

# **European Union Legislation and Procurement Reform (Scotland) Act 2014 Reference Pack**

**Changes to Scotland's Public Procurement  
Legislation**

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# European Union Legislation and Procurement Reform (Scotland) Act 2014 Reference Pack

## Changes to Scotland's Public Procurement Legislation

This reference pack is a word version of the online [eLearning Reference Pack](#) and has a dual purpose:

1. It is designed to help procurement practitioners and other stakeholders better understand the changes to the public procurement regime in Scotland.
2. It has also been designed as a reference pack to allow you to refer back to.

This pack is made up of 15 chapters which contain comprehensive and detailed information about the changes. The pack also contains questions at the end of each chapter for you to complete, with answers to be found on the last six pages of the document.

This pack covers the:

- Procurement Reform (Scotland) Act 2014
- Public Contracts (Scotland) Regulations 2015
- Procurement (Scotland) Regulations 2016
- Concessions Contracts (Scotland) Regulations 2016

**NOTE: It does NOT cover the Utilities Contracts (Scotland) Regulations 2016.**

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# 1. Introduction

## Legislative Changes

The motivation for updating and augmenting the procurement Directives is that public procurement is seen as having a vital role in the Europe 2020 strategy. Procurement is one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the efficient use of public funds.

The Directives have therefore been revised with the aim of increasing the efficiency of public spending, facilitating the participation of SMEs and enabling procurers to make better use of public procurement in support of smart, sustainable and inclusive growth.

The Procurement Reform (Scotland) Act 2014 is a significant element of the Scottish Government's strategy for improving public procurement in Scotland. The strategy centres on the Scottish Model of Procurement. It sees procurement as an integral part of policy development and service delivery. It is a simple concept - business friendly, socially responsible, looking at outcomes not outputs. It uses the power of public spend to deliver genuine public value beyond simply cost/quality in purchasing.

The Procurement Reform (Scotland) Act 2014 builds on the work achieved so far in the reform of public procurement in Scotland.

## New Procurement Directives

- Public Contracts Directive 2014/24/EU<sup>1</sup> replacing 2004/18/EC<sup>2</sup>.
- Concessions Directive 2014/23/EU<sup>3</sup>.
- Utilities Contracts Directive 2014/25/EU<sup>4</sup> replacing 2004/17/EC<sup>5</sup>



## What is a Concession Contract?

### Concession Contract

In a concession contract a company is remunerated through being permitted to run and exploit the work or service and is exposed to a potential loss on its investment. A "concession contract" is a contract where the economic operator is allowed to charge the public (i.e. usually not the contracting authority) for using the service or asset that the contractor provides. For example, a private company builds and manages a leisure

<sup>1</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0024>

<sup>2</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004L0018&from=en>

<sup>3</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0023&qid=1404730976365&from=EN>

<sup>4</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0025&qid=1404731051178&from=EN>

<sup>5</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004L0017&from=EN>

centre and is remunerated through entrance fees, running the risk that the revenue generated will not cover its investment and other costs incurred.

A key element of a concession contract is that the contractor must bear some element of risk that the revenue it earns may not cover its investment and other costs incurred.

A common example of a concession contract is where a public body contracts with a firm to build and maintain a new motorway or bridge and (rather than being paid an agreed sum by the contracting authority on completion of various stages), the contractor is granted the right to exploit provision of the asset by charging for its use - e.g. collecting tolls (charging motorists) to drive on the motorway/bridge.

In a public contract, a company is paid an agreed amount for completing the required work or providing a service. For example - a private company builds and manages a leisure centre for a fixed price.

### **Contracts containing both Payment and the Right to Exploit the Concession**

Where a contract includes a mix of payment and the right to exploit the concession (where the concessionaire is subject to risk regarding recouping its investment/costs) the Public Contracts (Scotland) Regulations 2015 must be applied.

The only exception to this is where the different parts of the contract are objectively not separable. In which case the main subject matter of the contract shall determine which regime applies.

The Concessions Contracts (Scotland) Regulations 2016 provides for a relatively light touch regime when compared with the Public Contracts (Scotland) Regulations 2015.

## **Duration of the Concession**

### **How long should a Concession last?**

A concession contract must be limited in time but the Regulations do not set out a maximum duration.

However, for concessions lasting more than 5 years, the maximum duration of the concession shall not exceed the time that a contractor could reasonably be expected to take to recoup the investments made in operating the works or services together with a return on invested capital, taking into account the investments required to achieve the specific contractual objectives.

### **How is the duration established?**

The maximum duration must be estimated and referred to in the concession documents, either as a matter subject to negotiation (may be part of the award criteria and so be fixed through competition) or as part of the fixed conditions.

# Changes to Scotland’s Public Procurement Legislation

The new legislation introduced four new legal regimes, across different contract values. See below:

<b>EU Regime</b>	<b>OJEU value contracts</b>	<b>Public Contracts (Scotland) Regulations 2015</b>	<b>Procurement Reform (Scotland) Act 2014</b>
<b>Reform Act Regime “slice”</b>	<b>Goods/ service contracts ≥ £50,000 Works contracts ≥ £2,000,00</b>	<b>Procurement (Scotland) Regulations 2016</b>	
<b>Concessions Regime</b>	<b>OJEU value contracts</b>	<b>Concession Contracts (Scotland) Regulations 2016</b>	<b>The 2014 Act introduces cross-over provisions which apply in the EU Regime and the Reform Act Regime. The Act does not apply in the Concessions or the Utilities Regime.</b>
<b>Utilities Regime</b>	<b>OJEU value contracts</b>	<b>Utilities Contracts (Scotland) Regulations 2016</b>	

## Key changes introduced by the Public Contracts (Scotland) Regulations 2015

- Shorter minimum procedural timescales
- New innovation partnership procedure
- Mandatory use of electronic communication
- New light touch regime for social and other specific services
- A presumption in favour of lotting contracts
- Clarification of shared service exemptions
- Supplier self-declaration
- Yearly turnover requirement should be limited to twice the contract value (unless justified)
- Suppliers can be excluded on the basis of poor performance
- Contract award criteria cannot be lowest price or lowest cost alone
- Contract award criteria may include social characteristics and staff experience
- Wider scope for reserved contracts

## **Key changes introduced by the Concessions Contracts (Scotland) Regulations 2016**

- Under the Public Contracts (Scotland) Regulations 2012 public works concession contracts were covered but service concessions were not.
- Under the Utilities Contracts (Scotland) Regulations 2012 neither works or service concessions were covered.
- Now the Concessions Contracts (Scotland) Regulations 2016 covers works and service concession contract awards for both the public and utilities sectors.
- The new Concessions Contracts (Scotland) Regulations 2016 also sets out the processes and procedures to be applied to the award of concession contracts with a value equal to or greater than £4,104,394.

## **Key changes introduced by the Procurement Reform (Scotland) Act 2014 and the Procurement (Scotland) Regulations 2016**

- New General Duty and Sustainable Procurement Duty
- Procurement Strategies and Annual Reports (£5,000,000 threshold)
- Community benefits requirements in contracts equal to or over £4,000,000
- Notices must be published on Public Contracts Scotland
- Public bodies must maintain a contracts register
- No fees to be charged for taking part in a procurement process

Procurement legislation now also applies to public contracts which equal or exceed the £50,000 threshold for supplies and services and the £2,000,000 threshold for works. The Reform Act covers certain elements of public procurement including:

- Exclusion grounds
- Selection criteria
- Technical specifications
- Supported businesses
- Dynamic Purchasing Systems
- Debriefing
- Remedies

# QUIZ

## Question 1

**When must contracting authorities apply the new legislation to their procurements? (please select one answer):**

- a) When the authority decides it is ready for the new legislation
- b) If a procurement commences on or after the date that the new Regulations enter into force
- c) There is no date as the new Regulations are optional.

## Question 2

**Under the new Concessions Contracts (Scotland) Regulations 2016 (which cover works and service concession contracts for public and utilities sectors) a concession contractor is remunerated by? (please select one answer):**

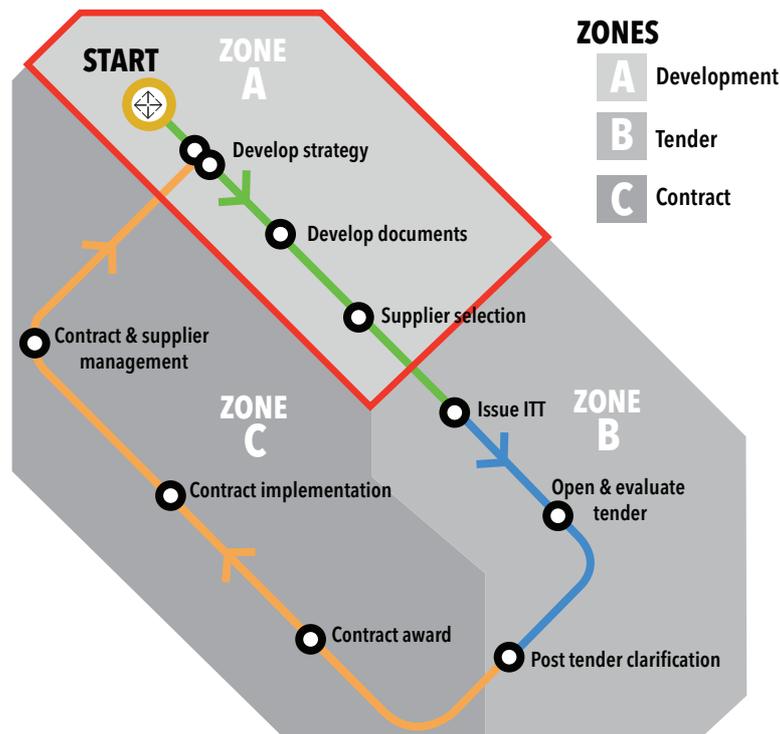
- a) Completing the work or service that you require for an agreed amount
- b) Being permitted to run the work or service, exploiting it for financial gain while accepting risks of potential loss on their investment
- c) Where the main purpose of the contract is a concession activity which is objectively inseparable from an element of the contract where the public body makes a payment to the concessionaire.

## Question 3

**The Procurement Reform (Scotland) Act 2014 introduces which of the following obligations on public bodies in respect of procurements above the Reform Act thresholds? (select all the apply):**

- a) Contracts Register
- b) The Sustainable Procurement Duty
- c) Preparation and publication of Procurement Strategies and Annual Reports by contracting authorities
- d) Advertising of contract opportunities
- e) Consideration of Community Benefits requirements
- f) Prohibition on charging a supplier a fee for participating in any part of a procurement process.

## 2. Strategic and Sustainable Procurement



### Principles of Procurement

Public bodies are required to design their procurements in such a way as to follow the principles which derive from the Treaty of the Functioning of the European Union, and which form part of the General Duty under the Procurement Reform (Scotland) Act 2014:

- Equal Treatment
- Non-Discrimination
- Transparency
- Proportionality

Public bodies must be careful that the design of their procurement does not have the effect of creating barriers to competition. For example, it is not permissible to require high insurance levels or turnover limits which cannot be justified and which artificially narrow the market. Public bodies must not disaggregate a procurement with the intention that it falls below the relevant advertising thresholds and the application of the legislation.

# Scotland's National Performance Framework

To facilitate progress in sustainable procurement, the National Performance Framework<sup>6</sup> is at the heart of the process. This is the single framework to which all public services in Scotland are aligned.



<sup>6</sup> <http://nationalperformance.gov.scot/>

## What is it?

Introduced in 2007, the National Performance Framework (NPF) sets out a **vision for national wellbeing in Scotland** and measures achievement in relation to this. The NPF provides a framework for collaboration across the whole spectrum of Scotland's civic society, including public and private sectors, voluntary organisations, businesses and communities. It is **based on delivering outcomes** that improve the quality of life for the people of Scotland.

Following the introduction of the Community Empowerment (Scotland) Act 2015, Scottish Ministers have a duty to consult on, develop and publish a new set of National Outcomes for Scotland and to review them at least every five years. The recent review of the NPF was undertaken in response to this legislation.

The review aimed to identify a set of National Outcomes which better reflects the values and aspirations of the public, expert stakeholders and Ministers, and also improves alignment with the UN's Sustainable Development Goals and other frameworks, such as Scotland's Economic Strategy. It also aimed to simplify the language and look of the framework, and will allow better tracking of progress in reducing inequalities, promoting equality, and encouraging preventative approaches.

A wide range of indicators are used to assess progress towards the Purpose and National Outcomes. These provide a broad measure of national wellbeing, incorporating a range of economic, social and environmental indicators. Performance is reported on the National Performance website.

## Reform Act: Organisational Procurement Strategy

A procurement strategy is required to cover a public body's financial year if the sum of the estimated values of their contracts is equal to or greater than £5,000,000. Public bodies are not required to prepare a procurement strategy relating to any period before **31<sup>st</sup> December 2016**. Public bodies needed to produce their first procurement strategy by **31<sup>st</sup> December 2016**. This first strategy covers, as a minimum, the remainder of that financial year and the first full financial year starting after **31<sup>st</sup> December 2016**.

It is possible for two or more contracting authorities to prepare a joint procurement strategy which covers their collective interests.

Procurement strategies must also be reviewed and revisions made as considered appropriate. Procurement strategies must, as a minimum, be made publicly available on the internet and also in such manner as it is considered appropriate.

## Organisational Procurement Strategy

### What must a procurement strategy include?

It must set out how the public body's regulated procurements will:

- contribute to the carrying out of the public body's functions;
- deliver value for money, and;
- be in compliance with the Reform Act's General Duty and Sustainable Procurement Duty.

For the purposes of the Procurement Reform (Scotland) Act 2014 and the Procurement (Scotland) Regulations 2016:

- A “regulated procurement” is any procedure carried out by a public body in relation to the award of a regulated contract.
- A “regulated contract” is a public contract which is not excluded and which equals or exceeds the £50,000 threshold for supplies and services and the £2,000,000 threshold for works.

The strategy must also include the public body’s general policy:

- on the use of community benefit requirements;
- on consulting and engaging with those affected by its procurements;
- on the payment of a living wage to persons involved in regulated procurements;
- on promoting compliance with the Health and Safety at Work etc. Act 1974;
- on the procurement of fairly and ethically traded goods and services;
- in respect of contracts involving the provision of food;
  - a) how it will improve the health, wellbeing and education of communities in their area, and;
  - b) promote the highest standards of animal welfare;
- ensuring prompt payment (within 30 days) of invoices for public contracts.

## Annual Procurement Reports

Annual procurement reports must be published as a minimum on the internet and any other location the public body chooses, and must contain:

- A reflection looking back on the procurement activity over the financial year, including:
  - a) a summary of the regulated procurements in the year,
  - b) a review of how the regulated procurements complied with the procurement strategy, and where they don’t,
  - c) a statement of how it will ensure compliance in future regulated procurements,
  - d) a summary of any community benefit requirements fulfilled during the year,
  - e) a summary of steps taken to facilitate the involvement of supported businesses in regulated procurements during the year covered by the report,
  - f) a summary of the regulated procurements the authority expects to commence in the next two financial years.
- Through legislative change, Scottish Ministers can require annual reports to include further information.

Upon publication of a public body’s annual procurement report, the public body must notify the Scottish Ministers of this.

## Contracts Register

To improve the transparency of a public body’s procurement activity, there is now a requirement to keep and maintain a register of contracts which have been awarded as a result of a regulated procurement.

Contracts which must be included are the award of a public contract, the establishment of a framework agreement and the award of a call off contract under a framework agreement.

As a minimum, public bodies must make it publicly available on the internet and by such other means as it considers appropriate. Publication of contract award notices via PCS will help facilitate capture of the data required by public bodies to populate their register.

The contract register must include the following details on each contract:

- the date of the award,
- the name of the contractor,
- the subject matter,
- the estimated value of the contract,
- the start date,
- the end date provided for in the contract, or the circumstances in which the contract will end, and
- the duration of any extension period.

## Sustainable Procurement Duty

To ensure public spend achieves value for money and contributes to national and local outcomes and the public body's priorities, early consideration of how to frame requirements is necessary. The sustainable procurement duty applies to **all** regulated procurements.

Public bodies are now **required to consider** before they carry out a regulated procurement, which commences on or after **1<sup>st</sup> June 2016**, how they can conduct the procurement and act with a view to securing improvements in a way which will:

- secure improvements to the economic, social and environmental wellbeing<sup>7</sup> of the authority's area<sup>8</sup>
- facilitate the involvement of SMEs, third sector bodies and supported businesses; and
- promote innovation.

Scottish Ministers have published statutory guidance on the Sustainable Procurement Duty which can be accessed on the Scottish Government website<sup>9</sup>.

## Reserved Contracts for Supported Businesses

Participation in any EU, concessions or Reform Act regulated procurement may be reserved by public bodies for:

- organisations that are Supported Businesses
- suppliers who operate an employment programme, the main aim of which is the social and professional integration of disabled or disadvantaged persons or may provide for this to be performed in the context of supported employment programmes.

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<sup>7</sup> "Wellbeing of the authority's area" includes, in particular, reducing inequality in the area.

<sup>8</sup> An "authority's area" is the area by reference to which the contracting authority primarily exercises its functions, disregarding any areas outside Scotland.

<sup>9</sup> <http://www.gov.scot/Topics/Government/Procurement/policy/corporate-responsibility/Sustainability>

In all cases the reservation is only available to economic operators where at least 30% of their workforce is disabled or disadvantaged, previously 50% of the workforce had to be disabled. Please note that supported businesses are defined in a way that would include business units within a larger organisation providing that the business unit meets the definition in the Regulations. Specific programmes meeting the definition may also qualify.

When advertising in the OJEU and/or Public Contracts Scotland, public bodies must make it clear that their opportunity is a reserved contract or concession. Reserving contracts is a good way of using public money to help people who might find it more difficult to gain employment through the open labour market.

## **Social and Environmental Considerations (including Community Benefits)**

The ability to incorporate social and environmental considerations (including community benefits) in EU procurements is not new, though there are developments which offer further clarification regarding their use. For example:

- these may include economic, innovation-related, environmental, social or employment-related considerations;
- there is new codification of case law, which confirms that social and environmental considerations may form part of the award criteria;
- there is new codification of case law, which confirms that permitted factors for technical specifications need not relate to material substance (of, for example, a product).

### **The key principles remain that:**

- social and environment considerations must relate to the subject matter of the contract;
- the use of social and environmental considerations must adhere to principles of procurement; and
- if scoring, social and environmental criteria must be capable of objective assessment.

