

Guidance under the Procurement Reform (Scotland) Act 2014



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Riaghaltas na h-Alba

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CONTENTS

CHAPTER 1

1.	Introduction	1
1.1.	Introduction	2
1.2.	Policy context	3
1.3.	Legal context	4

CHAPTER 2

2.	Procurement strategies and annual procurement reports	7
2.1.	Introduction	8
2.2.	Purpose of this chapter	8
2.3.	Legal basis of this chapter	8
2.4.	Preparing a strategy	10
2.5.	Form and content	13
2.6.	Monitoring, reviewing and reporting on a procurement strategy	24

CHAPTER 3

3.	Sustainable procurement duty	28
3.1.	Introduction	29
3.2.	Purpose of this chapter	29
3.3.	Legal basis of this chapter	29
3.4.	Improving the economic, social and environmental wellbeing of the authority's area	31
3.5.	Facilitating the involvement of small and medium enterprises (SMEs), third sector bodies and supported businesses	34
3.6.	Promoting innovation	37

CHAPTER 4

4.	Community benefit requirements in procurement	39
4.1.	Introduction	40
4.2.	Purpose of this chapter	40
4.3.	Legal basis of this chapter	41
4.4.	When to use community benefit requirements	42
4.5.	Identifying community benefit requirements through stakeholder consultation	44
4.6.	Incorporating community benefit requirements into the procurement process	45
4.7.	Other guidance and examples	47

CHAPTER 5

5.	Selection of tenderers and award of contracts	48
5.1.	Introduction	49
5.2.	Purpose of this chapter	50
5.3.	Legal basis of this chapter	50
5.4.	Exclusion of economic operators	51
5.5.	Basis on which to select economic operators	58
5.6.	European Single Procurement Document	62
5.7.	Award of contracts	63

CHAPTER 6

6.	Procurement for health or social care services	68
6.1.	Introduction – special considerations for the procurement for health or social care services	69
6.2.	Purpose of this chapter	69
6.3.	Legal basis and scope of this chapter	69
6.4.	Links to supporting best-practice guidance specifically covering care and support services	70
6.5.	Interpretation of this chapter	70
6.6.	Summary of the changes to the public procurement rules affecting health or social care services	71
6.7.	Specific changes to the public procurement rules for health or social care services	71
6.8.	Quality and cost considerations before procuring	72
6.9.	Application of the rules – thresholds and other considerations before procuring health or social care services	72
6.10.	Compliance	77

Annex A:	Community benefit requirements in procurement	79
	Annex A.1. Community benefit requirements – key National Outcomes	79
	Annex A.2. Monitoring and reporting	81

Annex B:	Selection of tenderers and award of contracts	83
	Annex B.1. Exclusion grounds	83

Annex C:	Procurement for health or social care services	85
	Annex C.1. List of health or social care services covered by this chapter	85
	Annex C.2. Flowchart – illustration of considerations that may help decision making in relation to the continuation of an existing service – more commonly recognised in a care and support service context	86

Annex D:	Definitions	87
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Annex E:	Resources	94
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CHAPTER 1

INTRODUCTION

1.1. INTRODUCTION

This suite of statutory guidance is published by the Scottish Ministers under the [Procurement Reform \(Scotland\) Act 2014](#) (the Act). Specifically, the Act allows Ministers to publish statutory guidance on the following:

- procurement strategies and annual procurement reports ([section 20 of the Act](#));
- sustainable procurement duty ([section 10 of the Act](#));
- community benefit requirements in procurement ([section 26 of the Act](#));
- selection of tenderers and award of contracts ([section 29 of the Act](#)); and
- procurement for health or social care services ([section 13 of the Act](#)).

In October 2015, the Scottish Ministers published statutory guidance under section 29 of the Act on:

- [Addressing Fair Work Practices, including the Living Wage, in Procurement](#).

This statutory guidance does not constitute legal advice. A contracting authority should seek its own legal advice where it is uncertain about the the legal rules and their application. This guidance applies to regulated procurements which commence on or after 18 April 2016.

The suite of statutory guidance has been informed by public consultation¹ and feedback received from key stakeholders.

This suite of statutory guidance provides advice on what a contracting authority should do to comply with the Act, [The Public Contracts \(Scotland\) Regulations 2015](#) (which transpose the public procurement Directive) and [The Procurement \(Scotland\) Regulations 2016](#) (which were made under the Act). A contracting authority must have regard to this guidance and should read it together with the relevant sections of the Act and the Regulations. A contracting authority should also take into account any other relevant guidance or good practice where appropriate.

¹ [Public Procurement: A Consultation on Changes to the Public Procurement Rules in Scotland](#)
[Changes to the Public Procurement Rules in Scotland: Scottish Government Formal Response to Consultation](#).

1.2. POLICY CONTEXT

The Scottish Government has a clear purpose, which is to focus Government and public services on creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth.

Good procurement is vitally important to public services, businesses and communities alike. The public sector spends over £10 billion each year on goods, works and services. The size of that spend means that, if we are to deliver sustainable economic growth, it is essential that we continue to use the power of public spending to deliver greater public value, drive efficiencies and help public bodies achieve their overarching purpose and strategic objectives.

Smart use of procurement can play a key role in building a more prosperous and fairer Scotland by: promoting jobs and growth; encouraging innovation; boosting training, apprenticeship and employment opportunities; and helping businesses, particularly small and medium sized enterprises (SMEs), third sector bodies, and supported businesses to compete effectively for contracts.

Much has already been done over recent years to improve the way that procurement processes and systems operate in Scotland. This has been achieved as a result of the whole of the public sector in Scotland working together to ensure public procurement continues to improve and to deliver greater public value.

[Scotland's Economic Strategy](#), published in March 2015, underlined the belief “that a One Scotland approach is needed to deliver on our ambitions, with all public sector agencies working together – recognising that all can and should make a contribution towards that growth – as well as the private sector, the third sector, and our universities and colleges.”

Only with Government working in partnership with the wider public sector in Scotland, the third sector, trade unions, businesses and communities, will we be able to create a society where the benefits of economic growth are shared more equally and where future economic growth is stronger and more sustainable as a result.

The overarching aim of public sector procurement activity in Scotland continues to be the achievement of value for money for the taxpayer. [The Scottish Model of Procurement](#) defines value for money as the best balance of cost, quality and sustainability and this should be reflected throughout strategy development, reporting and procurement processes.

1.3. LEGAL CONTEXT

Public procurement is governed by a legal framework which includes fundamental principles deriving from the [Treaty on the Functioning of the European Union \(TFEU\)](#)²; European Procurement Directives (the Directives) as implemented in national legislation³; other national legislation⁴; and, Court of Justice of the European Union and national case law. In combination, this legal framework establishes procedures that must be followed by a contracting authority whenever it purchases goods, works or services.

The three 2014 European Directives in relation to public procurement have been transposed into national legislation by Regulations:

- [Directive 2014/24/EU](#) on public procurement, replacing the 2004 Directive for Public Sector Contracts; transposed by [The Public Contracts \(Scotland\) Regulations 2015](#);
- [Directive 2014/25/EU](#) on procurement by entities operating in the water, energy, transport and postal services sectors, replacing the 2004 Directive for Utilities Contracts; transposed by [The Utilities Contracts \(Scotland\) Regulations 2016](#); and
- [Directive 2014/23/EU](#) on the award of concession contracts, which does not directly replace any previous Directive; transposed by [The Concessions Contracts \(Scotland\) Regulations 2016](#).

The aim of the Directives is to contribute to the [Europe 2020 Strategy](#), and to ensure that public purchases are made in a transparent and fair manner. This is in order to increase the efficiency of public spending, facilitating, in particular the participation of SMEs, third sector bodies and supported businesses. In doing so, enabling a contracting authority to make better use of public procurement in support of common societal goals.

The Act provides a national legislative framework for sustainable public procurement that supports Scotland's economic growth through improved procurement practice. The Act focuses on a small number of general duties on contracting authorities regarding their procurement activities and some specific measures aimed at promoting good, transparent and consistent practice in procurement processes.

Following consultation, we have used the opportunity of the changes introduced by both the Directives and the Act to apply consistent rules to public contracts above and below European Union (EU) threshold contract values where appropriate. The Act gives the Scottish Government the discretion to do this as it covers lower value regulated contracts. This means that even further consistency can readily be applied to the majority of public procurement contracts in Scotland, therefore simplifying and streamlining the procurement process for contracting authorities and economic operators alike.

² Fundamental principles deriving from the TFEU include: transparency (contract procedures must be transparent and contract opportunities should generally be publicised); equal treatment and non-discrimination (potential suppliers must be treated equally); proportionality (procurement procedures and decisions must be proportionate); and mutual recognition (giving equal validity to qualifications and standards from other Member States, where appropriate).

³ [The Public Contracts \(Scotland\) Regulations 2015](#); [The Utilities Contracts \(Scotland\) Regulations 2016](#); and [The Concessions Contracts \(Scotland\) Regulations 2016](#).

⁴ [Procurement Reform \(Scotland\) Act 2014](#) and [The Procurement \(Scotland\) Regulations 2016](#).

The table below shows sections of the Act and their application to public contract threshold values.

1.3.1. Table showing sections of the Act and their application

Section of the Act and title	Applies to all public contracts above the Act thresholds (1)	Applies only to public contracts between the Act and EU thresholds (2)	Equivalent or similar provision for procurements above EU thresholds
8(1) - General Duties		✓	✓
9 - Sustainable Procurement Duty	✓		N/A
11 - Supported businesses		✓	✓
12 - Contracts for health or social care services		✓ (3)	✓ (4)
15 - Procurement Strategy	✓ (5)		N/A
18 - Annual procurement reports	✓ (6)		N/A
23 - Publication of contract notices and award notices	✓		N/A (7)
25 - Community benefit requirements in major contracts	✓ (8)		N/A
27 - Exclusion of economic operators on grounds of criminal activity		✓	✓
28 - Selection of tenderers		✓	✓
30 - Technical specifications		✓	✓
31 - Charges for participation in procurement process	✓		N/A
32 - Giving reasons to unsuccessful participants		✓	✓
33 - Request for further information		✓	✓
35 - Contracts register	✓		N/A
37 - Actionable duties		✓	✓

Notes

- (1) The threshold for regulated procurements under the Act can be found in [section 3 of the Act](#).
- (2) The [thresholds for EU-regulated procurements](#).
- (3) [Section 12 of the Act](#) provides for a contracting authority to award health or social care contracts, or framework agreements, with a value between £50,000 and €750,000 without seeking offers in relation to the proposed contract. There are, however, some provisions that will still apply when an authority chooses to award without advertising. Many health or social care services require special consideration by a contracting authority and it is important to refer to the relevant statutory guidance.
- (4) A 'light-touch' regime has been introduced for certain services. That regime applies to public contracts above the EU threshold of €750,000.
- (5) [Section 15 of the Act](#) applies to a contracting authority which has a significant procurement expenditure in a financial year (this is where the total value of contracts to which its regulated procurements relate is at least £5 million).
- (6) [Section 18 of the Act](#) applies to a contracting authority that is required by [section 15](#) to prepare and publish a (or review an existing) procurement strategy.
- (7) [The Public Contracts \(Scotland\) Regulations 2015](#) do not contain reference to [Public Contracts Scotland \(PCS\)](#), but do contain reference to publication in the Official Journal of the European Union (OJEU).
- (8) [Section 25 of the Act](#) applies only to public contracts with an estimated value equal to or greater than £4 million.

CHAPTER 2 PROCUREMENT STRATEGIES AND ANNUAL PROCUREMENT REPORTS

2.1. INTRODUCTION

A procurement strategy allows a contracting authority to set out how it intends to ensure that its procurement activity delivers value for money and contributes to the achievement of the authority's broader aims and objectives, in line with [Scotland's National Outcomes](#). A contracting authority must, in its annual procurement report, record and publicise its performance and achievements in delivering its strategy.

Publication of a procurement strategy and annual procurement report will help promote the positive impacts public procurement can have on Scotland's economy and public services.

2.2. PURPOSE OF THIS CHAPTER

This chapter describes what is required of a contracting authority with respect to a procurement strategy and an annual procurement report. It must be read alongside [sections 15 to 21 of the Act](#). This chapter provides information on: preparing a procurement strategy; its form and content; and monitoring, reviewing and reporting on a strategy. This chapter must also be read alongside the other chapters of this guidance.

2.3 LEGAL BASIS OF THIS CHAPTER

A contracting authority must have regard to this chapter when it expects to have 'significant procurement expenditure' in the next financial year⁵. We would also encourage a contracting authority to produce a procurement strategy and an annual procurement report even if its spend is lower, to maximise its transparency and allow businesses to understand what policies are important to that authority when delivering procurement contracts.

Section 15 of the Act commences on 18 April 2016. However, a contracting authority is not required to prepare its first procurement strategy until 31 December 2016. The first procurement strategy prepared by a contracting authority must cover the remainder of the financial year of the contracting authority in which 31 December 2016 occurs and the first financial year starting after 31 December 2016⁶.

The following sections of the Act outline when a contracting authority must prepare and publish a procurement strategy and an annual procurement report.

[Section 15\(1\) of the Act:](#)

"A contracting authority which expects to have significant procurement expenditure in the next financial year must, before the start of that year:

- (a) prepare a procurement strategy setting out how the authority intends to carry out regulated procurements, or

⁵ Defined as £5 million of regulated procurement spend in [section 15\(4\) Procurement Reform \(Scotland\) Act 2014](#).

⁶ [Article 5 The Procurement Reform \(Scotland\) Act 2014 \(Commencement No. 3 and Transitional Provisions\) Order 2016](#)

(b) review its procurement strategy for the current financial year and make such revisions to it as the authority considers appropriate.”

[Section 18\(1\) of the Act:](#)

“A contracting authority which is required to prepare or revise a procurement strategy in relation to a financial year must also prepare an annual procurement report on its regulated procurement activities as soon as reasonably practicable after the end of that financial year.”

[Section 21\(1\) of the Act:](#)

“As soon as reasonably practicable after the end of each financial year, the Scottish Ministers must prepare a report, based on information contained in annual procurement reports published under [section 19\(1\)](#) during that year, on procurement activity in Scotland.”

[Section 15\(4\) of the Act:](#)

“An authority has significant procurement expenditure in a year if the sum of the estimated values of the contracts to which its regulated procurements in that year relate is equal to or greater than £5,000,000.”

[Section 5\(1\) of the Act:](#)

“For the purposes of this Act, the estimated value of a contract is the value of the total consideration (not including value added tax) which the contracting authority expects to be payable under or by virtue of the contract.”

The Act strikes a balance between increased transparency and consistency of approach, and consideration of wider benefits that can be achieved through procurement – and hence through publication of a procurement strategy and an annual procurement report. The preparation and publication of these documents will aid compliance with the general duty of acting transparently⁷ and provide a better basis for engagement.

Where a contracting authority has an existing procurement strategy, there will be no requirement for it to prepare a completely new procurement strategy each year. A contracting authority must, however, review its procurement strategy annually and make such revisions as it considers appropriate for the purposes of [sections 15 to 21 of the Act](#). Additionally, nothing in the Act precludes a contracting authority from updating its procurement strategy throughout the financial year, or providing more information than that contained in the Act.

While this chapter is designed to support effective implementation, it cannot be overly prescriptive about the requirements since there is no one-size-fits-all approach. A procurement strategy should be proportionate to the size and spend of the relevant contracting authority.

⁷ [Section 8\(1\)\(b\) Procurement Reform \(Scotland\) Act 2014.](#)

2.4. PREPARING A STRATEGY

A clear, comprehensive and effective procurement strategy has an important purpose. It underpins a contracting authority's strategic plan and provides a strategic focus for its procurement activities. It also sets the context in which a contracting authority will work to ensure that procurement delivers value for money and directly contributes to the achievement of its broader aims, objectives and, where relevant, those of the Community Planning Partnership.

A procurement strategy demonstrates how a contracting authority ensures it has considered the wider social, economic and environmental aims of procurement in a consistent manner as required by the sustainable procurement duty under the Act⁸. Information on the sustainable procurement duty is summarised in [chapter 3](#). It will also help businesses understand what is important to a contracting authority in the performance and delivery of a contract.

It is important, therefore, for a contracting authority with a significant procurement expenditure to provide clarity about how it intends to carry out its procurement activity. In particular, its procurement strategy should be clear how that activity will contribute to carrying out its functions, how it will deliver value for money and how it will contribute to meeting the general duties in the Act.

2.4.1. When should a contracting authority prepare a strategy

This chapter is aimed at a contracting authority with significant procurement expenditure, which is required by [section 15 of the Act](#) to prepare and publish a procurement strategy, and by [section 18 of the Act](#) to prepare and publish an annual procurement report.

If, before the start of its financial year, a contracting authority did not prepare a procurement strategy as it did not expect its procurement spend to exceed £5 million, but during the course of that financial year it becomes apparent that its total expenditure on regulated procurements for that financial year is likely to be greater than £5 million, it is required, as soon as practicable, to prepare a procurement strategy or review and revise its existing strategy as necessary⁹.

For clarity, the threshold value of £5 million (excluding VAT) represents the total value of regulated procurements. That is, all procurements for goods and services with an estimated value equal to or greater than £50,000, and procurements for works with an estimated value equal to or greater than £2 million¹⁰, contribute to this total¹¹.

⁸ [Section 9 Procurement Reform \(Scotland\) Act 2014](#).

⁹ [Section 15\(2\) - \(3\) Procurement reform \(Scotland\) Act 2014](#).

¹⁰ [Section 3\(2\) Procurement Reform \(Scotland\) Act 2014](#); it must be noted that section 3(3) of the Act provides an order-making power for the Scottish Ministers to amend the thresholds for application of this Act.

¹¹ [Section 5 Procurement Reform \(Scotland\) Act 2014](#) - Estimated value of contract and [Regulation 3 The Procurement \(Scotland\) Regulations 2016](#) - Methods for calculating the estimated value for regulated contracts.

Whilst this chapter is primarily aimed at those contracting authorities with significant procurement expenditure, a contracting authority whose spend is below the relevant financial threshold is not precluded from preparing and publishing a procurement strategy proportionate to its size and spend as a matter of good practice. Additionally a contracting authority is not precluded from including information about non-regulated procurements in its procurement strategy

2.4.2. Consultation to be undertaken in preparing a strategy

A contracting authority should undertake relevant and proportionate consultation and engagement when preparing its procurement strategy. The purpose of this is to ensure that a contracting authority's approach and procurement strategy takes account of stakeholders' views and that stakeholders have the opportunity to engage and contribute to development of the strategy. In doing so, a contracting authority can gain a better understanding of the needs of its area and tailor its strategy to reflect those needs. Indeed one of the areas that the strategy itself must address is an authority's policy on consulting and engaging with those affected by its procurements.

A contracting authority is likely to have a range of different stakeholders. It is therefore important that a contracting authority:

- identifies different stakeholder groups;
- communicates effectively with them;
- considers those affected by its regulated procurements; and
- looks for both internal and external views which can strengthen understanding of its proposed procurement strategy, its goals, policy aims and objectives anticipated from its proposed procurements.

