

A BLUEPRINT FOR 2020: THE EXPANSION OF EARLY LEARNING AND CHILDCARE IN SCOTLAND

FUNDING FOLLOWS THE CHILD AND THE NATIONAL
STANDARD FOR EARLY LEARNING AND CHILDCARE PROVIDERS:
TRANSITION OPTIONS GUIDANCE ON CONTRACTING



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NOTE TO THE READER

This Guidance Note is not intended as a substitute for legal advice and any party seeking to rely upon it should seek their own legal and/or related specialist advice before doing so.

Scotland Excel is the Centre of Procurement Expertise for the local government sector. Established in 2008, Scotland Excel are a leading non-profit shared service funded by Scotland's 32 local authorities.

Scotland Excel has been commissioned by the Scottish Government, on behalf of the Service Models Working Group, to develop a suite of supporting operational guidance and information that helps local authorities and providers in the private and third sectors, including childminders, implement Funding Follows the Child, and the underpinning National Standard, from August 2020. This included guidance on transition options for contracting with private and third sector providers, including childminders, from August 2020.

This Note (which was initially referred to as Transition Options in earlier Funding Follows the Child documents) has been produced based on feedback gathered from local authorities, providers, provider bodies and other stakeholders (for example, Care Inspectorate). This has been through various focus groups and meetings, and a survey which was issued to all Care Inspectorate registered providers and to local authorities. Comments were also received from a smaller group of providers and local authorities, as well as provider bodies, on drafts of the guidance notes.

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INTRODUCTION

1. The Scottish Government and local authorities have committed to the near doubling of the funded Early Learning and Childcare (ELC) entitlement from 600 to 1140 hours per year from August 2020 for all 3 and 4 year olds, and eligible 2 year olds.
2. In order to ensure that the funded entitlement is delivered in high quality ELC settings, Funding Follows the Child will be introduced in August 2020 alongside the statutory roll-out of the expanded entitlement.
3. This approach is ‘provider neutral’ and is underpinned by a National Standard that all settings who wish to deliver the funded entitlement will have to meet.
4. The Scottish Government and COSLA published national guidance on [Funding Follows the Child](#) in December 2018. This included supporting [Operating Guidance](#) and a [Frequently Asked Questions](#) document.
5. Funding Follows the Child was developed through the Scottish Government, COSLA and local authorities working in partnership, through a Service Models Working Group and through wider engagement with the ELC sector, including with providers. This included a consultation on Funding Follows the Child and the underpinning National Standard, which was supported by a programme of engagement events¹.
6. Scotland Excel has been commissioned by the Scottish Government, on behalf of the Service Models Working Group, to develop a suite of supporting technical guidance and information that supports local authorities and providers to implement Funding Follows the Child. The technical guidance documents cover:
 - establishing sustainable rates for funded providers;
 - meeting the business sustainability criteria in the National Standard; and,
 - transition options on contracting.

Aim of this Guidance

7. This document outlines options for local authorities to consider when developing their processes to contract with ELC private and third sector providers, including childminders, for the delivery of the funded hours. In particular, a key aspect of Funding Follows the Child is a commitment to simplifying the process for, and reducing the burden on, providers to deliver the funded entitlement.

¹ More information on the Consultation, including the responses and an analysis of the responses is available at: <https://consult.gov.scot/children-and-families/service-model-for-2020/>.

SECTION 1: THE POLICY LANDSCAPE

1.1: Funding Follows the Child

8. Funding Follows the Child places choice in the hands of parents and carers allowing them to access their child's funded entitlement from any setting – in the public, private or third sector, including from a childminder – who meets the National Standard, has a place available and is willing to enter into a contract with their local authority.