### **Community Benefit requirements in major contracts**

Community benefits can contribute to a range of national and local outcomes relating to employability, skills and reducing inequality.

In any procurement equal to or greater than £4,000,000, which commence on or after **1<sup>st</sup> June 2016**, public bodies must consider whether to impose community benefit requirements as part of the procurement. This £4,000,000 threshold will be subject to review.

For regulated procurements which are equal to or greater than £4,000,000, the contract notice must include the following:

- a) a summary of the community benefit requirements that will be included in the contract, or
- b) where the public body does not intend to include any such requirements, a statement of its reasons for not including any requirements.

Where community benefits are included in a regulated procurement, the public body must include in the award notice a statement of the benefits it considers will be derived from those requirements. Scottish Ministers have published statutory guidance on community benefit requirements<sup>10</sup>.

## QUIZ

### Question 4

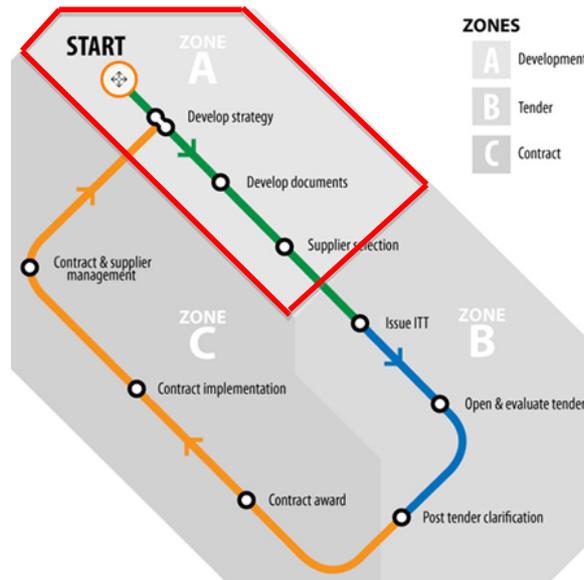
**In which of the following scenarios may a contract be reserved for supported businesses? (*please select one answer*):**

- a) Where at least 50% of the workforce are disabled
- b) Where at least 30% of the workforce are disabled
- c) Where at least 30% of the workforce are disadvantaged or disabled
- d) Where at least 50% of the workforce are disadvantaged of disabled.

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<sup>10</sup> <http://www.gov.scot/Topics/Government/Procurement/policy/corporate-responsibility/Sustainability/CommunityBenefits>

### 3. Scope, Thresholds and Definitions



### Public Contracts (Scotland) Regulations 2015

EU regulated procurements must be advertised on Public Contracts Scotland (PCS) and in the Official Journal of the European Union (OJEU) when their estimated value is equal to or greater than the thresholds below:

	Supplies	Services	Works
<b>Central Government Bodies</b>	£118,133	£118,133	£4,551,413
<b>Other Public Sector Contracting Authorities</b>	£181,302	£181,302	£4,551,413
<b>Social and Other Specific Services</b>	-	£615,278	-
<b>Small Lots</b>	£65,630	£65,630	£820,370

# Procurement Reform (Scotland) Act 2014

Regulated procurements must be advertised on Public Contracts Scotland (PCS) when their estimated value is equal to or greater than the Reform Act thresholds below:

<b>Goods and services, including framework agreements and dynamic purchasing systems</b>	$\geq$ £50,000
<b>Works contracts, including framework agreements and dynamic purchasing systems</b>	$\geq$ £2,000,000

## Threshold and methods for calculating the estimated value of a Concession contract

What is the threshold for applying the Concessions Contracts (Scotland) Regulations 2016?

<b>The Concessions Contracts (Scotland) Regulations 2016 applies only to work or service concession contracts where the value is equal to or greater than</b>	$\geq$ £4,104,394
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### How is a Concession’s estimated value calculated?

When estimating a concession’s value, a procurer must take into account the concessionaire’s total turnover generated over the duration of the contract (net of VAT), in consideration for the works and services that are the subject of the concession, and the supplies incidental to such works and services.

### Mixed Procurement

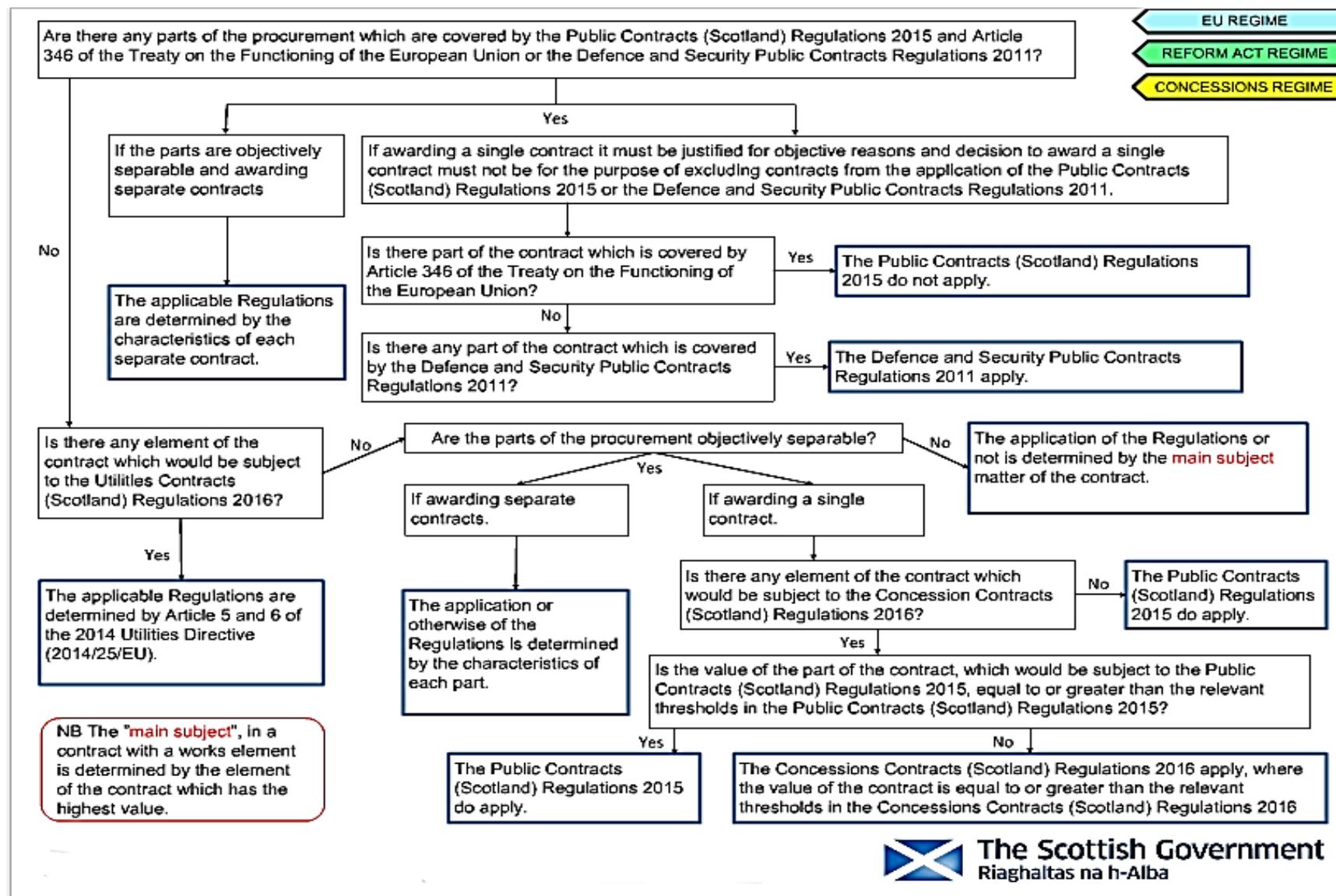
The Public Contracts (Scotland) Regulations 2015, in conjunction with the other sets of procurement Regulations, set out which legal regime(s) should apply where there is a mixed contract.

It should be noted that mixed procurement applies to two distinct situations:

- a) Where there are mixed contracts within the scope of the Public Contracts (Scotland) Regulations 2015 (contracts which include two or more elements which could be described as supplies, works or services).
- b) Where there are mixed contracts covered by the Public Contracts (Scotland) Regulations 2015 and other procurement regimes.

## Flowchart

The following flowchart highlights the key decisions to determine what rules apply to mixed contracts:



## Mixed Contracts: Public Contracts (Scotland) Regulations 2015 and another part of the procurement regime

- Where a contract includes different parts which are objectively separable and it is justifiable, these contracts can be awarded separately or as a single contract.
- Where a mixed contract combines a contract under the Public Contracts (Scotland) Regulations 2015 and a concession contract, if the public contract element is within the relevant threshold, the Public Contracts (Scotland) Regulations 2015 shall apply.
- Where a mixed contract combines a contract under the Public Contracts (Scotland) Regulations 2015 and a utilities contract, no matter the value, the applicable rules shall be determined by Article 5 and 6 of the Utilities Contracts Directive 2014/25/EU.
- Where there is any defence procurement element (Article 346 TFEU or the Defence Directive 2009/81/EC), the Defence Regulations<sup>11</sup> shall apply.

## New terms in the Public Contracts (Scotland) Regulations 2015

### Sub-central contracting authorities

‘Sub-central contracting authorities’ means all contracting authorities which are not central government authorities (including health boards) listed in Schedule 1 of the Public Contracts (Scotland) Regulations 2015.

### Ancillary purchasing activities

‘Ancillary purchasing activities’ means activities consisting in the provision of support to purchasing activities, in particular in the following forms:

- a) technical infrastructure enabling contracting authorities to award public contracts or to conclude framework agreements for works, supplies or services;
- b) advice on the conduct or design of public procurement procedures;
- c) preparation and management of procurement procedures for or on behalf of the contracting authority concerned.

### Procurement service provider

‘Procurement service provider’ means a public or private body which offers ancillary purchasing activities on the market.

### Life cycle

‘Life cycle’ means all consecutive and/or interlinked stages. This includes research and development to be carried out, production, trading and its conditions, transport, use and maintenance. This extends throughout the existence of the product/works or the provision of the service, from raw material acquisition or generation of resources to disposal, clearance and end of service or utilisation.

### Innovation

‘Innovation’ means the implementation of a new or significantly improved product, service or process. This includes, but is not limited to, production, building or construction processes, a new marketing method, a new organisational method in business practices, workplace organisation or external relations inter alia with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy for smart, sustainable and inclusive growth.

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<sup>11</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32009L0081>

## **Label**

'Label' means any document, certificate or attestation confirming that the works, products, services, processes or procedures in question meet certain requirements.

## **Label requirements**

'Label requirements' means the requirements to be met by the works, products, services, processes or procedures in question in order to obtain the label concerned.

## **New terms in the Concessions Contracts (Scotland) Regulations 2016**

### **Works concession**

'Works concession' means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the execution of works to one or more economic operators. The consideration consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment.

### **Services concession**

'Services concession' means a contract for pecuniary interest concluded in writing where one or more contracting authorities or contracting entities entrust the provision and management of services other than the execution of works to one or more economic operators. The consideration consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment.

### **Concessionaire**

'Concessionaire' means an economic operator which has been awarded a concession.

### **Execution of works**

'Execution of works' means the execution, or both the design and execution, of works in Schedule 1, of the Concessions Contracts (Scotland) Regulations 2016, or of a work corresponding to the requirements specified by the contracting authority or contracting entity exercising a decisive influence on the type or design of the work.

### **Exclusive right**

'Exclusive right' means a right granted by a competent authority of a Member State by means of any law, regulation or published administrative provision which is compatible with the Treaties. The effect is to limit the exercise of an activity to a single economic operator and which substantially affects the ability of other economic operators to carry out such an activity.

### **Special right**

'Special right' means a right granted by a competent authority of a Member State by means of any law, regulation or published administrative provision which is compatible with the Treaties. The effect is to limit the exercise of an activity to two or more economic operators and which substantially affects the ability of other economic operators to carry out such an activity.

### **Concession document**

'Concession document' means any document produced or referred to by the contracting authority or contracting entity to describe or determine elements of the concession or the procedure. This includes the concession notice, the technical and functional requirements, proposed conditions of concession, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents.

## Terms found in the Procurement Reform (Scotland) Act 2014

### Award notice

'Award notice' has the meaning given in section 23(6) of the Reform Act, is the information published in accordance with subsection (2) of Section 23 which is "A contracting authority must publicise the award of a contract under a regulated procurement on the Public Contracts Scotland website."

### Community benefit requirement

'Community benefit requirement' has the meaning given in section 24 of the Reform Act: "For the purposes 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."

### Contract notice

'Contract notice' has the meaning given in section 23(6) of the Reform Act, means the information published in accordance with subsection (1) of section 23 which is "A contracting authority must publicise its intention to seek offers as part of a regulated procurement on the Public Contracts Scotland website."

### Contracting authority

'Contracting authority' has the meaning given in section 1, "For the purposes of this Act, a 'contracting authority' is -

- a) a body, office-holder or other person listed in the schedule, 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 (c.46)."

### Economic operator

'Economic operator' means any person who offers the execution of works, the supply of products or the provision of services on the market.

### Financial year

'Financial year' means the period of 12 months in respect of which the accounts of the contracting authority in question are prepared.

### Public contract

'Public contract' means contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their objective the execution of works, the supply of products or the provision of services.

### Public works contract

'Public works contract' means public contracts having as their objective one of the following:

- a) the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex II;
- b) the execution, or both the design and execution, of works.

### Regulated procurement

'Regulated procurement' is:

- a) any procedure carried out by a contracting authority in relation to the award of a proposed regulated contract (where the procurement equals or exceeds £50,000 for supplies and services or £2,000,000 for works) 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.

### Authority's area

'Authority's area' is the area by reference to which the contracting authority primarily exercises its functions, disregarding any areas outside Scotland.

### Wellbeing of the authority's area

'Wellbeing of the authority's area' includes, in particular, reducing inequality in the area.

## QUIZ

### Question 5

**A 'regulated contract under the Procurement Reform (Scotland) Act 2014 is? (please select all that apply):**

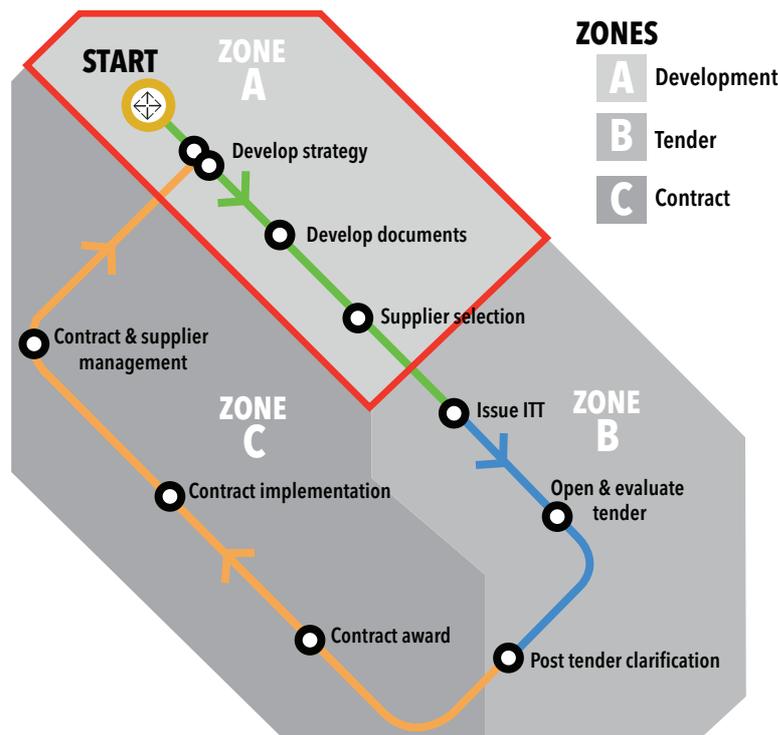
- a) A public contract
- b) Not an excluded contract
- c) All public contracts, not subject to thresholds
- d) Equals or exceeds £50,000 (supplies and services)
- e) Equals or exceeds £2,000,000 (works).

### Question 6

**Mixed Contracts: Where a procurement consists of two or more of works, supplies or a service, which regulations will apply to this procurement? (please select one answer):**

- a) The Regulations which characterise the works element
- b) The Regulations which characterise the supplies element
- c) The Regulations which characterise the service element
- d) The Regulations which characterise the main element of the contract.

## 4. Specific Exclusions from the scope of the Legislation



### Exclusions from the scope of the Public Contracts (Scotland) Regulations 2015 and the Procurement (Scotland) Regulations 2016

In addition to exclusions from the scope of procurement legislation in the 2012 Regulations, the 2015 Regulations introduce further exclusions:

- Certain legal services,
- Civil defence, civil protection, and danger prevention services<sup>12</sup> that are provided by non-profit organisations or associations except patient transport ambulance services,
- Public passenger transport services by rail or metro,
- Political campaign services<sup>13</sup> when awarded by a political party in the context of an election campaign.

These specific exclusions also apply to Reform Act Regulated procurements.

<sup>12</sup> Civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations, and which are covered by CPV codes 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8, 98113100-9 and 85143000-3 except patient transport ambulance services.

<sup>13</sup> Political campaign services covered by CPV codes 79341400-0, 92111230-3 and 92111240-6, when awarded by a political party in the context of an election campaign.

# Exclusions from the Scope of the Concessions Contracts (Scotland) Regulations 2016

## Regulations 9-12

Exclusions applicable to concessions awarded by contracting authorities and contracting entities. These regulations contain much of the same information as the Public Contracts (Scotland) Regulations 2015 on specific exclusions for service contracts. It also contains information on “Public contracts awarded and design contests organised pursuant to international rules” and “Service contracts awarded on the basis of an exclusive right”.

## Regulation 13

Specific exclusions in the field of electronic communications. This regulation excludes concessions from the scope of the Regulations where a contracting entity is providing or exploiting public communications networks.

## Regulation 14

Specific exclusions in the field of water. This regulation covers the exclusion of works and services concessions to provide or operate fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water or the supply of drinking water to such networks. Also, concessions for the disposal or treatment of sewage and for hydraulic engineering projects, irrigation or land drainage (provided that the volume of water to be used for the supply of drinking water represents more than 20% of the total volume of water made available by such projects, irrigation or drainage installations) should also be excluded in so far as they are connected with an excluded activity.

## Regulation 15

Concessions awarded to an affiliated undertaking. This regulation sets out the specific circumstances within which the Concessions Contract (Scotland) Regulations 2016 will not apply to affiliated undertakings. An affiliated undertaking is any undertaking of the annual accounts which are consolidated with those of the contracting entity in accordance with the requirements.