2.4.3. Approval of a strategy

A contracting authority should, following its consultation process, ensure that its procurement strategy is approved by, where appropriate, the organisational owner, for example board level or equivalent. Approval of the procurement strategy at an accountable level is important as it demonstrates the whole organisation's commitment to its aims and objectives while satisfying the principles of transparency and proportionality.

2.4.4. Publishing a strategy

[Section 19 of the Act](#) requires a contracting authority to publish its procurement strategy, and any revised versions, in a way that it considers appropriate. This must include publication on the internet. A contracting authority must also notify Scottish Ministers of the publication of its strategy¹². In carrying out this duty, a contracting authority is supporting increased transparency and accountability in its procurement activities. Separate advice will be issued to contracting authorities on the means of notifying Scottish Ministers of the publication of a procurement strategy.

A contracting authority should publish its procurement strategy in an inclusive way that takes into account equality and accessibility issues, and allows stakeholders to form a clear view of how the contracting authority intends to meet its procurement obligations.

2.4.5. Joint strategies

[Section 16 of the Act](#) states that a group of two or more contracting authorities may have a joint procurement strategy for both or all of the authorities in a group.

The development of a joint procurement strategy is at the discretion of contracting authorities and should cover their collective interests. Contracting authorities developing a joint procurement strategy must have regard to this statutory guidance.

There is nothing in the Act that precludes contracting authorities from developing joint strategies at a lower-level, for example a joint commodity strategy. However, such strategies are not within the scope of the Act.

¹² [Section 19\(3\) Procurement Reform \(Scotland\) Act 2014.](#)

2.5. FORM AND CONTENT

[Section 15\(5\) of the Act](#) sets out what a contracting authority must include as a minimum in its procurement strategy. Guidance is provided below on each of these requirements. A procurement strategy should be proportionate to the size and spend of the relevant contracting authority, and the Act does not preclude a contracting authority from addressing other relevant matters in its procurement strategy.

2.5.1. The authority must set out how it intends to ensure that its regulated procurements will contribute to the carrying out of its functions and achievement of its purposes (section 15(5)(a)(i) of the Act)

Contracting authorities operate in a diverse range of areas across the Scottish public sector. It is important that a contracting authority aligns its regulated procurement activity with its functions and purposes so as to better use its procurement activity as a lever for delivering its objectives.

In order to comply with this requirement, a contracting authority, when developing its procurement strategy, may have regard to its organisation's strategy, National Outcomes and – for those authorities listed in [Schedule 1 of the Community Empowerment \(Scotland\) Act 2015](#) – the collaboratively agreed Local Outcomes Improvement Plan for the area of the Community Planning Partnership. The Local Outcomes Improvement Plan, as described in that Act, contains a contracting authority's strategic plans for improving local outcomes (formerly described as Single Outcome Agreements).

In setting out how it intends to ensure that its regulated procurements will contribute to the carrying out of its functions and achievement of its purposes, a contracting authority should, for example, consider:

- effective and relevant consultation when developing and aligning its procurement strategy with its functions, purposes and the National Outcomes;
- effective contract and supplier management to monitor the effectiveness of regulated procurements;
- high level commercial targets;
- community and stakeholder consultation during procurement exercises; and
- the use of clear outcomes.

2.5.2. The authority must set out how it intends to ensure that its regulated procurements will deliver value for money (section 15(5)(a)(ii) of the Act)

Good procurement can significantly improve the quality of services the public sector delivers to the people of Scotland. [The Scottish Model of Procurement](#) defines value for money in Scottish procurement as not just being about cost and quality, but about the best balance of cost, quality and sustainability.

A contracting authority is required by [section 15\(5\)\(a\)\(ii\) of the Act](#) to set out how it intends to ensure that its regulated procurements will deliver value for money.

The balance of value for money in each regulated procurement will vary on a case-by-case basis. However by applying a key set of principles established in its procurement strategy, a contracting authority should maintain consistency and transparency in its procurement process. These principles can also promote and ensure compliance with other duties imposed by the Act, such as the general duties¹³.

A contracting authority should consider the whole-life cost of what is being procured and when applying the principle of value for money, ensure that it does so in a clear, transparent and proportionate manner; in line with the TFEU fundamental principles and the general duties of the Act.

2.5.3. The authority must set out how it intends to ensure that its regulated procurements will be carried out in compliance with its duty to treat relevant economic operators equally and without discrimination (section 15(5)(a)(iii) of the Act)

Equal treatment and non-discrimination are fundamental principles of the EU, established by the TFEU, and as such, a contracting authority must follow these principles in all public procurements within scope of [The Public Contracts \(Scotland\) Regulations 2015](#) and the [Act](#). A contracting authority can, by treating relevant economic operators equally and without discrimination, facilitate greater competition, promote innovation, and encourage a wider range of economic operators to become involved in public procurement. As a result, a contracting authority can, in return, achieve better value for money.

¹³ [Section 8 Procurement Reform \(Scotland\) Act 2014](#).

A contracting authority should, where relevant and proportionate, consider measures such as:

- early market engagement¹⁴ prior to the publication of a contract notice on [Public Contracts Scotland](#) (PCS);
- the use of clear and precise language preventing broad interpretation; and
- contract size, including the opportunity to break requirements into smaller lots.

The process should place the minimum burden possible on economic operators in order to facilitate greater access to procurements. This requirement is reinforced by the sustainable procurement duty¹⁵.

2.5.4. The authority must set out how it intends to ensure that its regulated procurements will be carried out in compliance with its duty to act in a transparent and proportionate manner (section 15(5)(a)(iii) of the Act)

Acting in a transparent and proportionate manner is an effective way by which a contracting authority can encourage competition and achieve better value for money in its public procurements. It also promotes accountability and wider participation in the public procurement process.

The principle of transparency requires a contracting authority to approach its public procurements in an open and inclusive manner. Proportionality has a two-part test a contracting authority should consider in all stages of a procurement process. First, it should determine whether a measure is appropriate and relevant to the objective or outcome being sought; and second, whether this measure goes beyond what is necessary to achieve the particular outcome being pursued. This will ensure proportionate procurement procedures and decisions, and will safeguard against barriers to participation; in particular for SMEs, third sector bodies and supported businesses.

A contracting authority is required by [section 15\(5\)\(a\)\(iii\) of the Act](#) to set out how it intends to ensure that its regulated procurements will be carried out in compliance with its duty to act in a transparent and proportionate manner.

Measures a contracting authority will undertake to comply with this duty should be stated in its procurement strategy and followed at each stage of the process from the development of its procurement strategy, to the notification of a successful bid and contract award.

¹⁴ [Regulation 41 The Public Contracts \(Scotland\) Regulations 2015.](#)

¹⁵ [Section 9 Procurement Reform \(Scotland\) Act 2014](#)

Some measures a contracting authority should consider in order to comply with its duty under [section 15\(5\)\(a\)\(iii\)](#) may include:

- the use of electronic communication for all procurement activity;
- open public and market engagement; and
- the use of clear and precise language to ensure a common understanding of the requirements.

2.5.5. The authority must set out how it intends to ensure that its regulated procurements will be carried out in compliance with the sustainable procurement duty (section 15(5)(a)(iii) of the Act)

Sustainable public procurement aims to make the best use of public money, helping the government achieve its overarching purpose and strategic objectives. The Act implements a national legislative framework for sustainable public procurement in Scotland. A contracting authority must have regard to [chapter 3 on sustainable procurement duty](#) and should read it alongside this section when developing its procurement strategy.

A contracting authority should develop a robust, achievable approach to sustainable procurement that is relevant and proportionate to its scope and area with details on how it will be implemented in its public procurements.

2.5.6. Statement of the authority's general policy on the use of community benefit requirements (section 15(5)(b)(i) of the Act)

Community benefit requirements in procurement, which are covered by [chapter 4](#), form part of the Scottish Government's aim of delivering procurement that improves public services for a prosperous, fairer and more sustainable Scotland. Public procurement contracts can help realise a wide range of social and environmental benefits, including more and better employment opportunities. Community benefits have been shown to contribute to local and national outcomes relating to employability, skills and the reduction of inequality¹⁶.

A contracting authority must have regard to [chapter 4 on community benefit requirements in procurement](#) and should read it alongside this section when developing its procurement strategy.

¹⁶ [University of Glasgow, Training & Employment Research Unit, *Analysis of the impact and value of community benefit clauses in procurement*, June 2015, p.17.](#)

[Section 15\(5\)\(b\)\(i\) of the Act](#) requires a contracting authority to include a policy statement in its procurement strategy on the use of community benefit requirements. In setting out its policy, a contracting authority should ensure that it takes into account any relevant legislation, statutory guidance, and any other relevant guidance or best practice. The statement should, despite being general, outline:

- what the policy is;
- when it is applicable;
- the aims and objectives of the contracting authority in its use of community benefit requirements; and
- how the authority will implement and monitor its policy.

Information on community benefit requirements in procurement is summarised in [chapter 4](#) and the associated [Annexes](#).

A strategy may outline the types of community benefits it hopes to achieve in particular contracts. In order to do so, it is essential for a contracting authority to understand the needs of its area¹⁷. This may be achieved by engaging and consulting with relevant stakeholders in its area and utilising the community benefit requirements and sustainable procurement chapters contained in this document.

2.5.7. Statement of the authority's general policy on consulting and engaging with those affected by its procurements (section 15(5)(b)(ii) of the Act)

Consultation and engagement with those affected by its procurements is an effective way for a contracting authority to understand the needs of its area, and to analyse the impact of its public procurement activity. Much like consultation and engagement during the development of a procurement strategy, consultation and engagement prior to individual procurements, where relevant and proportionate, also allows the views of those affected to be expressed and taken into account.

[Section 15\(5\)\(b\)\(ii\) of the Act](#) requires a contracting authority to include in its procurement strategy a statement of its general policy on consulting and engaging with those affected by its procurements. This should include community representatives and public service users or user groups where they could be affected by the procurement. For example, in the context of health and social care procurements this inevitably requires consideration of the interests of users of the service, their families and carers.

Whilst the level of consultation and engagement will vary from contract to contract, the policy statement should set out key principles that will underpin relevant and proportionate engagement.

¹⁷ [Section 42\(2\) Procurement Reform \(Scotland\) Act 2014](#) – defines a 'contracting authority's area' as the area by reference to which the contracting authority primarily exercises its functions, disregarding any areas outside Scotland.

When establishing the principles applicable to consultation and engagement, a contracting authority may wish to consider the [National Standards for Community Engagement](#). The National Standards document establishes some key principles, which represent good practice.

It defines community engagement as:

“Developing and sustaining a working relationship between one or more public body and one or more community group, to help them both understand and act on the needs or issues that the community experiences.”¹⁸

Although the National Standards are not applicable to all aspects of consultation, the key principles established represent good practice and can be considered in the policy statement on consulting and engaging with those affected by its procurements.

Encouraging involvement in an open, equal and inclusive public consultation process with clear principles and purposes enables a contracting authority to ensure all affected parties can have a voice which can be used to develop strong relationships which can support effective outcomes and promote innovative approaches or solutions.

A contracting authority must include in its policy statement details of when, and how it will consult and engage with those affected by its procurements and how the outcomes of the consultation will be used to implement the overarching procurement policy of the contracting authority.

2.5.8. Statement of the authority’s general policy on the payment of a living wage to persons involved in producing, providing or constructing the subject matter of regulated procurements (section 15(5)(b)(iii) of the Act)

The Scottish Government firmly believes that those organisations which have a diverse workforce and whose staff are well rewarded, well motivated, well led and who have appropriate opportunities for training and skills development are likely to deliver higher quality services. Furthermore, the Scottish Government holds that good relationships between employers and their workforce contribute to productivity and ultimately sustainable economic growth. Contracting authorities are encouraged to follow the lead of the Scottish Government by promoting the payment of the Living Wage in public procurement contracts and we encourage others to be a [Living Wage Accredited Employer](#).

The Scottish Government considers payment of the Living Wage to be a significant indicator of an employer’s commitment to fair work practices and that payment of the Living Wage is one of the clearest ways that an employer can demonstrate that it takes a positive approach to its workforce. Where an economic operator does not pay its employees the Living Wage, however, it does not necessarily mean that its approach to its employees fails to meet fair work practices.

¹⁸ [National Standards for Community Engagement, p.4.](#)

When developing its policy on the payment of the Living Wage, a contracting authority should take into account relevant legislation and other statutory guidance, in particular the [Statutory Guidance on the Selection of Tenderers and Award of Contracts - Addressing Fair Work Practices, including the Living Wage, in Procurement](#). As part of its policy statement, a contracting authority should also set out how it intends to implement this policy in its procurement activity.

In setting out its general policy, a contracting authority should state measures to promote the payment of the Living Wage in its procurements. In doing so, a contracting authority should consider:

- becoming a Living Wage Accredited Employer and promoting this through relevant public contracts;
- in what types of goods, works and services contracts it may be relevant to address living wage and fair work practices;
- how its living wage policy will be approached in regulated procurements in a way which takes account of other relevant factors, while ensuring an appropriate balance between quality and cost;
- how it will ensure a proportionate approach, based on the nature, scope, size and place of the performance of the contract; and
- how it can contribute towards improving the social wellbeing element, in particular reducing inequality in the area, of its sustainable procurement duty under [section 9 of the Act](#) by promoting the Living Wage and fair work practices.

2.5.9. Statement of the authority's general policy on promoting compliance by contractors and sub-contractors with the Health and Safety at Work etc. Act 1974 (c.37) and any provision made under that Act (section 15(5)(b)(iv) of the Act)

Nothing purchased by a contracting authority should be at the expense of the health and safety of those who are involved in manufacturing, construction or provision of goods, works and services. It is therefore important for a contracting authority to set out in its strategy its general policy on promoting compliance by contractors and sub-contractors with the [Health and Safety at Work Act 1974](#) and any provision made under that Act.

In setting out its statement, a contracting authority should consider how it will assess the potential health and safety risks arising from a particular contract and how it will monitor contracts to ensure compliance with health and safety requirements, including how an economic operator demonstrates compliance.

Any measure a contracting authority takes to ensure the promotion and compliance of health and safety in its public procurements must be relevant, proportionate and not overly burdensome, meeting current legislation as a minimum. The degree to which health and safety requirements are specified within procurement documents will vary according to the goods, works or services being purchased and should therefore be considered on a case-by-case basis. For example, specific legislation relating to risk reduction in construction is contained in [The Construction \(Design and Management\) Regulations 2015](#).

If there are specific health and safety concerns relating to a particular procurement, it is reasonable to require an economic operator to detail, as part of the procurement process, the measures it would implement to respond to the identified risks. A contracting authority can ask an economic operator to provide evidence to demonstrate that its organisation complies with current health and safety legislation. A contracting authority can also request details of how an economic operator actively promotes and manages good health and safety practice, such as through training and the communication of relevant information to staff. A contracting authority should also consider how it will monitor contracts to ensure compliance with health and safety requirements.

2.5.10. Statement of the authority's general policy on the procurement of fairly and ethically traded goods and services (section 15(5)(b)(v) of the Act)

The Scottish Government is committed to promoting sustainable procurement and tackling inequalities in Scotland. As part of this, a contracting authority is required to consider the relevant and proportionate application of fair and ethical trading principles in its regulated procurement activity. Whilst a contracting authority has discretion to decide how best to meet its needs, it must have due regard to the TFEU fundamental principles when taking account of any fair and ethical trading objectives.

A contracting authority is required by [section 15\(5\)\(b\)\(v\) of the Act](#) to include a statement of its general policy on the procurement of fairly and ethically traded goods and services in its procurement strategy. As part of its policy statement, a contracting authority should also set out how it intends to implement this policy in its regulated procurement activity.

When developing its policy, a contracting authority should consider the wider implications of its procurement activity and how, by including fair and ethical requirements, it can promote fairness, dignity and the rights of workers and producers in local and international trading.

In setting out its general policy, a contracting authority should, for example, consider:

- lifecycle costing;
- including in each public contract or framework agreement, conditions relating to the performance of the contract to ensure that the economic operator complies with environmental, social and employment law¹⁹; and
- how it can receive assurances of fair and ethical practices in supply chains.

Further, a contracting authority can require that goods, works or services it is procuring have been given a label certifying that these meet specific environmental, social or other characteristics where these are directly relevant²⁰. So as not to discriminate against any economic operator, to maintain transparency, and to promote competition and innovation; a contracting authority must accept all labels of equivalent standards as well as a bid from an economic operator that can demonstrate it meets the specified criteria without certification.

2.5.11. Statement of the authority's general policy on how it intends its approach to regulated procurements involving the provision of food to –

- (i) improve the health, wellbeing and education of communities in the authority's area, and**
- (ii) promote the highest standards of animal welfare (section 15(5)(c) of the Act)**

In 2014 the Scottish Government made a commitment to making Scotland a [Good Food Nation; a Land of Food and Drink](#), not only in what we as a nation produce but in what we buy, serve and eat²¹. Public expenditure on food has the potential to unlock benefits for community health, well-being and social justice through access to good nutrition including access to fresh and seasonal produce; market, employment and training opportunities in this key sector where there are a high number of SMEs.

Scotland produces some of the highest quality food and drink available however, the people of Scotland have one of the poorest diet-related health records globally²². A contracting authority has an opportunity to implement a food policy that is integrated into its overall strategy affording a wide range of benefits to the people of Scotland by promoting a healthier, more resilient and sustainable food system which is accessible and affordable to all, and uses the power of public spend to deliver genuine public value in purchasing.

¹⁹ [Regulation 19\(4\) The Public Contracts \(Scotland\) Regulations 2015.](#)

²⁰ [Regulation 44 The Public Contracts \(Scotland\) Regulations 2015.](#)

²¹ [Recipe for Success: Scotland's National Food and Drink Policy – Becoming a Good Food Nation, Discussion Document.](#)

²² [Recipe for Success: Scotland's National Food and Drink Policy – Becoming a Good Food Nation, Discussion Document.](#)

[Catering for Change: Buying food sustainably in the public sector](#), provides guidance on the sustainable procurement of food or catering services in the Scottish public sector. Sustainable food means food that, through its production, processing, distribution and consumption, provides a range of benefits. Food can promote sustainable development in a number of ways, including by:

- delivering the benefits of good nutritional quality;
- promoting good health and education;
- protecting the environment;
- avoiding unnecessary use of natural resources; and
- contributing towards economic development.

This should, in turn, help a contracting authority demonstrate its compliance with the sustainable procurement duty.

In setting out and implementing its general policy as required by [section 15\(5\)\(c\) of the Act](#), there is broad scope for a contracting authority to approach this requirement in a manner relevant to its needs and purposes. For a contracting authority which does not procure food or catering, it is necessary to include a statement in its procurement strategy to that effect.

Public procurement can play a key role in the promotion of the highest standards of animal welfare²³. When determining what is meant by animal welfare, this can encompass a range of aspects such as health standards for farm livestock, how animals are protected during transportation, no animal cruelty and how animals are treated at slaughter. Adherence with these standards can better protect public health but also make a major contribution to the sustainability of the fishing, aquaculture and livestock sectors to the wider agriculture and food industry and more broadly to the countryside, rural communities and the rural economy.

