

Construction Procurement Handbook

Chapter 1

Introduction and Procurement Overview

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Introduction

1.1 The Construction Procurement Handbook is the first issue in a suite of handbooks to provide guidance for public sector construction clients in developing and delivering their construction projects. The handbooks provide guidance on the processes and governance as well as policy direction and legislation. The other handbooks include The Project Initiation and Business Case Handbook, The Contract Management Handbook and The Asset Management Handbook. The Construction Procurement Handbook focuses on the procurement of the contractors and consultants who support the contracting authority in delivering their projects. Collectively these handbooks form the Construction Procurement Manual and are mandatory guidance for all organisations to which the Scottish Public Finance Manual is directly applicable.

1.2 This section provides an introductory overview to the processes and the various procedures to be followed in developing and delivering a construction project. It is not intended to be comprehensive and should be read in conjunction with the detailed guidance provided in the other chapters of the Construction Procurement Handbook.

Overview

2.1 The purchase of all goods, services and works by public bodies is subject to a legal framework designed to encourage free and open competition and deliver value for money, in line with internationally and nationally agreed obligations and regulations. A significant part of the relevant legislation derives from Europe. The following are the key pieces of legislation relating to public procurement in Scotland:

- [EU Directive 2014/24 on Public Procurement](#) (*the Directive*).
- The [Public Contract \(Scotland\) Regulations 2015](#) (*The 2015 Regs*). This transposes the EU Directive into Scots Law.
- The [Procurement Reform \(Scotland\) Act 2014](#) (*The Act*)
- The [Procurement \(Scotland\) Regulations 2016](#) (*the 2016 Regs*). These regulations give effect to the Act.
- This guidance focuses on the legislative aspects and administrative process for purchasing construction works and should be read in conjunction with the [Guidance under the Procurement Reform \(Scotland\) Act 2014](#) (*The Guidance*)

2.2 The project delivery process will normally start with the identification of a need, which is then developed, through a business case and the procurement of designers and constructors to the delivery of the built asset, *Figure 1* describes this graphically. The procurement of construction contracts is complex and, if it is to be carried out effectively, the appropriate level of required expertise must be identified and engaged. This handbook deals with the middle stage “*Procure the contractors and consultants*”.

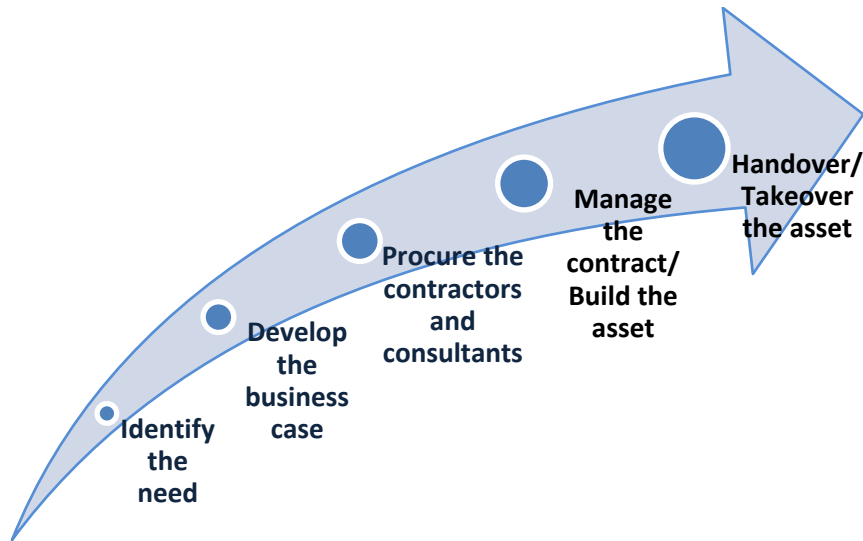


Figure 1: Construction project overview

Procurement Principles

3.1 The award of public contracts must comply with the principles of the *Treaty on the Functioning of the European Union (TFEU)*. These include the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency. Procurement policy and legislation aims to underpin adherence to these principles as well as supporting the delivery of value for money when awarding public contracts. [The Scottish Model of Procurement](#) promotes value for money as being an appropriate balance between cost or price, quality and sustainability and is at the heart of all public procurements conducted in Scotland.

Procurement Thresholds

4.1 The system in Scotland for public sector procurement identifies two categories of procurement, regulated procurement and non-regulated procurement. Whether a procurement is considered to be *regulated* or *non-regulated* is determined by whether the estimated contract value is equal to or exceeds thresholds set out below in *Figure 2*. Where contract estimated values breach the thresholds the procedures prescribed by the requirements of the relevant legislation must be followed. The thresholds applicable to the 2015 Regs are adjusted every two years with the current thresholds applicable from 1 January 2018.