## Regulation 16

Concessions awarded to a joint venture or to a contracting entity forming part of a joint venture. This clarifies that the Regulations do not apply to joint ventures where they are for the purpose of carrying out activities to provide: gas or heat, electricity, public transport, airports and ports, postal services, extracting oil or gas, and exploring for or extracting for coal. Neither does it apply to a contracting entity which is the parent organisation to the joint venture.

## Regulation 17

Notification of information by contracting entities. This regulation requires contracting entities to notify the Commission if they are requested to do so where they have applied the exclusions as set out in regulations 15 and 16 of the Concessions Contracts (Scotland) Regulations 2016 so that they can determine whether or not the exclusion has been made legitimately.

### **Regulation 18**

Exclusion of activities which are directly exposed to competition.

This regulation refers to situations where there is sufficient competition in a marketplace and therefore no requirement to legislate for it. This is on the basis that a contracting entity can demonstrate that, in the Member State in which it is performed, the activity is directly exposed to competition on markets to which access is not restricted. The activity concerned may form part of a larger sector or be exercised only in certain parts of the Member State concerned.

### **Regulation 19**

Concessions between entities within the public sector. This states that the Regulations do not apply in situations where the control and the function tests are satisfied and there is no private sector involvement in the controlled legal person. This can also be achieved through joint control. In addition, the codification of the Hamburg Case also provides clarity so that contracting authorities and entities can collaborate as long as it is in the public interest and there is no profit derived from the collaboration.

### **Which Research and Development services are covered?**

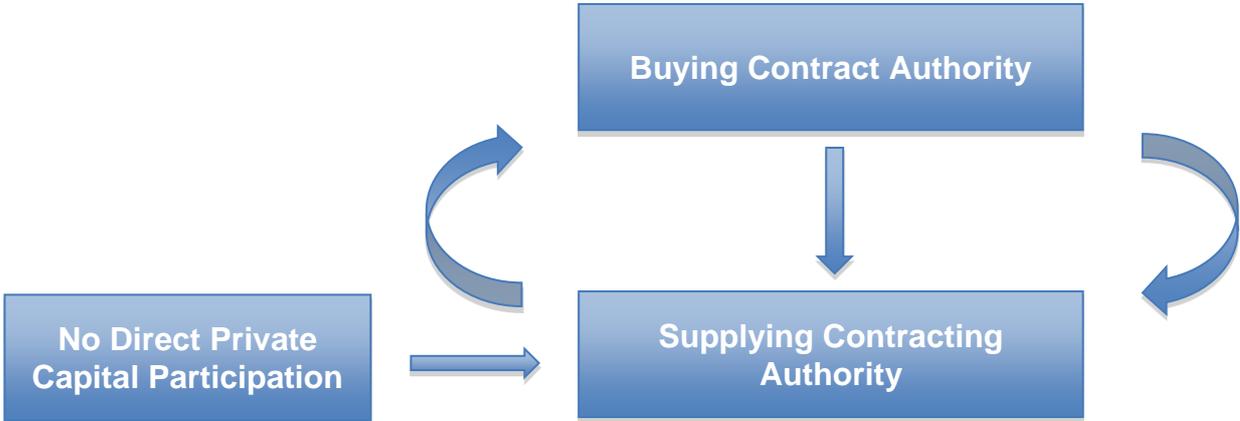
The Public Contracts (Scotland) Regulations 2015 will continue the application of the Regulations to research and development contracts, but only where the benefits accrue exclusively to a public body for its use in the conduct of its own affairs and the contracts are wholly paid for by the public body.

However, the Public Contracts (Scotland) Regulations 2015 are now more specific as they shall only apply to public service contracts for research and development services which are covered by specific CPV codes.

These specific exclusions also apply to Reform Act Regulated procurements.

# Public or Concessions Contracts between Public Sector organisations

A contract or concession between two or more public bodies may fall outside the procurement regulations -



The following cumulative conditions must all be met before a contract falls outside the scope of the procurement regulations:

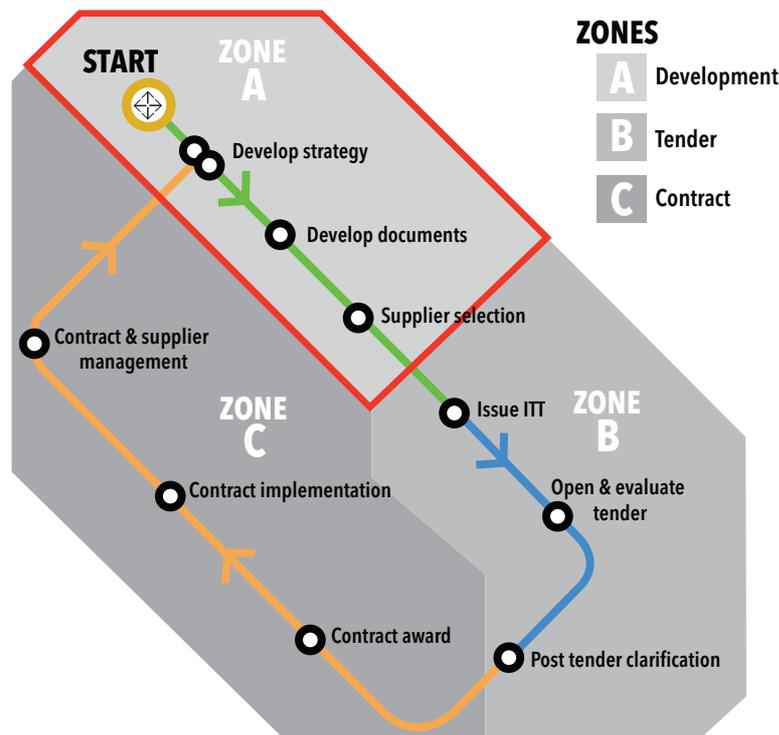
- Where the buying authority exerts on the supplying authority a control similar to that which it exercises over its own departments.
- Where 80% of the activities of the supplying authority are for the buying authority or other bodies controlled by it.
- Where there is no direct capital participation in the “supplying authority”. Direct capital participation could for instance be shares owned by a body which is not itself a public body or investment in the “supplying authority” by other legal persons.



A public or concession contract between two or more contracting authorities or entities may be exempted from the procurement regulations where the following cumulative tests are met:

- The participating contracting authorities/entities co-operate to perform public services they must provide with a view to achieving objectives they have in common;
- The implementation of that cooperation is only in respect of the public interest; and
- The participating contracting authorities/entities perform on the open market less than 20% of the activities concerned by the cooperation.

## 5. Preparation Stages



### Preliminary Market Consultations

For EU regulated procurements, it has now been made clear that public bodies may conduct market consultations. These consultations are for the preparation of the procurement and informing potential bidders of their procurement plans and requirements, as long as this activity ensures the equal treatment of suppliers and does not have the effect of distorting competition.

Preliminary Market Consultations can:

- help stimulate the market thereby increasing competition and reducing dependency on a limited number of suppliers;
- help determine the feasibility of the requirement, the best approach to the procurement including market capacity and the possible risks involved;
- be used to foster collaboration in the marketplace which can provide opportunities for smaller and/or more specialist suppliers;
- encourage suppliers to ask questions/raise queries at an early stage.

Mechanisms that may assist with early market engagement include the use of prior information notices, bidder days and webinars. Careful consideration must be given to determine how best to inform interested parties of proposals for consultation and how to conduct the consultation. No matter what method of consultation is chosen, it is essential that an effective audit trail of these interactions is created.

### Prior Involvement of Candidates or Tenderers

Sometimes a potential supplier has provided advice to a contracting authority, or has been otherwise involved in preparation for a specific procurement and then wishes to participate as a tenderer in that procurement process.

In this situation a contracting authority cannot automatically prohibit that economic operator from participating in the procurement process, but they must take appropriate measures to ensure that competition is not distorted by their participation. The contracting authority must provide all candidates/tenderers with relevant information exchanged or arising out of the economic operator's prior involvement and they must also fix adequate time limits for return of tenders.

Where it is not possible to avoid a distortion of competition arising from the prior involvement of that potential supplier in the preparation of the procurement procedure, then the discretionary exclusions permit public bodies to exclude that potential supplier.

## **Conflicts of Interest**

A conflict of interest situation can arise where members of a public body or of a contractor working for the public body, who is involved in the procurement procedure or may influence the outcome of the procurement procedure have, directly or indirectly, a financial, economic or other personal interest, which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

Public bodies must take "appropriate measures" to prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so that any distortion of competition is avoided and to ensure the equal treatment of economic operators.

Public bodies may exclude an economic operator from participation in a procurement procedure where the conflict of interest cannot be remedied by other less intrusive measures.

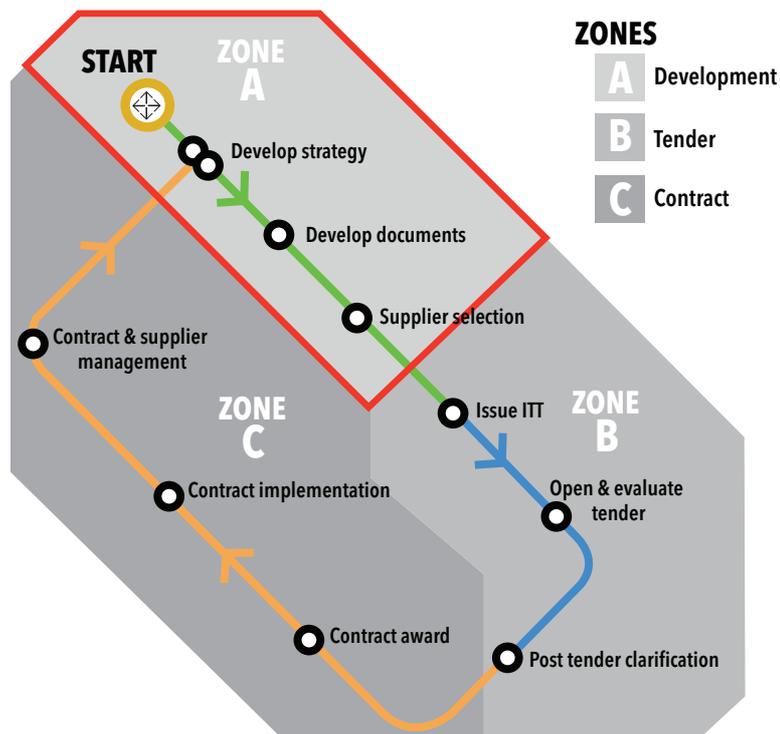
## **Combatting Corruption and Preventing Conflicts of Interest in Concession Contracts**

The Concessions Contracts (Scotland) Regulations 2016 require contracting authorities/entities to prevent, identify and remedy conflicts of interest in procurement procedures so as to avoid any distortion of competition and to ensure the transparency of the award procedure and the equal treatment of all candidates and tenderers.

This is consistent with the Public Contracts (Scotland) Regulations 2015.

However, in contrast, the Concessions Contracts (Scotland) Regulations 2016 limit the measures adopted to prevent, identify and remedy conflicts of interest to those which "shall not go beyond what is strictly necessary to prevent a potential conflict of interest or eliminate a conflict of interest that has been identified".

## 6. Technical Specifications



**BEWARE OF CREATING BARRIERS**



**ENSURE THAT SPECIFICATIONS ENCOURAGE COMPETITION**

Technical specifications used in tender documents must afford equal access to tenderers and not create unjustifiable barriers to the opening up of public procurement to competition.

The characteristics required in a technical specification may also refer to the way in which the goods, works or services are to be made or provided. These characteristics may even refer to another stage in the life cycle of these goods, works or services, even if this does not form part of their material substance (provided that they are linked to the subject matter of the contract and are proportionate to its value and its objectives). This could be the fuel economy of a generator or the energy rating of a laptop. Both of these measures are potentially relevant in a procurement exercise but they do not form a part of the generator or the laptop themselves.

Technical specifications may specify if the transfer of intellectual property rights will be required.

## **Division of contracts into lots**

One of the ways in which public procurement can encourage SMEs to bid for contracts is to split them into smaller contracts or lots.

The Public Contracts (Scotland) Regulations 2015 support this by requiring that buyers consider splitting their contracts into lots. The Regulations do not include any obligation to award contracts in the form of separate lots. In addition, there are now further questions relating to “Information about lots” on the contract notice form. If they do not split their contracts into lots, they are required to state their reasons. This explanation must be set out either in the procurement documents or in an individual report required for the contract procedure.

In addition, where more than one lot may be awarded to the same tenderer, public bodies may award contracts combining several or all lots, provided that they have specified that they reserve the right to do so and indicate the groups of lots that may be combined.

Division of contracts into lots is consistent with the sustainable procurement duty (in the Act), which requires public bodies to consider how they can facilitate SME access to public contracts. Buyers should think carefully about how their evaluation matrixes will be able to account for all scenarios.

## **Reliance on the Capacities of Other Entities**

In the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, the Public Contracts (Scotland) Regulations 2015 permit public bodies to require that certain critical tasks be performed directly by the tenderer or where the tenderer is a group by a participant of that group. These critical tasks might, for instance, be where the contract requires care for a vulnerable group, the handling of sensitive information or dangerous material, etc.

Where a contract requires the handling of sensitive information or dangerous material, the public body can require that critical tasks must be performed by an economic operator(s) with the requisite capability and capacity.

# QUIZ

## Question 7

**Are preliminary market consultations allowed where a procurement is within the scope of the new Public Contracts (Scotland) Regulations 2015?**

- a) Yes
- b) No.

## Question 8

**Technical specifications used in tenders...*(Select one that does not apply)*:**

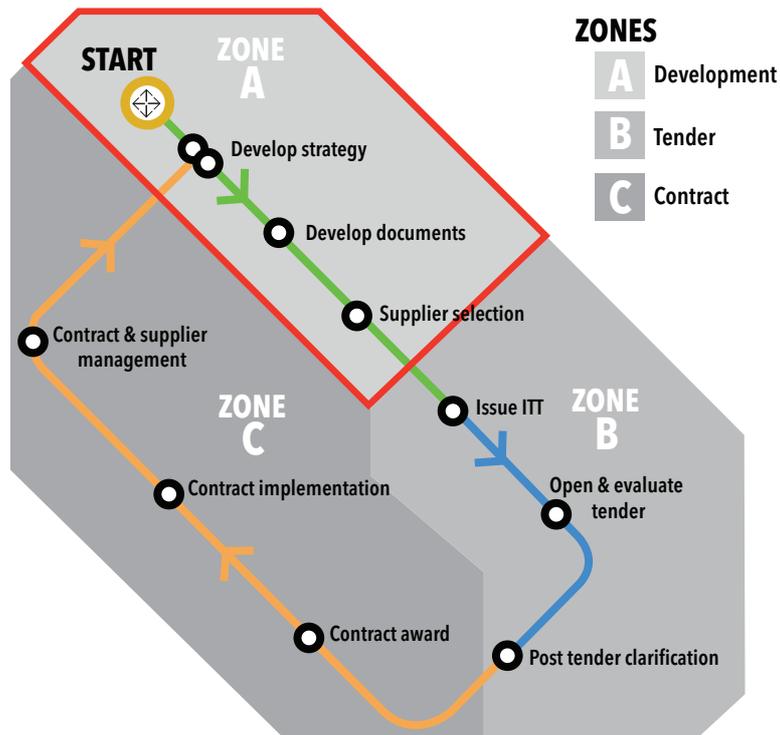
- a) Must afford equal access to tenderers
- b) May refer to the way the goods, works or services are made or provided
- c) Must refer to specific brands or sources
- d) Must be proportionate to its value and intended objectives
- e) Must link to the subject matter of the contract
- f) May refer to other life cycle stages even if this does not form part of the material substance.

## Question 9

**Must EU Regulated procurements always be split into Lots?**

- a) Yes
- b) No.

## 7. Social and Other Specific Services

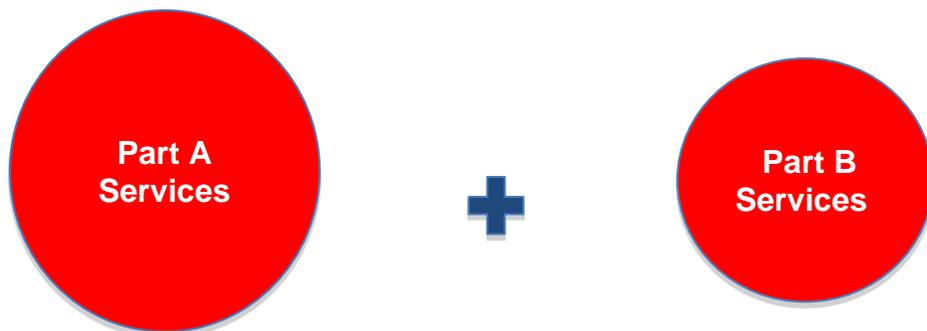


### Award of Contracts for Social and Other Specific Services

The categorisation of services has changed:

- Some of the services which were previously categorised as Part B now require the full application of the legislation.
- Some of the Part A services which required the full application of the legislation are now be listed under Annex XIV and require the light touch regime to be applied to them when their procurement is equal to or greater than £589,148.

THEN



NOW



Under the Public Contracts (Scotland) Regulations 2012, services were split into two groups. Part A covered the majority of services and were subject to the Regulations and Part B (most of which can be described as services to the person) for which there were much less stringent requirements.

Under the Public Contracts (Scotland) Regulations 2015, there are services to which the full Regulations will apply and services which, if they are listed in Annex XIV of the “Public Contracts Directive, 2014/24/EU” and equal to or exceed the £589,148 threshold, must have the “light touch regime” applied to them. Below this threshold the Reform Act applies, unlike for the other services.

## **Contracts for Health or Social Services**

Annex XIV includes some specific health or social services. The Reform Act permits a public body to award a contract for health or social care services without seeking offers in relation to the proposed contract, where the value of the contract is equal to or in excess of £50,000 and below the “light touch” regime threshold which is currently £589,148.

EU procurement legislation states that contracts below this threshold will not typically be of interest to providers from other Member States, unless there are concrete indications to the contrary. Public bodies should, therefore, consider the likelihood of interest being expressed by suppliers established in other Member States when devising a procurement strategy for health or social care contracts. Under the terms of the Reform Act, public bodies may decide to make a direct award (i.e. without competition) for a social care contract valued at less than the ‘light touch’ regime threshold or equally choose to run a competition.

Even where a public body does choose to award a contract without seeking offers, some of the provisions of the Reform Act still apply, including the need to issue a contract award notice.