23 Farm animal welfare is regulated in Scotland by a variety of legislation:

- [Animal Health and Welfare \(Scotland\) Act 2006](#) provides minimum standards for all protected animals, including farm animals;
- [The Welfare of Animals at the Time of Killing \(Scotland\) Regulations 2012](#) regulates the welfare of farmed livestock on-farm;
- [The Welfare of Animals \(Transport\) \(Scotland\) Regulations 2006](#) (as amended) regulates the welfare of animals during transport for commercial purposes (and implements EU Council Regulation EC 1/2005 on the protection of animals during transport and related operations); and
- The Welfare of animals at the time of Killing (Scotland) Regulations 2012 and some remaining parts of [The Welfare of Animals \(Slaughter or Killing\) Regulations 1995](#) regulate the welfare of animals at slaughter (and implement EU Regulation - No 1099/2009 on the protection of animals at the time of killing).

In setting out its general policy statement, a contracting authority is required to consider how to promote the highest standards of animal welfare. In doing so, it should, for example, consider:

- requiring appropriate food standards certification or equivalent – many now include animal welfare requirements and/or welfare inspections;
- careful sourcing of Halal and Kosher meat – religious slaughter must be carried out in a licensed abattoir or a licensed poultry slaughterhouse with official veterinary supervision;
- careful sourcing of eggs and consideration of the different types of system (enriched cage, barn, free range or equivalent);
- organic certification; and
- Royal Society for the Protection of Birds freedom foods.

2.5.12. The authority must set out how it intends to ensure that, so far as reasonably practicable, the following payments are made no later than 30 days after the invoice (or similar claim) relating to the payment is presented:

- (i) payments due by the authority to a contractor
- (ii) payments due by a contractor to a sub-contractor
- (iii) payments due by a sub-contractor to a sub-contractor (section 15(5)(d) of the Act)

Late payment legislation places a statutory duty on all public bodies to pay commercial debt within 30 days. [European Directive 2011/7/EU](#) allows businesses to claim interest and recovery costs if goods and services are not paid for on time²⁴.

High quality public procurement is dependent on good practice not only by a contracting authority and its purchasers but also by economic operators. Economic operators need to play their part by delivering high quality, cost-effective goods and services and by maintaining the highest possible business standards and ethics, including prompt payment to their sub contractors.

The Scottish Government is committed to ensuring that businesses are paid on time because we understand how important it is to pay businesses promptly once a service has been performed or goods delivered. Late payment is particularly detrimental to SMEs, third sector bodies and supported businesses.

A contracting authority is required by [section 15\(5\)\(d\) of the Act](#) to set out in its procurement strategy how it intends to ensure that, so far as reasonably practicable, payments to contractors and sub-contractors are made within 30 days of a valid invoice, or similar claim, being received.

²⁴ [The Late Payment of Commercial Debts Regulations 2013; The Late Payment of Commercial Debts \(Scotland\) \(No. 2\) Regulations 2013; The Late Payment of Commercial Debts \(Scotland\) Regulations 2015](#)

The Scottish Government's policy and approach to ensuring prompt payment in its procurements asks a contracting authority to adopt the standard contract clause or an equivalent provision in its procurement contracts. Prompt payment for goods, works and services can be enforced by including clauses into the terms and conditions of the contract.

Effective contract management and monitoring should be undertaken to ensure that prompt payment continues to be applied throughout the duration of the contract, for example, by requesting information on prompt payment at all levels of the contract. A contracting authority and economic operators should then, where relevant, take any necessary steps to rectify any prompt payment issues experienced.

A contracting authority should also consider monitoring the prompt payment of sub-contractors, for example by carrying out spot checks and/or using project bank accounts or trusts, where relevant and proportionate.

2.6. MONITORING, REVIEWING AND REPORTING ON A PROCUREMENT STRATEGY

2.6.1. Context

A contracting authority is responsible for ensuring its procurement activity complies with the relevant legislation and that the decisions it takes in the context of its procurement activity are in accordance with the legislation and its own strategic objectives.

The Act requires a contracting authority to review its procurement strategy annually. This can, for example, help a contracting authority maintain alignment of its procurement activity with its broader priorities and allow it to revise its strategy where necessary.

2.6.2. Annual procurement report

The Act requires a contracting authority, which is obliged to prepare or revise a procurement strategy in relation to a financial year, to prepare and publish an annual procurement report on its regulated procurement activities as soon as reasonably practicable after the end of its financial year²⁵. The date for the first annual procurement report will depend on when the contracting authority's financial year starts:

- If the financial year starts after 31 December 2016, for example on 1 January 2017, the first report will cover 1 January 2017 to 31 December 2017. In that case, the report would need to be produced as soon as reasonably practicable after 31 December 2017
- If the financial year starts later, for example on 1 May 2017, the first report will cover 31 December 2016 to 30 April 2017 **and** 1 May 2017 to 30 April 2018. In that case, the report would need to be produced as soon as reasonably practicable after 30 April 2018.

²⁵ [Section 18\(1\) Procurement Reform \(Scotland\) Act 2014.](#)

It is important to note that a contracting authority that does not meet the financial threshold obligating it to publish a procurement strategy is not precluded from preparing and publishing an annual procurement report. Additionally, a contracting authority is not precluded from including information about non-regulated procurements in its annual procurement report.

A contracting authority's annual procurement report should be relevant and proportionate to its size and spend. It can aid visibility of purchasing activities; be a mechanism for conveying how a contracting authority is meeting legislative requirements; and outline how a contracting authority's procurement activity is contributing to the delivery of its broader aims and objectives.

[Section 18\(2\) of the Act](#) states that the annual procurement report must include:

- (a) A summary of the regulated procurements that have been completed during the year covered by the report.
 - For the purposes of this section, a regulated procurement is completed when the award notice is published or otherwise comes to an end²⁶.
- (b) A review of whether those procurements complied with the contracting authority's procurement strategy.
 - A contracting authority is required by [section 17 of the Act](#) to ensure that its regulated procurements are carried out in accordance with its strategy.
 - A contracting authority should include, for example, details of how its procurement activity achieved the policies set out in its procurement strategy, how these contributed to its wider organisational aims and objectives, and highlight any other positive impacts resulting from its procurement activity.
 - A contracting authority should include details of policies which were not met and how these can be better achieved in future procurements.
 - Within its annual procurement report, a contracting authority should also include a brief statement detailing the methodology used to review its regulated procurements in relation to the requirements in [section 15\(5\)\(a\)-\(d\) of the Act](#).
- (c) To the extent that any regulated procurements did not comply, a statement of how the contracting authority intends to ensure that future regulated procurements do comply.
 - A contracting authority should consider including information on how improvement activities will address identified shortfalls and how these will be monitored and reported.
- (d) A summary of any community benefit requirements imposed as part of a regulated procurement that were fulfilled during the financial year covered by the report.
 - Please refer to [section 4.6.7. on monitoring and reporting on community benefit requirements](#).

²⁶ [Section 18\(3\) Procurement Reform \(Scotland\) Act 2014](#).

- (e) A summary of any steps taken to facilitate the involvement of supported businesses in regulated procurements during the year covered by the report.
- [Section 9\(1\) of the Act](#) sets out the specific requirements of the sustainable procurement duty on a contracting authority. This duty includes considering, before starting a procurement competition, how, by the way in which it conducts the procurement process, it might facilitate the involvement of supported businesses.
- (f) A summary of the regulated procurements the authority expects to commence in the next two financial years.
- Whilst it is acknowledged that at the time a contracting authority prepares its annual procurement report, it is unlikely to know what its precise requirements will be over the course of the next two financial years, it should be in a position to provide a brief forward plan of anticipated procurements relevant and proportionate to the contracting authority's size and spend. It is expected that a summary should include the subject matter, whether it is a new or re-let procurement, the expected contract notice date, expected award date and expected start date. This information gives economic operators advance notice of future opportunities that may be offered by an authority to assist with planning.

Whilst there are a number of things listed within the Act that a contracting authority must include in its annual procurement report, the content is by no means limited to those items listed under [section 18\(2\) of the Act](#). Other information to be included within a contracting authority's annual procurement report will be informed by a number of considerations such as the size and spend of the authority and the scope of its procurement activity. An annual procurement report must address all of the matters contained in a contracting authority's procurement strategy.

A contracting authority should, for example, consider:

- information on what it has learned from its consultation and engagement with stakeholders and those affected by its procurements, and what it is doing to respond to these views;
- information on what it is doing to improve its performance and impact, drawing on relevant information – for example spend analysis – and what improvements have been achieved since its last report; and
- how it is working with other bodies – for example procurement centres of expertise – to maximise effectiveness and efficiency.

The annual procurement report is also a mechanism for a contracting authority to demonstrate its compliance with other legislation that places specific requirements on a contracting authority with respect to its procurement activities, for example, the [Equality Act 2010](#) and [The Equality Act 2010 \(Specific Duties\) \(Scotland\) Regulations 2012](#)²⁷.

²⁷ Further information on equality legislation, including guidance on the public sector equality duties, can be found on the Equality and Human Rights Commission (EHRC) website: <http://www.equalityhumanrights.com>

[Section 19 of the Act](#) requires a contracting authority to publish its annual procurement report in a manner it considers appropriate, and this must include publication on the internet.

A contracting authority should publish its annual procurement report in an inclusive way that takes into account equality and accessibility issues and allows stakeholders to form a clear view of the contracting authority's performance. Separate advice will be issued to contracting authorities on the means of notifying Scottish Ministers of the publication of an annual procurement report.

2.6.3. Annual report on procurement activity in Scotland

Scottish Ministers are required to prepare an annual report on procurement activity in Scotland as soon as reasonably practicable after the end of each financial year²⁸. The report will be based on information contained within annual procurement reports published by contracting authorities during that year.

The annual report on procurement activity in Scotland will contain, as a minimum, information about regulated procurements that have been completed, community benefit requirements that contracting authorities consider were fulfilled, and steps taken to facilitate the involvement of supported businesses in regulated procurements. It will provide an overview of public procurement activity in Scotland for that year.

28 [Section 21 Procurement Reform \(Scotland\) Act 2014](#).

CHAPTER 3 SUSTAINABLE PROCUREMENT DUTY

3.1. INTRODUCTION

Sustainable public procurement aims to make the best use of public money, helping the government achieve its overarching purpose and strategic objectives. The Scottish Government's purpose is to focus government and public services on creating a more successful country, with opportunities for all of Scotland to flourish through increasing sustainable economic growth.

The Scottish Government is also a signatory to the [United Nations Sustainable Development Goals](#), an international action plan to tackle poverty and inequality and promote sustainable development across the globe. These goals align with the [National Outcomes](#).

The sustainable procurement duty requires that before a contracting authority buys anything, it must think about how it can improve the social, environmental and economic wellbeing of the area in which it operates, with a particular focus on reducing inequality. It also requires a contracting authority to consider how its procurement processes can facilitate the involvement of SMEs, third sector bodies and supported business and how public procurement can be used to promote innovation.

It will require a contracting authority to be aware of how its procurement activity can be used to contribute to national and local priorities and to act in a way to secure this. To achieve this, procurement spend should be thought of in this context by all those involved including: external stakeholders, budget holders, commissioners and policy leads, in advance of the start of the formal procurement process. See [section 2.5.7 of chapter 2 on consulting and engaging with stakeholders](#).

3.2. PURPOSE OF THIS CHAPTER

This chapter describes what is required of a contracting authority, to comply with the sustainable procurement duty. It must be read alongside sections [8](#), [9](#) and [37](#) of the Act.

3.3. LEGAL BASIS OF THIS CHAPTER

A contracting authority must have regard to this chapter when complying with the sustainable procurement duty under [section 8\(2\) of the Act](#) in respect of regulated procurements which commence on or after 1 June 2016²⁹.

The sustainable procurement duty should be applied to all regulated procurements in a proportionate way. A contracting authority must set out how it intends to ensure that regulated procurements will be carried out in compliance with the sustainable procurement duty. It should have a robust, achievable approach to sustainable procurement that is relevant and proportionate to its scope and area; with details on how it will be applied in the organisation.

29 [Article 4 The Procurement Reform \(Scotland\) Act 2014 \(Commencement No. 3 and Transitional Provisions\) Order 2016](#)

The duty is defined in [section 9 of the Act](#):

“(1) For the purposes of this Act, the sustainable procurement duty is the duty of a contracting authority

- (a) before carrying out a regulated procurement, to consider how in conducting the procurement process it can
 - (i) improve the economic, social, and environmental wellbeing of the authority’s area,
 - (ii) facilitate the involvement of small and medium enterprises, third sector bodies and supported businesses in the process, and
 - (iii) promote innovation, and
- (b) in carrying out the procurement, to act with a view to securing such improvements identified as a result of paragraph (a)(i).

(2) The contracting authority must consider under subsection (1) only matters that are relevant to what is proposed to be procured and, in doing so, consider the extent to which it is proportionate in all the circumstances to take those matters into account.

(3) In this section –

“small and medium enterprises” means businesses with not more than 250 employees,

“third sector bodies” means organisations (other than bodies established under an enactment) that exist wholly or mainly to provide benefits for society or the environment.

(4) In this section, references to the wellbeing of the authority’s area include, in particular, reducing inequality in the area.”

Wellbeing is explained in [The Local Government in Scotland Act 2003 – Guidance on the Power to Advance Wellbeing](#) and includes:

- economic factors such as the availability of suitable and high quality jobs, measures to encourage local small businesses, efficient and effective transport links, lifelong learning, training and skills development, the provision of infrastructure and new information and communication technologies, etc.;
- social factors such as the promotion of good quality and affordable housing, safe communities, the encouragement of the voluntary sector, looking after the needs of children and young people (particularly the most vulnerable), access to the arts or leisure opportunities, access to education, etc.;
- health-related factors such as the promotion of good physical, social and mental health and developing and promoting policies which have a positive impact on health outcomes, especially on health inequalities; and

- environmental factors such as the availability of clean air, clean water, clean streets, the quality of the built environment, the removal of objects considered hazardous to health, removal of disfiguring or offensive graffiti from buildings, protecting communities against the threat of climate change, freedom from a high risk of flooding, improving and promoting biodiversity and accessibility to nature.

Compliance with the sustainable procurement duty may aid compliance with other legislation that places specific requirements on a contracting authority with respect to its procurement activities. In particular the [Equality Act 2010](#), [The Equality Act 2010 \(Specific Duties\) \(Scotland\) Regulations 2012](#), [the Climate Change \(Scotland\) Act 2009](#) and [The Climate Change \(Duties of Public Bodies: Reporting Requirements\) \(Scotland\) Order 2015](#).

A number of regulations in [The Public Contracts \(Scotland\) Regulations 2015](#) are particularly relevant to sustainable procurement. Principles of procurement are set out in [regulation 19](#) and reflected in a range of other regulations, including those relating to exclusion ([regulation 58\(8\)\(a\)](#)³⁰) and abnormally low tenders ([regulation 69](#)). The Public Contracts (Scotland) Regulations 2015 also encourage use of lots ([regulation 47](#)), allow for reserved contracts ([regulation 21](#)), life cycle costing ([regulation 68](#)) and introduce a new innovation partnership procedure ([regulation 32](#)). Price or cost may not be used as the sole award criterion ([regulation 67\(1\)\(b\)](#)).

Community benefits may be viewed as a subset of the sustainable procurement duty. While the Act has a specific threshold at which community benefits must be considered, application of the sustainable procurement duty means that community benefits may be achieved below this threshold.

3.4. IMPROVING THE ECONOMIC, SOCIAL AND ENVIRONMENTAL WELLBEING OF THE AUTHORITY'S AREA

[The United Nations Environment Programme](#) devised an approach to achieving sustainable procurement. Since 2011 this approach has been tailored to reflect Scottish priorities and to reflect the requirements of the Act. It has been adopted across the public sector in Scotland through the Public Procurement Reform Programme. Scotland's approach to sustainability in public procurement now provides a methodology by which a contracting authority can identify and address how it can optimise social, environmental and economic outcomes through its procurement activity. This has been agreed by the Public Procurement Reform governance structure as the means by which a contracting authority may comply with the sustainable procurement duty.

The approach advocates that a contracting authority ensures that its organisational objectives and wider policy drivers are reflected in tender specifications. It has two concepts: life cycle impact mapping; and a risk and opportunity-based approach to considering all components of public procurement.

This chapter describes the principles of the approach and how they may aid compliance with the sustainable procurement duty. Access to standard tools is available from [the Scottish Government website](#).

30 This is also reflected in [regulation 9\(7\) of The Procurement \(Scotland\) Regulations 2016](#)

3.4.1. Sustainable Procurement Processes

For the purposes of this section there are four key processes or tools:

- [Scottish Public Procurement Prioritisation Tool](#);
- [The Sustainability test](#);
- [Life Cycle Impact Mapping](#); and
- [the Scottish Flexible Framework](#).

Prioritisation

[The Sustainable Public Procurement Prioritisation Tool](#) (SPPPT) is designed to be a standard structured approach to the assessment of spend categories for use across the whole of the Scottish public sector. This risk and opportunity based approach enables resources to be focused on areas with the greatest potential to generate benefits such as financial savings, reduced carbon emissions and waste, and community benefits, whilst driving innovation and, in turn, how national³¹ and local outcomes may be influenced through the procurement process.

This tool is designed to:

- help a contracting authority prioritise categories/sub-categories according to sustainability risks and opportunities and highlight subsequent actions;
- highlight those categories where particular risks and opportunities are relevant;
- highlight how category strategies may seek to mitigate relevant risks or capture opportunities;
- highlight a relevant focus on market engagement;
- act as a reference for the subsequent development of contracts and frameworks, through the sustainability test; and
- provide an evidence base for category strategies and eventual contract requirements.

As such, the SPPPT may be used to prioritise categories/sub-categories/commodities to inform both an organisation's procurement strategy and individual commodity strategies.

It may also be used to:

- prioritise a forward plan to help inform subsequent strategies;
- assess relevant options – for example when considering varying options for future procurements; and
- highlight single issue priorities – i.e. identifying within which particular categories/commodities specific environmental and socio-economic risks and opportunities are relevant so that market engagement and procurement strategies may be focused, (for example labour standards within the supply chain), so that a contracting authority can progressively focus on commodity spend areas where it can pursue the optimum outcomes.

³¹ <http://www.gov.scot/About/Performance/scotPerforms/outcome>.

The tool will assist a contracting authority to identify a relevant and proportionate approach to improving sustainable outcomes in procurement. A contracting authority can use the tool to take account of local priorities.

To identify the best opportunity for sustainable procurement and so a contracting authority can outline its proposed approach to sustainable procurement in its procurement strategy, a contracting authority should undertake the prioritisation test for its anticipated procurement spend annually. The SPPPT enables audit of the decision-making process.

The Sustainability Test

A [sustainability test](#) has also been developed. The sustainability test is for use in individual procurements at a contract level. It is a quick test and may be used as a standalone product or in conjunction with the SPPPT. Information derived from the prioritisation methodology can be carried across to the sustainability test and used to cross-check opportunities in individual contracts or frameworks. The sustainability test provides a 'sense check' of anticipated outcomes for individual procurements when used in conjunction with the prioritisation methodology. When used as a standalone tool, it provides a lighter touch check on the risks and opportunities that individual procurements may allow.