		Works	Services, Supplies & Design Contracts
Procurement Reform (Scotland) Act 2014		£2m	£50k
Public Contract (Scotland) Regulations 2015	Central Government	£4,551,413 See thresholds	£118,133 See thresholds
	Other Contracting Authorities	£4,551,413	£181,302
	Small Lots	£820,370	£65,630

Figure 2: Procurement Thresholds – thresholds are correct at 1 January 2018, for the latest thresholds please see the [procurement thresholds webpage](#)

4.2 The above table is a summary of the thresholds relevant to construction contracts, consequently it does not include those for utilities and concession contracts.

4.3 Generally, all contracts with values over the thresholds will be subject to one or other of the pieces of legislation referred to above. There are some exceptions; for example some defence and security contracts, which are regulated by the *Defence and Security Public Contract Regulations 2011*, are specifically excluded where they are classified as secret and where this is determined to be in the national interest. Property contracts for the acquisition or rental of land or existing buildings and employment contracts are also excluded as are some research and development contracts, subject to certain qualifications.

Classification of Contracts

5.1 As noted in *Figure 2* contracts fall into one of three types; those for works, those for goods and those for services. Assuming a contract is not out with the scope of, or exempt from procurement legislation, it is important to establish if the contract is for work, services or goods. For most of the time this should be obvious from the subject matter. Sometimes, though, it is less clear and a contract may be for more than one type of requirement, for example works and services, works and goods or perhaps services and goods. Generally speaking, the following will assist in determination of contract type. However, where there is doubt appropriate professional advice should be sought.

- Where the contract covers both goods and services, the part with the highest value will dictate what type of contract it is;
- If it covers works and goods or works and services, it should be classified according to its predominant purpose;

Estimating the Value of Contracts

6.1 The estimated value of the contract must be established in order to determine the relevant threshold and legislation which is to be applied.

6.2 Splitting up contracts in order to keep them below the threshold values is strictly prohibited. Where a contract is divided in to lots, it is the aggregate value of these lots that must be taken into account. This is particularly important when setting up a framework, where it is the total value of contracts envisaged under the framework and over the term of that framework that must be taken into account.

6.3 In the case of a works contract, the value will include the estimated value of any goods and services that are necessary for executing the works. For example, a works contract may primarily be for the construction of an office block but the contract will include the provision of materials for the construction and services in the shape of architects, cost consultants and engineers. The individual elements should be considered against each other with the overall classification being determined by the element which forms the greater value of the contract. For certain goods and services contracts that are regular in nature and are intended to be repeated in a

given time, the total value of all the contracts must be aggregated. For example, a series of contracts to provide architectural, engineering, landscaping and acoustician consultancy services for the same project but over a period of time, should be aggregated and if the aggregate total is equal to or more than the threshold, then the relevant procedures must be applied.

Contract Briefs and Technical Specifications

7.1 For a procurement to be successful in delivering the output and outcomes required, it is essential to ensure that a proper analysis of the requirement is undertaken by the client. This will allow unambiguous, appropriate and sufficient information to be provided in a brief to allow the prospective suppliers to accurately price and plan the job and will be informed by the business case. Preparing this analysis/requirement is the responsibility of the client and it is important that adequate time is allocated for forming the brief. This should include the development and formulation of any technical specifications; any ambiguity or lack of clarity about the client's requirements may lead to poor contract relations and a poor quality output.

7.2 A contracting authority should make available, as part of the procurement documents, any technical specifications that define what is being procured. These must not distort or restrict competition, for example, by specifying trade names or patents. An exception to this is where these are essential to describe what is required, but in this case, it should be accompanied by the words *or equivalent*. Regulations 43(11) and 43(12) of the 2015 Regs, as follows, cover this:

(11) Subject to paragraph (12), technical specifications must not, with the effect of favouring or eliminating certain undertakings or certain products, refer to

- (a) a specific make or source;*
- (b) a particular process which characterises the products or services provided by a specific economic operator; or*
- (c) trade marks, patents, types, or a specific origin or production.*

(12) Reference of a kind referred to in paragraph (11) is permitted in any of the following circumstances

- (a) where justified by the subject-matter of the contract;*
- (b) on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraph (10) is not possible, in which case the reference must be accompanied by the words "or equivalent".*

7.3 Specifications can relate to contractor performance, functional requirements or require the adherence to relevant standards. In summary, a contract specification

must be developed which provides sufficient information to allow bidders to show they can meet the contract requirement and deliver the client's output.