9. The key aspects of [Funding Follows the Child](#) which will affect a local authority's service provision, including any contractual relationship with funded providers are:
 - Families will be able to access high quality funded ELC with the provider of their choice if that provider meets the criteria set out in the National Standard, wishes to deliver the funded entitlement, has a space available, is able to offer the funded hours in line with local ELC delivery plans (subject to the setting's overall capacity) and, where the provider is willing to enter into a contract with the local authority;
 - The choice of setting (for example, a nursery, childminder, etc.) available to families is not restricted to their own local authority boundary;
 - Information for parents and carers will be clear and accessible to make them aware of the options available to them, in particular, the different types of settings that can be chosen when accessing their funded entitlement;
 - Settings must ensure that the funded hours are free at the point of access and parents and carers are not required to purchase additional hours beyond the funded entitlement in order to access their child's funded hours at a setting;
 - Local authorities retain the statutory responsibility for ensuring that the funded entitlement is available to all eligible children in their area, and will be the primary guarantors of quality and key enablers of flexibility and choice – ensuring that there is a range of options for families in their area;
 - Local authorities and providers should work together meaningfully and in genuine partnership in delivering flexible ELC provision, while continuing to ensure that a high quality experience for children is maintained and accessible to all;
 - Funded providers who agree to deliver the funded entitlement will commit to paying the real Living Wage to all childcare workers delivering the funded entitlement and commit to operating Fair Work Practices; and
 - A commitment to simplifying the process for, and reducing the burden on, providers to deliver the funded entitlement. All providers will face the same National Standard for becoming, and continuing to be, a funded provider.

KEY CONSIDERATION

The process used to appoint funded providers should align with the policy objectives, including being flexible enough to permit new providers to provide services throughout the contract lifetime.

1.2: The National Standard for ELC Providers

10. The [National Standard](#) sets out the criteria for all funded providers, regardless of whether they are in the public, private or third sectors or childminders need to meet in order to deliver the funded entitlement beyond August 2020.
11. The criteria focus on what children and their families should expect from their ELC experience, regardless of where they access their funded entitlement. This will ensure that, as part of the 'provider neutral' Funding Follows the Child approach, there is consistency of high quality provision across all funded provider types. It is also underpinned by the regulations in the [Public Services Reform \(Scotland\) Act 2010](#) which applies to all care services across Scotland, including daycare of children and childminding settings.
12. The National Standard criteria cover:
 - Staffing, leadership and management;
 - Development of children's cognitive skills, health and wellbeing;
 - Physical Environment;
 - Self-Evaluation and Improvement;
 - Parent and carer engagement and involvement in the life of a setting;
 - Inclusion;
 - Business Sustainability;
 - Fair Work Practices, including payment of the real Living Wage;
 - Payment Processes; and,
 - Food.
13. All settings, regardless of whether they are in the public, private or third sectors or childminders, must provide sufficient evidence to assure the local authority that they meet all of the National Standard criteria and relevant sub-criteria.

14. Private and third sector providers, including childminders, wishing to deliver funded hours will enter into a contract (or written agreement) with the local authority to become a funded provider and must meet the requirements outlined in the process, including agreeing to the terms and conditions and the sustainable funding rate.