Life Cycle Impact Mapping

The assessment of sustainable risks and opportunities is broken down in to four key phases:

- raw materials;
- manufacturing and logistics;
- use; and
- disposal or end-of-life management.

<ul style="list-style-type: none"> • Impacts of obtaining raw materials 	<ul style="list-style-type: none"> • Impacts of manufacturing & logistics
<ul style="list-style-type: none"> • Impacts during use of product/ service 	<ul style="list-style-type: none"> • Impacts at end-of-life/disposal

A contracting authority may use this approach to identify economic, social and environmental impacts at each stage in the product or service and address these in the procurement process. For example, there may be opportunities to drive fair work practices in any of the phases enabling a contracting authority to subsequently build requirements into both its performance clauses for successful contractors and its own internal management procedures.

[Life Cycle Impact Mapping](#) may be applied to categories before undergoing the prioritisation methodology and has had an impact when applied to individual projects. For example, it has identified risks to labour standards in the supply chain, risks of skills shortages in servicing and the likelihood of high levels of waste to landfill.

It requires users to consider the impact of the requirement at each stage in its life, for example the economic, social and environmental impact of mineral extraction at the raw material phase or the impact on providers, users and environment during use of the product or service.

Scottish Flexible Framework

[The Flexible Framework](#) enables a contracting authority to develop an action plan including responsibilities and target dates for delivery against elements of its procurement activity:

- people;
- objectives, strategy and communication;
- procurement process;
- engaging stakeholders; and
- monitoring and reporting.

This tool can help organisations within the Scottish public sector to determine and implement relevant actions that will embed good procurement practice and so realise intended sustainability outcomes. It is a self-assessment tool. Progression through the levels of the tool is based on providing evidence that a contracting authority meets relevant questions' requirements. The assessment process will, depending on answers provided, generate an action plan which should help inform a contracting authority's procurement strategy and help identify relevant actions to enable progression. Explanation, guidance and suggested forms of evidence are included.

3.5. FACILITATING THE INVOLVEMENT OF SMALL AND MEDIUM ENTERPRISES (SMES), THIRD SECTOR BODIES AND SUPPORTED BUSINESSES

This part of the duty is closely related to the duty to consider economic wellbeing, [section 9\(1\)\(a\)\(i\) of the Act](#). In line with TFEU fundamental principles of equal treatment and proportionality and the other general duty in [section 8\(1\) of the Act](#), policy is that the costs associated with submitting a tender be kept to a minimum, and barriers to participation by small firms, the self-employed and the third sector should be removed.

There are a number of well-documented concerns about public procurement that may arise; primarily transparency, simplicity of processes and size of contracts. The Scottish public sector has been working with the private and third sector over a number of years to address these, resulting in the development of a number of initiatives including:

- [Public Contracts Scotland \(PCS\)](#);
- [the Supplier Development Programme](#); and
- [the Single Point of Enquiry](#).

Placing a requirement on a contracting authority to facilitate access to public contract opportunities by SMEs, third sector bodies and supported businesses is intended to build on what has been achieved to date.

3.5.1. Definitions

Small and Medium-sized Enterprises (SMEs): Businesses with no more than 250 employees.

Third Sector: The third sector includes community groups, voluntary organisations, charities, social enterprises, co-operatives and individual volunteers that exist wholly or mainly to provide benefits for society or the environment.

Supported Businesses: Competition may be reserved to organisations as defined by [regulation 21 of The Public Contracts \(Scotland\) Regulations 2015](#); these are commonly referred to as supported businesses.

There are also a number of provisions in the Act that contribute to facilitating the involvement of SMEs, third sector bodies and supported businesses.

The following three sections will outline various aspects of the Act and The Public Contracts (Scotland) Regulations 2015 that encourage a contracting authority to ensure transparency, simplicity and promotion of innovation respectively.

3.5.2. Transparency

A key driver of the sustainable procurement duty is to increase the transparency of procurement activity to economic operators. There are other parts of the legislative framework that complement the sustainable procurement duty's aims of increased transparency. These include:

- a procurement strategy ([sections 15 and 16 of the Act](#)), sets out how a contracting authority intends to carry out regulated procurements;
- an annual procurement report ([section 18 of the Act](#)) allows a contracting authority to report and publicise its performance on regulated procurements carried out in that financial year;
- providing information on the scale and nature of procurement by a contracting authority through annual procurement reports, ([sections 18 & 21 of the Act](#)), and the Contracts Register, ([section 35 of the Act](#)), enabling the market to identify opportunities;
- use of PCS to advertise regulated contract and publish award notices ([sections 22 & 23 of the Act](#)); and
- increased provision of debriefing to advise economic operators on their bids ([sections 32 & 33 of the Act](#)).

These activities should assist businesses to assess current spend areas, organisational priorities and potential future contract opportunities. Debriefing is an important part of procurement activity because it helps economic operators to understand the relative strengths and weaknesses of their bids and provides a focus for developing their business. Requirements for debriefing are contained in [sections 32 and 33 of the Act](#) and [regulation 56 of the Public Contracts \(Scotland\) Regulations 2015](#).

3.5.3. Simplicity

In order to help facilitate access to public contracts, simplicity is key. This can be supported in a number of ways, including:

- see [chapter 5 on the selection of tenderers and award of contracts](#) for guidance on the assessment of the suitability of economic operators and addressing proportionality in the selection process ([sections 27 & 28 of the Act](#));
- including a provision to reserve participation in procurement exercises to supported businesses at Act thresholds ([section 11 of the Act](#)) may greatly increase opportunities where a market exists;
- providing for use of dynamic purchasing systems ([section 7 of the Act](#)); and
- prohibiting of charges for participation in the procurement process ([section 31 of the Act](#)).

[The Act](#) and [The Public Contracts \(Scotland\) Regulations 2015](#) also outline possible approaches to facilitate access. In the list below, 'sections' relate to the Procurement Reform (Scotland) Act 2014 and 'regulations' relate to the Public Contracts (Scotland) Regulations 2015:

- preliminary market consultation ([regulation 41](#)) – so that the market is aware of procurement plans and requirements;
- use of lots ([regulation 47](#)) – a contracting authority must explain its decision not to sub-divide procurements subject to The Public Contracts (Scotland) Regulations 2015 into lots. This provision has not been drawn down to Act thresholds because of the relatively low thresholds at which the Act applies. [Regulation 5\(3\)](#) makes some provision for direct award of small lots, the thresholds that apply are available from the [Scottish Government website](#);
- use of community benefit clauses – the Act defines availability of sub-contracting opportunities as a community benefit ([section 24](#)). [Chapter 4 on community benefits requirements](#) provides more detail on this;
- use of innovation partnership ([regulation 32](#));
- use of dynamic purchasing systems ([regulation 35](#) & [section 7](#));
- use of the scope to reserve contracts for supported businesses and the wider definition of supported businesses ([regulation 21](#)); and
- opportunities under the new Health and Social Care regime ([regulations 74-76](#)). See also [chapter 6 on the procurement for health or social care services](#).

It is important to consider these mechanisms to encourage participation by smaller businesses, including micro-businesses which constitute the majority of businesses in Scotland.

3.6. PROMOTING INNOVATION

Innovation in public procurement gives a contracting authority the opportunity to influence the market towards innovative solutions. This may involve innovation in the design and delivery of public services, the procurement of innovative goods and services and/or innovative procurement processes and models. [Section 9\(1\)\(a\)\(iii\) of the Act](#) requires a contracting authority to consider promoting innovation in all regulated contracts.

Some ways in which a contracting authority can promote innovation are listed below:

- for routine requirements there may be scope to innovate in the tendering process. This has happened through the development of e-procurement with use of e-catalogues and e-invoicing;

- where public procurement is required to achieve wider policy goals, the public sector can drive demand for the creation of new technologies, standards and services. The Public Contracts (Scotland) Regulations 2015 specifically provide for this through clarifying provisions for preliminary market consultation ([regulation 41](#)) and through a new procedure – the Innovation Partnership ([regulation 32](#)) – as well as replacing the Negotiation Procedure with a Competitive Procedure with Negotiation ([regulation 30](#)) to make it more like the Competitive Dialogue ([regulation 31](#)) and the ability to allow for variant bids ([regulation 46](#));
- the public sector may also directly procure research and development. In many instances research and development is exempt from procurement rules ([regulation 15](#) & [section 4\(1\)\(c\) of the Act](#)); and
- the public sector can also demand innovations with a view to increasing availability of a range of goods, works or services that may also be of interest to the private market. For example, [the Lead Market Initiative](#) (LMI) for Europe aims to foster the emergence of markets with potentially high economic and societal value. Six markets were identified as part of the LMI: eHealth; protective textiles; sustainable construction; recycling; bio-based products and renewable energies.

A full list of the drivers in the Public Contracts (Scotland) Regulations 2015 are available in the [EU Commission's publication on Public Procurement as a Driver of Innovation in SMEs and Public Services](#).

All of these approaches involve risk management to strike a balance between innovation strategies and the need for competition, transparency and accountability in public procurement to avoid monopolies, discrimination against SMEs and protectionism. They also require early stakeholder consultation to ensure that needs are identified. This will commonly include policy priorities such as employment and training (community benefits) as well as fair work practices and resource efficiency (zero waste).

CHAPTER 4 COMMUNITY BENEFIT REQUIREMENTS IN PROCUREMENT

4.1. INTRODUCTION

Community benefits are one of a range of social and environmental considerations that can be included in public contracts and frameworks where they are compatible with the TFEU fundamental principles of transparency, equal treatment and non-discrimination, proportionality and mutual recognition. While community benefit requirements will not be relevant and proportionate to all contracts and frameworks, this chapter, in conjunction with guidance on the sustainable procurement duty, aims to help a contracting authority identify relevant opportunities to include them.

Since publication of the [Community Benefits in Public Procurement Report](#) and accompanying [policy guidance](#) in 2008, community benefits have increasingly been included in contracts and framework agreements by contracting authorities in Scotland. Research³² demonstrates that, community benefits have contributed to a range of national and local outcomes relating to employability, skills and tackling inequalities by focussing on under-represented groups. The [Procurement Reform \(Scotland\) Act 2014](#) aims to achieve the maximum use of these requirements in public contracts and framework agreement.

Community benefit requirements in procurement policy is outlined below:

- there is a presumption that where there is an opportunity to deliver community benefits, appropriate requirements will be included in public contracts and framework agreements;
- contract or framework suitability and capacity needs to be addressed on a case-by-case basis – value, duration, local factors and the nature of the supply base will all have an impact;
- requirements should be robust, relevant and proportionate so that they can be judged on objective and measurable outcomes;
- discrimination should be avoided in the wording of requirements; and
- monitoring of contract deliverables and outcomes is essential to ensure contract compliance.

4.2. PURPOSE OF THIS CHAPTER

This chapter describes what is required of a contracting authority with respect to community benefit requirements in procurements. It must be read alongside [section 24 of the Act](#). This chapter provides information on: when to use community benefit requirements; identifying community benefit requirements through stakeholder consultation; and incorporating community benefit requirements into the procurement process.

32 [University of Glasgow, Training & Employment Research Unit, Analysis of the impact and value of community benefit clauses in procurement, June 2015.](#)

4.3. LEGAL BASIS OF THIS CHAPTER

A contracting authority must have regard to the guidance in this chapter when it undertakes regulated procurements which meet the community benefit threshold and commence on or after 1 June 2016³³.

For the purposes of the Act, an initial threshold value of £4 million has been set out in [section 25\(1\)](#) at or above which community benefit requirements must always be considered. Their use does not need to be limited to contracts and framework agreements of this value and this threshold value will be subject to future review³⁴. Where contract or framework agreement requirements and clauses relating to community benefits are not evaluated as part of a procurement process, they may capture social and environmental considerations. Providing clarity to economic operators on what these requirements are, helps bidders understand and better respond to them. This chapter focuses on community benefit requirements as defined by the Act.

Community benefit requirements are defined in the Act as follows:

[“Section 24 of the Act:](#)

For the purpose of this Act, a community benefit requirement is a contractual requirement imposed by a contracting authority –

- (a) relating to –
 - (i) training and recruitment, or
 - (ii) the availability of sub-contracting opportunities, or
- (b) which is otherwise intended to improve the economic, social or environmental wellbeing of the authority’s area in a way additional to the main purpose of the contract in which the requirement is included.

[Section 25 of the Act:](#)

- (1) This section applies where a contracting authority proposes to carry out a regulated procurement in relation to which the estimated value of the contract is equal to or greater than £4,000,000.
- (2) The contracting authority must, before carrying out the procurement, consider whether to impose community benefit requirements as part of the procurement.
- (3) The contracting authority must, in the contract notice relating to the procurement, include –
 - (a) a summary of the community benefit requirements it intends to include in the contract, or
 - (b) where it does not intend to include any such requirements, a statement of its reasons for not including any requirements.

³³ [Article 4 The Procurement Reform \(Scotland\) Act 2014 \(Commencement No. 3 and Transitional Provisions\) Order 2016](#)

³⁴ [Section 25\(5\) Procurement Reform \(Scotland\) Act 2014.](#)

- (4) Where community benefit requirements are included in a contract, the contracting authority must include in the award notice a statement of the benefits it considers will be derived from those requirements.
- (5) The Scottish Ministers may by order modify subsection (1) so as to substitute for the figure specified there for the time being such other figure as they consider appropriate.”

While there are clear requirements relating to community benefits in sections 24 & 25 of the Act, use of community benefit requirements may also demonstrate compliance with the sustainable procurement duty which applies to all regulated procurements³⁵.

A contracting authority is also required to set out in its procurement strategy a general policy on the use of community benefit requirements and to review compliance with that policy in its annual procurement report. (Please refer to [chapter 2](#) for further information.)

4.4. WHEN TO USE COMMUNITY BENEFIT REQUIREMENTS

A contracting authority is required, by section 25(1) of the Act to consider including community benefit requirements for all regulated procurements where the estimated value of the contract is equal to or greater than £4 million. Community benefit requirements may not always be appropriate and a contracting authority must consider their use by taking into account the nature of the contract, its duration and local factors. In line with the sustainable procurement duty, community benefit requirements should be used in instances where a risk and opportunity assessment identifies that they are the appropriate benefit to seek in a contract or framework.

Research has shown that community benefits principally contribute to four national outcomes. These national outcomes are outlined in [Annex A.1.](#) alongside a range of typical community benefit requirements.

While the threshold for considering community benefits is £4 million, this value will be subject to review and research has shown that community benefits can be achieved in procurements under the £4 million threshold³⁶. Reporting on community benefits will help Scottish Ministers gather data to determine whether a change to the threshold figure of £4 million is appropriate ([section 25\(5\) of the Act](#)).

³⁵ [Section 3 Procurement Reform \(Scotland\) Act 2014](#).

³⁶ [University of Glasgow, Training & Employment Research Unit, Analysis of the impact and value of community benefit clauses in procurement, June 2015](#) – seven of the twenty-four contracts analysed for the Research were valued at below £4 million.

Factors to consider when deciding whether to include community benefit requirements include opportunities such as:

- to generate employment and training opportunities for priority groups;
- vocational training;
- to up-skill the existing workforce;
- equality and diversity initiatives;
- to make sub-contracting opportunities available to SMEs, the third sector and supported businesses;
- supply-chain development activity;
- to build capacity in community organisations;
- educational support initiatives;
- to work with schools, colleges and universities to offer work experience; and
- to minimise negative environmental impacts, for example impacts associated with vehicle movements and/or associated emissions and impacts on protected areas, buildings or sites³⁷.

This is not an exhaustive list.

Community benefit requirements may be particularly helpful to disadvantaged groups or areas. [The Scottish Index of Multiple Deprivation](#) may be a helpful tool for targeting the application of community benefits on particular disadvantaged areas. A contracting authority may also have a particular disadvantaged group as a key customer.

Care should be taken to ensure the requirements do not place a disproportionate burden on economic operators or have a wider, unintended effect. This could be the case, for example, where training and recruitment requirements are included. Here, care needs to be taken to avoid displacement of existing trainees and employees in order to meet community benefit commitments³⁸. It should also be noted that training and employment opportunities require adequate contract length for these activities to be undertaken. For this reason, while there may be opportunities for activities such as curriculum support on lower value contracts, the majority of community benefits are likely to come from higher value and longer term³⁹ contracts.

37 A range of environmental considerations are covered by the [tools supporting the sustainable procurement duty](#).

38 A generic clause is available to ensure that the use of community benefit requirements do not result in displacement of existing employees or apprentices by recruiting new entrants: 'the contractor shall not cause any current employee of the contractor or any current employee [or apprentice] of its sub-contractors (or any tier) to become unemployed as a result of implementing Community Benefits.'

39 Typically contract duration of greater than six months.

4.5. IDENTIFYING COMMUNITY BENEFIT REQUIREMENTS THROUGH STAKEHOLDER CONSULTATION

The purpose of stakeholder consultation is to inform well-considered and clearly specified community benefit requirements. Some of this will take place during formulation of the procurement strategy which suggests that a contracting authority may consider the [National Standards for Community Engagement](#) and [Community Empowerment Scotland Act 2015](#), or when assessing risks and opportunities in compliance with the sustainable procurement duty.

Consultation may be with:

- the market, to identify the capacity of the contract or framework agreement and to ensure clarity of target outcomes for bidders;
- customers, for example users of the service; and
- those with an understanding of related policies, for example non-governmental organisations.

The nature of stakeholder consultation must be relevant and proportionate to the community benefit requirements and should ensure that the requirements:

- reflect the needs of the community;
- are relevant and proportionate; and
- will not have a negative impact on the delivery of value for money.

Stakeholder consultation will also help identify what support is available to successful contractors to deliver the requirement – for example from employability teams, skills agencies, graduate or student placement programmes and delivery bodies that may support the policy that is being included – and build understanding of how to evaluate the requirements in the procurement process.

Opportunities to use the requirements to advance equality of opportunity between persons who share a relevant protected characteristic and those who do not, in line with equality duties⁴⁰ may also emerge as a result of this process; as may opportunities to benefit priority groups that are specifically within the scope of a contracting authority's functions and purposes.

⁴⁰ [Equality Act 2010](#) and [Equality Act 2010 \(Specific Duties\) \(Scotland\) Regulations 2012](#).

4.6. INCORPORATING COMMUNITY BENEFIT REQUIREMENTS INTO THE PROCUREMENT PROCESS

When community benefit requirements are being used these are either included in the specification as conditions of contract performance or both.

4.6.1. Identifying the need

The requirements of a specific procurement may reflect wider organisational priorities. For example, if you are a contracting authority and have training or education in your remit, there may be an opportunity to include curriculum support or training community benefit requirements in contracts that would traditionally have been solely for goods, works or services. This approach would have the benefit of making these priorities core to the procurement requirements, which is both relevant and proportionate.

4.6.2. Specification

The requirements can then be built into the specification. The appropriate requirements should be developed through stakeholder consultation and engagement and by using the support available as described above. Technical specifications may refer to the specific process, method of production or provision of requested works, supplies or services provided they are linked to the subject matter of the contract or framework and are proportionate. Social and environmental considerations may be included and community benefits can therefore form part of the specification.

