

SCOTTISH PROCUREMENT DIRECTORATE

SINGLE POINT OF ENQUIRY (SPoE) - REVIEW OF ACTIVITY - January 2008 to February 2009.

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1 Background

The Single Point of Enquiry¹ (SPoE) has been established in response to a recommendation by John McClelland in his Review of Public Procurement in Scotland².

Recommendation 12.5 of the report stated:

“ Suppliers need to have a single point of enquiry within Scotland to which they can address concerns and obtain clarification of decisions and procedure related to public procurement. There should be a designated point of appeal positioned within the Scottish Executive and authorised to address this need. If the appeal concerns a decision or procedure of SPD, the point of appeal should include some element of independence from SPD. “

After cross public sector agreement the service was launched by John Swinney MSP in January 2008 with the following aims:

- *To provide businesses with advice on procurement legislation and practices, to seek resolution of disputes regarding procurement practice and to help improve the consistency of public procurement processes applied by public and publicly funded bodies in Scotland.*
- *To encourage and establish best practice in procurement within the Scottish public sector and publicly funded bodies by working with suppliers, the business community and purchasers to address issues of concern.*
- *To operate with impartiality, fairness and objectivity and promote a culture of openness and transparency in relation to procurement practice.*

The SPoE offers a confidential service to suppliers. Confidentiality is maintained in this reporting document.

2 Context

Advice and Guidance

A core task of the Scottish Procurement Directorate³ is providing guidance and advice on public procurement legislation and policy to the Scottish public sector. This guidance is publicly available on Government websites and the SPD maintains a constant dialogue with business and suppliers with a view to improving its purchasing effectiveness and suppliers' capabilities and knowledge.

¹ <http://www.scotland.gov.uk/Topics/Government/Procurement/Selling/supplier-enquiries>

² <http://www.scotland.gov.uk/Publications/2006/03/14105448/0>

³ <http://www.scotland.gov.uk/Topics/Government/Procurement>

The focus of the SPoE is to provide a service to business by having a readily identifiable and accessible source of advice and support where suppliers can seek clarification of procurement practices and procedures and raise issues of concern regarding public procurement practices.

Remedies

Where a supplier believes that a public procurement organisation has breached procurement rules and wishes to pursue formal remedies then this can be done either through an approach to the European Commission or by pursuing a case through the Sherriff Court or the Court of Session. Pursuing formal remedy is a major step for a supplier and can incur significant legal costs. Whilst an approach to European Commission does not incur any costs it can also take a substantial time to reach a determination.

The SPoE operates as an informal service and supplements the existing formal remedies that are open to suppliers. As such, the SPoE cannot materially affect or overturn contract award activity and seeks to broker, through its involvement, mutually positive outcomes for suppliers and buyers where possible. The ultimate aim is, through this process, to contribute to improved public procurement practices.

3 Operation of SPoE

Advice and guidance

The bulk of the contacts made with the SPoE are suppliers seeking relatively straightforward guidance on, and clarification of, public procurement procedures or wishing to register their view on procurement practices. Most of this communication is conducted informally, by telephone or e-mail, and where concerns exist suppliers have been content to register this with the SPoE. Due to its routine nature, this activity it is not specifically monitored or recorded. However, such requests most frequently concern:

- Seeking contract opportunities – enquiries are directed to the relevant Centre of Expertise, procuring authority and the new contracts portal (Public Contracts Scotland).
- Seeking clarification on Remedies/SPoE service – typically suppliers seeking general guidance on what remedy options exist where they perceive a breach in the application of public procurement rules.
- Contract award criteria and procedures – typically post contract award where suppliers have concerns regarding the award criteria evaluation process.
- Approved supplier lists – typically complaints that approved lists are limiting competition and excluding new supplier entry to markets/contracts.

- Proportionality and complexity of tendering requirements – general criticism from smaller companies who feel that they are disadvantaged by disproportionately complex or arduous requirements in tendering process e.g. Turnover, insurance and statutory compliance verifications.