The statutory guidance, published by Scottish Ministers, provides details on how to apply the rules based on contract value. It also describes how the other services in Annex XIV (i.e. non-health or social services) are handled<sup>14</sup>.

## **Publication of Notices and Principles of Awarding Contracts under the “Light Touch” Regime**

A ‘light touch’ regime applies to contracts for health or social services contracts and also to other specific services (as defined in Schedule 3 of the Public Contracts (Scotland) Regulations 2015, where the value of the contract exceeds £598,148 or Schedule 3 of the Concessions Contracts (Scotland) Regulations 2016).

Public bodies who are intending to award such a contract must make their intention known by using a contract notice or prior information notice, and must make known the results of the procurement procedure (in accordance with the principles of procurement) by using a contract award notice as set out in the legislation.

Parts H, I and J of Annex V of the Public Contracts Directive 2014 explain the information requirements for contract notices concerning contracts, PINs or contract award notices for social and other specific services.

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<sup>14</sup> <http://www.gov.scot/Resource/0049/00496919.pdf>

Public bodies wishing to award a concession for Social and Other Specific Services shall make known their intention of the planned concession award through the publication of a prior information notice.

The legislation makes it clear that public bodies may take into account the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services; the specific needs of different categories of users, including disadvantaged and vulnerable groups; the involvement and empowerment of users and innovation. Scottish Ministers have published statutory guidance for these contracts.

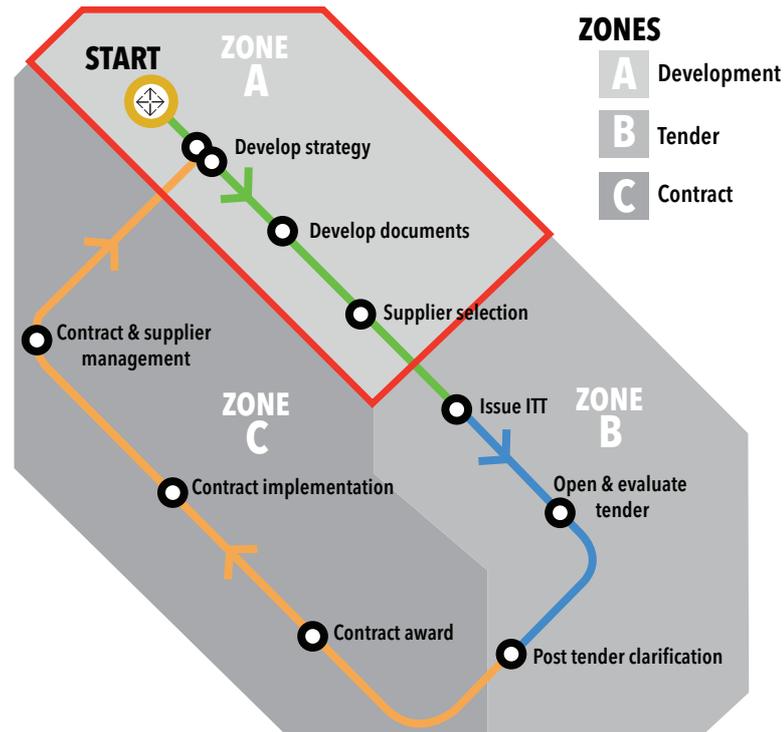
## QUIZ

### Question 10

**For health and social services, at what contract values can you choose to direct award? (excluding standard non-competitive action provisions)**  
***please select one answer:***

- a) Above EU advertising thresholds
- b) Above Reform Act but below EU advertising thresholds
- c) Below Reform Act advertising thresholds.

## 8. Techniques and Instruments for Electronic and Aggregated Procurement



### Framework Agreements

The maximum duration of a framework agreement is maintained at 4 years, other than in exceptional justified cases. For clarification, the duration of the individual contracts based on a framework agreement does not need to coincide with the duration of that framework agreement, but might be shorter or longer.

Please note that if you are awarding a contract, the duration of which will be out with the term of the framework agreement, you should be able to justify why you have closed off the market to competition for longer.

Mini-competitions (call-off contracts) may only be run by public bodies clearly identified as being able to buy from the Framework Agreement and must only involve suppliers party to the concluded Framework.

### Dynamic Purchasing Systems

A Dynamic Purchasing System is a completely electronic mechanism through which a contracting authority may buy goods, services or works and is open throughout its period of validity to any economic operator who fulfills the selection criteria. DPS now require the use of the Restricted Procedure (with the caveat that you cannot restrict the number of candidates who qualify) where previously the Open Procedure was required. Suppliers are able to be added to a DPS at any time throughout the period of arrangement, following assessment of the relevant selection criteria.

The requirement to advertise a call off contract in the OJEU has been removed. There is no longer any fixed duration for a Dynamic Purchasing System. Public bodies can ask for an updated European Single Procurement Document (ESPD) at any time during the period that the DPS is valid. The ESPD is a new form of self-declaration which an economic operator can provide at the initial stage of the selection process. Further information on the ESPD will be set out in a later chapter of this document which covers the changes to the Selection Stage.

The period that the DPS shall be valid must be indicated in the call for competition. Any changes to the period that the DPS shall be valid must be notified to the Commission. Dynamic Purchasing Systems can also be created under the Reform Act.

## **Electronic Catalogues**

Where there is a requirement for the use of electronic means of communication, public bodies can require that tenders are presented in the format of an electronic catalogue, or that an electronic catalogue is included. Please note that the chosen format cannot be restrictive.

Tenders can be sought by public bodies in eCatalogue form, provided that the call for competition made this clear and also specified the required technical format, equipment, connection requirements, etc.

eCatalogues may also be used:

- where multi-supplier frameworks have been concluded on the basis of eCatalogues, the reopening of competition for a particular contract may be achieved by seeking updated eCatalogues.
- when awarding contracts based on a Dynamic Purchasing System by requiring that offers are presented in the format of an electronic catalogue.

## **Occasional Joint Procurement**

Where two or more public bodies decide to undertake a joint procurement, in the name of all the public bodies concerned, they shall be jointly responsible for ensuring that they comply with the legislation. This also applies in cases where one public body manages the procedure, acting on its own behalf and on the behalf of the other public bodies concerned.

Where a procurement procedure is not in its entirety carried out in the name and on behalf of the public bodies concerned, they shall be jointly responsible only for those parts carried out jointly.

Each contracting authority shall have sole responsibility for fulfilling its obligations pursuant to the Regulations in respect of the parts it conducts in its own name and on its own behalf.

# QUIZ

## Question 11

**When do the sustainable procurement duty rules on supported businesses, publication on PCS and mandatory exclusions apply to framework agreements and related contracts, which are equal to or more than the Reform Act thresholds but less than the EU advertising thresholds? *(please select one answer):***

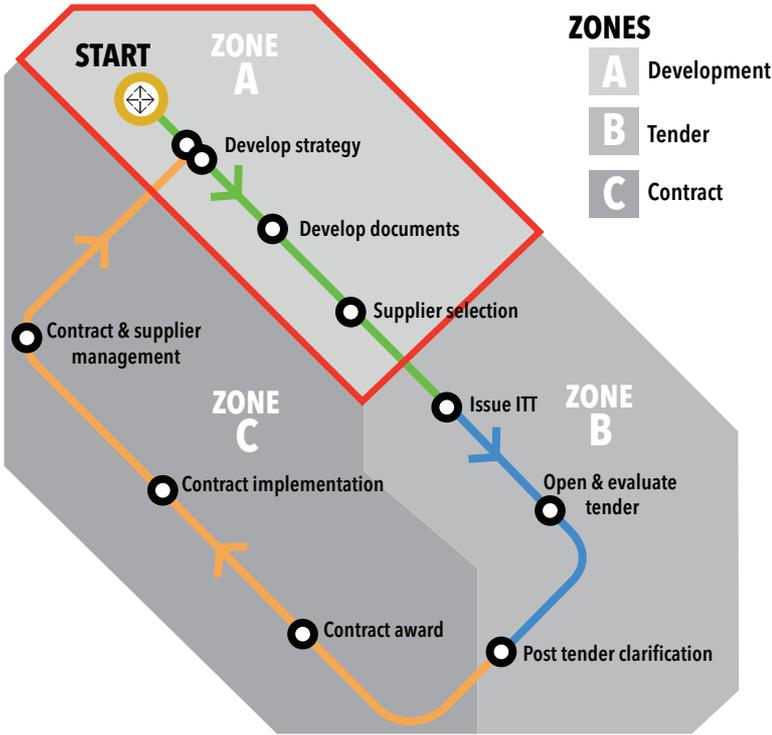
- a) In the development of the framework
- b) In the development of the framework and call offs from that agreement
- c) In the development of call offs from the agreement.

## Question 12

**Where two or more public bodies decide to undertake a joint procurement which in its entirety, is carried out jointly and in the name of all the public bodies concerned, which body or bodies are responsible for ensuring compliance with procurement regulations? *(please select one answer):***

- a) The largest public body
- b) The first named public body
- c) The body that managed the procurement procedure
- d) The public bodies will have joint responsibility.

# 9. Procurement Procedures



## Types of Procedures

Open Procedure	Use freely
Restricted Procedure	
Competitive Procedure with Negotiation	Use when justifiable
Competitive Dialogue	
Innovation Partnerships	
Negotiated Procedure Without Prior Publication	Use only in the permitted instances

The Open and Restricted Procedures may be used freely in any circumstances and for any type of contract covered by the Regulations. The only real change to these procedures are the shorter permissible timescales and the changes to the selection and award criteria which must be applied.

By contrast the following procedures may only be used where specific grounds for their use are met.

The Negotiated Procedure Without Prior Publication may only be applied when the justification for its use is within one of the nine distinct situations set out in the Regulations, and should only be used where the other procedural options have been exhausted.

## Minimum Timescales

(Further information is provided on the procedures highlighted in blue cells below, on the following pages):

	Dispatch of Prior Information Notice Minimum Days	Selection Stage Minimum Days	Award Stage Minimum Days
<b>Open Procedure</b>	N/A	N/A	<b>35</b>
<b>Open Procedure</b> with electronic submission of tenders	N/A	N/A	<b>30</b>
<b>Open Procedure</b> with publication of compliant PIN	<b>35</b>	N/A	<b>15</b>
<b>Open Procedure</b> with duly substantiated state of urgency	N/A	N/A	<b>15</b>
<b>Restricted Procedure</b>	N/A	<b>30</b>	<b>30/10</b>
<b>Restricted Procedure</b> with electronic submission of tenders	N/A	<b>30</b>	<b>25/10</b>
<b>Restricted Procedure</b> with publication of compliant PIN	<b>35</b>	<b>30</b>	<b>10</b>
<b>Restricted Procedure</b> - Use of a PIN as a call for competition	<b>35</b>	<b>30</b>	<b>30/25/10</b>
<b>Restricted Procedure</b> with duly substantiated state of urgency	N/A	<b>15</b>	<b>10</b>
<b>Competitive Procedure with Negotiation</b>	N/A	<b>30</b>	<b>30/10</b>
<b>Competitive Procedure with Negotiation</b> with electronic submission of tenders	N/A	<b>30</b>	<b>25/10</b>
<b>Competitive Procedure with Negotiation</b> with publication of compliant PIN	N/A	<b>30</b>	<b>10</b>
<b>Competitive Procedure with Negotiation</b> with PIN as a call for competition	<b>35</b>	<b>30</b>	<b>30/25/10</b>
<b>Competitive Procedure with Negotiation</b> with duly substantiated state of urgency	N/A	<b>15</b>	<b>10</b>
<b>Negotiated Procedure Without Prior Publication</b>	N/A	N/A	None
<b>Competitive Dialogue</b>	N/A	<b>30</b>	None
<b>Innovation Partnership</b>	N/A	<b>30</b>	None
<b>Dynamic Purchasing System</b>	N/A	<b>30</b>	<b>10</b>

### Prior Information Notices & timescales

PINs can be used in most tendering situations where there is sufficient time, however, where they are being used to shorten the minimum procedural time limits they must be sent for publication between 35 days and 12 months before the date on which the contract notice is sent.

## Minimum Timescales (continued)

<p><b>Open Procedure</b></p>	<ul style="list-style-type: none"> <li>• Minimum 35 days or 30 days where tenders submitted electronically</li> </ul>
<p><b>Open Procedure – with publication of a compliant Prior Information Notice</b></p>	<ul style="list-style-type: none"> <li>• PIN must be dispatched between 35 days and 12 months before contract notice sent to OJEU</li> <li>• Dispatch contract notice to OJEU</li> <li>• Minimum 15 days</li> </ul>
<p><b>Open Procedure – with a duly substantiated state of urgency</b></p>	<ul style="list-style-type: none"> <li>• Minimum 15 days</li> </ul>
<p><b>Restricted Procedure</b></p>	<ul style="list-style-type: none"> <li>• Minimum 30 days</li> <li>• Deadline for request to participate and submission of selection stage information</li> <li>• Dispatch invitation to tender to selected candidates</li> <li>• 30 days (or 25 days for electronic submission). Option for all specific categories of sub-central contracting authorities to agree time limit with candidates, default of at least 10 days where no agreement</li> </ul>
<p><b>Restricted Procedure – with publication of a compliant PIN</b></p>	<ul style="list-style-type: none"> <li>• Dispatch PIN between 35 days and 12 months before contract notice sent to OJEU</li> <li>• Minimum 30 days</li> <li>• Closing date for request to participate and submission of selection stage information</li> <li>• Dispatch invitation to tender to selected candidates</li> <li>• Minimum 10 days. Option for all or specific categories of sub-central contracting authorities to agree time limit with candidates, default of at least 10 days where no agreement</li> </ul>
<p><b>Restricted Procedure – use of a PIN as a call for competition</b></p>	<ul style="list-style-type: none"> <li>• Dispatch PIN as a call for competition to OJEU between 35 days and 12 months before sending invitation to confirm interest</li> <li>• Following the deadline to express an interest, simultaneously invite the candidates to confirm their interest</li> <li>• Minimum 30 days</li> <li>• Closing date for confirmation of interest and submission of selection stage information</li> <li>• Dispatch invitation to tender to selected candidates</li> <li>• 30 days (or 25 days for electronic submission). Option for all or specific categories of sub-central contracting authorities to agree time limit with candidates, default of at least 10 days where no agreement</li> </ul>

<p><b>Restricted Procedure – with duly substantiated state of urgency</b></p>	<ul style="list-style-type: none"> <li>• Minimum 15 days</li> <li>• Closing date for request to participate and submission of selection stage information</li> <li>• Dispatch invitation to tender to selected candidates</li> <li>• Minimum 10 days. Option for all or specific categories of sub-central contracting authorities to agree time limit with candidates, default of at least 10 days where no agreement</li> </ul>
<p><b>Competitive Procedure with Negotiation</b></p>	<ul style="list-style-type: none"> <li>• Minimum 30 days</li> <li>• Deadline for request to participate and submission of selection stage information</li> <li>• Invitation to submit initial tenders</li> <li>• 30 days (or 25 days for electronic submission). Option for all or specific categories of sub-central contracting authorities to agree time limit with candidates, default of at least 10 days where no agreement</li> <li>• Deadline for receipt of initial tenders</li> <li>• Determine whether to award the contract based on the initial tenders or whether to continue with negotiation</li> <li>• No statutory timescales for negotiation phase(s)</li> <li>• Tenderers informed that the contracting authority intends to conclude negotiations and are invited to submit any new or revised tenders</li> <li>• No minimum period specified. Common period to be set for all tenderers</li> <li>• Deadline for receipt of tenders</li> </ul>
<p><b>Competitive Procedure with Negotiation – with publication of a compliant PIN</b></p>	<ul style="list-style-type: none"> <li>• Dispatch PIN between 35 days and 12 months prior to sending contract notice to OJEU</li> <li>• Minimum 30 days</li> <li>• Deadline for request to participate and submission of selection stage information</li> <li>• Invitation to submit tenders</li> <li>• Minimum 10 days. Option for all or specific categories of sub-central contracting authorities to agree time limit with candidates, default of at least 10 days where no agreement</li> <li>• Deadline for receipt of initial tenders</li> <li>• Award the contract based on initial tenders or invite tenderers to negotiate</li> <li>• No statutory timescales for negotiation phase(s)</li> <li>• Tenderers informed that the contracting authority intends to conclude negotiations and are invited to submit final tenders</li> <li>• Deadline for receipt of final tenders</li> </ul>

<p><b>Competitive Procedure with Negotiation - with PIN as a call for competition</b></p>	<ul style="list-style-type: none"> <li>• Dispatch PIN as a call for competition to OJEU between 35 days and 12 months before sending initiation to confirm interest</li> <li>• Following the deadline to express an interest, simultaneously invite the candidates to confirm their interest</li> <li>• Minimum 30 days</li> <li>• Deadline for confirmation of interest and submission of selection stage information</li> <li>• Dispatch of invitation to submit initial tender to successful candidates</li> <li>• 30 days (or 25 days for electronic submission). Option for all or specific categories of sub-central contracting authorities to agree time limit with candidates of at least 10 days where no agreement</li> <li>• Deadline for receipt of initial tenders</li> <li>• Award the contract based on initial tenders or invite tenderers to negotiate</li> <li>• No statutory timescales for negotiation phase(s)</li> <li>• Tenderers informed that the contracting authority intends to conclude negotiations and are invited to submit final tenders</li> <li>• Deadline for receipt of final tenders</li> </ul>
<p><b>Competitive Procedure with Negotiation - with duly substantiated state of urgency</b></p>	<ul style="list-style-type: none"> <li>• Minimum 15 days</li> <li>• Closing date for request to participate and submission of selection stage information</li> <li>• Dispatch of invitation to submit initial tender</li> <li>• Minimum 10 days. Option for all or specific categories of sub-central contracting authorities to agree time limit with candidates, default of at least 10 days where no agreement</li> <li>• Closing date for receipt of initial tender</li> <li>• No statutory timescales for negotiation phase(s)</li> <li>• Tenderers informed that the contracting authority intends to conclude negotiations and are invited to submit final tenders</li> <li>• Closing date for receipt of final tenders</li> </ul>
<p><b>Competitive Dialogue</b></p>	<ul style="list-style-type: none"> <li>• Minimum 30 days</li> <li>• Closing date for request to participate and submission of selection stage information</li> <li>• Contracting authority invites selected candidates to participate in the dialogue</li> <li>• No minimum period specified. Several stages of dialogue may be undertaken to reduce the number of solutions</li> <li>• Declaration that dialogue is concluded. Invitation to submit final tenders</li> <li>• No minimum period specified</li> <li>• Deadline for receipt of final tenders</li> <li>• Tenders may be clarified, specified or optimised but this must not involve the essential aspects or distort competition</li> </ul>

<p><b>Innovation Partnership</b></p>	<ul style="list-style-type: none"> <li>• Minimum 30 days</li> <li>• Deadline for request to participate and submission of selection stage information</li> <li>• Invite 1 or 3 or more selected innovation partners</li> <li>• No minimum period specified for multiple mini tender stages may be undertaken to develop and reduce the number of solutions. Option to terminate after each stage</li> <li>• Invite partners to submit final tenders. No minimum period specified.</li> <li>• Evaluate final solutions and terminate the partnership or award the contract</li> <li>• If contract is awarded manage supply of goods, works or services</li> </ul>
<p><b>Concession Minimum Timescales</b></p>	<ul style="list-style-type: none"> <li>• The minimum time limit for the receipt of applications whether or not including tenders for a concession shall be 30 days from the date on which the concession notice was sent.</li> <li>• However if the procedure is to take place in successive stages the minimum time limit for the receipt of initial tenders shall be 22 days from the date on which the invitation to tender is sent.</li> <li>• These minimum time limits can be shortened by 5 days where tenders may be submitted by electronic means.</li> <li>• Concession award notices on the results of the concession award procedure must be sent not later than 48 days after the award of the concession.</li> <li>• It should be noted that the Concessions Contracts Regulations do not prescribe detailed procedures, but do include general principles and procedural guarantees relating to specifications, selection and award criteria, and providing information to the candidates and tenderers.</li> </ul>

# Procurement Procedures

## Open Procedure

In the open procedure public bodies are permitted to evaluate tenders before applying the selection stages, exclusion grounds and criteria. However, if a public body chooses to do this, they must ensure that no grounds for exclusion apply to the winning tenderer and that they meet the selection criteria.