7.4 In the case of a public works contract, technical specifications can include, for example:

- Environmental and climate performance levels;
- Design requirements and performance conformity, for example accessibility for disabled persons;
- Critical dimensions, performance requirements, and safety requirements, including the procedures concerning quality assurance;
- Material/component specifications;
- Methods or techniques of construction; and,
- Requirements relating to design and costing, and test and acceptance conditions for the works.

Pre-market consultation

8.1 There may be occasions when it is beneficial to undertake consultations with the market before going out to tender for example, to gauge the capacity of the market to deliver a type of contract. This is recognised in the 2015 Regs, particularly where the requirements to be procured are complex and early consultation may assist with planning the procurement.

8.2 This is considered in more detail later in Chapter 4 of this handbook. In outline though, the legislation permits clients to seek advice from independent experts or market participants, provided that it does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.

Procurement Procedures

9.1 The 2015 Regs set out six procurement procedures, that is methods of advertising contracts and selecting the companies which will perform them, for use in all procurements which are subject to the regulations. These are:

- Open;
- Restricted;
- Competitive dialogue;
- Competitive procedure with negotiation;

- Innovation partnership; and
- Negotiated procedure without prior publication.

9.2 The majority of procurements for construction will be taken to the market using either the *open* or *restricted* methods. Contracting authorities will wish to ensure that the most appropriate method is used according to the complexity, outcomes and values of their job.

9.3 The use of the *competitive procedure with negotiation* and *competitive dialogue* are more appropriate for complex procurements where, for example, readily available solutions need to be adapted or the contract requires innovative design solutions. Their use will be following careful consideration of the advantages and disadvantages of them in the context of the project at hand.

9.4 The *innovation partnership* procedure is aimed at the development of innovative solutions not available on the market and which will require a commitment to research and development in order to deliver them.

9.5 The Act and 2016 Regs provide the regulatory framework for the conduct of procurements below the OJEU thresholds set out by the 2015 Regs. The Act does not mandate any particular procurement procedures. However, we suggest that procurements below OJEU thresholds should follow similar procedures proportionate and appropriate to the contracts being awarded. Regardless, they *must* adhere to the principles of equal treatment, non-discrimination, transparency and proportionality.

9.6 Procurements below the thresholds established by the Act are not regulated by any of the legislative measures mentioned in this guidance. Contracting authorities have more discretion below these thresholds around how such procurements are conducted and the guidance at Chapter 6 provides information on how to take works contracts below £2m and construction goods and services contracts below £50k to market. This is known in this guidance as *Construction Procurement Route 1 (CPR1)*. The guidance sets out that whilst there are no mandated procedures below those values, similar processes to those for above threshold procurements should be followed, proportionate to the complexity and value of the contract. This should ensure an efficient and auditable approach which is understood by the market and client alike. *Construction Procurement Route 2 (CPR2)* applies to procurements above the Act's threshold.

Frameworks

10.1 *Regulation 34* of the 2015 Regs covers the procurement and establishment of framework agreements.

10.2 A framework is basically an agreement where all (or at least some) of the terms and conditions on which parties will enter into future contracts (call offs) have been established. Some restrictions exist as to their use, for example:

- The framework must not exceed 4 years save in exceptional cases duly justified by the subject of the framework agreement;
- The framework must identify those contracting authorities who will be entitled to use it at the outset.
- Substantial changes must not be made to any of the terms of the framework agreement

10.3 Where a firm has a place on a framework agreement, the client will seek to place a contract by a process known as “calling off”. This can be achieved by one of the following two methods:

- Holding a mini competition among the suppliers on the framework
- Applying the terms of the framework itself. For example, the framework may provide for contracts to be allocated on strict rotation between the suppliers or it may identify contracts of a certain type to a certain supplier on the framework

Publishing and Advertising Contracts

11.1 When it has been established what type of contract is being procured, i.e. unregulated or regulated subject to the Act or the 2015 Regs, consideration must be given to the method of informing the market of the opportunity.

11.2 Contract notices for regulated procurements must be published on the national portal, [Public Contracts Scotland \(PCS\)](#). The guidance on *CPR1* (Chapter 6 of this manual) notes that it is good practice to advertise some unregulated procurements and in these cases *PCS* should also be used.

11.3 Procurements regulated under the 2015 Regs must also be published in the [Official Journal of the European Union \(OJEU\)](#) and must follow the exact format required by the OJEU. The *PCS* system automatically generates the OJEU Notice assuming that the contracting authority has set out the required information correctly. The principal means of making a call for competition, that is advertising the procurement, is by a contract notice.¹ However a *Prior Information Notice (PIN)* can also be used as a call for competition by *sub-central*² contracting authority in some circumstances.