4.6.3. Contract notice

The community benefit may be reflected in the contract or framework agreement by name and in Common Procurement Vocabulary (CPV) codes used, for example codes relating to recruitment (but not including employment contracts). Potential bidders should be alerted to the use of community benefits in the contract notice. Suggested wording is as follows:

‘Community benefits are included in this requirement. A summary of the expected community benefits have been provided as follows:

[insert text].’

Some typical community benefits are listed in [Annex A.1](#). Further examples are available from existing guidance⁴¹.

41 Scottish Government Web Pages - [Community Benefit Requirements](#).

Where community benefits have not been included in requirements valued at or above £4 million, the contracting authority must provide a reason for this in the contract notice. Reasons should reflect that, having considered the scope to include community benefits, they are not considered to be appropriate, relevant and/or proportionate to the procurement with a brief explanation. Urgency is unlikely to be a suitable reason for not including community benefit requirements.

Circumstances where an authority is not required to apply a community benefit include:

- where the requirement is excluded from the provisions of the Act; and
- where the length or nature of the contract means that it is not a suitable choice for community benefits, for example, supply contracts of very short duration and where there is little scope to achieve social, environmental or economic outcomes for the relevant area.

In some instances social, economic and environmental considerations will be so integral to the requirement that it may be difficult to separate them out.

4.6.4. Supplier selection⁴²

As community benefits have been in use for a number of years many economic operators will be able to provide evidence of experience in their use. To encourage businesses to bid for contracts or frameworks using the requirements, care should be taken in what is considered relevant experience. For example, an organisation's approach to recruitment and training of staff may be adequate evidence that it has the capacity to deliver the benefits required, it may not need actual experience of recruitment and training in the course of delivering a community benefit requirement in a contract. A general policy on, for example, recruitment and training, staff or supply-chain development is not enough and would need to be supported by evidence demonstrating how it is applied.

4.6.5. Evaluation and award

One of the key aims of applying award criteria is to achieve value for money by balancing cost, quality and sustainability. Community benefits should be evaluated in a similar manner to other sustainability aspects of the requirement. The weighting for community benefit requirements should be determined on a case-by-case basis, (to ensure they are proportionate), and evaluation of community benefit requirements should include evaluation of the bidder's proposed approach to meet the requirement, ensuring that they demonstrate an understanding of how to achieve the required community benefit. A range of examples of how community benefit requirements are evaluated is available on the Scottish Government website. See [section 4.7](#) of this chapter.

⁴² Also see [section 5.5.4. on technical and professional ability in chapter 5](#).

In addition to training, recruitment and sub-contracting opportunities, community benefits may be used to improve economic, social or environmental wellbeing in a way that is additional to the main purpose of the contract or framework in which the requirement is being included. See [Annex A.1.](#) for examples.

4.6.6. Award notice

Where community benefits are included in a procurement (at or above the £4 million threshold), the award notice should include a statement of the benefits that are expected to be derived from these requirements⁴³.

4.6.7. Monitoring and reporting

A contracting authority which is required by the Act to produce and publish an annual procurement report must include a summary of any community benefit requirements imposed as part of a regulated procurement that were fulfilled during the year covered by the report⁴⁴. This may include:

- apprenticeships completed;
- curriculum support activities;
- business support activities;
- support to communities; and
- resource efficiencies achieved – materials, waste, water.

To understand the scale and nature of the community benefits being achieved, a range of information should be collected. Suggested reporting has been developed, which allows flexibility to reflect local needs while encouraging consistent monitoring across contracts. This will give a contracting authority a clear view of how the use of requirements is contributing to national and organisational priorities as well as providing a basis for summarising its achievements in compliance with the reporting duties in the Act. See [Annex A.2.](#)

4.7. OTHER GUIDANCE AND EXAMPLES

Further guidance and examples relating to community benefits in procurement are available at:

<http://www.gov.scot/Topics/Government/Procurement/policy/corporate-responsibility/Sustainability/CommunityBenefits>

⁴³ [Section 25\(4\) Procurement Reform \(Scotland\) Act 2014.](#)

⁴⁴ [Section 18 Procurement Reform \(Scotland\) Act 2014](#)

CHAPTER 5 SELECTION OF TENDERERS AND AWARD OF CONTRACTS

5.1. INTRODUCTION

By applying exclusion grounds and establishing relevant and proportionate selection and award criteria for regulated procurements, a contracting authority can ensure that economic operators who deliver public contracts, do so in full compliance with the law and supporting principles. The Scottish Government expects economic operators which are awarded public contracts to adopt corporate social responsibility policies appropriate to their business and the public contract, an ethical approach as an employer, and support our aim to achieve value for money by balancing cost, quality and sustainability.

Where relevant to do so, criteria must be in support of the priorities set out in a contracting authority's procurement strategy, and support its sustainable procurement duty and community benefit requirements (see earlier chapters for further details on these obligations).

This chapter focuses on the following three areas:

Exclusion grounds – There are circumstances in which an economic operator must be excluded from the procurement process. There are other circumstances in which a contracting authority can determine, on a case-by-case basis whether an economic operator should be excluded. These are referred to as mandatory and discretionary exclusion grounds, respectively.

Selection criteria – There are also different criteria which are used in order to determine the suitability of economic operators to perform the contract. These are referred to as selection criteria. These criteria consider an economic operator's suitability to pursue a professional activity, its economic and financial standing and technical and professional ability.

Award criteria – These are used to determine which economic operator is best placed to deliver and which should be awarded the contract. A contracting authority has discretion to determine what award criteria apply in relation to individual regulated procurements. In all cases award criteria must be proportionate and relate to the goods, works or services to be provided.

Exclusion grounds, selection and award criteria must be clearly defined in the procurement documents, to ensure a common understanding of the requirements by all economic operators. These criteria must not be changed or waived during the procurement process.

5.2. PURPOSE OF THIS CHAPTER

This chapter describes what is required of a contracting authority when selecting economic operators and awarding contracts in relation to regulated procurements. These requirements do not apply to a call-off contract, which is a contract awarded under a framework agreement. It must be read alongside [regulations 57 to 69 of The Public Contracts \(Scotland\) Regulations 2015](#), which relate to EU-regulated procurements and [regulations 8 to 10 of The Procurement \(Scotland\) Regulations 2016](#) which relate to regulated procurements below EU contract threshold values. This chapter provides guidance on the assessment of the suitability of economic operators expressing an interest in being selected to tender or to become a contract supplier, and the basis on which the contract is awarded. It must also be read in conjunction with the other chapters of this statutory guidance.

5.3. LEGAL BASIS OF THIS CHAPTER

The Scottish Ministers have published this statutory guidance under [section 29 of the Act](#). A contracting authority must have regard to this chapter in relation to the selection of tenderers and the award of contracts for regulated procurements where the estimated value of the contract is equal to or greater than £50,000 for goods and services and £2 million for works, and which is not otherwise exempt from regulation. Contracting authorities are further encouraged to follow this statutory guidance wherever it is appropriate to do so, for example for lower value or exempt contracts where a formal tender evaluation is to be undertaken.

Separate statutory guidance, associated with this chapter, has also been published on [Addressing Fair Work Practices, including the Living Wage, in Procurement](#).

[Regulations 57 to 69 of The Public Contracts \(Scotland\) Regulations 2015](#) set out the requirements for EU-regulated procurements in respect of the choice of participants and awarding contracts. These regulations cover the requirements in respect of mandatory and discretionary exclusion grounds, and the application of selection and award criteria relevant to individual procurement exercises. They also set out the requirements for the capability and capacity of an economic operator, what is expected of sub-contractors and where bids are made by consortia.

[Regulations 8 to 10 of The Procurement \(Scotland\) Regulations 2016](#) set out the requirements for regulated procurements below the EU contract threshold values in respect of mandatory and discretionary exclusion grounds and the application of selection criteria relevant to individual procurement exercises.

5.4. EXCLUSION OF ECONOMIC OPERATORS

There are circumstances in which an economic operator must be excluded from the procurement process, and there are other circumstances in which a contracting authority can determine on a case-by-case basis whether an economic operator should be excluded. These are referred to as mandatory and discretionary exclusion grounds, respectively.

In the case of mandatory and discretionary exclusion grounds, an economic operator must be given the opportunity to provide evidence which proves that it has taken sufficient and appropriate remedial action to demonstrate that it has 'self-cleansed' (i.e. that the problem will not occur and that the economic operator can be regarded as reliable).

5.4.1. Grounds for the exclusion of economic operators

For regulated procurements there are particular circumstances in which a potential economic operator must be excluded. These are known as mandatory exclusion grounds. There are other grounds where it is for a contracting authority to determine whether that particular exclusion should be applied on a case-by-case basis, these are known as discretionary exclusion grounds. [Regulation 58 of The Public Contracts \(Scotland\) Regulations 2015](#) and [regulations 8 and 9 of The Procurement \(Scotland\) Regulations 2016](#) set these out in both instances. An economic operator must be given the opportunity to provide evidence which proves that it has taken sufficient measures to demonstrate its reliability ([see section 5.4.5. on self-cleansing](#)).

Mandatory exclusion grounds – must be applied in all regulated procurements; these include circumstances in which a potential supplier has been convicted by final judgement of one of the criminal offences contained in the relevant regulations. These are contained in [regulations 58\(1\) and 58\(3\) of The Public Contracts \(Scotland\) Regulations 2015](#) and [regulations 8\(1\) and 9\(1\) of The Procurement \(Scotland\) Regulations 2016](#).

An economic operator must not be excluded indefinitely from participating in procurement activity. In respect of mandatory exclusion grounds, an economic operator must only be excluded for a maximum of five years from the date of the conviction, three years for a breach of the blacklisting regulations, or in the case of a breach of tax or social security obligations, until the amount owed is paid, including any applicable interest or fines, a binding agreement to pay it has been entered into, or it becomes otherwise no longer owed.

Discretionary exclusion grounds – may be applied in regulated procurements; these are circumstances in which a potential supplier is in one of the circumstances listed in [regulations 58\(4\) and 58\(8\) of The Public Contracts \(Scotland\) Regulations 2015](#) and [regulations 9\(2\) and 9\(5\) of The Procurement \(Scotland\) Regulations 2016](#).

Economic operators must not be excluded indefinitely from participating in a procurement exercise. In respect of discretionary exclusion grounds, an economic operator must only be excluded for a maximum of three years from the date of the relevant event.

5.4.2. Derogation from mandatory exclusion considerations

Under [regulation 58\(6\) of The Public Contracts \(Scotland\) Regulations 2015](#) and [regulation 8\(3\) and 9\(4\) of The Procurement \(Scotland\) Regulations 2016](#), where there are exceptional circumstances, a contracting authority may, for overriding reasons relating to the public interest, disregard any of the mandatory exclusion grounds when making a decision in respect of the selection of an economic operator. This provision is known as a derogation from the mandatory exclusion considerations. This ensures that a contracting authority is able to respond to unforeseen emergency circumstances.

There is no definitive list of situations in which this derogation can be used and any decision should be made on a case-by-case basis. A contracting authority should be able to demonstrate that the actual or potential harm is so great, that the public interest in using the derogation outweighs the public interest in excluding an economic operator. An example may be where urgently needed vaccines or emergency equipment can only be purchased from an economic operator to whom one of the mandatory exclusion grounds otherwise applies.

Each situation must be judged on its merits, but the following situations are, on their own, unlikely to meet this test:

- when an economic operator which should be excluded is offering a substantially better quality/more economical product or service; and
- when there would otherwise be a lack of competition.

5.4.3. Applying exclusion grounds to sub-contractors

In complying with its sustainable procurement duty, a contracting authority must facilitate the involvement of small and medium enterprises, third sector bodies and supported businesses in a procurement process. This can include the use of sub-contractors to support the delivery of the contract.

Under [regulation 71\(9\) of The Public Contracts \(Scotland\) Regulations 2015](#), for EU-regulated procurements, a contracting authority can require confirmation of whether there are any mandatory or discretionary grounds for the exclusion of any sub-contractor involved in the delivery of the contract. Where this information is sought the ESPD (see [section 5.6.](#)) must be used.

Where there are mandatory grounds for the exclusion of a sub-contractor, a contracting authority must require that they are replaced. Where there are discretionary grounds for the exclusion of a sub-contractor, a contracting authority can choose whether it should be substituted. A contracting authority must decide whether to apply discretionary exclusion grounds to sub-contractors involved in the contract delivery on a case-by-case basis, taking into account the various circumstances of the contract.

The Procurement (Scotland) Regulations 2016 do not extend the application of mandatory and discretionary exclusion grounds to sub-contractors for regulated contracts below the EU threshold contract value. However, a contracting authority may wish to consider the circumstances where this approach may be applied in order to safeguard the effective delivery of the contract.

5.4.4. Self-cleansing

If an economic operator is in a situation which might result in its exclusion, it must be given the opportunity to provide evidence to show that it has taken sufficient and appropriate remedial action to demonstrate its reliability. See [regulations 58\(13\) to 58\(17\) of The Public Contracts \(Scotland\) Regulations 2015](#) and [regulations 8\(6\) to 8\(10\) of The Procurement \(Scotland\) Regulations 2016](#). This is known as self-cleansing. Specific guidance on how an economic operator can take self-cleansing action in respect of tax and social security obligations is detailed in [section 5.4.6. of this chapter](#).

An economic operator must prove that it has:

- paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct;
- clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; and
- taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

When considering any self-cleansing measures, a contracting authority must consider all relevant factors, including the gravity and particular circumstances of the criminal offence or misconduct. Where a contracting authority considers that the evidence provided proves that the measures taken are sufficient to demonstrate the reliability of an economic operator, it must not exclude that economic operator from the procurement activity (although a contracting authority may still, nonetheless, decide after applying selection criteria, to select an economic operator to submit a bid).

Where a contracting authority is of the view that the remedial action taken is not sufficient to demonstrate a potential economic operator's reliability, it must provide the economic operator with a statement outlining the reasons for the decision. The statement of reasons must be provided as soon as is reasonably practicable. It should be in writing and allow the economic operator to understand why the self-cleansing measures taken are insufficient, and the basis of the decision.

5.4.5. Mandatory and discretionary exclusion grounds

[Annex B.1](#) provides details of the breakdown of the different types of exclusion grounds, which apply to regulated procurements, with an explanation of whether they are mandatory or discretionary.

Blacklisting

The Scottish Government regards blacklisting or the compiling of a blacklist as totally unacceptable. Blacklisting refers to the practice of systematically denying individuals employment, who would otherwise be able to be employed, on the basis of information, accurate or not, held in some type of database.

[The Employment Relations Act 1999 \(Blacklists\) Regulations 2010](#) provide rights for individuals if blacklisting results in refusal of employment, detriment, dismissal or redundancy. A breach of these Regulations is a mandatory exclusion ground. See [regulation 58\(3\)\(b\) of The Public Contracts \(Scotland\) Regulations 2015](#) and [regulation 9\(1\) of The Procurement \(Scotland\) Regulations 2016](#). A breach must be established on the basis of a judicial finding, for example, by an employment tribunal or court, or an admission by the economic operator concerned. An economic operator which has been found to breach or which has admitted to breaching these Regulations must be excluded from the procurement process in respect of regulated procurements unless it can demonstrate to the satisfaction of the contracting authority that it has taken sufficient appropriate remedial steps.

An economic operator which has breached the relevant legislation is required to disclose full details of the breach, including any successful action against it and/or, any finding by an employment tribunal that a complaint raised under the relevant legislation is well-founded.

Tax and social security obligations

The Scottish Government treats tax and social security obligations seriously.

For EU-regulated contracts, under [regulation 58\(3\)\(a\) of The Public Contracts \(Scotland\) Regulations 2015](#), a contracting authority must exclude an economic operator where it has been subject to a binding decision (judicial or administrative) and which is found to be in breach of its legal obligations to pay tax or social security. A judicial decision is one which is made by a court or tribunal. An administrative decision is one which is made by the relevant tax authority in the UK or in the Member State where the economic operator is established.

In respect of regulated contracts, under [regulation 58\(4\) of The Public Contracts \(Scotland\) Regulations 2015](#) and [9\(2\) of The Procurement \(Scotland\) Regulations 2016](#), a contracting authority can also exclude an economic operator where it establishes by any appropriate means that the economic operator has breached its tax or social security obligations. This means that where there is evidence which falls short of a judicial or administrative decision, a contracting authority still has the option of excluding an economic operator where it thinks it is appropriate to do so. A contracting authority must determine on an individual basis whether a particular piece of evidence which falls short of a judicial or administrative decision is sufficient to demonstrate “appropriate means”.

Examples of evidence which may demonstrate breaches in tax or social security obligations, which a contracting authority can seek clarification from an economic operator, could include:

- credit references, i.e. details of any outstanding tax debt;
- company accounts, depending on the size of the tax debt an economic operator may be obliged to include this in its accounts;
- an admission by an economic operator to an Occasion of Non-Compliance (OONC);
or
- an admission by an economic operator of the failure of an avoidance scheme which it was involved in and was, or should have been, notified under Disclosure of Tax Avoidance Scheme (DOTAS).

Where an economic operator admits to a breach of its tax or social security obligations, which did not involve a judicial or administrative decision, in order to determine the nature of the breach, a contracting authority can request further details and any mitigating factors, from the economic operator. This could include:

- a brief description of the OONC and which tax it applied to;
- where the OONC relates to a DOTAS, the number of the relevant scheme;
- the date of the original breach;
- corrective action taken by the economic operator to date;
- planned corrective action to be taken;
- changes in personnel or ownership since OONC; and
- changes in financial, accounting, audit or management procedures since the OONC.

Note – these examples relate to the UK tax regime, and there will be equivalents in other Member States, which should be considered as required.

Self-cleansing – tax and social security contributions

Where an economic operator can provide evidence that it has fulfilled its obligations by paying the amount due, it must not be excluded from the procurement exercise on this basis alone. See [regulation 58\(5\) of The Public Contracts \(Scotland\) Regulations 2015](#) and [9\(3\) of The Procurement \(Scotland\) Regulations 2016](#). This can include circumstances where it has entered into a binding agreement with a view to paying the taxes or social security contributions, including any interest due. Evidence of this could include a receipt or confirmation of payment requested from the relevant tax authority or a written copy of the agreement to pay obligations.

Additionally, for EU-regulated procurements, under [58\(7\) of The Public Contracts \(Scotland\) Regulations 2015](#), where the exclusion of an economic operator would be clearly disproportionate, either because a minor amount of tax or social security contributions is owed or an economic operator has not had sufficient time to pay the amount owed, a contracting authority may decide not to exclude the economic operator.

A contracting authority must take a balanced view when deciding not to exclude on this basis. This could include consideration of the economic operator's overall tax and social security obligations and the overall risk to the effective delivery of the contract. For example there may be instances where an apparent "minor amount" may significantly affect the liquidity of an economic operator and its ability to perform the contract, or where sufficient time did exist for the outstanding amounts to be paid.

Social, environmental and labour laws or obligations

Economic operators are bound to operate within the limits of a wide range of legislative provisions, and in respect of procurement processes, we regard social, environmental and labour law obligations as critical to the effective delivery of public contracts. These obligations include any relevant national and European law, as well as relevant collective agreements and specific international agreements.

