Agree  Disagree

No comment

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.

Agree  Disagree

No comment

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.

Agree  Disagree

No comment

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.

Agree  Disagree

No comment

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.

Yes  No

No comment

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

No comment

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.

Agree  Disagree

No comment

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.

Agree  Disagree

No comment

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.

Agree  Disagree

No comment

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

No comment

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

Agree  Disagree

No comment

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.

Yes  No

No comment

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.

Agree  Disagree

No comment

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.

Agree  Disagree

No comment

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

Agree  Disagree

No comment

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

Agree  Disagree

No comment

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

Yes  No

No comment

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

No comment

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

No comment

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

No comment

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.

Agree  Disagree

No comment

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.

Agree  Disagree

No comment

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.

Agree  Disagree

No comment

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

Yes  No

We believe there is a need for a review body and that it must be available, not only to any person having an interest in obtaining a particular contract, but also to wider civil society. There must be a process by which procurement decisions taken which are not in line with the Act and guidance can be challenged, as long as any such challenge is based on the appropriate principles.

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

Yes  No

No comment

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

Yes  No

No comment

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?

Transparency is vital if citizens and civil society are to hold governments to account and ensure public spending is used responsibly and sustainably. To that end, we welcome the Scottish Government's position to endorse the principles of open contracting and commitment to work with civil society and others to improve transparency.