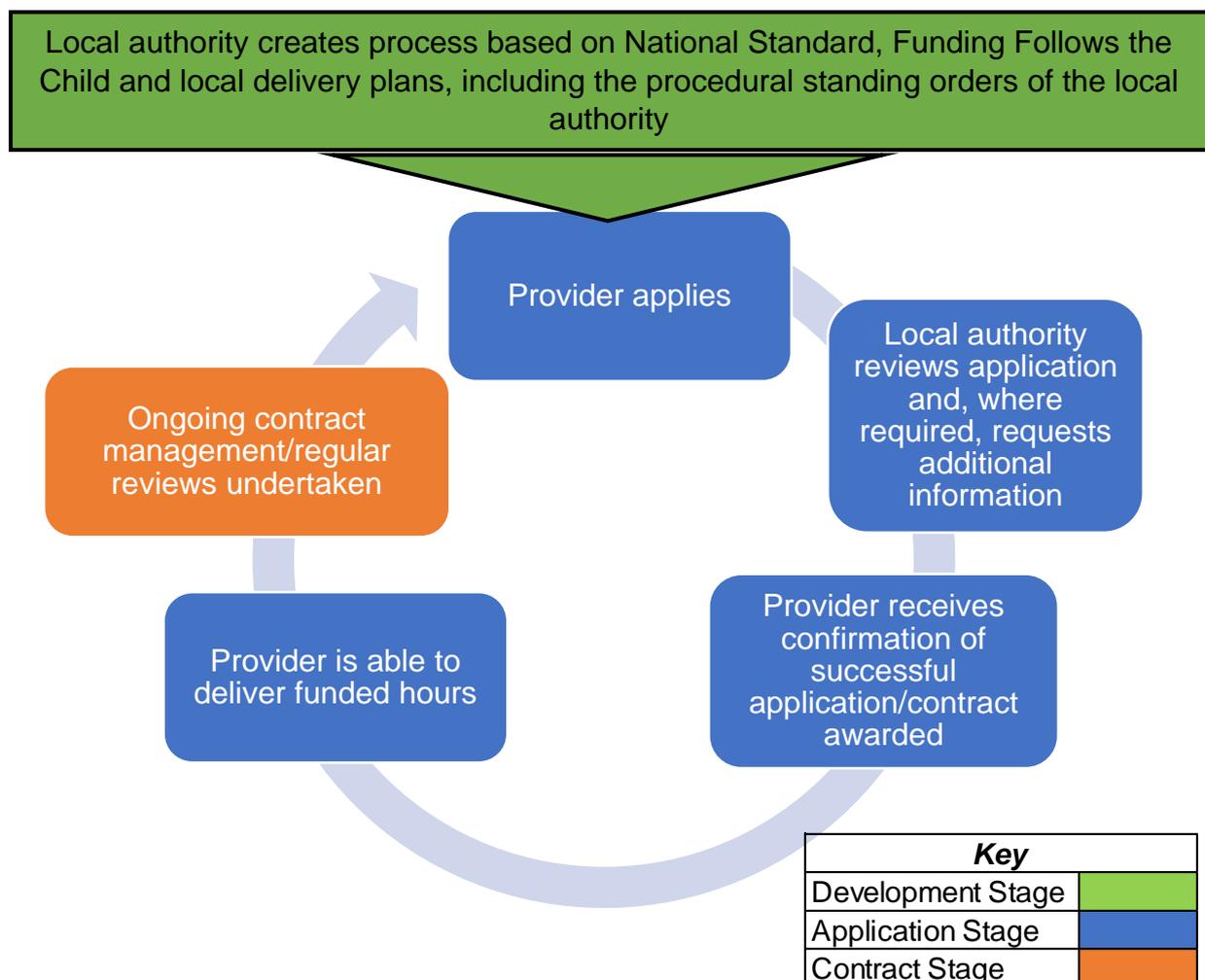
KEY CONSIDERATION

A local authority's process for contracting or entering into an alternative arrangement with ELC providers must include the National Standard criteria. Providers must provide evidence to assure the local authority that they meet the National Standard criteria to become a funded provider.

SECTION 2: PROCESS TO BECOME A FUNDED PROVIDER

15. Under [Funding Follows the Child](#), local authorities are responsible for ensuring that there is a funded place available for all eligible children in their area, including using services from private and third sector providers, including childminders.
16. Currently, local authorities use a variety of processes to contract with funded providers in their local area. As part of Funding Follows the Child, there is a commitment to simplifying the process for, and reducing the burden on, providers and local authorities to deliver the funded entitlement. To meet this commitment, some local authorities may need to adapt current processes and procedures.
17. Figure 1 shows a simple version of common steps in the process to contract with funded providers. **Each local authority will continue to be responsible for implementing these steps locally, retaining flexibility around the local process.**

Figure 1: Suggested steps in the process for becoming a funded provider



18. The following is required regardless of the exact process used to commission the delivery of funded ELC from funded providers:

- Flexibility that allows new private and third sector providers, including childminders, to apply at regular intervals throughout the contract period;
- A clear and transparent process for private and third sector providers, including childminders, to apply and provide information/evidence to local authorities;
- Documentation which is accessible for private and third sector providers, including childminders, including clear guidance and instructions for them to follow;
- A contract between the local authority and funded provider which clearly sets out the roles and responsibilities of both parties; and
- Compliance with regulatory requirements, including procurement legislation and local authority standing orders (where relevant).

KEY CONSIDERATION

Each local authority will have to seek their own local advice in finalising the process for how they commission the delivery of funded early learning and childcare from providers, in line with Scottish Government policy, including Funding Follows the Child and the underpinning National Standard. Local authorities are encouraged to work together to meet the commitment to create a more simplified approach that reduces the burden on providers.