Under [regulation 58\(8\)\(a\) of The Public Contracts \(Scotland\) Regulations 2015](#) and [9\(5\)\(a\) of The Procurement \(Scotland\) Regulations 2016](#), an economic operator may be excluded where a contracting authority can demonstrate that the economic operator has breached any of these obligations. This exclusion ground is discretionary and, it is therefore for the contracting authority to decide if exclusion is appropriate.

When determining whether to exclude an economic operator on this basis, a contracting authority should be proportionate in its decision, taking into account the size of the contract, the relevance of the breach, and its impact on the operational and reputational risk to the delivery of the contract.

Bankrupt or insolvent businesses

Where an economic operator is bankrupt or is the subject of insolvency proceedings a contracting authority can choose whether to exclude it from the procurement exercise. See [regulation 58\(8\)\(b\) of The Public Contracts \(Scotland\) Regulations 2015](#) and [regulation 9\(5\)\(b\) of The Procurement \(Scotland\) Regulations 2016](#). Potential evidence to assist in making this decision could include: copies of accounts verifying they have sufficient liquidity to perform the contract; its business plan outlining steps it will take to address concerns; or references from other recent customers.

When considering whether to exclude an economic operator who has become, or is at risk of becoming bankrupt or the subject of insolvency proceedings, a contracting authority must consider the potential risks associated with the delivery of the contract. This includes the impact this may have on the sub-contracting supply chain. This can also include the scale of the contract and any potential consequences of the contract failing. Additionally, a contracting authority may take into account the potential benefits of awarding a contract to an economic operator in these circumstances. These can include providing opportunities to contribute to: increased employment opportunities in communities; the wellbeing of local and regional communities or helping unlock the innovation or economic potential with local businesses.

5.5. BASIS ON WHICH TO SELECT ECONOMIC OPERATORS

Selection and award criteria must not be confused. Selection criteria are concerned with the capability and capacity of an economic operator to deliver the contract, they do not focus on how an economic operator proposes to perform the contract in question. Award criteria are discussed below at [paragraph 5.7](#).

The Public Contracts (Scotland) Regulations 2015 and The Procurement (Scotland) Regulations 2016 determine what criteria can be used to select economic operators. These are in respect of its suitability to pursue a professional activity, its economic and financial standing, and its technical and professional ability. A contracting authority has discretion to determine how to apply these selection criteria to individual regulated procurements.

In all cases criteria must be proportionate to the contract in question, taking into consideration the nature, scope, size and scale of the contract. Selection criteria must always be designed to select the most suitable economic operators on their merits and should not be designed with the intent solely of reducing the number of economic operators that are qualified to participate.

5.5.1. How groups of economic operators meet selection criteria

In meeting its sustainable procurement duty, a contracting authority is required to consider how in conducting the procurement process, it can facilitate access to contracts for SMEs, third sector bodies and supported businesses. One way to do this is to ensure that the process allows groups of economic operators to work together to develop a joint bid to participate in procurement opportunities.

Where groups of economic operators bid for a public contract, [regulation 20\(5\) of The Public Contracts \(Scotland\) Regulations 2015](#) enables a contracting authority to specify, for EU-regulated procurements, how a group will meet the tests of economic and financial standing and technical and professional ability as part of the selection stage of the procurement process. This approach should also be adopted where it would be relevant and proportionate to do so for regulated contracts below the EU contract threshold value.

In determining how economic operators which make up the group meet these criteria, a contracting authority must be proportionate, take into account the extent to which any economic operator will be relied on to perform the contract and not create barriers to bidding. This may, for example, be by giving due and appropriate consideration to the time it may take a group of economic operators to properly submit a bid. In determining how groups of economic operators meet these criteria, a contracting authority could describe whether particular members of the group are required to meet all or some of the selection criteria.

5.5.2. Suitability to pursue the professional activity

Where a contracting authority considers it necessary to ensure the effective performance of the contract, it can require that an economic operator bidding for a contract is enrolled in a relevant professional or trade register.

In respect of a service contract, and where there are particular requirements on those operating in a particular services sector, a contracting authority can additionally require an economic operator to prove that it possesses the necessary authorisation or is a member of a particular organisation, which is relevant in its country of origin.

Where such assurances are considered necessary, suitable evidence can be provided by:

- proof of registration to pursue the activity in question, in the relevant professional or trade registers of the country where it is registered;
- providing a special statement or reference by which it can prove its right to pursue the relevant professional activity; or
- other proof regarding eligibility of the economic operator to perform the activity in question.

These are not requirements in respect of all contracts, and a contracting authority should only insist on these requirements where necessary for the performance of the contract. In making this decision, a contracting authority must take a proportionate approach and must not impose requirements that are not necessary, and which could prevent an economic operator bidding based on its size or status.

5.5.3. Economic and financial standing

Assessing the economic and financial capacity of an economic operator is an important way to ascertain whether it can deliver the contract. In particular, a contracting authority can seek information in respect of a minimum yearly turnover, annual accounts and professional risk indemnity insurance. Any assessment of an economic operator's financial status must be conducted by suitably trained or experienced personnel. See [regulation 59\(7\) to 59\(15\) of The Public Contracts \(Scotland\) Regulations 2015](#) and [regulation 10\(7\) to 10\(14\) of The Procurement \(Scotland\) Regulations 2016](#).

A contracting authority must consider on a case-by-case basis what criteria are relevant and relate to the nature of the contract. Criteria used must be proportionate and a contracting authority must not set requirements which may arbitrarily reduce the number of economic operators or which would be disproportionate or discriminate against an economic operator based on its status or size.

A contracting authority should take a rounded, commercial approach to considering what is a relevant criterion in respect of economic and financial standing. For some contracts, an assessment of an economic operator's economic or financial standing may not be required, for example where the contract is low value, low risk or payment does not occur until delivery of the contract is complete.

A contracting authority can require that economic operators have a minimum yearly turnover in respect of the goods, works or supplies to be delivered through the contract. This criterion should only be used as a minimum standard in exceptional circumstances. An economic operator's turnover may indicate, in broad terms, that it has the capacity to deal with the volume of work, but it is rarely, if ever, a good indicator on its own. An economic operator which has a smaller or un-established turnover may have strength in the form of cash and a strong balance sheet.

Where it is considered appropriate to set a minimum yearly turnover as a requirement for economic operators, this must not exceed two times the estimated contract value, except in duly justified cases such as relating to the special risks attached to the nature of the goods, works or services. Where higher minimum turnover requirements are to be applied, a contracting authority must indicate the main reasons for doing so in the contract notice. Such circumstances can relate to the high risks attached to the performance of the contract or the fact that its timely and correct performance is critical, for instance because it constitutes a necessary preliminary step for the performance of other contracts.

Suitable evidence of an economic operator's overall turnover can be provided by receipt of a statement of the turnover levels and, where appropriate, of turnover in the area covered by the contract for a maximum of the last three financial years available. If this evidence is not available, additional information and documentation which demonstrates their financial standing can be provided.

Annual accounts

Where relevant to the contract, a contracting authority may require an economic operator to provide certain information on its annual accounts, for example showing the ratio between assets and liabilities. A contracting authority must consider what is required on a case-by-case basis.

Suitable evidence can include financial statements and/or annual accounts required under the law of the country in which the economic operator is established. A contracting authority should also be aware that not all economic operators have an audited set of accounts and if a bidder is unable, for a valid reason, to provide the information in the format required, a contracting authority must accept other information where appropriate to demonstrate an economic operator's economic and financial standing for assessment purposes.

Insurance levels

A contracting authority must consider what level of insurance is required of potential economic operators to perform the contract on a case-by-case basis. The type and level of insurance required must be proportionate and commensurate with the needs of the contract. It is a legal requirement that all companies hold Employer's (Compulsory) Liability Insurance of £5 million as a minimum, apart from sole traders.

Where relevant to the contract, a contracting authority may require an economic operator to have an appropriate level of professional risk indemnity insurance in place which is proportionate to the value of the contract and the level of risk attached to the effective delivery of the contract. It is unlikely that a contracting authority would need to expect an economic operator to have unlimited levels of insurance.

An economic operator is not required to have the relevant insurance in place at the time of bidding but should be asked to confirm that it either has the required level or would be willing to obtain the required level if successful. If at the selection stage an economic operator cannot provide the level of cover required, an undertaking to secure the insurance on the award of contract would be necessary.

5.5.4. Technical and professional ability

A contracting authority may request evidence of the technical and professional ability of an economic operator to meet the quality standards required for the effective delivery of the contract. See [regulation 59\(16\) to 59\(20\) of The Public Contracts \(Scotland\) Regulations 2015](#) and [regulation 10\(15\) to 10\(19\) of The Procurement \(Scotland\) Regulations 2016](#). This can include its skills, efficiency, experience and reliability.

In respect of award criteria, if relevant, and where the quality of the staff assigned can have a significant impact on the level of performance of the contract, the organisation, qualification and experience of those staff can be assessed at the award stage.

In establishing selection criteria to assess technical and professional ability, a contracting authority should be careful not to exclude an economic operator which can demonstrate that it has the capacity and capability to deliver the contract, but which may not have delivered exactly the same goods, works or services previously. This will ensure opportunities are provided to economic operators to access new markets or provide innovative solutions, no matter their size or status.

Use of references

One way that suitable experience can be evidenced is through the use of references from contracts performed within the previous three years for goods and services and within the last five years for works contracts.

Other legislation and policy or procedures

As further evidence of an economic operator's technical and professional ability, a contracting authority should set out in the contract notice the relevant minimum requirements and ask economic operators to self-certify that they comply with all relevant legislation and that their organisation has policies and procedures in place to support their application in practice. Where evidence is provided of breaches of legislation, a contracting authority must take into consideration any remedial action that has been taken by an economic operator in order to address these breaches.

These in particular will include:

- **Environmental management legislation/policy**

An economic operator must self-certify that it has any necessary formal third party environmental management requirements and corporate social responsibility policies which set out the responsibilities that are in place throughout the organisation, which are relevant to the nature and scale necessary when performing the contract. This can include an economic operator's environmental emergency response procedures.

- **Health and safety legislation/policy**

Health and safety requirements will vary according to the goods, works or services being purchased, and must be considered on a case-by-case basis. For example, specific legislation relating to risk reduction in construction is contained in the [The Construction \(Design and Management\) Regulations 2015](#).

A contracting authority with significant procurement expenditure must ensure that its approach to selection in respect of health and safety matters in individual procurement processes supports its policy set out in its procurement strategy. [Section 2.5.9 of chapter 2 on procurement strategies and annual procurement reports](#) provides further information on setting out a policy for promoting compliance by contractors and sub-contractors with health and safety legislation.

An economic operator must self-certify that it complies with any relevant health and safety legislation and that it actively promotes and manages good health and safety policies, procedures and practices, for example, through training and the communication of relevant information for staff.

- **Quality management procedures**

Quality management procedures can include requiring an economic operator to self-certify that it will manage communication with its clients to ensure continued delivery of a service or product that meets its needs.

5.6 EUROPEAN SINGLE PROCUREMENT DOCUMENT

Under [regulation 60 of The Public Contracts \(Scotland\) Regulations 2015](#), the European Single Procurement Document (ESPD) must be used by contracting authorities for EU-regulated procurements. The ESPD must be accepted as a self-declaration by an economic operator that it has not breached any of the mandatory or discretionary exclusions grounds (or, if it does, it can demonstrate in the ESPD that it has taken self-cleansing measures) and that it meets the relevant selection criteria.

As the ESPD is a generic form used across all Member States as part of the initial selection process, contracting authorities must set out the specific requirements and minimum standards that are relevant for each individual procurement exercise in the contract notice.

The ESPD should also be used for regulated procurements below the EU contract threshold values.

Where the capability and capacity of a sub-contractor, members of a consortia or any other body will be relied on to meet the selection criteria in respect of economic and financial standing under [regulations 59\(7\) to 59\(15\) of The Public Contracts \(Scotland\) Regulations 2015](#), or the technical and professional ability under [regulations 59\(16\) to 59\(19\) of The Public Contracts \(Scotland\) Regulations 2015](#), a contacting authority must request a separate ESPD from those economic operators. Where sub-contractors are to be used, but their capability and capacity is not to be relied on to meet the selection criteria, a contacting authority may decide to request a separate ESPD from those sub-contractors.

An economic operator is not required to produce supporting documentary evidence or certificates until specifically requested to do so by a contracting authority. A contracting authority must request this evidence before awarding the contract, as part of its due diligence process. If the preferred economic operator is unable to provide this evidence it should not be awarded the contract.

A contracting authority may also, where it is necessary to ensure the integrity and proper conduct of the procurement process, request, at any time, all or part of the supporting documents from an economic operator and any sub-contractors, consortia members or other bodies, whose capability and capacity will be relied on to perform the contract. Supporting documentary evidence should only be sought during the procurement process where a contracting authority has a genuine concern that there is a risk to the effective conduct of the procurement procedure or, in a two-stage process (e.g. restricted procedures, competitive procedures with negotiation, competitive dialogue and innovation partnerships), before moving from selection stage to award stage.

5.7. AWARD OF CONTRACTS

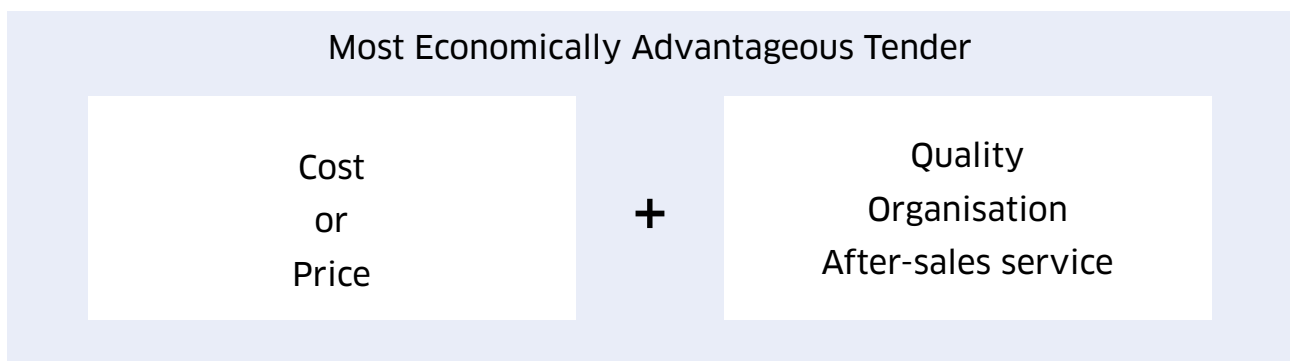
The [Scottish Model of Procurement](#) promotes value for money as being an appropriate balance between cost or price, quality and sustainability. In addition, a procurement strategy sets a framework in which a contracting authority will work to ensure that its procurement activities deliver value for money, how it plans to meet its procurement obligations and how these targets are subsequently met. Cost or price, quality, sustainability and value for money are all factors which can be taken into account when establishing contract award criteria.

Award criteria are used to determine which economic operator is best placed to deliver and who should be awarded the contract. A contracting authority has discretion to determine what award criteria to apply in relation to individual regulated procurements.

In all cases, award criteria must be linked to the subject matter of the goods, works or services to be provided, and should not include criteria which have formed part of the assessment at the selection stage. This is because the selection stage is intended to assess the economic operator's suitability to tender, whereas the award stage is intended to assess the merits of the tender itself. For example, a contracting authority is able to evaluate an economic operator's general staff qualifications and experience as part of assessing whether it possesses the necessary technical and professional capacity to perform the contract. Where the quality of staff designated in the tender (for example, as responsible for delivery of the contract) is likely to have an impact on technical quality and/or delivery of the contract, this may be assessed at award stage.

5.7.1. Most economically advantageous tender

[Regulation 67 of The Public Contracts \(Scotland\) Regulations 2015](#) requires EU-regulated contracts to be awarded to the 'most economically advantageous tender', also known as MEAT. MEAT criteria must be made up of price or cost, and other criteria such as: quality; organisational factors, which can include the qualification and experience of staff who will work on the contract; and issues associated with after sales service, technical assistance, and delivery matters.



This means that EU-regulated contracts may not be awarded on the basis of lowest price or lowest cost only.

This approach should also be applied to any award criteria for regulated contracts below the EU contract threshold values. While it is not possible to award contracts on the basis of lowest price or lowest cost, a contracting authority can award the majority of available points to price or cost, if to do so would reflect its priority for the contract in question.

By making use of 'cost' rather than the 'price' when determining the value of the contract, a contracting authority can support wider economic, social and environmental impacts. The cost of the contract is the purchase price plus other economic costs and can also include the whole of life or life cycle cost of the goods, works or services.

5.7.2. Life cycle costing

For EU-regulated procurements, where a contracting authority is determining the value of a contract on the basis of 'cost', the cost element can be calculated on the basis of the whole life cycle of the goods, works or services, as opposed to considering only the purchase price. See [regulation 68 of The Public Contracts \(Scotland\) Regulations 2015](#).

The legislative provisions on life cycle costing do not extend to regulated procurements below the EU contract threshold values, however, the use of a life cycle approach, will support a contracting authority's responsibility to consider how to support its sustainable procurement duty to improve the economic, social and environmental wellbeing of its area and help deliver value for money.

The use of life cycle costing enables a more rounded approach to assessing the wider impact of the goods, works or services and which reflect their true costs throughout their life.

Life cycle costs can represent any acquisition costs such as: research or development costs, for example, preparation of the site, transfer of assets or redeployment costs; any internal or operational costs, such as legal fees, consumption of energy and other resources, production and maintenance costs and training. It can also include end-of-life disposal costs such as decontamination, disposal or landfill tax.

Life cycle costs can also take into account environmental factors, such as pollution caused by extraction of raw materials used in the product or caused by the product itself or its manufacturing, this may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

Where a life cycle costing approach is to be used to assess the costs of the contract, a contracting authority must establish the method in advance and indicate in the procurement documents what method will be used, and what information is required of economic operators. The method being used must be objective, based on non-discriminatory criteria and accessible to all interested parties, i.e. not favour a particular economic operator. Where any common methods have been made mandatory by legislation, for example the [Clean and Efficient Vehicles Directive \(2009/33/EU\)](#), they must be used.

5.7.3. Fair work practices, including the Living Wage

Separate statutory guidance is available on [Addressing Fair Work Practices, including the Living Wage, in Procurement](#).

5.7.4. Abnormally low tenderers

There may be situations where an economic operator's tender could be regarded as abnormally low. This low cost or priced tender could be justifiable, for example because of a competitive advantage based on greater efficiency in production processes or place in the market, however it may not be a true indication of the costs associated with the contract and may therefore pose a risk to the effective delivery of the contract.

For EU-regulated procurements, under [regulation 69 of The Public Contracts \(Scotland\) Regulations 2015](#), a contracting authority must require economic operators to explain any tender which, in its view, could be regarded as abnormally low. While this is not a requirement for regulated procurements below the EU contract threshold values, this approach is best practice.

In considering whether a tender is abnormally low a contracting authority must consider all factors which may affect the cost or price and the effective delivery of the contract. Additional information can be sought from an economic operator, which must be given careful and thorough consideration by the contracting authority. The bid can only be rejected where the contracting authority is not reassured that the evidence supplied explains the reason for the low level of costs or price proposed. Tenders must not be rejected solely on the basis of the low cost or price. In all instances any abnormally low bid must be rejected where it has been established that the tender is abnormally low because it does not comply with environmental, social or labour law. A tender may also be rejected if the economic operator has obtained State Aid and is unable to prove that the aid in question was compatible with EU rules on State Aid.

