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Cabinet Office Mystery Shopper Scheme

This paper considers the role of the Cabinet Office Mystery Shopper Scheme in
Public Procurement Contracts.

This information is provided to MLAs in support of their Assembly duties and is not intended to address the specific circumstances of any particular individual. It should not be relied upon as professional legal advice or as a substitute for it.

1 Introduction

This briefing aims to contribute to the Committee for Finance and Personnel's (CFP) on-going consideration of issues relating to prompt payment of invoices in public procurement contracts in Northern Ireland (NI). It supplements [RaISe briefing dated 22 May 2013](#), providing more information about the Cabinet Office's 'Mystery Shopper Scheme' (the Scheme).

Section 2 outlines background information relating to the Scheme, including; its role; the information required by the Cabinet Office under the Scheme; and, the public bodies covered by it. The circumstances which the Cabinet Office will intervene on behalf of the mystery shopper under the Scheme are outlined in section 3. The Scheme's limitations are also explained, as are the potential outcomes that *mystery shoppers* themselves may expect. The results of interventions under the Scheme are explored in section 4; and a conclusion is offered in section 5.

2 Background

The Scheme was launched by the Prime Minister and the Minister for the Cabinet Office in February 2011. It was part of a series of measures intended to open up public procurement to greater participation by small and medium enterprises (SMEs). Initially, it was set up to investigate referrals that highlighted poor procurement practice in general. However, in March 2012 its scope and remit was extended to include supply chain problems between prime contractors and sub-contractors. Issues covered now include prompt payment of sub-contractors and the opening up of supply chain opportunities for smaller sub-contractors.

The Scheme is operated by the Cabinet Office's Supplier Feedback Service (SFS). SFS have given a commitment to suppliers that procurers will be challenged to be more transparent and open. The Scheme provides suppliers with a mechanism to raise concerns about public procurement practices and processes. A noteworthy aspect of the Scheme is the apparent anonymity it affords users. If individuals or companies believe that by raising concerns they may jeopardise their on-going business dealings, they have the opportunity to report issues anonymously.

A summary of the Scheme is presented in the following table:¹

Roles of the Scheme	Details required by the Cabinet Office	What bodies are covered?
To provide a clear, structured and direct route for suppliers to raise concerns about public procurement practice when attempts at resolving issues with a contracting authority or a first-tier supplier have failed.	Name, telephone number and email address of the mystery shopper. Whether or not the mystery shopper wishes to maintain their anonymity.	Central government departments; e.g. Ministry of Defence (MOD) – Cabinet Office will address feedback about the central departments or any of the bodies for which they are responsible.
To provide feedback to enquirers on their concerns	The name and address of the contracting authority the mystery shopper is providing feedback on and, if possible, the name of the person dealing with the contract and their telephone number and email address.	The wider public sector (eg local authorities, NHS trusts or education establishments).
To help the Cabinet Office identify areas of poor procurement practice so it can work with the contracting authority to put them right, and help ensure similar cases do not arise in future.	The detailed and specific concerns about the procurement, including Official Journal of the European Union (OJEU) reference numbers, if appropriate.	Prime contractors working on government contracts – Cabinet Office will work with contract managers in departments and prime contractors to address feedback about unfair practices and other issues in the supply chain of government contracts.
To take action to reduce the likelihood of similar issues arising in other authorities.	Whether the mystery shopper has already approached someone in the relevant organisation with their concerns. Whether the mystery shopper has sought advice from any other source.	
To hold government to account for making progress in improving poor procurement practices.	Whether the mystery shopper has started, or are contemplating, formal proceedings against the organisation (e.g. in the UK courts or by contacting the European Commission).	
	The current stage of the procurement project, e.g., is the competition still open?	

3 Submitting a Request to the Scheme

This section explains the circumstances under which the Cabinet Office will or will not intervene under the Scheme, on behalf of the mystery shopper. It also considers what the mystery shopper might expect the Scheme to achieve in relation to their concerns.²

¹ Table is compiled by RaiSe from information available at: <https://www.gov.uk/doing-business-with-government-a-guide-for-smes#mystery-shopper-scheme>

² A more detailed analysis of the scope and remit of the scheme is available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61796/New-Scope-and-Remit-of-the-Mystery-Shopper-Scheme-9-3-12.pdf

For the Cabinet Office to intervene under the Scheme, the feedback supplied by the mystery shopper must meet one or more of the following criteria:³

- Does it highlight procurement practice in conflict with best practice guidance?
- Does the issue represent widespread poor practice?
- Does it concern supply chain issues between contractors and sub-contractors?
- Is it part of a series of enquires about a particular contract?
- Does it concern any announcements aimed at SMEs?

