

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

The Faculty of Advocates

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

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N/A

2. Postal Address

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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.

The Act provides a clear statement on the minimum requirements for the procurement strategy (section 15(5)) and the procurement report (section 18(2)). Accordingly, we would suggest that the guidance should focus on the form of the strategy and the report. We consider that it would be unhelpful for the guidance to provide a gloss on the content requirements which are clearly set out in the Act. Section 20(3) of the Act provides that the guidance may include a model procurement strategy and model annual report. We consider that the provision of such model documents would be a positive step. It would provide a framework that public bodies could follow. This would provide for a uniform structure which would make comparison, and evaluation, a more straightforward process.

We can see no difficulty in practical guidance being provided on the approach to consultation and the approval process. Whether general or specific guidance is provided is ultimately a policy question, which we do not feel we can assist with. However, the majority of contracting authorities already have strong internal governance in relation to procurement strategies. We note that section 20(4) of the Act provides that contracting authorities must have regard to the guidance. If prescriptive guidance is provided then this will have to be followed and developed practices may have to be altered. The requirements of section 20(4) should be considered when the policy issue is being addressed.

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

Developing practical tools that public bodies could use to assist in complying with the requirement of section 10 of the Act would be a positive step. The consultation document states that a “...consistent approach to complying with this duty is being developed and tested across the public sector in Scotland...” We consider that this is desirable and should promote the policy objectives behind the Act. However, we are unclear on what this “consistent approach” is. The consultation document refers to the “prioritisation” methodology and the “flexible framework” approach. We have no practical experience of either approach. Accordingly, we cannot comment on whether these approaches would be able to provide the necessary practical guidance to assist with compliance. However, we would be concerned if any modelling approach was the only way that a contracting authority could demonstrate compliance with the requirements of the Act. It is important that compliance with the fundamental requirements of section 10 of the Act does not become a mechanical process. There may well be procurement exercises that are not well suited to a standard modelling

approach and a more individual consideration would be necessary. We would suggest that any guidance should retain a degree of flexibility in relation to compliance to ensure that the requirements of section 10 are carefully considered by contracting authorities in all procurement exercises. This should assist in ensuring that appropriate compliance strategies are considered and adopted in all cases. We consider that any guidance should provide guidance on the tools that can be utilised to demonstrate compliance but also highlight that there is scope for compliance to be demonstrated by means other than the tools in appropriate cases.

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

The statutory guidance should provide clear and practical guidance on what is required by section 24 of the Act. We agree that the guidance should address the importance of stakeholder engagement, the requirements for the contract notice and the contract award notice, and reporting requirements. The guidance should also cover the circumstances in which the requirement would be inoperative.

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

The proposal would be an effective means of ensuring compliance. However, we do not necessarily see these two options as being standalone provisions. It would be open to the Scottish Ministers to: (i) impose a requirement on public bodies to ensure compliance; and (ii) impose a requirement that appropriate contractual provisions are made in all contracts to reinforce the requirement.

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

Yes No

This question is a matter of policy, rather than a legal issue. Accordingly, the Faculty of Advocates cannot usefully respond to it.

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?

Any definition would need to be precise enough to ensure that it can be applied by contracting authorities. The concepts of “disadvantaged minorities or otherwise socially marginalised groups” is vague and open to different interpretations. Further guidance on the definition of the term “disadvantaged person” would be required to ensure consistent application by contracting authorities.

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

We are not aware of any arguments that currently support reserving contracts for mutual and other non-public sector bodies in Scotland. Indeed, there may be significant disadvantages associated with applying this provision to procurement activities of public bodies in Scotland. The principles in the Act are meant to embody an ethos of open and fair competition for public contracts. Any derogation from these principles potentially compromises the wider public objectives that the Scottish Ministers are seeking to achieve.

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

This is essentially a policy question rather than a legal issue. However, adopting such an approach would emphasise the importance of this issue and provide a clear mechanism for ensuring that the issue is dealt with in a consistent manner.

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

Yes. A consistent approach should assist in ensuring simplicity and transparency.