SECTION 3: GENERAL GUIDANCE

19. Whilst this guidance is written to support the implementation of [Funding Follows the Child and the underpinning National Standard](#), there is a recognition that, in some cases, there may be a significant transition period to move away from current practices and that this may require new ways of working. This may mean that the process is reviewed during the transition to 2020 and following full roll-out of the expansion to 1140 hours.
20. The exact process that a local authority decides to adopt will depend on local factors, as well as guidance from national sources and their own internal advisers, including procurement and legal teams.
21. Regardless of the final process that is implemented, it should reflect the following points:
- The reasoning behind the local authority's approach must be clear. This may be based on current or historical arrangements, requirements to guarantee service continuity, resource allocation or other local requirements.
 - The local authority should engage with existing private and third sector providers, including childminders, to ensure awareness of the new process and any transitional arrangements.
 - The process used should be flexible enough to allow new private and third sector providers, including childminders, to apply at regular intervals throughout the contract period. This must be clearly stated when advertising and publicising the opportunity to become a funded provider. It may be beneficial to consider how this flexibility would link to other processes, such as the local authority's enrolment cycle for children taking up funded places at ELC settings.
 - The process for applying to offer funded places to 3 and 4 year-olds could be combined with the process for applying to provide funded hours to eligible 2 year-olds. This would simplify the process for providers, as well as streamlining the process for local authorities.
 - Where the local authority requests evidence in relation to the National Standard, or to adhere to their Standing Orders and Financial Regulations, the evidence and evaluation methodology must be clearly outlined.
 - Where local authorities have, historically, had high levels of cross-boundary places with neighbouring local authorities, it would be best practice to consider the extent to which it would be possible to align the funded provider processes, to ensure consistency.

- Local authorities must adhere to the EU Treaty principles when undertaking any procurement activity, namely:
 - Transparency;
 - Equal treatment and non-discrimination;
 - Proportionality; and
 - Mutual recognition.

22. The information in this document provides guidance specifically in relation to ELC requirements as well as the [National Standard and Funding Follows the Child policies](#).

23. In relation to general best practice guidance for care services, the Scottish Government has published guidance on “[Procurement of care and support services: best practice guidance](#)” to support local authorities and commissioners.

SECTION 4: CURRENT PROCESSES AND CONSIDERATIONS

24. From 2020, local authorities will need to ensure their process for commissioning the delivery of funded ELC from providers is compliant with law and guidance including procurement regulations, its own internal procedural standing orders as well as relevant policies, such as Funding Follows the Child and the underpinning National Standard.

25. To ensure compliance with procurement regulations, local authorities are required to have consideration to the application of certain rules and regulations when spend exceeds a stated threshold for this type of service (see Table 1).

Table 1: Thresholds for public procurement at April 2019

| Threshold | Rules and regulations |
|------------------------------|---|
| Less than £50,000 | Local authorities Standing Orders |
| Between £50,000 and £615,278 | Procurement (Scotland) Regulations 2016 and the Procurement Reform (Scotland) Act 2014 |
| Above £615,278 | Public Contracts (Scotland) Regulations 2015 and the Procurement Reform (Scotland) Act 2014 |

26. The value of a contract is calculated by having regard to relevant regulations, for example, in the 2015 Regulations, the relevant provision is regulation 6(13), which calculates the value by reference to all contracts “of the same type” likely to occur in the 12 months or financial year period following the delivery of the first contract, so the value would be calculated on the basis of all funded provider contracts. This is the total external spend on ELC services within a 12-month period by the local authority.

27. Considering the applicable rules, Scotland Excel’s view would be that the procurement Regulations apply when contracting for these services. Where the value exceeds the threshold under the 2015 Regulations, currently £615,278, the Light Touch Regime set out for services of this type in the Public Contracts (Scotland) Regulations 2015 will apply. The Light Touch Regime is explained in more detail in section 5.1. Below the Light Touch Regime threshold value provisions of the 2014 Act apply.

28. The Light Touch Regime sets out a flexible and compliant route to market which is relevant for this type of service and should enable the outcomes required for the local authority, funded providers and families. The requirement of this process is lighter than other procedures set out in the Regulations including, for example, negotiated procedures. Local authorities may, however, consider that other procurement procedures are necessary to meet their needs and requirements once they have gained advice from their own advisers.