5.7.5. Food and animal welfare

When determining contract award criteria for EU-regulated procurements in respect of the provision of food, a contracting authority must ensure that it takes account of the policy position as provided in its procurement strategy, and ensure that these criteria do not discriminate against economic operators based on their size or status. This guidance is also best practice in respect of regulated procurements below the EU contract threshold values.

Contract award criteria in respect of the provision of food must consider how to promote the highest standards of animal welfare and can take into account a wide range of factors, and ensure that all aspects of sustainability and health are considered. This can include how to tackle quality and nutrition, specifying a requirement for fresh and seasonal produce, buying food which aims to help meet the Scottish Dietary Goals, taking into account how food has been produced and processed and also considering the distribution processes and thinking about animal welfare.

When determining what is meant by animal welfare, this can encompass a range of aspects such as health standards for farm livestock, how animals are protected during transportation, animal cruelty and how animals are treated at slaughter. These aspects must be given careful consideration as part of the wider procurement process.

CHAPTER 6 PROCUREMENT FOR HEALTH OR SOCIAL CARE SERVICES

6.1. INTRODUCTION – SPECIAL CONSIDERATIONS FOR PROCUREMENT FOR HEALTH OR SOCIAL CARE SERVICES

This chapter recognises that buying many health or social care services requires special consideration by a contracting authority. This is because the quality or availability of these services can have a significant impact on the quality of life, health and wellbeing of people accessing the service and their carers⁴⁵.

Specifically, it describes the key legislative changes (as a result of the Regulations⁴⁶ and the [Act](#)) that have an impact on the procurement of those services. There have also been wider policy changes and legislation that have a bearing on the purchase of these services. For example, frontline services are now operating in a different adult health and social care environment.

Key changes include the integration of health and social services as determined by the [Public Bodies \(Joint Working\) \(Scotland\) Act 2014](#) and also self-directed support legislation⁴⁷.

6.2. PURPOSE OF THIS CHAPTER

The overall purpose of this chapter is to provide statutory guidance for use by a contracting authority where it has chosen to procure health or social care services from an economic operator (see the full list of health or social care services within the scope of this chapter at [Annex C.1](#)).

6.3. LEGAL BASIS AND SCOPE OF THIS CHAPTER

As mentioned in [the introductory chapter 1](#) of this document, Scottish Ministers have published this statutory guidance in accordance with [section 13 of the Act](#). That section provides for the development of statutory guidance covering the procurement for health or social care services.

For the purposes of this chapter any references to health or social care services includes care and support services. Supporting best-practice guidance is also being developed separately with a particular focus on the procurement of those care and support services.

This chapter applies to any contract for health or social care services where the estimated value is equal to, or greater than, £50,000 for goods and services and is not otherwise exempt from regulation.

It has been developed to support all staff involved in the procurement of these services including, for example, senior managers, commissioning and contracts officers, the third and independent sectors, care managers, legal officers and finance officers. It will also be of interest to regulators and those responsible for auditing the commissioning of services and to service providers, people who use services and also their carers.

⁴⁵ Any reference in this statutory guidance to 'carers' includes unpaid carers

⁴⁶ [The Public Contracts \(Scotland\) Regulations 2015](#); and, [The Procurement \(Scotland\) Regulations 2016](#)

⁴⁷ [Social Care \(Self-Directed Support\) \(Scotland\) Act 2013](#)

This chapter applies to all regulated procurements which commence on or after 18 April 2016. It does not constitute legal advice. A public body should always seek its own legal advice where it chooses to procure.

Overall, this is procurement focused guidance and is intended to help contracting authorities interpret the public procurement rules introduced by the Regulations and the Act. It has been published together with the associated wider suite of procurement statutory guidance and should be read together with that.

6.4. LINKS TO SUPPORTING BEST-PRACTICE GUIDANCE SPECIFICALLY COVERING CARE AND SUPPORT SERVICES

As mentioned at [section 6.3](#) above, this chapter is to be complemented by supporting best-practice guidance. That best-practice guidance updates the 2010 Procurement of Care and Support Services Guidance and was produced together with, and has been endorsed by, a reference group of stakeholders.

The best-practice guidance establishes a set of key considerations for a contracting authority to have particular regard to for the specific procurement of those care and support services. In particular, it places the purchasing of those services within a set of principles which acknowledges a balance between human rights, outcomes for the individual, best value and procurement regulations.

In linking with the best-practice guidance this chapter also reinforces those messages.

6.5. INTERPRETATION OF THIS CHAPTER

For the purposes of this chapter, the term ‘contracting authority’ describes the various organisations that might procure health or social care services. For example, this could include NHS Boards, criminal justice organisations and housing organisations.

Procurement staff should note that Integration Joint Boards⁴⁹ are not able to contract or hold contracts with third parties as contractual arrangements remain with either the local authority or the NHS Board. They are responsible however for the production of Strategic Commissioning Plans thereby providing some direction and oversight where a decision has been taken to procure.

⁴⁸ The Public Bodies (Joint Working) (Scotland) Act 2014 places various duties on the Integration Authorities established by that Act. These are either Integration Joint Boards or Health Boards and/or local authorities acting as lead agencies to create a “strategic plan” for the integrated functions and budgets that they control.

6.6. SUMMARY OF THE CHANGES TO THE PUBLIC PROCUREMENT RULES AFFECTING HEALTH OR SOCIAL CARE SERVICES

The key change to the public procurement legal rules is that the former distinction between Part A and Part B services contracts has been abolished. A 'light-touch' regime has been introduced for certain services, including health or social services⁴⁹. That regime applies to contracts above the EU threshold of €750,000 (the sterling equivalent value can be found on the Scottish Government's procurement [webpages](#)).

This is a change that all procurement staff and many other stakeholders need to understand.

6.7. SPECIFIC CHANGES TO THE PUBLIC PROCUREMENT RULES FOR HEALTH OR SOCIAL CARE SERVICES

As mentioned at [section 6.1](#) buying health or social care services is a complex area and as such it requires special consideration within a contracting authority's overall approach to procurement. This is because the quality or availability of these services can have a significant impact on the quality of life and health of people who might use these services and also their carers. Also many of these services are becoming increasingly personalised to better match individual needs.

For these reasons, these types of services are often purchased differently to other services. That is, a contracting authority has some flexibility to decide how to handle these contracts on a case-by-case basis. For example, a contracting authority can decide how it applies the TFEU fundamental principles⁵⁰ that apply to all public procurements. This includes whether these require advertising and competition (i.e. only for contracts below €750,000) and also the form that this should take.

As mentioned at [section 6.6](#), a 'light-touch' regime has replaced the former Part A and Part B arrangements for the procurement for health or social care services. Under these arrangements, the main EU rules, as described in The Public Contract (Scotland) Regulations 2015 apply only to health and social care contracts which are worth at least €750,000⁵¹ over the life of that contract. Contracts below that threshold, but which are worth at least £50,000 are regulated by the Act.

49 [Regulations 74 – 76 The Public Contracts \(Scotland\) Regulations 2015](#)

50 Fundamental principles deriving from the TFEU include: transparency (contract procedures must be transparent and contract opportunities should generally be publicised); equal treatment and non-discrimination (potential suppliers must be treated equally); proportionality (procurement procedures and decisions must be proportionate); and mutual recognition (giving equal validity to qualifications and standards from other Member States, where appropriate).

51 [EU thresholds table](#)

6.8. QUALITY AND COST CONSIDERATIONS BEFORE PROCURING

6.8.1. Quality

In accordance with [regulation 76\(9\) of The Public Contracts \(Scotland\) Regulations 2015](#), a contracting authority may now also take account of some other issues when procuring these services including:

- the quality of the service;
- the continuity of the service;
- the affordability of the service;
- the availability and comprehensiveness of the service;
- the accessibility of the service;
- the needs of different types of service users;
- the involvement of service users; and
- innovation.

This is not an exhaustive list and there may be other considerations that a contracting authority may also take account of and which are relevant on a case-by-case basis.

6.8.2. Cost

The Public Contracts (Scotland) Regulations 2015 confirm that a contracting authority is not able to award a contract on the basis of lowest price only. This includes contracts for health or social care services that fall within the scope of those Regulations. This means that, in accordance with [regulation 76\(10\) of The Public Contracts \(Scotland\) Regulations](#), contracts for health or social care services must be awarded on the basis of both quality and price.

6.9. APPLICATION OF THE RULES - THRESHOLDS AND OTHER CONSIDERATIONS BEFORE PROCURING HEALTH OR SOCIAL CARE SERVICES

A contracting authority should first estimate the total value of a contract. This includes, where appropriate, any option for an extension of the contract. More detail on valuing contracts which must be advertised in the Official Journal of the European Union (OJEU), is in [regulation 6 of the Public Contracts \(Scotland\) Regulations 2015](#). It is for a contracting authority to assess whether there is a cross-border interest i.e. interest from bidders from another member state of the EU.

The table opposite summarises the different rules that apply to health or social care contracts at different threshold levels.

€750,000 and above	Must be advertised in OJEU and the light touch provisions in the Public Contracts (Scotland) Regulations 2015 apply	
£50,000 – €750,000	May award without seeking offers, but should consider the TFEU fundamental principles where relevant. For contracts over £50,000, an award notice must be published on PCS and certain other rules apply (see section 6.9.3).	May choose to seek offers: in which case all provisions of the Procurement Reform (Scotland) Act 2014 apply
Below £50,000		Non-regulated procurement

The specific rules that apply to the procurement for health or social care contracts, at these different threshold levels, are described in more detail below.

6.9.1. Specific rules for health or social care contracts over €750,000

For contracts or framework agreements with a value greater than, or equal to, €750,000 all of the ‘light-touch’ provisions (introduced at [section 6.6](#) and described in The Public Contracts (Scotland) Regulations 2015) will apply. Specifically, the following applies:

- publish a contract notice or prior information notice as a call for competition (unless it is a direct award without competition) on PCS for onward transmission to the OJEU;
- publish a contract award notice; and
- continue to follow a process that ensures the observance of the TFEU fundamental principles of transparency, equal treatment and non-discrimination, proportionality and mutual recognition.

Also [regulation 58\(1\) and 58\(3\) of The Public Contracts \(Scotland\) Regulations 2015](#) require that a contracting authority must consider whether any of the mandatory exclusion grounds referred to in those Regulations apply in respect of the potential economic operator.

6.9.2. Specific rules for health or social care contracts between £50,000 and €750,000 – award with advertising

In relation to contracts for health or social care services below the EU-regulated procurement threshold the European Commission has confirmed that these services will “typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary, such as Union financing for cross-border projects⁵²”. This means that for contracts or framework agreements with a value of £50,000 or more, but less than €750,000, a contracting authority should decide on a case-by-case basis whether or not to seek offers in relation to the proposed contract.

The flowchart at [Annex C.2](#) provides some illustration of the sort of things that might be considered by a contracting authority when deciding whether to seek offers for contracts of this value. A number of factors may influence this decision, as explained below, but are not limited to:

- the estimated value of the contract;
- the application of the procurement rules, procurement policy and benefits and risks to people who use services;
- application of local financial regulations and standing orders;
- benefits and risks to people who use services and service delivery; and
- the specifics of the sector concerned (for example, the size and structure of the market and commercial practices).

Where a contracting authority chooses to seek offers in relation to a contract, then as with all contracts with a value of £50,000 or more, it must be advertised on PCS. All of the provisions of the Act apply in that case.

52 [EU Directive 2014/24/EU, Recital, 114](#)

6.9.3. Specific rules for health or social care contracts between £50,000 and €750,000 – award without advertising

For contracts of this value, a contracting authority may choose to award a health or social care services contract, or framework agreement, without seeking offers in relation to the proposed contract. This is consistent with the provisions of [section 12 of the Act](#) and this chapter should be read together with that. Under the Act there are some provisions that will still apply when a contracting authority chooses to award without advertising. These are:

[section 23\(2\) of the Act](#)

A contracting authority must publicise the award of a contract on PCS;

[section 27 and 28 of the Act](#)

A contracting authority must consider whether any of the mandatory exclusion grounds referred to in [The Procurement \(Scotland\) Regulations 2016](#) apply in respect of the potential contractor/service provider; and

[section 35 of the Act](#)

A contracting authority must keep and maintain a register of contracts.

And more generally:

[section 15 of the Act](#)

“A contracting authority which expects to have significant procurement expenditure (equal to or greater than £5,000,000) in the next financial year must, before the start of that year –

- (a) prepare a procurement strategy setting out how it intends to carry out regulated procurements; or
- (b) review its procurement strategy for the current financial year and make such revisions to it as the authority considers appropriate.”

[section 18 of the Act](#)

A contracting authority which is required to prepare or revise its procurement strategy in relation to a financial year must prepare an annual procurement report on its regulated procurement activities as soon as reasonably practicable after the end of that financial year⁵³.

In addition to these minimum requirements, a contracting authority, when not seeking offers in relation to a proposed contract, should also consider, where applicable, the general duties ([section 8 of the Act](#)); technical specifications ([section 30 of the Act](#)); and charges for participation in procurement process ([section 31 of the Act](#)).

⁵³ Sections 15 and 18 of the Act are not just relevant to health or social care services contracts but apply more generally to public procurements.

6.9.4. Specific rules for health or social care contracts below £50,000

Contracts or framework agreements with a value below £50,000 are not regulated under the Act. As a matter of best practice, a contracting authority should consider following a procurement process that is proportionate to the value of the contract.

6.9.5. Rules covering other services (i.e. those services that are not principally health or social care) and which are also covered by the 'light-touch' regime

There are some other services covered by the 'light-touch' regime that are not health or social care. [Schedule 3 of the Public Contract \(Scotland\) Regulations 2015](#) also describes those services. The 'light-touch' EU rules also apply to these other services for contracts above the threshold (i.e. €750,000). For below that threshold any procurement of these services is regulated by the Act. The specific rules, applying to these services, are described in more detail below.

Procurement staff should note how these other (i.e. non-health or social care services) are handled – albeit not the main subject of this guidance. In summary, the rules for those services are that for above EU threshold (i.e. €750,000) contracts the 'light-touch' rules apply. See [section 6.9.1](#) for the main rules applying at that level. For below the EU threshold (i.e. between £50,000 and €750,000) – and unlike for health or social care services contracts of the same value – there is no bespoke provision which allows general exemption from advertising these other services. This means that contracts of that value for these services are subject to the full provisions of the Act. Contracts below £50,000 are not regulated by either the Act or the Regulations.

6.10. COMPLIANCE

The TFEU fundamental principles apply to all procurement activity of cross-border interest and regardless of value. This includes the principles of transparency, equal treatment and non-discrimination, proportionality and mutual recognition which should be adopted by a contracting authority when running a competition. This also includes contracts below the EU-regulated procurement thresholds and including contracts which are otherwise exempt from application of the Regulations.

It is the responsibility of an individual contracting authority to decide whether, and if so at what level, advertising is required taking account of the procurement rules.

A contracting authority is largely free to decide to use the procurement procedures, tools and techniques of its own choosing where procuring a health or social care services contract. That said, as a matter of best practice, it is likely it will want to follow a procurement procedure that is proportionate to the value of the contract and to take account of some fundamental considerations (for example, fair work matters) and other matters described in more detail in the other procurement statutory guidance.

ANNEXES

ANNEX A COMMUNITY BENEFIT REQUIREMENTS IN PROCUREMENT

Annex A.1. COMMUNITY BENEFIT REQUIREMENTS – KEY NATIONAL OUTCOMES

[Research](#) published in June 2015 illustrates the link between community benefit requirements and national outcomes. The table below lists key national outcomes and typical corresponding community benefits.

NATIONAL OUTCOMES THAT CB REQUIREMENTS CONTRIBUTE TO		
2	We realise our full economic potential with more and better employment opportunities for our people	<ul style="list-style-type: none"> • Recruitment from priority⁵³ groups. • Apprenticeships from priority groups. • Opportunities in the supply chain for SMEs and third sector bodies (will generate further employment outcomes).
3	We are better educated, more skilled and more successful, renowned for our research and innovation	<ul style="list-style-type: none"> • Work placements/work experience • Training (to meet market needs) – for example S/NVQs or equivalent for existing employees, new entrants or subcontractor staff.
4	Our young people are successful learners, confident individuals, effective contributors and responsible citizens	<ul style="list-style-type: none"> • Apprenticeships and job opportunities targeted at young people. • Work experience placements for young people at school, college and university. • Support to young people to become successful learners, confident individuals, effective contributors and responsible citizens – including school visits, structured career events for school pupils or college students, mentoring, mock interviews and assistance with CVs.
7	We have tackled the significant inequalities in Scottish society	<ul style="list-style-type: none"> • Requirements targeted at specific groups (for example long-term unemployed, residents of deprived areas, ex-offenders, recovering drug users) – thus contributing to a reduction in inequality.

⁵⁴ Priority groups for a contracting authority may depend on its purpose and functions.

Where the contract or framework can accrue these or similar benefits – for example contributing to the Reducing Reoffending (Justice) or Healthy Living (Health) through employment and training opportunities – community benefits should be used. For example: the NHS has a general duty to improve the health of the population of Scotland, clauses that seek to improve employment opportunities for the population at risk of ill health (including: young people; those with a disability; and long-term unemployed) are likely to be relevant to them.

In addition to the established benefits listed above other benefits include:

- supply chain development;
- community engagement events; and
- professional advice to communities.

ANNEX A.2. MONITORING AND REPORTING

[Research](#) published in June 2015 included recommendations on information that should be reported to gain an understanding of how community benefit requirements are contributing to local and national outcomes. The table below includes these recommendations.

Suggested summary information

USE OF COMMUNITY BENEFIT REQUIREMENTS IN PROCUREMENT
• Total Number of Contracts Awarded
• Total Number of Contracts Awarded Over £4 million
• Total Number of Contracts Awarded with Community Benefit Requirements
• Total Number of Contracts Awarded Over £4 million with Community Benefit Requirements
KEY CONTRACT INFORMATION
• Total Value of Contract
• Number of Jobs Filled by Priority Groups
• Number of Apprenticeships Filled by Priority Groups
• Number of Work Placements for Priority Groups
• Number of Qualifications Achieved Through Training by Priority Groups
• Total Value of Works Sub-Contracted to SMEs
• Total Value of Works Sub-Contracted to Social Enterprises
• Total Value of Works Sub-Contracted to Supported Businesses
SHORT-TERM SUSTAINABILITY INDICATORS
• Number of Recruits from Priority Groups Employed at 26 Weeks After Job Start
• Number of Apprenticeships from Priority Groups Employed at 26 Weeks After Apprenticeship Start
• Number of Work Placements for Priority Groups Subsequently Recruited by Contractor/Sub-Contractor

As evidence of community benefits delivery accumulate through monitoring and reporting, further indicators may be developed.