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 should not be awarded on price alone. The majority of contract awards are currently made on the basis of the most economically advantageous tender. Within this definition, contracting authorities have significant latitude to determine what weight should be accorded to quality and price. In our opinion, it would not be a positive development if price were the sole determining factor in a contract award. Even if this requirement was introduced, it is difficult to see that any local authority could ever utilise a price only assessment criteria due to the requirement imposed on local authorities to secure “best value”, in terms of section 1 of the Local Government in Scotland Act 2003.

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

The regulation of public procurement should seek to ensure that there is open and fair competition. However, it is also important to retain flexibility and ensure that contracting authorities can procure goods and services that suit their particular needs and requirements. We consider that public bodies should be able to split requirements into smaller lots and award more than one lot to the same tenderer.

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?

We agree that public bodies should have the discretion to decide whether to request additional information about sub-contractors.

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?

We do not consider there to be any cogent reasons in favour of transferring this obligation to the main contractor.

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

We agree. It would not be proportionate to apply similar provisions to the lower value procurements regulated by the Act.

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

This is largely an issue of policy and so other respondents are likely to be better placed than the Faculty to comment. However, our broad view is that it is undesirable to introduce a scheme of direct payments, given the complexities which it would involve. We note that sub-contractors can utilise the legal protections currently in place.

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

We consider that each of these rules can usefully be applied to lower value regulated contracts. In relation to the turnover issue, it is important that small businesses, or recent start-ups, have the opportunity to bid without being met by excessively high turnover criteria.

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

In our view, the introduction of national standards is inappropriate and undesirable. We consider that it is better that public bodies be able to

decide which tests to apply for a particular contract and we are not aware of any evidence suggesting that the flexibility which public bodies currently enjoy in this area is causing any difficulty.

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

In our view there is no good reason to have a different list of relevant criminal convictions for contracts of a lower value. It is desirable in the interests of legal certainty and consistency that the same list should be used.

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

Yes, for the same reasons as given in our answer to question 18.

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

We agree. In our view, this matter is best dealt with as a one of discretion rather than compulsion.

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

We consider that public bodies should be able to decide not to exclude a business from a procurement exercise if, in light of the circumstances of the breach, the public body considers that 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?

Yes No

We consider that the same approach should be taken for lower value regulated contracts, in the interests of consistency.

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

Again, a discretionary rather than mandatory approach is desirable, in order that proper regard can be had to the particular circumstances.

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

Yes No

We agree that for reasons of simplicity and consistency the same approach is desirable for lower value contracts.

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

We agree that in exceptional circumstances and when overriding considerations of the public interest require it, a public body should be allowed not to exclude a business with disqualifying criminal convictions or which has breached its obligations to make tax and social security payments.

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

Yes No

For reasons of simplicity and consistency, the same rules should be applied to lower-value contracts.

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

We consider that the types of conduct identified in the consultation paper are not ones which should invariably exclude a business from public contracts. The examples listed cover a range of undesirable conduct. The Faculty considers that an outright prohibition on tenders from businesses guilty of such conduct would be disproportionate. It would result in a fettering of the choice of a public body where the individual circumstances of the body, or the business, may mean that the business ought not to be excluded. This should be a matter for the discretion of the public body.

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

Yes No

For reasons of simplicity and consistency, the same rules should be applied to lower-value contracts.

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

Agree Disagree

In our view, a proportionate system of exclusions will carry maximum periods for those exclusions. Nevertheless, we agree that breaches leading to exclusion are serious matters and should attract a significant penalty. For that reason, we support setting the exclusionary periods at the permitted maxima of five and three years.

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

Yes No

For reasons of simplicity and consistency, the same rules should be applied to lower-value contracts.

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

Yes No

We consider that requiring public bodies to ensure sub-contractors do not fail any of the exclusion criteria would be onerous. For that reason, we

agree that they should not be obliged to check this information.

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

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. We consider that the manner in which public bodies address the various concerns identified in the consultation paper should be matters for them. They should not be required to demonstrate the extent to which, or the manner in which, they have addressed them by reference to a code.