The Cabinet Office **will not intervene** under the Scheme in the following circumstances:

- There is an existing formal dispute between suppliers and contracting authority;⁴
- If they understand that the mystery shopper is contemplating legal action;
- Where the case relates to the mandatory standstill period;⁵ and;
- Where bodies with a statutory right to investigate, such as the Ombudsman, have been or will be, involved.

3.1 Outcomes

So what can the mystery shopper expect in response to his query? The Cabinet Office indicates that it will seek to provide a reasoned response to the enquirer.⁶ It may issue instructions to the contracting authority or prime contractor on how to remedy the problem. It may issue a set of recommendations to a Central Government body. For the wider public sector it may work with lead authorities to produce recommendations. If it considers the issue to be of general importance to public procurement practice, it may issue guidance through a 'Procurement Policy Note'.⁷ If the contract has yet to be awarded, it may **recommend** that the contracting authority delays, restarts or suspends the procurement exercise.⁸ However, the Cabinet Office **does not have the power to require a contracting authority to delay or suspend procurement.**

³ Cabinet Office. *Scope and remit of Mystery Shopper Scheme*:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61796/New-Scope-and-Remit-of-the-Mystery-Shopper-Scheme-9-3-12.pdf

⁴ This may include legal or administrative proceedings such as an internal appeals process.

⁵ The standstill period is a mandatory period between the notification of the intended award of a contract and the actual award of the contract.

⁶ Cabinet Office. *Scope and remit of Mystery Shopper Scheme*:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61796/New-Scope-and-Remit-of-the-Mystery-Shopper-Scheme-9-3-12.pdf

⁷ Public Procurement Note:

https://www.gov.uk/government/publications?keywords=procurement&publication_filter_option=all&topics%5B%5D=all&departments%5B%5D=cabinet-office&world_locations%5B%5D=all&direction=before&date=2013-03-01

⁸ Cabinet Office. *Scope and remit of Mystery Shopper Scheme*:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61796/New-Scope-and-Remit-of-the-Mystery-Shopper-Scheme-9-3-12.pdf

3.2 Limitations

The Cabinet Office does not provide legal advice and the Scheme should not be viewed as a potential basis to obtain legal compensation or damages. The Cabinet Office cannot advise a contacting authority to award or refrain from awarding contracts to particular bidders. Nor can it make an assessment of the financial losses suffered by an enquirer; or comment on any statement made by the enquirer on any possible losses. Under the *Freedom of Information Act 2000*, all information submitted to the Cabinet Office may be disclosed on request. If the mystery shopper views any information as commercially sensitive, the mystery shopper must explain the potential implications of disclosure to the Cabinet Office. However, the **Cabinet Office cannot guarantee that any information provided by an enquirer will not be disclosed, even where it is marked as confidential.**⁹

4 Examples of Interventions under the Scheme

The SFS publishes the results of the investigations. These documents set out the issue and the resolution of the cases investigated.¹⁰ A table from the Scheme, showing how the results are displayed, is provided in annexe 1. From February 2011 to December 2012, over 300 referrals were received.¹¹ The Cabinet Office classified the issues raised using the following groupings:¹²

- Problem with the procurement process
- Problems with contract management
- Problems with the bureaucracy of the whole process
- Problems with technology and systems

The chart below provides a breakdown of the above groupings:¹³

⁹ Cabinet Office. *Scope and Remit of the Mystery Shopper Scheme*:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61796/New-Scope-and-Remit-of-the-Mystery-Shopper-Scheme-9-3-12.pdf

¹⁰ The results can be viewed at: <https://www.gov.uk/government/publications/mystery-shopper-results>

¹¹ Cabinet Office. *Mystery Shopper Service Progress Report*. December 2012:

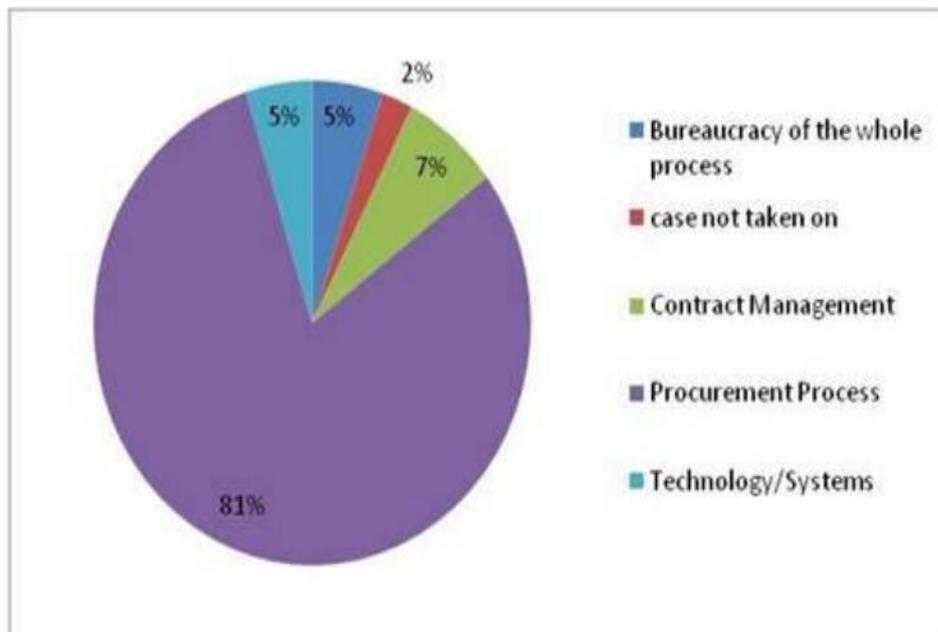
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79307/Mystery_Shopper_Progress_Report_18-DEC-2012.pdf

¹² Cabinet Office. *Mystery Shopper Service Progress Report*. December 2012:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79307/Mystery_Shopper_Progress_Report_18-DEC-2012.pdf

¹³ Cabinet Office. *Mystery Shopper Service Progress Report*. December 2012:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79307/Mystery_Shopper_Progress_Report_18-DEC-2012.pdf



The following sub-sections provide some key considerations of the results:

4.1 Pre-Qualification Questionnaires

Cases that concerned the use of pre-qualification questionnaires (PQQs) were most common. The use of financial assessments of contractors within PQQs was particularly singled out for criticism. In one case, the Devon and Cornwall Police Authority were criticised for including a £33 million turnover threshold for companies bidding for an HR services contract.¹⁴ A SME complained that this stipulation: would prevent them from bidding for the contract; and, is in general, discriminatory against small businesses. Devon and Cornwall Police explained that the reason for the high turnover figure was that the contract was high risk. The Scheme disagreed and recommended that the police reconsider its approach to financial assessments. Devon and Cornwall Police agreed to adopt this approach in future, but **could not be persuaded to change arrangements for that particular procurement exercise.**

In a similar case a small construction firm objected to the scoring system for financial assessment in a PQQ from Basildon Council.¹⁵ More marks were given for higher turnovers, apparently disadvantaging small firms. Basildon made the decision to cancel the original exercise and are taking the Scheme's recommendations into account when developing arrangements for the new procurement. It remains unclear as to the decision to cancel the original exercise was a result of the Scheme's intervention or for other reasons.

¹⁴ Mystery Shopper Results: <https://www.gov.uk/government/publications/mystery-shopper-results>

¹⁵ Mystery Shopper Results: <https://www.gov.uk/government/publications/mystery-shopper-results>

4.2 Prompt Payments

In terms of the amount of enquiries overall, a limited number of investigations concern prompt payments of contractors and sub-contractors. In a MoD contract for medical locums for the armed services, a sub-contractor was experiencing delays in payments.¹⁶ The Scheme worked with MoD to ensure the contract, including payments to sub-contractors was actively managed. The Scheme recommended MoD remind operational units to address any staff training issues around the purchase and payment system which may hold up payments to sub-contractors. Another late payment query was raised against MoD by a sub-contractor concerning construction procurements. The Scheme contacted MoD who investigated the case and reminded the prime contractor of its responsibilities to pay sub-contractors promptly as part of their on-going contract management.

Another case concerned Her Majesty's Revenue and Customs (HMRC) and a small training supplier. The mystery shopper's MP was contacted to ensure that HMRC were made to enforce the 30 day payment contract terms for sub-contractors.¹⁷ The case reached a successful conclusion and the sub-contractor received payment within the 30 days. Other examples include referrals from National Health Service (NHS) Trusts where SMEs are waiting for overdue payments. They have worked with the Department of Health to ensure prompt payment of invoices. Their advice included recommendations that there should be a clear point of contact for the resolution of queries between sub-contractors and suppliers.