Prior Information Notices

12.1 A *PIN* has two functions. Firstly, it can be used as a way of giving advance notice of forthcoming procurements. For supplies and services this could be the estimated requirements for the financial year, while for works projects the total requirements for the project would apply. This allows suppliers to ready themselves

¹ There are bespoke notices for design competitions, concessions and other specific services. These are beyond the scope of this guidance.

² All contracting authorities listed in schedule 1 of the 2015 Regs are termed central contracting authorities. Any public body not listed in schedule 1 is termed sub-central contracting authorities.

for the procurement, but also may reduce the timescales for the procurement exercise. Secondly a *PIN* can be used by sub-central contracting authorities as a call for competition.

Timescales

13.1 The prescribed timescales for publishing contract notices for the various procedures are considered under the guidance for *CPR2* (Chapter 7) which is also good practice for *CPR1* (Chapter 6).

Selection

14.1 Selection is the process by which contracting authorities assure themselves that the company, which has either requested to be considered for a tender process or has submitted a tender, can be assessed for suitability to compete. Under the *Open Procedure*, any supplier may submit a tender. This, however, does not preclude the use of selection criteria to ensure that the successful tenderer meets the minimum standards, and should otherwise not be excluded from the competition.

14.2 The other procedures are all *two stage procedures*, where a contracting authority can shortlist a restricted number of bidders that will be invited to tender. The shortlist must provide genuine competition and the 2015 Regs stipulate that under the *restricted procedure* a minimum of five bidders are invited to tender although they allow for fewer when fewer bidders qualify. However, the number invited to tender must be sufficient to allow genuine competition. Under the more complex procedures of *competitive dialogue*, *competitive procedure with negotiation* and *innovation partnership* a minimum of three tenderers is stipulated.

14.3 The initial part of a selection process confirms that potential tenderers should not be excluded from the competition. The 2015 Regs set out mandatory grounds for exclusion which are: having been convicted of serious offences such as fraud, corruption, organised crime and terrorism offences, money laundering or excluded for blacklisting. However, these exclusions are only valid for five years from the date of the conviction; three years in the case of blacklisting.

14.4 The 2015 Regs also allow the contracting authority to set discretionary exclusion criteria. These can include bankruptcy or insolvency and specified grounds such as grave professional misconduct or poor prior performance of a contract that led to a contract being terminated early or damages awarded as a result of that poor performance.

14.5 The second part of the selection process involves an evaluation of the suppliers' economic and financial standing as well as their technical capacity and ability. The minimum financial standards and technical capacity that a contracting authority is looking for must be stated within the contract notice, as well as guidance on the relevant experience being sought and how it will be evaluated.

14.6 Where suppliers are not selected to be invited to tender they have a right to be advised. There are rules covering this for all regulated contracts that are considered in the detailed advice. However, under the 2015 Regs where a supplier is

not informed of the reasons for failing the selection process, they must be sent letter at the appropriate standstill period providing them with those reasons.

Self-Cleansing

15.1 Where a bidder is, or may be, excluded on any of the grounds for exclusion above, the 2015 Regs introduced a concept of self-cleansing. This allows a bidder, which may otherwise be excluded, to provide evidence to the client, that it has taken measures that prove it is reliable, despite the existence of a relevant ground for exclusion. For example the bidder may prove that they have paid fines and taken measures to prevent further criminal offences or misconduct.

European Single Procurement Document (ESPD)

16.1 The 2015 Regs introduced *the European Single Procurement Document (Scotland) (ESPD)*. It must be accepted for all 2015 Regs regulated procurements and should also be used for regulated contracts below the EU contract threshold values. The *ESPD* is essentially a form that sets out the questions that are permitted to be asked by the client of the tenderer when undertaking a selection process. These questions cannot be amended or added to, although questions can be omitted by the contracting authority. Some of the prescribed questions will require the contracting authority to provide further explanation as to what it is seeking. This explanatory information must be made available at the time of the publication of the contract notice.

16.2 Further guidance on the use of the *ESPD* can be found in Chapter 7.

Award – Invitation to Tender

17.1 The Scottish Model of Procurement promotes value for money as being an appropriate balance between cost or price, quality and sustainability, all being factors that should be taken into account when establishing the contract award criteria.

17.2 Award criteria are set by the client and used to determine which bidder is best placed to deliver the contract and consequently whether a contract can be awarded to it.