KEY CONSIDERATION

A local authority may need to change or adapt their route to market to ensure it aligns with both Scottish Government policy (including Funding Follows the Child and the National Standard) and procurement regulations. This may mean developing a new process.

SECTION 5: PROCUREMENT

5.1: The Light Touch Regime

29. The Light Touch Regime is set out in the Public Contracts (Scotland) Regulations 2015. It outlines specific rules when contracting for certain social and other specific services, known as “services to the people”. These types of services generally have a limited cross border dimension and so are of lower interest to cross-border competition. Consequently, a ‘lighter touch’ is permitted when letting contracts for such services. These services are specified in Schedule 3 of the Public Contracts (Scotland) Regulations 2015.
30. The Light Touch Regime offers local authorities the flexibility to develop a process that considers the specifics of the services required and the requirements and needs of the users (in this case, children and their families) whilst still ensuring compliance with their Financial Regulations and Standing Orders. It also offers the opportunity to reduce the administrative burden of contracting for both funded providers and local authorities.
31. As noted above, where services are specified in Schedule 3, greater flexibility is permitted in public tenders for the award of the services. For ELC services, two services specified under Schedule 3 may apply (and are identified in Table 2).

Table 2: *Potential Relevant Services from Schedule 3 of the Public Contracts (Scotland) Regulations 2015*

| Common Procurement Vocabulary (CPV) Code | Description |
|---|-------------------------------|
| 80110000-8 | Pre-school education services |
| 85312110-3 | Child daycare services |

32. Neither of these codes are defined in the Scottish Education system as having a particular meaning and therefore either could be used to define the requirements.
33. Regulation 74 of the Public Contracts (Scotland) Regulations 2015 states that:

“A public contract or framework for social and other specific services listed in Schedule 3 must be awarded in accordance with this Section (Social and Other Specific Services) where the value of the contract or framework is equal to or greater than the threshold indicated in regulation 5(1)(d)(thresholds).”

5.2: Options under the Light Touch Regime

34. The Light Touch Regime is designed to give local authorities more discretion (compared to other regulated procurements) in how they organise the process for the choice of service providers in a way that they consider most appropriate.
35. Under the Light Touch Regime, for ELC services, the local authority can develop a process that allows them to:
- Request evidence from providers regarding the National Standard criteria (with all ELC providers being assessed against the same National Standard criteria);
 - Request additional contracting documentation, such as insurance documents; and,
 - Set out the terms and conditions of contract, including the sustainable funding rate.
36. Although there are certain requirements that a local authority is required to follow - which include complying with the general principles of transparency, equal treatment and non-discrimination, proportionality and mutual recognition - these are limited to publishing a Contract Notice or Prior Information Notice, a Contract Award Notice and applying mandatory exclusion criteria (regulation 58(1) and (3)). There are, therefore, a number of ways that the local authority could establish a process under Light Touch Regime to align with both the policy requirements and regulatory requirements.
37. Whilst Scotland Excel is unable to comment on the exact process that would be best suited to meet this requirement for individual local authorities (as this will be based on a variety of factors including local authority resource as well as local market conditions), it is our view that the Light Touch Regime will apply to contracts for these types of services (where the threshold applies) and that it establishes a framework for a compliant and comparable approach to be taken to ELC procurement processes across local authorities. The Light Touch Regime can encompass a variety of procedures tailored to suit the local authority's requirements.
38. An example of how the Light Touch Regime process could be used when considering an ELC providers' suitability to deliver the funded ELC entitlement and to enter into a contract with the local authority is set out in Section 6.

5.3: Alternatives to the Light Touch Regime

39. It should be noted that a local authority may decide that ELC services do not fall under the applicable procurement rules after seeking its own legal and specialist advice.

40. Where this is the case, the local authority should consider the points detailed in Section 2 (Process to become a Funded Provider) of this document. In addition, the local authority should record its reasoning for this decision in an open and transparent manner and should ensure that a fair and transparent approach is taken to the distribution of available funding in their area.

SECTION 6: EXAMPLE OF THE LIGHT TOUCH REGIME IN PRACTICE

KEY CONSIDERATION

The following pages set out a suggested route that a local authority may adopt when considering a provider's suitability to deliver the funded ELC entitlement and establish a public contract.