5 Conclusion

From February 2011 to October 2012 the Scheme received over 300 cases.¹⁸ Some 81% of all cases concerned the procurement process. Contract management difficulties accounted for 7% of the cases. The prompt payment of invoices could be considered an issue under contract management. The relatively small amount of cases concerning 30 day payments may be in part due to the fact that before March 2012 prompt payment issues were not considered under the Scheme. The Cabinet Office assert that of all closed cases 78% have received a positive conclusion.¹⁹ Positive outcomes are listed as: changes made to a live procurement; and, recommendations accepted as part of future practice. Included in the 78% success rate are cases where the Scheme has found nothing wrong, but has enabled the *mystery shopper* to understand what has happened.

¹⁶ *Mystery Shopper Results*: <https://www.gov.uk/government/publications/mystery-shopper-results>

¹⁷ *Mystery Shopper Results*: <https://www.gov.uk/government/publications/mystery-shopper-results>

¹⁸ Cabinet Office. *Mystery Shopper Service Progress Report*. December 2012: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79307/Mystery_Shopper_Progress_Report_18-DEC-2012.pdf

¹⁹ Cabinet Office. *Mystery Shopper Service Progress Report*. December 2012: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79307/Mystery_Shopper_Progress_Report_18-DEC-2012.pdf

A prime contractor exacting commercial retribution on a sub-contractor for reporting poor payment practices (or any other poor procurement practices) is a serious problem. This is particularly pertinent to the construction industry in Northern Ireland, where sub-contracting is commonplace and largely informal in nature. At first inspection the anonymity afforded to the *mystery shopper* would appear to significantly redress this problem. However Department of Finance and Personnel (DFP) has communicated to CFP its view that when any contracting authority investigates poor payment practices, the prime contractor is likely to assume that it is the sub-contractor that has made the allegation against it.²⁰ Added to this, the duty to disclose information from a FoI request, and the fact that the Cabinet Office cannot guarantee confidentiality, the level of anonymity afforded seems threadbare at best.

Ultimately DFP view the Scheme as providing no benefits to sub-contractors beyond those they could already obtain through direct contact with the relevant Centre of Procurement Expertise (CoPE). DFP view the Scheme as ineffective as illustrated by the following statement:

A mystery shopper service would not be able to investigate sub-contract payments as it would have no power to ask either the main contractor or sub-contractor for details of their contract.²¹

Whether or not the Scheme will evolve and acquire these investigative powers remains to be seen. A watching brief could be kept in this area if requested.

²⁰ DFP response to RalSe *Prompt Payments* briefing. Dated 17 June 2013.

²¹ DFP response to RalSe *Prompt Payments* briefing. Dated 17 June 2013.

Annexe 1

A sample of the issues investigated by the Scheme:²²

CONTRACTING AUTHORITY COMPLAINT AGAINST	ISSUE WITH PROCUREMENT	DESCRIPTION OF COMPLAINT	OUTCOME OF CASE / RECOMMENDATIONS
Durham Constabulary	PQQ	Durham Constabulary's procurement for 'Leadership Development Services' was raised as an example of a tender process not being SME friendly. It was an extensive PQQ (38 pages - 163 pieces of separate information) for a £90k contract.	Durham Constabulary agreed to use the simplified Cabinet Office PQQ for future procurements.
Department for Transport	Procurement Strategy and Lots	Cabinet Office received feedback about the Department for Transport's implementation of a 'one stop shop' all embracing framework for consultancy services. The supplier said this effectively prevented SMEs from working directly with the Department for Transport for four years. The supplier stated that if a specialised company was to stand a chance of working with the Department it would have to be as a sub-contractor to a larger company.	Department for Transport reviewed the procurement and made significant changes by breaking 'Technical and Engineering Advice' and 'Research Services' into lots. A Product Surgery was also held.
Child Maintenance & Enforcement Commission (CMEC)	PQQ	A supplier challenged the PQQ questions and scoring relating to levels of turnover and insurance for CMEC's contract for Bailiff Services, as he believed they penalised SMEs.	CMEC have withdrawn the PQQ and re-issued a revised version to all suppliers.

²² Mystery Shopper Results: <https://www.gov.uk/government/publications/mystery-shopper-results>