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

We agree that limited requirements are desirable in the field of certain services. A greater degree of discretion on the part of public bodies is appropriate, and even inevitable, in some cases. The limited rules will necessarily be less effective than the full regime; but the balance struck is in our view appropriate.

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

Cost alone ignores the factors necessary for best value contracting.

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

We consider that the principles identified in the consultation paper are the right ones. The guidance should be framed with a view to avoiding unmeritorious legal challenges. For that reason, it should not be prescriptive or excessively detailed. We agree that decisions as to their procedures should be left to the judgement of public bodies.

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

These are principally policy questions rather than legal questions. On the basis that a PIN is likely to increase flexibility in a useful way, and that it is optional, we would agree that provision should be made. We have no further observations.

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

Applying the same principles as in Question 36, we would agree. However, this is also a policy and not a legal question.

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

This is principally a policy question. We agree, however, that there should be some flexibility to allow for particular circumstances. Provided there is a robust system in place that allows for relevant decisions to be scrutinised, and challenged if necessary, we consider that this permission provides the necessary flexibility.

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

The same considerations apply as in Question 38.

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

This is a policy rather than a legal question and we have no observations to make.

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

This is a policy rather than a legal question. The only observation we would make is that public bodies will need to be vigilant about transparency in such circumstances.

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

This is a policy rather than a legal question.

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

This is a policy rather than a legal question.

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

This is a policy rather than a legal question.

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

This is a policy rather than a legal question.

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

This is a policy rather than a legal question.

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

Agree Disagree

This is a policy rather than a legal question.

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

This is a policy rather than a legal question.

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

Questions as to the practicalities of postponing the requirement to provide the ESPD in electronic form until 18 April 2018 are not matters upon which the Faculty of Advocates can usefully respond. That said, in the interests of reducing the complexity of domestic legislation to the absolute minimum, we consider that, if this particular requirement is indeed deferred until 18 April 2018 then so, too, should be the provision to the effect that businesses should not have to submit supporting documents where the public body awarding the contract already holds these.

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

See our response to Q. 49.

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

Agree Disagree

We agree with this proposal. The reduction of complexity referred to in our response to Q. 49 applies here also.

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

Agree Disagree

We agree with this proposal. With a view to simplifying the implementing legislation as far as possible, it is preferable to apply the same requirement to all types of contracts falling within the directives.

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

Yes No

This question is of an essentially practical, rather than legal, nature and accordingly the Faculty of Advocates cannot usefully respond to it.

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

In the interests of legislative simplicity, yes.

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

This question is of an essentially practical, rather than legal, nature and accordingly the Faculty of Advocates cannot usefully respond to it.

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

This question is of an essentially practical, rather than legal, nature and accordingly the Faculty of Advocates cannot usefully respond to it.

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

This question is of an essentially practical, rather than legal, nature and accordingly the Faculty of Advocates cannot usefully respond to it.

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

The question whether the monitoring and enforcement body for Scotland should be the Scottish Ministers raises practical and political considerations upon which we cannot comment. However, taken together, this question and the "Overview" and "Options" which precede it reveal issues of some complexity.

(1) By way of introduction, it is not accurate as a matter of law to say that Article 83 of the Public Procurement Directive and the corresponding articles of the two other new directives "require that one or more organisations *in Scotland* should monitor how the procurement rules are being delivered [*etc.*]" (our emphasis). The directives are not concerned with the internal constitutional arrangements within the United Kingdom or with the powers of the Scottish Ministers or the Scottish Parliament in terms of those arrangements.

(2) For present purposes, the provision of concern to us is Article 83(2) of the Public Procurement Directive, which (like the corresponding provisions in the two other new directives) is in the following terms.

"Member States shall ensure that the application of public procurement rules is monitored.

When monitoring authorities or structures identify by their own initiative or upon the receipt of information specific violations of systemic problems, they shall be empowered to indicate those problems to national auditing authorities, courts or tribunals or other appropriate authorities or structures, such as the ombudsman, national parliaments or committees thereof."