This must be carried out in an impartial and transparent manner to ensure that no contract is awarded to a tenderer who should have been excluded or who does not meet the selection criteria.

## Competitive Procedure with Negotiation (CPN)

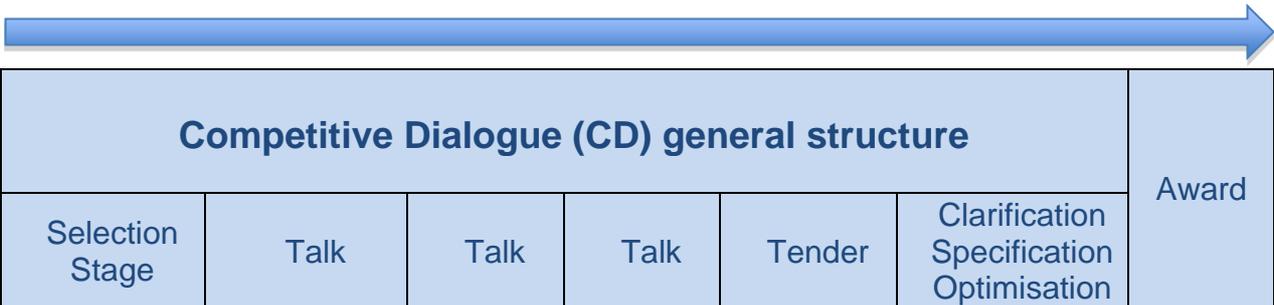
The Competitive Procedure with Negotiation (CPN) replaces the old negotiated procedure with prior publication for the public sector (whereas the negotiated procedure remains in place for the utilities sector).

The major difference between the CPN and the negotiated procedure with prior publication is the greater ease with which its use may be justified by public bodies.

The CPN permits limited negotiation but this must not involve the minimum requirements or the award criteria and must not distort competition. These requirements must be detailed enough for a potential supplier to work out whether they should bid or not. In addition, certain elements of the restricted procedure must be applied to the negotiated procedure. Lastly, if a public body is wishing to award the contract on the basis of the initial tenders without negotiation then it must reserve the possibility of doing so in the contract notice or the invitation to confirm interest.

## Competitive Procedure with Negotiation or Competitive Dialogue?

As these procedures are now able to be justified in the same way, procurers will have to determine which of them best meets their needs.



The CPN requires the development of a specification of its requirements in advance of inviting submissions from bidders, and to structure the negotiation around those requirements. It is likely that many procurers will opt for the CPN where they have a clearer idea of the possible solution. In contrast, the CD simply requires that procurers identify their needs without having to prescribe the nature, characteristics or solutions to be offered.

Following the selection stage, the CPN requires procurers to conduct an initial tender stage. Public bodies may award contracts on the basis of these initial tenders where they have reserved the possibility of doing so in the contract notice (or the invitation to confirm interest). If the contract is not awarded at this stage, there may be multiple stages of negotiation/dialogue (based on the bidder's initial tender) with this process culminating in a new or revised tender and then the award of a contract.

Clarification, specification and optimisation (or additional information) may be provided following a request by a public body. However, this information may not involve changes to the essential aspects of the tender or the procurement. This includes the needs and requirements set out in the contract notice or in the descriptive document, where such changes are likely to distort competition or cause discrimination e.g. final planning permission where required for a large build or getting a quote from a financial market to ascertain an up to date cost for financing a large project.

Once the selection stage is complete, CD permits multiple dialogue stages (to be set by the public body) during which the number of solutions may be reduced (where they have reserved the possibility of doing so in the contract notice or descriptive document). Once the public body has identified the solutions which are capable of meeting its needs, they may declare that the dialogue has been concluded and ask the bidders to submit their final tenders, following which there may be clarification, specification and optimisation of the preferred bidder's final tender.

CD is most useful in situations where the public body knows what outputs or outcomes they want but not necessarily how they might achieve them. Therefore procurements involving innovative projects, the implementation of major integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing can all fit well with CD. Following selection, the CD process is aimed at the parallel development of solutions and culminates with the final tender which can be clarified, optimised or fine-tuned prior to contract award.

### **Use of Competitive Procedure with Negotiation or Competitive Dialogue**

Public bodies may apply a Competitive Procedure with Negotiation or a Competitive Dialogue with regard to works, supplies or services fulfilling one or more of the following criteria:

- a) the needs of the public body cannot be met without adaptation of readily available solutions;
- b) they include design or innovative solutions;
- c) the contract cannot be awarded without prior negotiations because of specified circumstances related to the nature, the complexity of the contract, the legal and financial make-up or because of the risks attaching to any of them;
- d) the technical specifications of the contract cannot be established with sufficient precision by the public body with reference to a standard, European Technical Assessment, common technical specification or technical reference.

In addition, public bodies may now apply a Competitive Dialogue procedure with regard to works, supplies or services in response to an open or a restricted procedure where only irregular or unacceptable tenders are submitted.

In such situations contracting authorities shall not be required to publish a contract notice where they include in the procedure all of, and only, the tenderers which satisfy the criteria set out in regulations 57 to 64 (criteria for qualitative selection) of the Public Contracts (Scotland) Regulations 2015 and which, during the prior open or restricted procedure submitted tenders in accordance with the formal requirements of the procurement procedure.

- Examples of irregular tenders are those which are late, where there is evidence of collusion or corruption or those which are abnormally low.
- Examples of unacceptable tenders are those where the tenderers do not have the required qualifications, tenders where the price exceeds the public body's budget as determined and documented prior to the launching of the procurement procedure.

### Innovation Partnership

Under the Public Contracts (Scotland) Regulations 2012 public bodies faced a practical problem: they may well have been able to justify awarding a research and development contract without competition. However, if the outcome was a useful product, service or works they may have been unable to purchase this directly from the developer without further competition.

The Innovation Partnership aims to resolve this issue by combining the following components in to one procedure:

- the appointment of one or several partners conducting separate research and development activities;
- parallel and innovative development work as well as permitting the number of partners to be reduced; and
- an option for the public body to purchase the innovative supplies, services or works developed as a result of the Innovation Partnership.

The Regulations define "innovation" as "the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, new marketing method, new organisational method in business practices, workplace organisation or external relations inter alia with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy for smart, sustainable and inclusive growth".

It is important to understand that innovation partnerships may only be used where there is a need for the development of an innovative product, service or works which is not already available on the market:

- While an innovative solution is the objective, this outcome must meet the minimum requirements set out in the procurement documents and be within the agreed performance levels and maximum costs.
- The information provided shall be sufficiently precise to enable economic operators to identify the nature and scope of the required solution and decide whether to request to participate in the procedure.

- It should be noted that the recitals state that public bodies should not use innovation partnerships in such a way as to prevent, restrict or distort competition.

Public bodies should be careful when setting minimum requirements as these have the potential to restrict their ability to take advantage of innovative proposals. This could occur where an authority does not know as much about the potential solutions to their requirement as the market and their minimum requirements have the effect of restricting innovation and therefore competition.

Public bodies may set up an innovation partnership, with one or several partners, conducting separate research and development activities with the aim of developing an innovative product service or works and their subsequent supply, provided that they correspond to the performance levels and maximum costs agreed between the public bodies and the participants. The innovation partnership shall be structured in successive stages, following the sequence of steps in the research and innovation process, and shall set intermediate targets to be attained by the partners and provide for payment in appropriate instalments.

Where there are sufficient partners, a public body may conduct a staged reduction based on those targets, as long as they have indicated those possibilities and the conditions for their use in the procurement documents.

Public bodies shall negotiate with tenderers to improve the content of the initial and all subsequent tenders submitted by them, except for the final tenders. In addition this negotiation should not be based on the minimum requirements or the award criteria. The procurement documents shall indicate the regime applicable to intellectual property rights.

Just as with the Competitive Procedure with Negotiation and the Competitive Dialogue Procedure, public bodies must ensure the equal treatment of all tenderers and part of this requires that confidentiality must be maintained to prevent any distortion of competition. Information must not be divulged without the express permission of the tenderer and this permission shall only be given with reference to the intended communication of specific information.

<b>Phase One</b>	<b>Award procedure conducted in accordance with the Regulations to choose the partner or partners that will subsequently participate in the innovation phase of the awarded contract.</b>
<b>Phase Two</b>	<b>After contract award the final elements of the contract may be developed through technical dialogue prior to contract execution. It should be noted that this should not involve the minimum requirements or the award criteria.</b>
<b>Phase Three</b>	<b>Following the outcome of the innovation phase, phase three concerns the placing of orders for the purchase of the goods, works or services constituting the outcome of the innovation phase.</b>

## Use of the Negotiated Procedure without Prior Publication

While this procedure remains largely unchanged, the wording has been clarified to explain more clearly when this procedure can be used where an open or restricted procedure fails.

A tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the public body's needs and requirements as specified in the procurement documents.

A request for participation shall be considered not to be suitable where an economic operator is to be or may be excluded based on the mandatory or discretionary exclusion criteria or where it does not meet the selection criteria set out by the public body pursuant to the Regulations.

Public bodies must publish a contract award notice in OJEU within 30 days of awarding the contract, if the procurement is caught by the Public Contracts (Scotland) Regulations 2015 and is above the advertising thresholds.

## QUIZ

### Question 13

Where a public body engages with the market without prescribing the nature, characteristics or solutions to be offered, which of these procurement procedures is designed for use within these circumstances? *(please select one answer):*

- a) Competitive Dialogue
- b) Competitive Procedure with Negotiation
- c) Open Procedure.

### Question 14

A public body is seeking an innovative product, service or works (above the EU Thresholds) and has determined that this cannot currently be met by the market. Does it...*(please select one answer):*

- a) Consider entering into exclusive discussions with one supplier?
- b) Consider an Innovation Partnership to research and develop innovative solutions with option to procure the eventual solution?
- c) Consider deferring the procurement?

### Question 15

Innovation Partnerships may be used where...*(please select all that apply):*

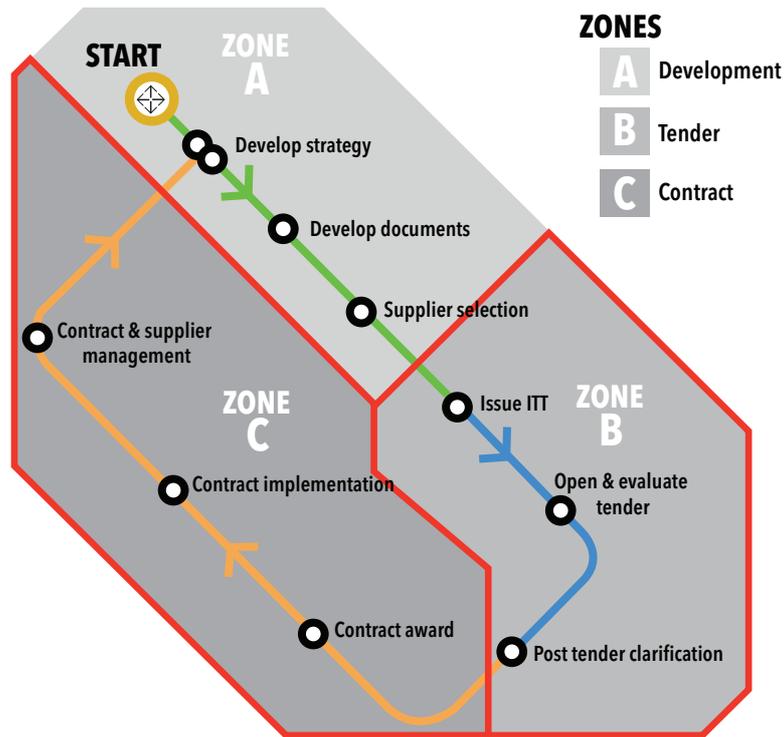
- a) There is a need to expand the number of suppliers providing an existing solution that aims to deliver above target savings
- b) There is a need for the development of an innovative product, service or works and that the subsequent purchase of these cannot be met by solutions already available on the market
- c) There is a need for the development of an innovative product, service or works, currently available on the market.

### Question 16

In an Open Procedure, under the new Public Contracts (Scotland) Regulations 2015, selection stage exclusion grounds may...*(please select one answer):*

- a) Be applied before examining tenders
- b) Be applied after examining tenders.

## 10. Publication and Transparency



### Prior Information Notices (PINs)

While PINs can still be used for early market engagement and to reduce procedural time limits, the Public Contracts (Scotland) Regulations 2015 now allow sub-central public bodies to use PINs as a call for competition in restricted procedures or competitive procedures with negotiation. A PIN can also be used as a call for competition in the Procurement (Scotland) Regulations 2016. The notice must:

- clearly state the supplies, works or services that will be the subject of the contract to be awarded;
- indicate that the contract will be awarded by restricted procedure or competitive procedure with negotiation (for EU Regulated procurements) without further publication of a call for competition and invites interested economic operators to express their interest;
- contain all the information that is necessary for a potential supplier to express their interest and understand the procurement as set out in Annex V (Part B) (Sections I and II) of the Public Contracts Directive 2014; and
- be sent for publication between 35 days and 12 months before asking those suppliers (who have noted an interest) to confirm their continuing interest.

PINs used as a call for competition shall not be published on a buyer profile.

Publication at national level must not be made prior to its publication in the OJEU, and must not contain any information over and above that contained within the OJEU advert. Public bodies should receive a receipt from the EU Publications Office once they have sent their notice for publication. Public bodies can publish at a national level once, either, they receive confirmation from OJEU that their notice has been published or 48 hours have elapsed from the notification of the receipt of their notice.

The period covered by the PIN shall be a maximum of 12 months from the date the notice is transmitted for publication. However, in the case of public contracts for social and other specific services, the PIN may cover a period which is longer than 12 months.

## Publication of Contract Award Notices and Contract Awards

In addition to the existing OJEU publication requirements, the Procurement Reform (Scotland) Act 2014 require all public bodies who are conducting a regulated procurement to publicise their intention to seek offers (contract notice) and the award of a contract or framework agreement (award notice) on Public Contracts Scotland (PCS)<sup>15</sup>.

While public bodies must publish a contract award notice when they establish a framework agreement as well as for the results of call-off contracts deriving from them, they do not have to publicise the fact that they are running their call off on PCS. Call offs do not have to be published in OJEU, but above Reform Act threshold call off awards must be published in PCS.

### Public Contracts Scotland

- The PCS Info Centre<sup>16</sup> contains further information on how public bodies can meet their publication obligations.
- PCS also meets the minimum requirements for electronic means of communication.
- All public bodies are provided with the opportunity to publicly host their Contract Register on PCS.

### Contract Award Notices

The new contract award standard form introduced by the European Commission requires public bodies to provide information over and above that previously required when completing a contract award notice.

The legislation provides the full details of what must be contained in a contract award notice. One of the ways in which the new contract award notice has been updated is in the new “Information about tenders” section which requires information about the:

- Number of tenders received;
- Number of tenders received from SMEs;
- Number of tenders received from tenderers from other EU Member States;
- Number of tenders received from tenderers from non-EU Member States;
- Number of tenders received by electronic means; and
- Whether or not the contract has been awarded to a group of economic operators.
- Public bodies should give early consideration as to how they will gather this information.

The time limit for publication of a contract award notice (on the results of the procurement procedure) has been reduced from 48 calendar days down to 30 calendar days after the award of a contract, the conclusion of a framework agreement or the award of a contract based on a dynamic purchasing system. This 30 day time limit for publication of contract award notices also applies to contracts awarded under the Reform Act Regulations.

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<sup>15</sup> <http://www.publiccontractsscotland.gov.uk/>

<sup>16</sup> <http://www.publiccontractsscotland.gov.uk/info/InfoCentre.aspx?ID=1361>

Certain information on the contract award or the conclusion of the framework agreement may be withheld from publication where its release would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of a particular economic operator, public or private, or might prejudice fair competition between economic operators.

Although this is very similar to the wording in the 2004 public procurement Directive, the inclusion of the phrase “a particular” before economic operator, makes it much clearer that public bodies should consider whether the release of a specific economic operator’s information would have any of the negative effects that are listed in this paragraph.

### **Publication at National Level**

Previously as soon as you had proof that a notice had been dispatched to OJEU you could publish the same information at a national level. Under the new regime, you are required to wait, either, until you have confirmation that the notice has been published in OJEU or for 48 hours - whichever is the soonest. Such confirmation shall constitute proof of publication. Public Contracts Scotland will automatically publish a notice (and the public body will be notified) if a receipt has been received from the EU Publications Office, but the notice has not been published within 48 hours.