Suggested detailed contract information

To inform organisational compliance with the community benefits provisions of the Act, at a local level, for each contract containing the requirements, the following information could be collected:

KEY CONTRACT INFORMATION
• Total Value of Contract
• Total Value Sub-Contracted
• Total Value Sub-Contracted to SMEs
• Total Value Sub-Contracted to Social Enterprises
COMMUNITY BENEFIT REQUIREMENT INDICATORS
• Total Number Recruited to Deliver Contract
• Number of Jobs Filled by Priority Groups
• Total Number of Apprenticeships Recruited to Deliver Contract
• Number of Apprenticeships Filled by Priority Groups
• Number of Work Placements for School Pupils, College and University Students
• Number of Work Placements for Priority Groups
• Number of Qualifications Achieved Through Training by Priority Groups
• Number of Qualifications Achieved Through Training by Other Employees
• Community Engagement Activities

ANNEX B: SELECTION OF TENDERERS AND AWARD OF CONTRACTS**ANNEX B.1. EXCLUSION GROUNDS**

The table below lists the mandatory and discretionary exclusion grounds, which apply to EU-regulated and regulated procurements.

Self-cleansing

In all cases an economic operator is able to provide evidence that it has taken remedial action to demonstrate its reliability.

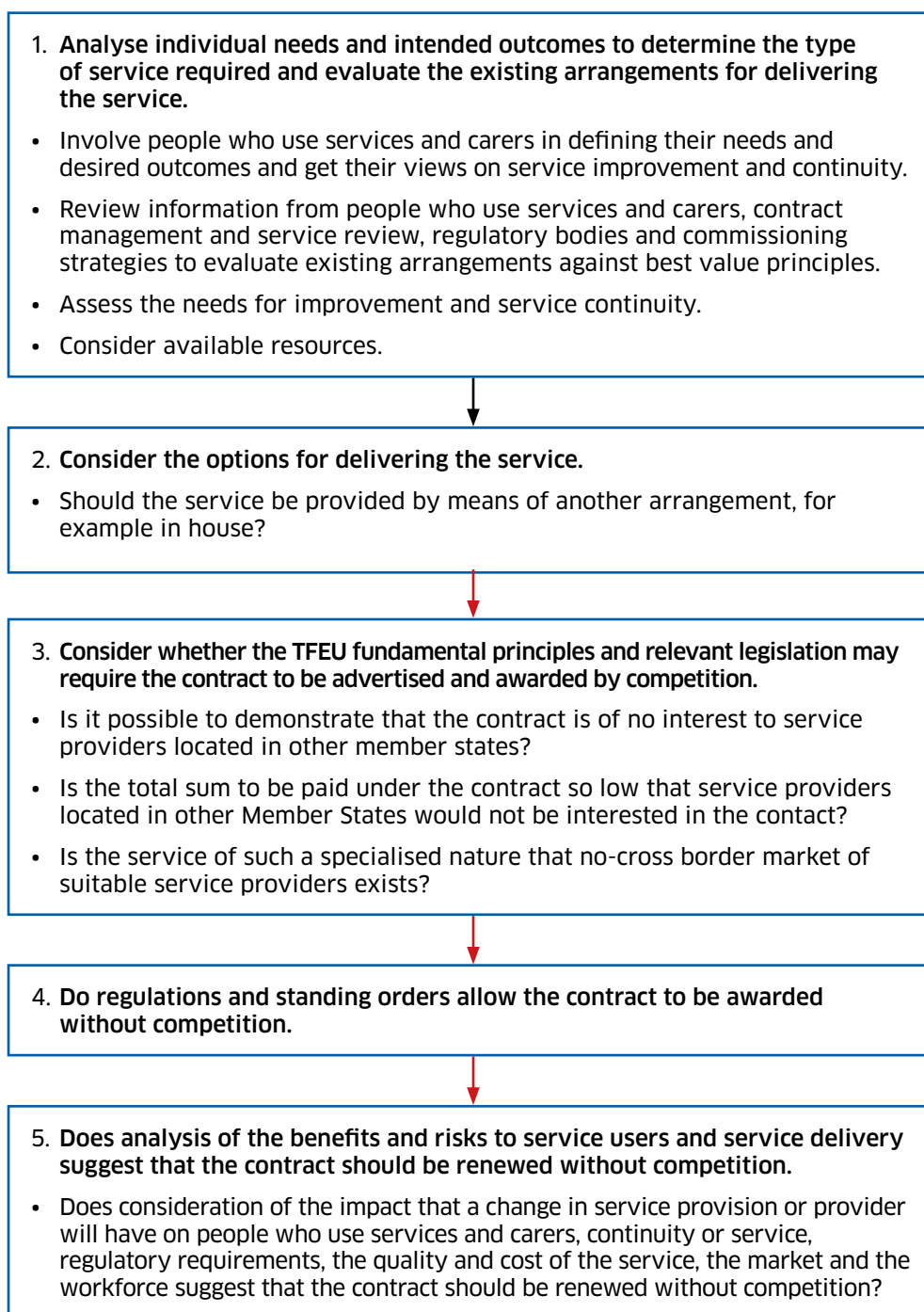
Exclusion ground	Mandatory exclusion ground	Discretionary exclusion grounds
Conviction by final judgement of a criminal offence <ul style="list-style-type: none"> • Participation in a criminal organisation • Bribery, corruption or conspiracy • Fraud • Terrorist offences or offences linked to terrorist activities • Money laundering or terrorist financing • Drug trafficking • Child labour and other forms of trafficking in human beings 	✓	
Breach of The Employment Relations Act 1999 (Blacklists) Regulations 2010	✓	
Breach of tax and social security obligations <ul style="list-style-type: none"> • Established by judicial or administrative decision 	EU-regulated contracts ✓	Regulated contracts ✓
Breach of tax and social security obligations <ul style="list-style-type: none"> • Established by any appropriate means 		✓
Breach of environmental, social and labour laws		✓
Economic operator is subject to bankruptcy, insolvency or winding up proceedings		✓
Grave professional misconduct, which renders the economic operator's integrity questionable		✓

Where the contracting authority has sufficiently plausible indications that the economic operator has entered into agreements with other economic operators to distort competition		✓
Conflict of interest which cannot be effectively remedied by other less intrusive measures		✓
Distortion of competition from the prior involvement of the economic operator in the preparation of the procurement exercise, that cannot be remedied by other less intrusive measures		✓
Economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a previous contract, which led to early termination of that contract, damages or other comparable sanctions		✓
Economic operator is guilty of serious misrepresentation in supplying the information required for the verification of absence of grounds for exclusion or fulfilment of the selection criteria		✓
Economic operator has undertaken to unduly influence the decision making process of the organisation, to obtain confidential information to gain undue advantages or to negatively provide misleading information that may have a material influence on decision concerning exclusion, selection and award		✓

ANNEX C: PROCUREMENT FOR HEALTH OR SOCIAL CARE SERVICES**ANNEX C.1. LIST OF HEALTH OR SOCIAL CARE SERVICES COVERED BY THIS CHAPTER**

Product	CPV Codes	Description
Supply services of domestic help personnel	75200000-8; 75231200-6; 75231240-8; 79611000-0; 79622000-0	Health, social and related services
Supply services of nursing personnel	79624000-4	
Supply services of medical personnel	79625000-1	
Private households with employed persons	85000000-9 to 85323000-9; 98133100-5, 98133000-4; 98200000-5; 98500000-8	
<ul style="list-style-type: none"> • Manpower services for households, • agency staff services for households, • clerical staff services for households, • temporary staff for households, • home-help services and Domestic services 	98513000-2 to 98514000-9	

ANNEX C.2. FLOWCHART – ILLUSTRATION OF CONSIDERATIONS THAT MAY HELP DECISION MAKING IN RELATION TO THE CONTINUATION OF AN EXISTING SERVICE – MORE COMMONLY RECOGNISED IN A CARE AND SUPPORT SERVICE CONTEXT*



*

- A public body will want to consider the answers to all of these types of questions overall – and any other relevant considerations on a case-by-case basis – before reaching a decision about whether it needs to compete, or direct award, a health or social care services contract.
- There is no discretion for a contracting authority to directly award health or social care contracts that are equal to, or greater than, the EU-regulated threshold of €750,000 and which are regulated by [The Public Contracts \(Scotland\) Regulations 2015](#). See [section 6.9.1](#) for more details about the rules that apply at that level. A contract notice is required in all cases except where the circumstances described in [regulation 33 of The Public Contracts \(Scotland\) Regulations 2015](#) apply.

ANNEX D: DEFINITIONS

• **award notice**

For the purposes of the Act, the information published in accordance with [section 23\(2\) of the Act](#) which states that a contracting authority must publicise the award of a contract under a regulated procurement on the Public Contracts website.

• **businesses**

For the purposes of public procurement in Scotland, businesses are defined as follows:

- o Micro – 1–9 employees;
- o Small – 10–49 employees;
- o Medium – 50–250 employees; and
- o Large – more than 250 employees.

This is a simplification of the definition used by the European Commission⁵⁵.

• **candidate**

Means an economic operator that has sought an invitation to or has been invited to take part in any of the following:

- (i) a restricted procedure;
- (ii) a competitive procedure with negotiation;
- (iii) a negotiated procedure without prior publication;
- (iv) a competitive dialogue procedure;
- (v) an innovation partnership.

• **community benefit requirement**

For the purposes of the Act, a community benefit requirement is a contractual requirement imposed by a contracting authority-

- a) relating to-
 - (i) training and recruitment, or
 - (ii) the availability of sub-contracting opportunities, or
- b) which is otherwise intended to improve the economic, social or environmental wellbeing of the authority's area in a way additional to the main purpose of the contract in which the requirement is included.

⁵⁵ http://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition/index_en.htm
European Commission SME definition - What is an SME?

- **contract award notice**

Means the notice referred to in [regulation 51](#) (contract award notices) or, where relevant, [regulation 75\(3\)](#) (publication of notices) of The Public Contracts (Scotland) Regulations 2015.

- **contract notice**

For the purposes of the Act, means the information published in accordance with [section 23\(1\) of the Act](#) which states that a contracting authority must publicise its intention to seek offers as part of a regulated procurement on the Public Contracts website.

For the purposes of The Public Contracts (Scotland) Regulations 2015, Subject to [regulation 98\(6\)](#), means the notice referred to in regulation 50 (contract notices) or, where relevant, [regulation 75\(1\)\(a\)](#) (publication of notices).

- **contracting authority**

For the purposes of the Act, a contracting authority is-

- (a) a body, office-holder or other person listed in the schedule to the Act, or
- (b) any other person who is a contracting authority for the purposes of the Public Contracts Regulations and whose functions-
 - (i) are exercisable in or as regards Scotland, and
 - (ii) do not relate to reserved matters within the meaning of the [Scotland Act 1998](#).

- **contracting authority's area**

For the purposes of the Act, means the area by reference to which the contracting authority primarily exercises its functions, disregarding any areas outside Scotland.

- **DOTAS**

Means the Disclosure of Tax Avoidance Schemes rules which require a promoter of tax schemes to tell HM Revenue and Customs of any specified notifiable arrangements or proposals and to provide prescribed information on those arrangements or proposals within set time limits as contained in Part 7 of the Finance Act 2004 and in secondary legislation made under vires contained in Part 7 of the Finance Act 2004 and as extended to National Insurance Contributions by the National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2012, SI 2012/1868 made under s.132A Social Security Administration Act 1992.

- **Economic operator**

Means any person who offers the execution of works, the supply of products or the provision of services on the market.

- **EU-regulated procurement**

For the purposes of the Act, means a regulated procurement to which The Public Contracts Regulations apply.

- **ESPD**

Means the European Single Procurement Document referred to in [regulation 60\(1\)](#) (European single procurement documents: Use, content and form of ESPD) of The Public Contracts (Scotland) Regulations 2015.

- **excluded contract**

For the purposes of the Act, a contract is an excluded contract for the purposes of section 3 of the Act if-

- (a) it is a contract of a kind to which The Public Contracts (Scotland) Regulations 2015 do not apply by virtue of [regulation 4 or 7 to 18](#) of those regulations,
- (b) the following conditions apply-
 - (i) it is for the purpose of acquiring goods, works or services in order to sell, hire or provide them to other persons,
 - (ii) the contracting authority will not have an exclusive right to sell, hire or provide the goods, works or services, and
 - (iii) the conditions on which the contracting authority intends to sell, hire or provide them are the same or similar to the conditions on which another person could sell, hire or provide the same or similar goods, works or services, or
- (c) the principle purpose of the contract is to acquire goods, works or services in connection with research or development undertaken by the contracting authority.

- **financial year**

For the purposes of the Act, means the period of 12 months in respect of which the accounts of the contracting authority in question are prepared.

- **framework agreement**

- (a) a framework agreement is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing public contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged,
- (b) a call-off contract is a contract awarded under a framework agreement.

- **general anti abuse rule (UK)**

- (a) [Part 5 of the Finance Act 2013](#); and
- (b) any future legislation introduced into parliament to counteract tax advantages arising from abusive arrangements to avoid national insurance contributions

- **general anti-avoidance rule**

- (a) [Part 5 of the Revenue Scotland and Tax Powers Act 2014](#); and
- (b) any future legislation introduced into parliament to counteract tax advantages arising from abusive arrangements to avoid national insurance contributions

- **life cycle**

Means all consecutive or interlinked stages, including research and development to be carried out, production, trading and its conditions, transport, use and maintenance, throughout the existence of the product or the works or the provision of the service, from raw material acquisition or generation of resources to disposal, clearance and end of service or utilisation.

- **living wage**

Is a rate of pay which is sufficient to ensure that the recipient may enjoy an acceptable standard of living. The rate will be different for different places, reflecting costs of living. In the UK the rate is an hourly rate set independently and updated annually by the Living Wage Foundation and calculated by the Centre for Research in Social Policy at Loughborough University'. More information is available at – <http://www.livingwage.org.uk/waht-living-wage> – and is consistent with the definition provided in [section 15\(7\) of the Act](#).

- **member state**

Means a state which is a member of the European Union. As of the date of publication of this guidance, there are 28 member states: http://europa.eu/about-eu/countries/index_en.htm.

- **Occasion Of Non-Compliance**

- (a) any tax return of the supplier submitted to a relevant tax authority on or after 1 October 2012 is found on or after 1 April 2013 to be incorrect as a result of:
 - (i) a relevant tax authority successfully challenging the supplier under the General Anti-Abuse Rule, the General Anti-Avoidance Rule or the Halifax Abuse Principle or under any tax rules or legislation that have an effect equivalent or similar to the General Anti-Abuse Rule, the General Anti-Avoidance Rule or the Halifax Abuse Principle.
 - (ii) the failure of an avoidance scheme which the supplier submitted to the relevant tax authority on or after 1 October 2012 gives rise, on or after 1 April 2013, to a criminal conviction in any jurisdiction for tax related offences which is not spent at the effective date or to a civil penalty for fraud or evasion.

- **procurement**

Means the process leading to the award of a public contract or framework agreement or establishment of a dynamic purchasing system for the acquisition of works, supplies or services from an economic operator.

- **procurement document**

Means any document produced or referred to by the contracting authority to describe or determine elements of the procurement or the procedure, including the contract notice, the prior information notice where it is used as a means of calling for competition, the technical specifications, the descriptive document, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents.

- **public contracts**

subject to [regulation 98\(6\) of The Public Contracts \(Scotland\) Regulations 2015](#), means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as its object the execution of works, the supply of products or the provision of services.

- **public service contracts**

Means a public contract having as its object the provision of services not including those comprising a public works contract (except a subsidised public service contract).

- **public supply contracts**

Means a public contract having as its object the purchase, lease, rental or hire purchase, with or without an option to buy, of products which contract may include, as an incidental manner, siting and installation operations.

- **public works contracts**

means a public contract having as its object one of the following-

- (a) the execution or the design and execution of works related to one of the activities within the meaning of [schedule 2 of The Public Contracts \(Scotland\) Regulations 2015](#);
- (b) the execution or the design and execution of a work;
- (c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work; (except a subsidised public works contract).

- **regulated contract**

For the purposes of the Act, a contract is regulated if-

- (a) it is a public contract,
- (b) the estimated value of the contract is equal to or greater than the contract threshold⁵⁶, and
- (c) the contract is not an excluded contract.

- **regulated procurement**

For the purposes of the Act, a regulated procurement is-

- (a) any procedure carried out by a contracting authority in relation to the award of a proposed regulated contract including, in particular-
 - (i) the seeking of offers in relation to the contract, and
 - (ii) the selection of economic operators,
- (b) the award of a regulated contract by a contracting authority.

⁵⁶ For the purposes of the Act, the contract threshold is £50,000 for a public contract (other than a public works contract), and £2,000,000 for a public works contract.

- **relevant Tax Authority**

HM Revenue & Customs, Revenue Scotland or, if applicable, a tax authority in the jurisdiction in which the supplier is established.

- **reserved contracts**

A process where participation in a procurement exercise is restricted to (reserved) only those economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons and where at least 30% of the employees are disabled or disadvantaged persons.

- **selection criteria**

Means selection criteria set out by a contracting authority in accordance with [regulation 59](#) of The Public Contracts (Scotland) Regulations 2015.

- **significant procurement expenditure**

For the purposes of the Act, an authority has significant procurement expenditure in a year if the sum of the estimated values of the contracts to which its regulated procurements in that year relate is equal to or greater than £5,000,000.

- **State aid**

As outlined in [Article 107\(1\) of the Treaty on the Functioning of the European Union](#), grant funding may constitute State aid if it strengthens the position of the service provider relative to other competitors and therefore has the potential to distort competition. Further information about State aid rules is available on the Scottish Government State Aid Unit website: (http://www.stateaidscotland.gov.uk/state_aid/SA_HomeView.jsp?p_applic=CCC&p_service=Content.show&pContentID=323&)

Advice can also be sought from the State Aid Unit by e-mailing stateaid@scotland.gsi.gov.uk.

- **supported business**

Means an economic operator whose main aim is the social and professional integration of disabled or disadvantaged persons and where at least 30% of the employees of the economic operator are disabled or disadvantaged persons.

- **sustainable procurement duty**

For the purposes of the Act, is the duty of a contracting authority-

- (a) before carrying out a regulated procurement, to consider how in conducting the procurement process it can-
 - (i) improve the economic, social and environmental wellbeing of the authority's area,
 - (ii) facilitate the involvement of small and medium enterprises, third sector bodies and supported businesses in the process, and
 - (iii) promote innovation, and
- (b) in carrying out the procurement, to act with a view to securing such improvements identified as a result of paragraph (a)(i).

- **tenderer**

Means an economic operator that has submitted a tender.

- **third sector bodies**

For the purposes of the Act, means organisations (other than bodies established under an enactment) that exist wholly or mainly to provide benefits for society or the environment.

ANNEX E: RESOURCES

Legislation

- Animal Health and Welfare (Scotland) Act 2006
<http://www.legislation.gov.uk/asp/2006/11/contents>
- Climate Change (Scotland) Act 2009
<http://www.legislation.gov.uk/asp/2009/12/contents/2009-08-05>
- Climate Change (Duties of Public Bodies: Reporting Requirements) (Scotland) Order 2015
<http://www.legislation.gov.uk/ssi/2015/347/contents/made>
- Community Empowerment (Scotland) Act 2015
<http://www.legislation.gov.uk/asp/2015/6/contents/enacted>
- The Concessions Contracts (Scotland) Regulations 2016
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