(3) Article 83(2) appears to operate in a conceptual environment which is to some extent foreign to the administrative and legal system in the United Kingdom and has the potential to raise difficulties which need to be considered.

(4) In the first place, it is important to bear in mind the fact that the language of Article 83(2) is mandatory, in so far as it provides that monitoring authorities "shall" be empowered to indicate those problems [etc.]. This emerges not so much from the use of the word "shall", which, whilst often employed in a mandatory sense, may on occasions be merely directory. Rather, it emerges from the French text, which provides starkly that: "*Lorsque les autorités ou structures de contrôle constatent, de leur propre initiative ou après en avoir été informées, des violations précises ou des problèmes systémiques, elles **doivent être habilitées** à les signaler aux autorités nationales d'audit, aux juridictions ou aux autres autorités ou structures compétentes telles que le médiateur, le parlement national ou les commissions de celui-ci*" (emphasis added). Indeed, what we have here is a mixture of the mandatory and the discretionary, because on the one hand, it is mandatory for implementing legislation to **confer** upon the "monitoring authorities or structures" the power to "indicate ... problems", whilst on the other hand what the recipients of such "indications" are to do about them appears to be a matter for their **discretion**.

(4) In particular, it is not apparent what consequences are to flow from the receipt, by a "structure" such as the Scottish Ministers, of "indications" of "specific violations" (meaning specific violations of the public procurement rules), at least so far as the perpetrators of those specific violations are concerned. To take an obvious example, a "specific violation" of the implementing Regulations by a given contracting authority is likely to mean that that authority has acted in breach of a statutory duty which it owed to certain economic operators. The task of assessing whether there has been such a breach is essentially a judicial, rather than an administrative, one, the judicial authority which carries out the assessment also having vested in it the requisite remedial powers - but of course no such powers come into play where there has been a mere "indication" of a specific violation, still less do they come into play where the authority to which the indication has been made is, for example, the Scottish Ministers. Accordingly, whoever this monitoring power is eventually vested in should perhaps refrain from making findings of "specific violations" unless those findings have first been made by a competent court or tribunal.

Whether the Scottish Ministers should act by the SPoE is not a matter upon which we can usefully 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

We agree that the remedies provided for in the existing 2012 Regulations should be copied into the new Regulations. The remedies as they stand are in compliance with the Remedies Directives and, from the legal perspective, there is no good reason to alter them.

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

Yes No

We consider that there is much to be said for a review body which sits beneath the national courts. Although we are not persuaded that procedure before such a body would necessarily be cheaper or faster than immediate recourse to the courts, we consider that the principal advantages would be the accrual, within the review body, of a degree of specialist expertise and the likelihood of a fair degree of consistency in the review body's judgments. It appears to us, from our acquaintance with public procurement cases which have been remitted to the Court of Justice of the European Union from Germany and Austria, for example, that the dedicated review bodies in those Member States (the *Vergabekammer* and the *Bundesvergabeamt* respectively) have indeed developed considerable specialist expertise.

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

Yes No

We consider that, if there were to be such a review body, it should be established as a tribunal with the Scottish Tribunals system. Such a tribunal would be able to operate by reference to general rules of procedure applicable to the Scottish tribunals as a whole and its judgments would fit readily into a clearly discernible system of appeals. We consider that it would be helpful if the tribunal in question were to consider maintaining a website in which, amongst other things, it published summaries of its judgments (or at least the more important ones), with links to the full text of the judgments themselves.

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

Yes No

No. An ombudsman is unlikely to be as well equipped as a tribunal to deal with the legal complexities raised by public procurement litigation.

Furthermore, the remedial powers which, in terms of the Remedies Directives, a review body is required to possess are essentially legal in nature, so that it would not be appropriate to confer the full panoply of such powers upon an ombudsman.

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?

Although this question, like many others in the consultation, raises issues which fall outwith our area of expertise, we naturally welcome Scottish Government's proposal, in the interests of transparency.