- For OJEU contracts, the publication of PINs, contract notices and contract award notices at national level is prohibited prior to their publication in the OJEU.
- The OJEU publications office will normally provide public bodies with confirmation of receipt of the notice and of publication of the information sent indicating the date of that publication.
- Following this publication at European level, further publication may take place at national level. However, where a public body has received confirmation of receipt of the notice but not publication, they may publish the information at national level once 48 hours have elapsed from their confirmation of the receipt of the notice. Notices published at national level shall not contain information other than that contained in the notices dispatched to OJEU.

### **Commerce – Further Information**

Systems provided by Scottish Government for public procurement purposes are reviewed and updated to ensure they are compliant with the current legislation.

#### **Public Contracts Scotland**

For further information on updates to PCS, please click on the following link - [Public Contracts Scotland](#)

#### **PCS-Tender**

For further information on updates to PCS-T, please click on the following link - [Public Contracts Scotland- Tender](#)

#### **Procurement Journey and Supplier Journey**

Announcements to updates on the Procurement Journey will be made through the pop-up box, the updates section and emails, if you have subscribed to “Notify me of Changes”.

- <https://www.procurementjourney.scot/>
- <https://www.procurementjourney.scot/help-advice>
- <https://www.supplierjourney.scot/>

# Supplier Development Programme

This organisation provides local businesses with free access to procurement advice and training, including training on the ESPD. Further information is available at <https://www.sdpscotland.co.uk/>.

## Electronic Communication and Information Exchange

18 <sup>th</sup> April 2017	<b>All communication must be by electronic means for EU Regime procurements commenced by Central Purchasing Bodies from this date.</b>
18 <sup>th</sup> April 2018	<b>European Single Procurement Document must be published exclusively in electronic format for all EU Regime procurements from this date.</b>
18 <sup>th</sup> October 2018	<b>All communication must be by electronic means for EU Regime procurements commenced by all public bodies from this date.</b> <b>Public bodies must obtain the relevant information directly by accessing a national database.</b> <b>Public bodies must require the certificates or forms of documentary evidence that are covered by e-Certis</b>

## Rules Applicable to Communication

The tools and devices to be used for this electronic communication, as well as their technical characteristics, must be non-discriminatory, generally available and interoperable with the ICT products in general use and must not restrict access to the procurement procedure.

Public bodies may, where necessary, require the use of tools and devices which are not generally available, provided that they offer alternative means of access.

Alternative means:

- Which offer unrestricted and full direct access free of charge by electronic means to those tools and devices; specify the internet address they are available from and ensure they are available from the outset of the procurement.
- Which ensure that tenderers having no access to tools and devices or the possibility of obtaining them within the relevant time limits (provided this is not the tenderers fault) may access the procurement procedure free of charge online.
- Which supports an alternative channel for electronic submission of tenders.

Public bodies are allowed to speak to potential suppliers as long as this communication does not interfere with the essential elements of a procurement procedure and this interaction is documented to a sufficient degree, and by appropriate means (such as written records or summaries of the main elements of the communication).

For avoidance of doubt, the “essential elements” of a procurement procedure include the procurement documents, requests for participation (applications in the Concessions Contracts (Scotland) Regulations 2016), confirmations of interest and tenders.

## Confidentiality

It is well established that unless otherwise provided for in the Regulations (e.g. Contract Award Notices, Informing candidates and tenderers or under the Freedom of Information (Scotland) Act 2002) public bodies must not disclose any information forwarded to them by bidders who have designated it as confidential.

Public bodies are able to impose requirements on bidders to protect confidential information that public bodies make available throughout the procurement procedure.

## Charges for Participation in Procurement Exercises

Public bodies must not charge a fee for participation in their procurement exercises. This includes a fee to provide any document required to participate in that process.

## QUIZ

### Question 17

**Prior Information Notices (PIN) may be used as a call for competition by sub-central public bodies in which of the following procedures?  
(select all the apply):**

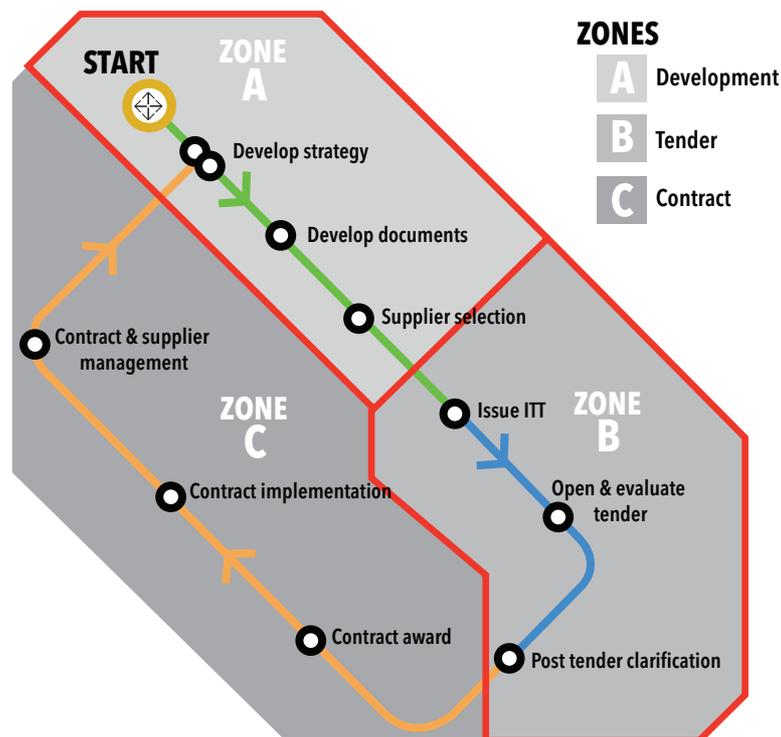
- a) Open procedure
- b) Restricted procedure
- c) Competitive procedure with negotiation
- d) Competitive dialogue
- e) Innovation partnership
- f) Negotiated procedure without a call for competition.

### Question 18

**Under the Procurement Reform (Scotland) Act 2014 which of the following must be publicised on Public Contracts Scotland (PCS)?  
(select all the apply):**

- a) Regulated procurement- contract notices
- b) Regulated procurements- contract award notices
- c) Regulated procurements- framework award notices
- d) Regulated procurements- results of calls offs from frameworks
- e) Regulated procurements- notice of intention to run call offs from frameworks.

## 11. Selection Stage



### Mandatory Exclusion Grounds

Under the EU, Concessions and Reform Act Regimes, public bodies must exclude a potential supplier from participation in a procurement procedure where they have established, or are otherwise aware that the potential supplier has been the subject of a conviction in the last five years. For blacklisting, EU law limits the period to three years.

Scottish Ministers have published statutory guidance on the selection of tenderers and award of contracts<sup>17</sup>.

### Criminality Exclusion Grounds

These are the mandatory exclusion grounds based on criminality. These exclusion grounds should not be confused with contracts which are excluded from the scope of the Regulations (see chapter 4). Instead, these mandatory and discretionary exclusions are for the purpose of preventing public sector funds going to criminals or any other unsuitable economic operators.

More detailed information about the offences listed here can be found in regulation 58 of the Public Contracts (Scotland) Regulations 2015, regulation 8 and regulation 9(1) of the Procurement (Scotland) Regulations 2016.

All exclusion grounds in bold are new:

- Conspiracy where it relates to participation in a criminal organisation
- Corruption
- Bribery
- Fraud
- **Terrorist offences or offences linked to terrorist activities**
- Money laundering or **terrorist financing**

<sup>17</sup> <http://www.gov.scot/publications/2016/03/8410>

- **Child labour and other forms of trafficking in human beings**

The maximum period for exclusion shall be five years from the date of the conviction. The obligation to exclude a potential supplier shall also apply where the person convicted by final judgement is a member of the administrative, management or supervisory body of that potential supplier or has powers of representation, decision or control therein.

## **Tax and Social Security**

Public bodies must exclude a supplier from an EU Regime procurement procedure where they are aware that the supplier is in breach of its obligations relating to the payment of taxes or social security contributions and where this has been established by a judicial or administrative decision having final and binding effect.

Public bodies should exclude a supplier under Reform Act procurements where it can be demonstrated by any appropriate means, that the supplier is in breach of its obligation to pay taxes or social security contributions.

Where such a decision would be disproportionate in light of all relevant facts, or the supplier has paid, or entered into an agreement to pay the sums due, or the obligation to make a payment otherwise ceases, public bodies may decide not to exclude the supplier.

## **Blacklisting**

Blacklisting refers to the practice of systematically denying individuals employment on the basis of information, accurate or not, held in some type of database.

When a public body is aware that a supplier has breached the Employment Relations Act 1999 (Blacklists) Regulations 2010 and has been found to have done so in a formal ruling (e.g. by tribunal or court), or has admitted this, it is now mandatory for the public body to exclude the supplier from bidding for a public contract.

This will be for a period of three years from the date on which the blacklisting took place, unless within that time the supplier has demonstrated that it has taken appropriate remedial measures.

## **But May Not Exclude If:**

## **Self-Cleansing and Periods of Exclusion**

Where a bidder should have been excluded as a result of one of the mandatory or discretionary exclusions, they may provide evidence that they have taken measures which are sufficient to demonstrate reliability despite the existence of the ground for exclusion.

For this purpose, the bidder shall:

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

It is for the public body to decide whether sufficient evidence has been provided, by taking into account the gravity and particular circumstances of the offence or misconduct. If the public body considers their evidence to be insufficient, they must provide a statement of the reasons for their decision to continue to exclude the bidder.

### **Tax and Social Security (obligations paid or minor amounts)**

If a potential supplier has paid, or has entered into a binding arrangement with a view to paying the taxes or social security contributions due (including any applicable interest accrued or fines), or the obligation to pay is removed, that potential supplier cannot be excluded from the competition. Please note that this exemption applies to both the mandatory exclusion ground and the discretionary ground.

A public body may, however, decide not to exclude a potential supplier where it would be clearly disproportionate to do so, particularly where only minor amounts of taxes or social security contributions are unpaid, or where they have not had sufficient time to pay or put in place arrangements to pay what is due, before submitting their tender.

### **Exceptional circumstances where mandatory exclusion need not be applied**

Public bodies can decide not to apply any or all of the mandatory exclusion grounds to a regulated or EU-regulated procurement only in exceptional circumstances.

Such a decision to award a public contract to a potential supplier who may in breach of one or more of these exclusion grounds, must only be taken in exceptional circumstances, where the contract is necessary for overriding reasons relating to the public interest, such as public health or protection of the environment. For example, where urgently needed vaccines or emergency equipment can only be purchased from an economic operator to whom one of the mandatory grounds for exclusion otherwise applies.

### **Discretionary Exclusion Grounds**

Public bodies may exclude suppliers from participation in a procurement procedure, for a maximum of 3 years from the date the event occurred. Scottish Ministers have published statutory guidance on the selection of tenderers and award of contracts.

### **Tax and Social Security**

Public bodies should exclude a supplier where it can be demonstrated by any appropriate means, that the supplier is in breach of its obligation to pay taxes or social security contributions. Where such a decision would be disproportionate in light of all relevant facts, or the supplier has paid, or entered into an agreement to pay the sums due, or the obligation to make a payment otherwise ceases, public bodies may not exclude the supplier.

### **Breach of environmental, social or labour law**

The public body can demonstrate by any appropriate means a violation by the supplier of applicable obligations in the fields of environmental, social and labour law established by EU law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X to the Public Contracts Directive 2014/24/EU.

## **Bankruptcy**

The supplier is bankrupt or is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it is in an arrangement with creditors, where its business activities are suspended or it is in any analogous situation arising from a similar procedure under laws and regulations to which the suppliers may be subject.

## **Grave professional misconduct**

Grave professional misconduct is not a new ground for exclusion. However, the Public Contracts (Scotland) Regulations 2015 adds a caveat that such conduct must now render the suppliers integrity questionable.

## **Competition distorting agreement**

The public body has sufficiently plausible indications to conclude that the supplier has entered into agreements with other economic operators aimed at distorting competition.

## **Conflict of interest**

A conflict of interest exists, which includes any situation where relevant staff have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure and which cannot be effectively remedied by other less intrusive measures. (When the Regulations refer to “less intrusive measures” this means that if there is no way to resolve the conflict of interest or distortion of competition then a public body may exclude a supplier).

## **Prior involvement**

A distortion of competition from the prior involvement of the supplier in the preparation of the procurement procedure (e.g. through advice to the public body or other involvement in the preparation of the procurement), cannot be remedied by other, less intrusive measures.

## **Past performance**

The supplier has shown significant or persistent deficiencies in the performance of a substantive requirements under a prior public contract, a prior contract with a public body or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions.

## **Serious misrepresentation**

The supplier has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria.

## **Withholding information**

The supplier has withheld information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria or is not able to submit the supporting documents required.

## Undue influence

The supplier has undertaken to unduly influence the decision-making process of the public body, to obtain confidential information that may give them undue advantages in the procurement procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or award.

### But May Not Exclude If:

#### **Self-Cleansing and Periods of Exclusion**

If a supplier is in any of the situations which would, or could, lead to it being excluded, they may provide evidence that it has taken measures which are sufficient to demonstrate reliability despite the existence of the ground for exclusion. The measures taken by the supplier must be evaluated by taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the supplier shall receive a statement of the reasons for that decision.

For this purpose the supplier shall:

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

It is for the public body to decide whether sufficient measures have been taken, by taking into account the gravity and particular circumstances of the offence or misconduct. If the public body considers the evidence provided to be insufficient, they must provide a statement of the reasons for their decision to continue to exclude the supplier.

#### **Tax and Social Security (obligations paid or minor amounts)**

If a supplier has paid, or had entered into a binding arrangement with a view to paying the taxes or social security contributions due (including any applicable interest accrued or fines), or the obligation to pay is removed, that supplier cannot be excluded from the competition. Please note that this exemption applies to both the mandatory exclusion ground and the discretionary ground.

A public body may, however, decide not to exclude a supplier where it would be clearly disproportionate to do so, particularly where only minor amounts of taxes or social security contributions are unpaid, or where the supplier has not had sufficient time to pay or put in place arrangements to pay what is due, before submitting their tender.

#### **Selection Criteria**

New provisions have been added in relation to the assessment of economic and financial standing. It is useful to note that the selection criteria apply to both Regulated and EU Regulated procurements.

Under the Regulations a minimum annual turnover requirement must be limited to no more than two times the estimated contract value, except in duly justified cases relating to special risks attached to the nature of the works, services or supplies. Please note that this only applies if you intend to use minimum annual turnover as a requirement. In addition, minimum annual turnover should (in most cases) not be used on its own to determine the economic and financial stability of a supplier. If a public body chooses to utilise this criterion it should only be as part of a wider financial analysis.

A further addition to the Regulations is in respect of financial ratios, for example those between assets and liabilities. These ratios may now be taken into consideration where the public body specifies the methods and criteria for such consideration in the procurement documents.

These methods must be transparent, objective and non-discriminatory. Scottish Ministers have published statutory guidance on the selection of tenderers and award of contracts.

## **Economic Operators/ Suppliers**

Economic Operator means any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market e.g. limited companies, subsidiaries, partnerships, cooperative societies, universities, public or private organisations, sole traders etc whether or not they are 'natural or legal persons' in all circumstances.

Public bodies are now able to set out explicitly how groups of economic operators/suppliers (consortia) are to meet the requirements concerning economic and financial standing or the criteria relating to technical and professional ability.

Any conditions for the performance of contracts by groups of economic operators/suppliers (consortia) may necessitate setting conditions which are not imposed on individual suppliers, but these conditions should be justified by objective reasons and must be proportionate.

## **European Single Procurement Document (ESPD)**

This is a change to the way that suppliers can demonstrate their qualifications and how they are selected to bid.

Public bodies will now be required to provide in the **contract notice** the minimum standards required of suppliers to be invited to bid. Suppliers may self-declare that they meet the minimum standards.

Where a supplier self-declares that they meet the minimum standards by submitting an ESPD, the public body must accept the ESPD as confirming that the supplier is eligible to participate.

Public bodies may only insist on submission of further evidence of the supplier's qualifications at the point at which submission is necessary to ensure the proper conduct or the integrity of the competition.

The ESPD is generic and is the same form used by all EU Member States.

Suppliers use the ESPD to declare that they:

- have not breached any of the grounds for mandatory or discretionary exclusion;
- have taken appropriate self-cleansing measures (where appropriate); and
- comply with the relevant selection criteria.

Public bodies must create, issue and then accept an ESPD for any procurement process which commenced from the **18<sup>th</sup> April 2016**.

Any specific requirement in respect of the mandatory or discretionary exclusion grounds, or minimum selection criteria requirements, needs to be set out by the public bodies in the **contract notice**.

Prior to awarding the contract, public bodies must ask the successful supplier for the relevant evidence and certificates (except in respect of call-off contracts from framework agreements).

Public bodies can ask for evidence and certificates at any stage of the procurement process, if they consider it necessary to ensure the proper conduct of the process. This may, particularly, be at the moment of selection of suppliers in a two stage process. However, as from 2018, public bodies will not be able to ask for documents and certificates that either they already hold or are reasonably obtainable elsewhere.

Public bodies must also:

- request a separate ESPD from subcontractors (upon whose capability and capacity the main bidder relies) and where a subcontractor fails to comply with one or more grounds, the buyer can insist that the subcontractor is replaced.
- request a separate ESPD from each member of a consortium to ensure all members meet the exclusion criteria and relevant selection criteria.

The following requirements of the ESPD were deferred in respect of EU regime contracts:

- **18<sup>th</sup> April 2018** – the requirement to publish the ESPD exclusively in electronic format.
- **18<sup>th</sup> October 2018** – public bodies must not request copies of supporting documents if they already possess them.

## **Subcontractors**

The Public Contracts (Scotland) Regulations 2015 require public bodies to ask contractors for information relating to subcontractors.

- Public bodies can ask a bidder to indicate in its tender any share of the contract that it intends to subcontract to third parties and information about any proposed subcontractors, including their name and contact details.
- In respect of a works contract or a contract which includes services to be provided at the public body's premises under the direct oversight of the public body, the public body must require the main contractor to notify it, at the latest when the performance of the contract commences, of the name,

contact details and legal representatives of its subcontractors, involved in such works or services, in so far as known at the time.

- In addition, the public body must require the main contractor to notify it of any changes during the course of the contract, including details of any new subcontractors.

The public body may verify whether there are grounds for exclusion of subcontractors (using the mandatory and discretionary exclusion criteria), and if they do they must use an ESPD.

- The public body must require the main contractor to replace a subcontractor where this verification process has shown that there are mandatory grounds for exclusion of the subcontractor, and may require the main contractor to replace a subcontractor where the verification process has shown that there are discretionary grounds for exclusion.