17.3 The contracting authority must use criteria linked to the subject matter of the contract, and should not include matters that have been assessed as part of the selection criteria. The selection stage assesses suppliers on their suitability, ability and capacity to be able to undertake the contract; not how they will actually perform the contract, which is considered and assessed at the award stage. The award criteria can relate to, for example, the price and quality of the proposal. In the case of the quality of the proposal, this can comprise many factors but typically it is technical merit, the aesthetic and functional characteristics, the environmental characteristics, the after-sales service, delivery dates or delivery date for completion. Where the quality of staff assigned to delivering a contract is important, a contracting authority may evaluate a bidder's general staff qualifications and experience at the selection stage. As part of the award stage evaluation, the contracting authority may seek information from the bidders confirming the precise make-up, experience and

qualifications of the team that will be delivering the contract. In short, the selection part looks back at the ability of the company to deliver a contract whereas the award evaluation looks forward to the ability of the contractor to deliver the specifics of the contract.

17.4 A contract must be awarded on the basis of the best price/quality ratio, based on the *most economically advantageous tender* (MEAT) and 2015 Regs regulated contracts must not be awarded on price alone. This approach should also be adopted for contracts regulated under the Act.

17.5 The criteria to be used and any weightings attached to the criteria must be disclosed in the procurement documents. Where weightings are not attached to criteria, the contracting authority must list the criteria in descending order of importance.

Award Decision

18.1 As soon as the contracting authority has decided which tender will be awarded the contract, they must inform all tenderers of the result in writing. This *Decision Notice* is sometimes known as a standstill letter. If the contracting authority has not already informed those parties who were unsuccessful at the selection process of that outcome, they should do so now. This Notice should include the reasons why they were unsuccessful.

18.2 A *Decision Notice* must include:

- The criteria used for the award of the contract;
- A summary of the reasons why the supplier was unsuccessful and the relative merits of the winning bid;
- Where practicable, the score achieved by the supplier as well as the score obtained by the winning bidder;
- The name of the winning bidder;
- A precise statement of the standstill period, this is a period during which the contract will not be formally awarded.

Standstill Period

19.1 The standstill period is a time period that opens the award decision for review before concluding the contract. During the standstill period the full range of pre-award remedies are available to aggrieved parties to challenge the decision. This could lead to the setting aside of the contract and/or damages. Challenges may still be raised after standstill but they may not necessarily result in the suspension of the contract until the final decision of the court is determined.

19.2 If a supplier formally challenges an award decision by commencing legal proceedings, the contract may not be concluded until the court permits it.

19.3 The standstill period begins the day following the issue of the award notices and will last for 10 days if the notices have been issued electronically, or 15 days if sent by other means. The final day must fall on a working day and, if it doesn't, the standstill period will be extended until the next working day.

Contract Award Notices

20.1 For EU regulated procurements, the contracting authority must send a *Contract Award Notice* to the OJEU within 30 days.

20.2 For contracts regulated under the Act a contract award notice must be published on the PCS portal. This is also true for all mini competitions under a framework agreement where the value awarded is above the Act thresholds.

Feedback to bidders

21.1 Providing feedback to both successful and unsuccessful bidders is an important element of the tendering process. Besides being a courtesy, which breeds good relationships and trust, it helps suppliers to improve their competitive performance, which in turn improves the quality of future bids for public sector work. Unsuccessful suppliers for procurements regulated by the Act and the 2015 Regs have a legal right to know the reasons for their rejection, while successful bidders are also entitled to seek feedback in order to understand any improvements that they could have made, even though they won the bid.

Keeping Records

22.1 Contracting authorities are obliged to hold detailed records of the process and decisions reached for at least three years from the date of the award of the contract. *Regulation 83* of the 2015 Regs provides details of the reporting and documentation requirements.

Conclusion

23.1 Detailed guidance on the application of the various processes and procedures outlined in this introduction can be found elsewhere in the *Construction Procurement Handbook* and should be referred to as appropriate. In summary, however, there are a number of guiding principles which contracting authorities should have regard to in order to assist them successfully procure construction projects.

- Bidders are treated equally and fairly;
- The process is transparent and well managed;
- There is a genuine intention by the client to proceed;
- All bidders are provided with the same, relevant and up to date information which is sufficiently detailed to enable them to prepare proper and realistic bids;

- No bidder is provided with information that puts them at an advantage, or could be seen to put them at an advantage, over the other bidders;
- Bidders are given sufficient time to participate properly in the process and prepare bids;
- The information required from bidders is proportionate to the risk and size of the contract;
- All bidders are fully informed of the process, or processes, to be followed and the required procedures to be adhered to;
- The process is open to scrutiny;
- The reasons given for the award of the tender must be transparent and can be justified;
- All bidders, whether successful or unsuccessful, are given feedback.