Supplier Complaints

The more substantive SPoE activity occurs where suppliers perceive they have a difficulty and are seeking an active involvement by the SPoE in a particular public contract activity. The initial approach adopted by SPoE in such cases is always to advise suppliers to exhaust discussions directly with the procuring authority. Where this is not conclusive, for whatever reason, and the SPoE judges the issues merit review, it will involve itself in trying to broker a positive resolution. It is important at this stage that suppliers understand that the SPoE has no legal redress to overturn the procurement decisions of public bodies.

In doing so the SPoE works closely with the Scottish public procurement Centres of Expertise in reviewing any issues raised within their respective sectors. This has been required in only a minority of the total cases handled by the SPoE since some form of outcome has generally been achieved early in the process.

SPoE cases have arisen from a variety of sources:

- Supplier approaches
- Business Organisations
- Approaches to Ministers
- Legal firms

This review process can, and has, involved senior management from Centres of Expertise, Procuring Authorities and the SPD.

4 Review of Cases

In general, supplier approaches to SPD (handled by SPoE from Jan 2008) have increased significantly and the rate of approaches being made to the SPoE increased during the last quarter of 2008 and into 2009. In the most recent cases suppliers are indicating that current economic pressures mean contract opportunities are becoming increasingly important and it may be reasonable to expect that suppliers' willingness to challenge will increase as competition for business increases.

The sample of cases is not yet large enough to provide a definitive analysis of supplier feedback and satisfaction with the service although informal feedback from suppliers is generally positive. Such analysis will be considered when appropriate in the future. The views expressed in this report are therefore subjective in part, but attempt to offer an objective assessment of the activities of the SPoE to date.

The subject matter of approaches to the SPoE has varied from relatively straightforward communications difficulties which can be readily resolved to, on occasion, more serious allegations of malpractice. It is therefore essential that the SPoE seeks to establish all relevant facts and judge where it has a valid contribution to make.

Issues raised have covered the whole procurement process from advert and specification through to the tendering process and award procedures. Complainants although primarily SMEs have also included larger plc organisations and are often well versed in procurement rules. More recently there has been increasing interest from legal firms interested in what the SPoE might be able to offer.

Cases have been raised in all the major public sector areas and the range of products and services involved is fairly extensive.

Cases by public sector area:

- *Local Authorities – 9*
- *Scottish Government (SG) Agencies – 8*
- *Higher Education – 4*
- *National health service – 3*
- *SG Central Government – 2*
- *Transport body -1*

Cases concerned the following business sectors:

<i>Legal services</i>	<i>Insurance services</i>	<i>Consultancy (business)</i>
<i>Transport services</i>	<i>IT services</i>	<i>Employment services</i>
<i>Environmental management</i>		<i>Pharmaceutical services</i>
<i>Scientific supplies</i>	<i>Printing supplies</i>	<i>Care services</i>
<i>Consultancy (civil engineering)</i>		<i>Advertising/promotions</i>
<i>Construction/facilities services</i>		<i>Education/training</i>

Issues raised by suppliers

Predominantly suppliers are raising issues concerning what they regard as inaccurate or inequitable evaluation at the award stage

- When awarding scores the evaluation teams necessarily need to be as objective as possible particularly when assessing qualitative elements. However, evaluation techniques such as e.g. weighted averages or calculated ratios have been cited by suppliers as sometimes arithmetically distorting scores and award results. This is an area where there should be clarity of process and suppliers should be made aware of how scoring will be

conducted. From this particular input to SPoE, and other inputs, it is clear that there is a need for SPD to issue further guidance in this area.

- Proportionality and complexity of tender criteria are also causing concern. This is a particular difficulty for smaller firms and lower value contracts and consumes a disproportionate amount of SME resource in PQQ and tender preparation. Particular areas causing concerns are the extent of insurance cover required and the scope of relevant compliance with the necessary statutory requirements (e.g. Health and Safety and social legislation). It is important that tender requirements are balanced to the contract activity.
- Several suppliers have raised concerns that re-competed or new framework contracts have introduced supply profiles wider than their capabilities to supply.
- Communications and feedback to suppliers emerges as an issue. The tendering activity consumes resource within both buying teams and suppliers, and feedback to unsuccessful companies is extremely important in terms of their capability to develop and compete for future business.