A public body may also require a contractor to provide information of the name, contact details and legal representatives in respect of any one or more of the following:

- Supply contracts or service contracts (other than those concerning services to be provided at the facilities under direct oversight of the public body);
- Suppliers involved in works or services contracts;
- Subcontractors of the main contractor's subcontractors and other contractors further down the subcontracting chain.

## QUIZ

### Question 19

**Which of the following are sufficient grounds for discretionary (optional) exclusion? (select all the apply):**

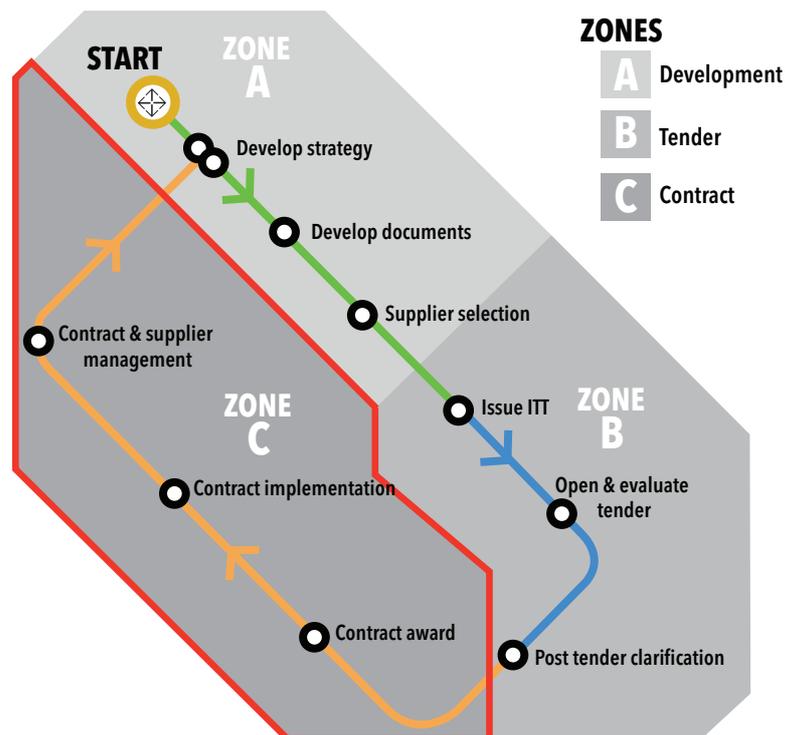
- a) Breaches of environmental EU, national law, collective agreements
- b) Breaches of social or labour EU, national law, collective agreements
- c) Breaches of money laundering Regulations
- d) Significant or persistent deficiencies in performance of a prior public contract, resulting in early termination, damages or other comparable sanctions
- e) Breaches of social security obligations.

### Question 20

**The European Single Procurement Document (ESPD) is a new form of self-declaration which a supplier may provide at the initial stage of the selection process. Which of the following characteristics applies to this? (select all the apply):**

- a) The ESPD is a standard EU form
- b) It may be re-used and updated for different procurements
- c) Removes the need to ask for other selection requirements
- d) May be requested from subcontractors upon whose capacity the main contractor relies.

## 12. Award Stage



### General Principles when Awarding Contracts

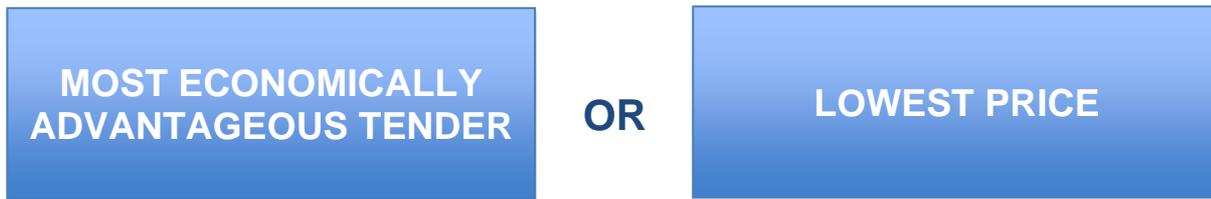
Regulation 57 of the Public Contracts (Scotland) Regulations 2015 applies general principles to public procurements, so that suppliers adhere to the relevant laws and minimum standards.

Public bodies may decide not to award a contract to the supplier submitting the most economically advantageous tender, where, the way the supplier proposes to deliver the contract would not comply with the environmental, social and labour law established by European Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X of the 2014 Public Contracts Directive.

Public bodies may ask suppliers to “submit, supplement, clarify or complete the relevant information or documentation” where “information or documentation” submitted by them “is or appears to be incomplete, erroneous or where specific documents are missing”, provided that such requests are made in full compliance with the principles of equal treatment and transparency.

## Contract Award Criteria

Contract award criteria options under Public Contracts (Scotland) Regulations **2012**:



Contract award criteria option under Public Contracts (Scotland) Regulations **2015**:

**MOST ECONOMICALLY  
ADVANTAGEOUS TENDER  
(Best Price / Quality Ratio)**

Public bodies must base the award of public contracts on the basis of the most economically advantageous tender which must be identified on the basis of both price or cost AND other criteria which may include qualitative, environmental and/or social aspects linked to the subject matter of the public contract in question.

This is represented by the new term “best price-quality ratio”. This is the only way that procurements within the scope of the Public Contracts (Scotland) Regulations 2015 may be carried out.

Importantly there will no longer be any option for public bodies to use price only or cost only as the sole award criterion for contracts awarded under the Public Contracts (Scotland) Regulations 2015. It should be noted that this differs from the UK Public Contracts Regulations 2015, which still permit price or cost only as the sole award criterion.

Award criteria shall be considered to be linked to the subject matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle - including factors (even where such factors do not form part of their material substance) involved in:

- the specific process of production, provision or trading of those works, supplies or services; or
- a specific process for another stage of their life cycle.

The regulations provide us with the following updated list of exemplar criteria:  
*(NB: those in bold are new)*

- quality, including technical merit, aesthetic and functional characteristics, **accessibility**<sup>18</sup>, **design for all users**, **social**, environmental and **innovative characteristics** and trading and its conditions;
- **organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract;** or
- after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

The Regulations clarify that public bodies are able to use criteria such as the “organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract.” This might be the case, for example, in contracts for intellectual services such as consultancy or architectural services. Public bodies which make use of this possibility should ensure, by appropriate contractual means, that the staff assigned to contract performance effectively fulfil the specified quality standards and that such staff can only be replaced with the consent of the public body which verifies that the replacement staff affords an equivalent level of quality.

Scottish Ministers have published statutory guidance on the selection of tenderers and the award of contracts.

### **Concessions Award Criteria**

Concessions contracts must be awarded on the basis of objective criteria which comply with the principles of equal treatment, non-discrimination and transparency and which ensure that tenders are assessed in a way which ensures effective competition.

The public body shall list the criteria in descending order of importance. Where the public body receives a tender which proposes an innovative solution with an exceptional level of functional performance which could not have been foreseen by a diligent public body, the public body may, exceptionally, modify the ranking order of the award criteria to take into account that innovative solution.

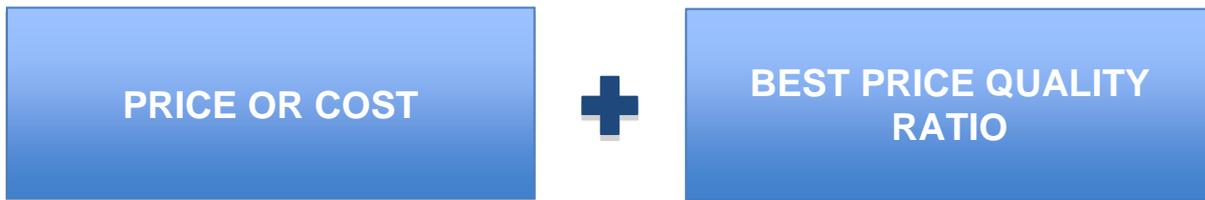
The modification of the ranking order must not result in discrimination.

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<sup>18</sup> For example: A website with larger text for the visually impaired, or one which has audio embedded in it or is provided in different languages. Alternatively it could relate to access to and use of leisure services for disabled or disadvantaged persons.

## Life Cycle Costing

In awarding public contracts on the basis of the most economically advantageous tender, public bodies must determine the balance between:



In determining price or cost, a cost-effectiveness approach can be used. A cost-effectiveness approach may include life cycle costing. “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.

Life cycle costing encourages closer integration of social and environmental considerations, the key concepts of which are set out in the Guidelines for Social Life Cycle Assessment of Products.

If used as an award criterion:

“Life cycle costing must, to the extent relevant cover parts or all of the following costs over the life cycle of a product, service or works -

- costs, borne by the contracting authority or other users, such as -
  - a) costs relating to acquisition;
  - b) costs of use, such as consumption of energy and other resources;
  - c) maintenance costs;
  - d) end of life costs, such as collection and recycling costs; and
- costs imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified.

Such costs may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.”

When public bodies assess costs using a life-cycle costing approach they must indicate in the procurement documents the information that they require from suppliers, and how they will evaluate these costs.

The method used for this assessment must be based on objective and non-discriminatory criteria, be accessible to all interested parties and the data required can be provided with reasonable effort by suppliers.

The Directive requires that wherever a common method for the calculation of life-cycle costs has been made mandatory then this common method shall be applied such as the Clean Vehicles Directive in Annex XIII. The clean vehicles Directive requires that energy and environmental impacts linked to the operation of vehicles over their whole lifetime are taken into account in all purchases of road transport vehicles, as covered by the public procurement Directives and “The Cleaner Road Transport Vehicles (Scotland) Regulations 2010”.

## Abnormally low tenders

Public bodies shall require bidders to explain the price or costs proposed in the tender where they appear to be abnormally low, as opposed to the previous position which only required a check of abnormally low bids where a public body intended to reject them:

- Although not defined, where all bids except one (or more) are similar on price/cost, and where those bid(s) are well below that quoted by all other bidders, that **may** indicate the bid is abnormally low. Where a tenderer submits an unusually low priced bid, it could be due to legitimate factors such as a competitive advantage it enjoys based on its greater efficiency, cheaper inputs, or even the ability to take a loss on the contract. It may however be due to illegitimate factors, such as underpayment of staff or subcontractors, or a failure to comply with relevant legislation.

This means that public bodies must now check all abnormally low bids, as opposed to the previous position where it was possible to accept an abnormally low bid without investigating why it was abnormally low.

A supplier's explanation of their potentially abnormally low bid may now also relate to subcontracting obligations.

Public bodies must reject a tender where it has been established that the tender is abnormally low because a supplier has not complied with the environmental, social and labour law listed in Annex X of the 2014 Public Contracts Directive.

## QUIZ

### Question 21

**Contracts within the scope of the Public Contracts (Scotland) Regulations 2015 can be awarded on the basis of lowest price or lowest costs only:**

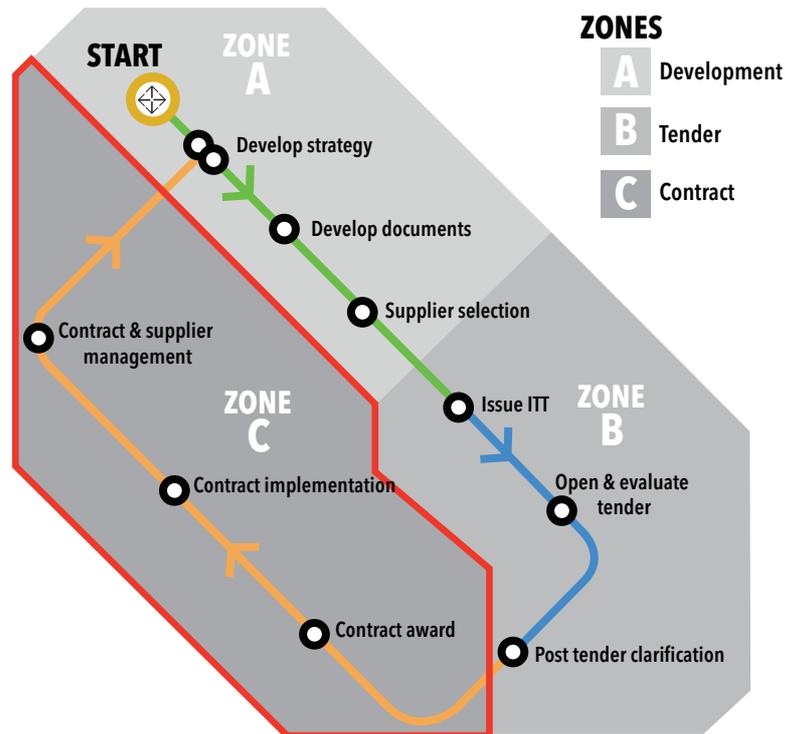
- a) True
- b) False.

### Question 22

**Which of the following may be included as life cycle costs under relevant public contracts? (select all answers that apply):**

- a) Energy consumed by equipment procured or in service delivery
- b) Carbon and other greenhouse gas emissions
- c) Maintenance costs
- d) Waste management costs
- e) Purchase costs.

## 13. Contract Performance



### Modification of contracts during their term

Regulations set explicit requirements regarding modifications of contracts. The starting position is that modifications to contracts will require a new competition to be held, unless one of the six exceptions can be applied.

These provisions do not apply to contracts above the Reform Act regime threshold and below EU advertising thresholds.

#### These exceptions are:

- Where the modification is provided for in a clear, precise and unequivocal contract condition, which was included in the initial procurement documents.
- For additional works, services or supplies where a change of contractor is not possible for economic or technical reasons and would result in significant inconvenience or substantial duplication of costs. However, any increase in price must not exceed 50% of the value of the original contract.
- Where the need for modification is brought about by circumstances which a diligent public body could not foresee, which does not alter the overall nature of the contract and where any increase in price is not higher than 50% of the value of the original contract.
- Replacement of the original contractor by another under a contract condition; universal or partial succession, perhaps due to takeover, merger, acquisition, or insolvency; or where the authority steps in and assigns some or all of the goods, works or services back to itself.
- Where the modifications, irrespective of their value, are not substantial.

- f) Where the modification does not change the overall nature of the contract and the modification is below:
- i) the relevant threshold value for the type of contract, and
  - ii) is below 10% of the initial contract value, for service and supply contracts, or is below 15% of the initial contract value for a works contract.

## Modification of Concession Contracts During Their Term

The only sections of “modifications contracts” in the Concessions Contracts (Scotland) Regulations 2016 which differ from the approach taken in the Public Contracts (Scotland) Regulations 2015 are as follows:

Concessions may be modified without a new procurement procedure where the value of the modification is below the OJEU advertising thresholds, and below 10% of the initial concession value (as opposed to 10% of the initial contract value for supplies or services or 15% of the initial contract value for works contracts or framework agreements in the Public Contracts (Scotland) Regulations 2015).

## Termination of EU Regulated Contracts

Public bodies can, at least under the following circumstances, terminate a public contract during its term where:

- the contract has been subject to a substantial modification, which would have required a new competition due to the modification being beyond the scope of that allowed by the Regulations;
- the contractor had, at the time of contract award, been caught by one of the mandatory or optional exclusions and should therefore have been excluded from the procurement procedure;
- the contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and Regulations that has been declared in an EU infringement procedure by the Court of Justice of the European Union.

The Regulations state that public bodies “must ensure” that their contracts contain a clause which allows for termination in these circumstances. If a contract does not contain such a clause, the Regulations state that the ability for a public body to give notice of termination under these circumstances shall be an implied term of contract.

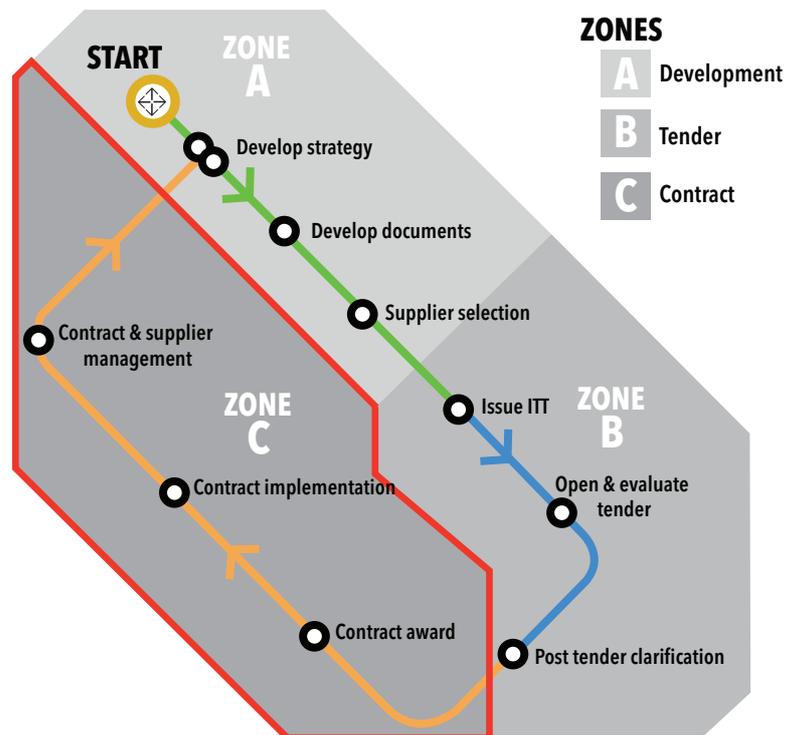
## QUIZ

### Question 23

**A public body that has awarded a service contract valued at £200,000 (above EU threshold- non-social and other specific services) seeks to modify this with the value of modification being £30,000. Does the new legislation allow for the contract to be modified without the need for a new competition?**

- a) Yes
- b) No.

## 14. Governance



### Retention of Copies of Concluded Contracts

Contracting authorities are required to keep copies of all concluded contracts with a value equal to or greater than £785,530 for supply and service contracts and £7,855,300 for works, for at least the duration of the contracts.