The SPoE has endeavoured to maintain positive relationships in its activity and this has generally been reciprocated. It is worth noting the positive support given to the SPoE reviews by the various public bodies concerned and, in particular, from Excel and the Local Authorities.

Annex 1 gives a brief overview of the cases involving SPoE activity.

5 Remedies Landscape

In terms of seeking remedy, suppliers regularly express their unwillingness to pursue formal remedies either because of legal costs or fear of possible detrimental affect to future business opportunities. Whether this reluctance to publicly raise a complaint is based on real or perceived concerns it is a recurring theme in discussions with suppliers. The SPoE seeks to provide some degree of recourse and discussion where suppliers or business organisations raise issues - but do not elect to pursue formal legal remedies.

EU Remedies Directive Consultation

The Scottish Government in autumn last year consulted on its approach to implementation of the new EU Remedies Directive¹ and has published an analysis of the responses it received on the SG website². This Directive will affect the remedies available to business.

¹ <http://www.scotland.gov.uk/Topics/Government/Procurement/policy/Consultations/EUremDir>

² <http://www.scotland.gov.uk/Publications/2009/02/remedies>

During this consultation respondents had the opportunity to comment on the SPoE service:

- **NHS National Services Scotland** commented that the Single Point of Enquiry (SPoE) operated by SPD has proved to be a useful additional review point. They noted that the SPoE is not a point of appeal and that this should not be changed by implementation of the Remedies Directive.
- In **CBI** Scotland's view, the SPoE does not possess sufficient powers at the present time. Its powers should be enhanced to enable it to act as an effective arbitrator on procurement decisions and its decisions should be given some weight in any subsequent court action. It could, for example, be modelled on the Complaints Board for Public Procurement in Norway. An independent arbitration body would provide quicker and less expensive resolution of procurement disputes.
- **APUC** commented that the Government should further promote the SPoE as an alternative to court action. The SPoE should, however, continue to operate on an informal basis and should not become a point of appeal. It would be helpful for the Government to publish information on the types of cases handled by the SPoE and any lessons learned.
- **Maclay, Murray and Spens** commented that they have used the SPoE on behalf of clients and found it to be a reasonably effective facility.
- **Dundas & Wilson** commented that whilst the SPoE may be a useful way to identify common problems and generate a better understanding of the rules, it does not appear to provide any form of meaningful independent review function for disputes over individual tender processes. When the limitation periods for bringing claims are so strict, it is important that those using the enquiry system do not have their legal rights prejudiced.
- Another respondent commented that the SPoE is not sufficiently independent. It should be developed to become a shared learning facility to improve contracting authorities' practice and reduce infringements.

In response to this consultation the SG and SPD will be considering options for future implementation of the Directive and also the continuing operation of the SPoE.

6 Summary

The activity of the SPoE service is clearly dependent upon the uptake by business which appears to be increasing - this will rely upon supplier awareness of the service and willingness to pursue their concerns. In order to increase supplier awareness the SPoE continues to support public procurement seminars and training initiatives and consideration is being given to further promotion of the service. (**Annex 2** indicates the type of promotional activity undertaken so far.)

Review outcomes vary and whilst there are clearly instances of deficiency in procurement disciplines there are, too, situations where the SPoE review moderates and clarifies the supplier's initial expectations and perceptions through the supplier gaining an improved level of knowledge and understanding of public procurement procedures. Even in cases where suppliers may remain dissatisfied, they typically acquire a better knowledge and understanding for 'next time' – a benefit to both buyer and supplier for future tendering.

The informal feedback from suppliers is generally positive and it is important to remember that the support of business and its willingness to use the SPoE will be the key determinant of the success of a service like the SPoE.

The Public Procurement Reform Board has requested that fuller outcome and corrective action reporting would be appropriate for both historical cases and future activity. This will be addressed in future SPoE reporting.