### Reporting and Documentation Requirements

For every contract, framework agreement or dynamic purchasing system established under the Public Contracts (Scotland) Regulations 2015, public bodies must draw up a written report which must include at least the following:

- the name and address of the public body, the subject-matter and value of the contract, framework agreement or dynamic purchasing system;
- where applicable, the results of the qualitative selection and/or reduction of numbers, namely:
  - the names of those suppliers invited to participate in the procurement process and the reasons for the selection;
  - the names of those participants who were subsequently excluded from bidding or who bid but were not successful and the reasons for their rejection;
- the reasons for the rejection of tenders found to be abnormally low;
- the name of the successful tenderer and the reasons why its tender was selected;
- where known by the contracting authority, the share (if any) of the contract or framework agreement which the successful tenderer intends to subcontract to third parties; and, the names of the main contractor's subcontractors (if any);
- for competitive procedures with negotiation and competitive dialogues, the circumstances which justify the use of those procedures;
- for negotiated procedures without prior publication, the circumstances which justify the use of this procedure;
- where applicable, the reasons why the contracting authority has decided not to award a contract or framework agreement or to establish a dynamic purchasing system;

- i) where applicable, the reasons why means of communication other than electronic means have been used for submission of tenders; and
- j) where applicable, conflicts of interests detected and subsequent measures taken.

There is a practical exemption where no reports are required for contracts based on framework agreements, where the frameworks are either concluded with a single economic operator or where all of the terms are fixed in a multi supplier framework agreement.

If a public body has already provided all the information required here, when completing a contract award notice, there is no additional need to draw up a written report.

Public bodies must document the progress of all procurement procedures (whether electronic or not), and must retain sufficient documentation to justify decisions taken in all stages of the procedure:

- Documentation on communications with suppliers;
- Internal deliberations;
- Preparation of the procurement documents, dialogue or negotiation (if any);
- Selection and award of the contract.

This documentation must be kept for at least three years from the date of award of the contract and the report must be communicated to the Commission (or competent authorities, bodies or structures where they so request).

Public bodies may be required by the European Commission to send it a copy of any such report. Scottish Ministers must, by 18 April 2017, and every 3 years thereafter, provide the European Commission with a report addressing compliance with the EU procurement legislation, frequent sources of wrong application or legal uncertainty, the level of SME involvement and on the prevention detection and reporting of fraud, corruption, conflicts of interest and other serious irregularities.

Under the Public Contracts (Scotland) Regulations 2015, public bodies must provide Ministers with such information as Ministers ask for to meet their obligations to the Commission.

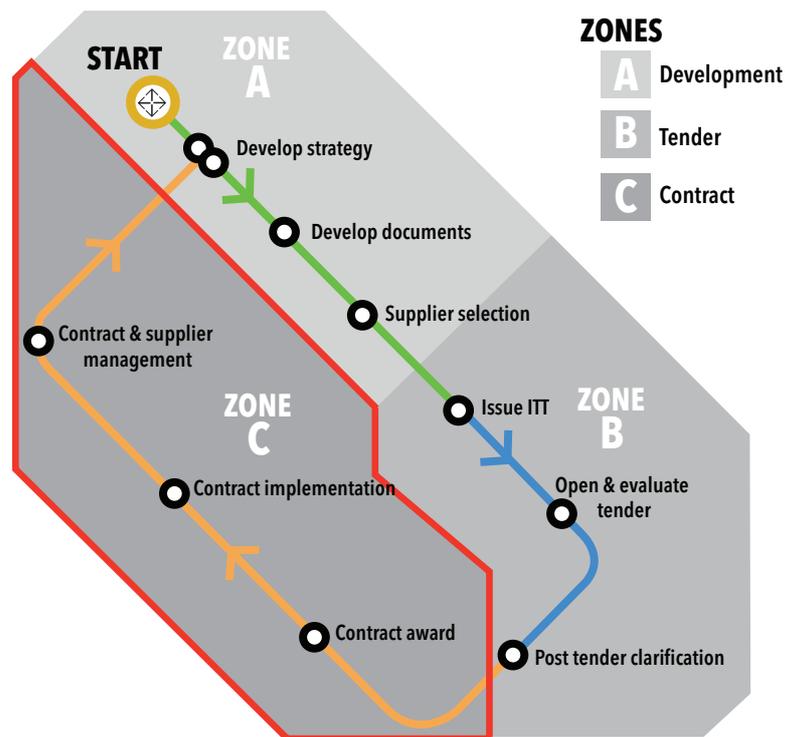
## QUIZ

### Question 24

**For which of the following must public bodies draw up a written report as required under the Public Contracts (Scotland) Regulations 2015? (Please select one answer):**

- a) Contracts, framework agreements (except where the framework agreement is with a single supplier) and Dynamic purchasing systems
- b) Call offs under a framework agreement or dynamic purchasing system established in accordance with the legislation.

## 15. Information and Remedies



### Informing Bidders

A public body, must as soon as possible after the decision has been made, inform all bidders in writing, of its decision to award a contract. This is commonly known as a standstill letter.

The public body must provide the following information:

- a) the criteria for the award of the contract;
- b) where practicable, the score obtained by the bidder;
- c) the name of and, where practicable, the score obtained by the winning bidder; and
- d) a precise statement of the effect of the standstill period on the bidder.

Additionally, in the case of an unsuccessful bidder:

- a) a summary of the reasons why it was unsuccessful;
- b) the characteristics and relative advantages of the successful bid;
- c) (if applicable) a summary of the reasons why a supplier was excluded, if this has not previously been explained.

### Informing Bidders – Concession Contracts (Scotland) Regulations 2016

This is similar to the Public Contracts (Scotland) Regulations 2015 in that it requires the public body to inform the bidders of any significant developments in the procurement process without delay.

The requirement to respond to written requests for further information is similar to the Public Contracts (Scotland) Regulations 2015, although it is slightly less prescriptive as the Concessions Contracts (Scotland) Regulations 2016 have a narrower scope.

The important requirements of the grounds for any decision to reject the bidder should still be provided, as well as the important requirement where a bidder has provided an admissible tender of the characteristics and relative advantages of the tender selected.

A public body must within 15 days of receiving a request in writing from any unsuccessful bidder inform it of:

- a) the precise reasons why it was unsuccessful (this goes further than the requirement to provide a summary of these reasons in the standstill letter);
- b) the characteristic and relative advantages of the successful tender as well as the name of the successful bidder (if the business in question has not already received this information in a standstill notice).

Where applicable, the public body must include any reason for its decision that the bidder did not meet the technical specification, either in terms of an “or equivalent” offering by the bidder or where the bidder did not address the performance or functional requirements laid down by the public body.

The need to notify bidders does not apply where:

- a) the only bidder is the one to be awarded the contract;
- b) the contract is a call off contract under a framework agreement or under a dynamic purchasing system.

A public body must within 15 days of the date on which it receives a request in writing from any unsuccessful bidder inform it of:

- a) the reasons why it was unsuccessful;
- b) the characteristics and relative advantages of the successful tender as well as the name of the successful bidder.

A public body is also required to provide the successful bidder with a description of any improvements the public body considers the bidder could have made to its bid, within 15 days of such a request.

## **Giving of Reasons to Unsuccessful Participants in Reform Act Regime procurements**

The Reform Act extends the provision of debriefing (**but not the standstill period and standstill letter requirements**) to contracts below the EU Regime which are within its scope.

These provisions require that public bodies notify any supplier who participated, of their decision to exclude.

A supplier who was excluded must be given the names of the suppliers who have not been so excluded, the criteria used to exclude the supplier in question and the public body’s scoring (if any), against those criteria.

Public bodies must inform a supplier:

- as soon as reasonably practicable when they are excluded from a procurement process,
- as soon as reasonably practicable of a decision to award a contract.

Unsuccessful suppliers must be given specific information which will enable them to improve their future tenders, this includes:

- The name of the successful tenderer,
- The criteria used to award the contract,
- The public body's scoring, against those criteria, of the unsuccessful tenderer and the successful tenderer.

Just as with EU Regime procurements, public bodies can withhold information if they consider that disclosure would: impede law enforcement or otherwise be contrary to the public interest; prejudice the commercial interests of any person or prejudice fair competition between suppliers.

## **Further information and withholding information**

### **Reform Act Regime procurements**

Any unsuccessful or successful bidders have the right to request further information in relation to a Reform Act regime procurement other than an EU Regime procurement.

Within 30 days of receiving a request for information, public bodies must provide a written summary of the reasons:

- in the case of a public body excluded from the participating in the procurement process, a summary of the reasons why the bidder was excluded;
- in the case of an unsuccessful bidder;
  - i) a summary of the reasons why the bidder was unsuccessful, and
  - ii) the characteristics and relative advantages of the successful bidder.
- in the case of the successful bidder, a description of any improvements the public body considers the bidder could have made to its bid.

Public bodies may withhold information if they consider that disclosure would: impede law enforcement or otherwise be contrary to the public interest; prejudice the commercial interests of any person or prejudice fair competition between bidders.

## **Remedies**

Where a public body has failed in its obligation (in terms of the duty which it owes to a supplier), then the supplier may take action against the public body in either the Sheriff Court or the Court of Session where they have suffered or risks suffering, loss or damage.

### **Single Point of Enquiry (SPoE)**

In addition to the legal remedies, the Single Point of Enquiry (SPoE) is an informal service which can help provide information, advice or act as an intermediary between a supplier and a public body, but has no formal powers to investigate any concerns or change the decisions made by another public body.

### **Court of Justice to the European Union (CJEU)**

The Court of Justice permits the individuals, companies or organisations to bring cases before the court if they feel their rights have been infringed by an EU institution.

## Procurement Reform (Scotland) Act 2014

### Actionable Duties

For contracts with a value above the threshold for the Act and below the relevant EU threshold, proceedings (legal challenge) may be brought against a public body.

Proceedings can be raised by a supplier:

- interested in winning the contract (including a supplier who may not have participated in the procurement process), and
- who suffers, or risks suffering, a loss or damage as a result of the alleged breach by the public body.

For these purposes, a supplier not only includes a supplier established in a Member State of the European Union, but also suppliers established in Iceland, Liechtenstein and Norway.

The relevant person must also bring proceedings within 30 days beginning with the day on which the relevant person knew or ought to have known (disclosure or discovery) that grounds for beginning the proceedings had arisen; or up to three months at the courts discretion and possibly even longer if the court considers that there is good reason for doing so.

Court proceedings can only be brought if the supplier has notified the public body of the alleged breach, and its intention to raise a legal challenge.

Court proceedings can only be brought in respect of breaches of some, not all, sections of the Act. Those sections of the Act which allow for a legal challenge to be raised are:

- General Duties
- Publication of contract notices and award notices
- Mandatory exclusion of a bidder (on grounds of criminal activity)
- Selection of bidders to submit a bid
- Guidance on selection of bidders and award of contracts
- Technical specifications
- Charging a fee to participate in a procurement exercise
- Giving of reasons to unsuccessful bidders
- Providing debrief information

### Determination by the Court

A court may, by interim order suspend the procedure leading to the award of a public contract, or the implementation of any decision or action taken by a public body in relation to that procedure.

In deciding whether to grant this interim order, the court must decide whether the negative consequences of this order, are likely to outweigh the benefits taking into account:

- the decisions taken by the public body;
- the consequences of an interim order for all interests likely to be harmed; and
- the public interest.

If the court finds that the public body was in breach of their duties under the Reform Act (prior to entering into a contract) then they may order the setting aside of that decision or action; order the public body to amend any document or award damages.

The only remedy available once the contract has been awarded is to award damages.

Please note that for procurements equal to or above the Reform Act thresholds and below the OJEU advertising thresholds there is no requirement for a standstill period or ineffectiveness remedy.

## QUIZ

### Question 25

**Where regulated procurements apply between the Procurement Reform (Scotland) Act 2014 and OJEU advertising thresholds a Court may, as a result of legal proceedings brought against the public body... *(select all answers that apply)*:**

- a) Suspend the procedure leading to award of a public contract if in the public interest
- b) Set aside a public body's decision or action if it finds the body to be in breach of duties under the Procurement Reform (Scotland) Act 2014
- c) Order where relevant the public body to amend any document
- d) Where relevant, a Court order of contract effectiveness
- e) Award damages.

# QUIZ ANSWERS

Question	Answer	Explanation
1.	B	Contracting authorities must apply the new legislation to any procurement which commences on or after the date that the new Regulations enter into force, which is the 18 <sup>th</sup> April 2016.
2.	B	A concession contractor is permitted to run and exploit the work or service for financial gain while accepting risks of potential loss on their investment.)
3.	A, B, C, D, E, F	The Reform Act introduces the requirement for a Contracts Register, the Sustainable Procurement Duty, a requirement for a Procurement Strategy and Annual Report and specific duties relating to advertising of contract opportunities, Community Benefit consideration and a prohibition on charging a supplier a fee for participating in any part of a procurement process.
4.	C	Any EU, concessions or Procurement Reform Act regulated procurement may be reserved for supported businesses where at least 30% of the workforce is disadvantaged or disabled.
5.	A, B, D, E	A 'regulated contract' under the Procurement Reform (Scotland) Act is: A public contract which is not an excluded contract, and which equals or exceeds £50,000 (supplies and services) or equals or exceeds £2,000,000 (works).
6.	D	Where a procurement consists of two or more of works, supplies or a service you should follow the Regulations which characterise the main element of the contract.

7.	A	Public Bodies may conduct market consultations (for example through PIN's, bidder days and webinars) with a view to preparing the procurement and informing economic operators of their plans and requirements, as long as this ensures the equal treatment of suppliers and does not distort competition.
8.	C	<p>Technical Specifications: must afford equal access to tenderers; may refer to the way the goods, works or services are made or provided; may refer to other life cycle stages even if this does not form part of the material substance; must link to the subject matter of the contract; must be proportionate to its value and intended objectives.</p> <p>You must not set out technical specifications which refer to specific brands, sources or terms which refer to the specific origin or to a particular process or means of production, trademarks, patents or types that have the effect of favouring or discriminating against a potential supplier. The only exception is if you can justify due to the subject matter of the contract or you cannot otherwise describe the requirement by reference to technical specifications that are sufficiently precise and intelligible to all tenderers.</p> <p>Where you cannot avoid referring to a particular make or source you must always qualify by adding 'or equivalent'.</p>
9.	B	The Public Contracts (Scotland) Regulations 2015 supports the encouragement of SMEs bidding for contracts by splitting into lots, but public bodies may decide not to, as long as relevant reasons are set out in the procurement documents. While there are no obligations to split contracts into lots it is important that public bodies give careful consideration to doing so in order to help facilitate SME access in accordance with the sustainable procurement duty.
10.	B, C	<p>A public body may directly award a contract for health and social services where the value is below the EU advertising threshold for light touch regime contracts which is £589,148.</p> <p>EU procurement legislation states that contracts below this threshold will not</p>

		typically be of interest to providers from other Member States, unless there are concrete indications to the contrary, public bodies should still, however, consider whether there is any cross border interest prior to contract award. Equally, they could choose to compete a contract of the value.
11.	A	Despite many of the provisions of the Reform Act applying to framework agreements, those listed do not apply to their call off contracts.
12.	D	The bodies have joint responsibility where the procurement is carried out in its entirety jointly and in joint names, irrespective of who manages the procedure.
13.	A	A competitive dialogue procedure requires the procurer to identify the need, without prescribing the nature, characteristics or solutions to be offered. It is possible that CPN may overlap with competitive dialogue. However, the CPN does require the development of a specification of its requirements.
14.	B, C	An innovation partnership may be entered into, in accordance with procurement regulations, to undertake research and development and the body may elect to procure the eventual solutions. Innovation Partnerships are justifiable where required solutions are not currently available on the market. Alternatively, the body may decide to defer the procurement and conduct further research with other public bodies- this may or may not lead to an innovation partnership in due course.
15.	B	Innovation Partnerships may only be used where there is a need for the development of an innovative product, service or works and that the subsequent purchase of these cannot be met by solutions already available on the market.

16.	B	<p>The new Regulations expressly allow public bodies to examine tenders before applying the selection stage's exclusion grounds and criteria.</p> <p>This must be carried out in an impartial and transparent manner to ensure that no contract is awarded to a tenderer who should have been excluded or who does not meet the selection criteria</p>
17.	B, C	<p>The Public Contracts (Scotland) Regulations 2015 now allow sub-central contracting authorities to use PINs as a call for competition in restricted procedures or Competitive Procedures with Negotiation</p>
18.	A, B, C, D	<p>All public bodies who are conducting regulated procurements must publicise on PCS, contract notices and award of a contract or frameworks (award notice) this does not extend to notice of intention to run a call off (results of call offs must be publicised)</p>
19.	A, B, D E	<p>Public bodies may exclude suppliers (for a period of 3 years from the date the event occurred) for a number of reasons which include: breach of environmental, social or labour laws or collective agreements (or others set out in Annex X to Public Contracts Directive 2014), deficiencies in performance of a prior public contract which have been sufficient to result in early termination, damages or comparable sanctions and breaches of social security obligations. A breach of money laundering is a mandatory exclusion ground.</p>

20.	A, B, D	The ESPD is a standard EU form of self-declaration that may be re-used and updated for different procurements and it may be requested from relevant sub-contractors. However, as it is a generic document, procurers will have to add specific requirements into their contract notices and ask the supplier in the ESPD whether or not they have complied with the contract notice.
21.	B	The Public Contracts (Scotland) Regulations 2015 require contracts to be awarded on the basis of the best price/ quality ratio. Contracts must never be awarded on the basis of lowest price or cost only.
22.	A, B, C, D, E	Life cycle costs will depend on the scope and nature of the subject matter of the contract but may include all costs borne by the public body relating to acquisition, costs of use and end of life costs as well as those environmental externalities which may be monetised, such as cost of emissions of greenhouse gas emissions.
23.	B	<p>There are six exceptions applying under the Public Contracts (Scotland) Regulations 2015 to the requirements to undertake a new procurement procedure.</p> <p>These include the requirement that the value of the modification is below both of the following values:</p> <p>a) The relevant threshold; and b) 10% of the initial contract value (service and supply contracts)</p> <p>As the modification to the service contract is more than 10% of the initial contract value and other exceptions do not apply a new procurement procedure is required.</p>

24.	A	Where are framework agreement established in accordance with the Public Contracts (Scotland) Regulations 2015 (with the exception of framework agreements concluded with a single supplier or where all the terms are fixes in a multi-supplier framework agreement) public bodies are not required to compile and retain a report in respect of call offs under the framework agreement.
25.	A, B, C, E	<p>A court may by interim order suspend a procedure leading to award of a public contract if in the public interest; set aside a public body’s decision or action if it finds the body to be in breach of duties under the Reform Act; order where relevant the contracting authority to amend any document or award damages.</p> <p>There is no power under the Reform Act for a Court order of contract ineffectiveness (unlike for Remedies under EU Regulated contracts).</p>

**You have reached the end of this Reference Pack**

You may wish to click on one of the options below for further information:

- [Implementing the EU Directives and Procurement Reform \(Scotland\) Act 2014](#)
- [Procurement Journey](#)
- <http://www.gov.scot/Topics/Government/Procurement>



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