ANNEX 1 SPOE – CASES January 2008 to February 2009

Sector	Issue alleged	Outcome
SG	Restricted competition for framework contract (scope of framework exceeded incumbent supplier's capability)	Procurement process compliant – supplier accepted this position.
SG Agency	Non compliant tender criteria (PQQ requested confidential pricing strategy)	Procurement process compliant – supplier accepted this position.
SG Agency	Non compliant tender process (Non compliant award criteria)	Unclear legal position; supplier elected not to pursue.
LA	Non compliant tender evaluation (change of award evaluation methodology)	Supplier elected to consider formal remedy. SPoE involvement ceased.
LA	Non compliant single sourcing (redirection of contract from incumbent supplier)	Supplier pursued formal remedy. SPoE involvement ceased.
LA	Non compliant tender specification (specifying proprietary product)	Supplier case considered justifiable. Supplier did not pursue.
LA	Alleged malpractice	Supplier pursued formal remedy. SPoE involvement ceased.
NHS	Restricted competition for framework contract (incumbent supplier not aware of re-competition of contract)	Procurement process not compliant. Supplier dissatisfied but did not pursue.
HE	Non compliant tender practices	Supplier failed to pursue
HE	Non compliant tender practices (non declared PQQ criteria)	Contract re-tendered by customer.
SG Agency	Non compliant tender assessment (award criteria evaluation)	Resolved to suppliers satisfaction
Transport body	Avoidance of public procurement regulations.	Contract re-tendered as public contract
LA	Stipulation of OJEU disciplines through sub tier commercial supply chain.	Procurement process conforming – supplier accepted this position
SG Agency	Non compliant sourcing timescales	Supplier case valid. After discussions with procurer supplier did not pursue.
LA	Non compliant tender process (evaluation of award criteria)	Not resolved. Supplier considering formal remedy.
NHS	Non competitive allocation of contracts.	Legislative position unclear. SG pursuing clarification.
HE	Alleged restriction of competition. (scope of framework exceeded incumbent supplier's capability)	Procurement process compliant.
LA/NHS	Non-compliance with procurement regulations	On-going. SPoE waiting further input from business

		representative organisation.
SG Agency	Lack of proportionality in tendering criteria	Procurement process compliant. Supplier accepts position.
SG Agency	Non-compliant award criteria evaluation	On-going. SPoE has facilitated LA/supplier meeting.
SG	Alleged restriction of competition (scope of new framework exceeded incumbent suppliers capability)	Procurement process compliant. Supplier dissatisfied.
LA	Lack of proportionality in tendering criteria and non-compliant tendering timescales	SPoE pursuing on a confidential basis.
LA	Inaccurate tender criteria evaluation	On going. Awaiting further meeting between buyer/supplier.
HE	Terms of PQQ procedure.	Resolved to supplier's satisfaction
SG Agency	Non-compliant tendering timescales	Resolved to supplier's satisfaction
SG Agency	Procurer unwilling to provide feedback	Resolved to supplier's satisfaction.

SG = Scottish Government; LA = Local Authorities; HE = Universities & Colleges; NHS = NHS Scotland (Central Procurement plus Health Boards).

ANNEX 2

SINGLE POINT OF ENQUIRY – promotional activity

Ministerial Launch

J Swinney, January 2008 press release.

SPD Website

- SPD website explanatory notes; Q&A, e-form for enquiries/issues.
- Contact e-mail address spoeprocurement@scotland.gsi.gov.uk

Published articles and website entries

- ‘*Supply Management*’ magazine; ‘*Government Opportunities*’ magazine; ‘*Scottish Law Society Journal*’
- CBI, Scottish Chambers, FSB, IoD, SCDI membership publications.
- APUC, Procurement Scotland, CGCoPE, Glasgow Council Supplier Development Programme, HIE , Scottish Enterprise.
- *BIP PASS* guidance document, *Achilles* guidance documents

Seminar and Conference presentations

- Procurement National Conferences
- Local Govt. Procurement Managers Forum
- Centres of Expertise
- Local Authority Supplier Development seminars
- BIP supplier seminars.