Each local authority will define their own process for contracting with funded providers.

6.1: Overview

41. This guidance has been prepared to set out a suggested route, where a local authority is establishing a public contract, under the Light Touch Regime. It highlights best practice from current processes relevant to the ELC marketplace requirements.

42. The most important aspects of an ELC procurement process are shown below:

- **Accessible:** The process used must be flexible enough to allow new private and third sector providers, including childminders, to become funded providers at regular intervals and this must be clearly stated when advertising and publicising the opportunity to become a funded provider.
- **Simple:** The process for private and third sector providers is easy to follow and understand.
- **Transparent:** Private and third sector providers must be aware of what is expected of them at the outset (for example, that they must provide evidence that they meet the National Standard criteria). The rationale and frequency of the local authority process for considering new private and third sector providers, including childminders, must be open and transparent.
- **Procurement Principles:** Where the local authority is undertaking a procurement process under the Light Touch Regime and awards are subject to the procurement rules, the local authority must adhere to the procurement principles deriving, namely:
 - treat providers equally and without discrimination; and
 - act in a transparent and proportionate manner.

43. Box 1 describes an approach to developing, advertising and awarding a 'flexible framework' arrangement under the Light Touch Regime.

44. A flexible framework is an arrangement which can operate in a similar way to a framework agreement, where private and third sector providers, including childminders, are invited to complete an application form for the local authority to consider.
45. A successful application will result in providers being admitted to the flexible framework as a funded provider.
46. This will mean that the funded provider can begin to offer the funded hours to children and their families. The local authority will have a contractually compliant arrangement with the funded provider, supporting consistency and continuity for the child's funded entitlement.
47. Whilst individual local authorities will determine how they monitor whether settings are meeting the National Standard and how they will enter into contracts with funded providers who meet the National Standard, there is strong consensus for simplifying processes across Scotland. This is a key aspect of Funding Follows the Child.
48. Depending on the process a local authority uses to commission the delivery of funded ELC, providers may be required to provide additional information and agree to certain contract conditions to ensure the process complies with the local authorities procedural standing orders, financial regulations and procurement regulations. However, if it is decided that additional information or contractual conditions are required, local authorities must not alter or add to the National Standard criteria.
49. Where the Light Touch Regime applies, additional questions will include those that are detailed in the European Single Procurement Document (Scotland) in respect of mandatory exclusion grounds. In the case of Social and Other Specific Services, which includes ELC provision, the mandatory exclusion grounds (regulations 58(1) to (3) of Public Contracts (Scotland) Regulations 2015) must be applied to all procurements. An organisation can choose to apply the discretionary exclusion grounds and selection criteria and can also choose to use the European Single Procurement Document (Scotland) for this purpose, without amending the questions, and this is recognised as best practice.
50. Separate guidance has also been prepared on how to apply **Criteria 8 - Fair Work Practices, including payment of the real Living Wage**, when undertaking a procurement process (see Annex A).

6.2: Flexible Framework Process for ELC Funded Providers

Box 1: Flexible Framework Process for ELC Funded Providers

This box sets out an approach for developing, advertising and awarding a 'flexible framework' arrangement under the Light Touch Regime.

The approach is split into the following key steps (with a section below setting out the details for each step):

- Step 1: Develop a strategy
- Step 2: Prepare documents
- Step 3: Advertise opportunity and invite applications
- Step 4: Applications are submitted
- Step 5: Review of applications and award of successful providers
- Step 6: Contract mobilisation
- Step 7: Contract management

Step 1: Develop a strategy

1.1 Complete market research and engagement

- Market research and engagement should be undertaken by local authorities with local private and third sector providers, including childminders.
- It should be considered whether evening or weekend engagement sessions need to be held to ensure that ELC setting staff and childminders are able to attend. The local authority may also want to consider engaging with provider bodies to ensure their members are aware of the upcoming opportunity.
- When active consultation is undertaken with the market, including with private and third sector providers (including childminders), local authorities should consider the requirements of the procurement rules where a public tender is in prospect. Further information on this can be found in the Frequently Asked Questions in Section 7.

1.2 Develop a procurement based strategy

- The local authority should create a procurement strategy based on, for example,:
 - Market evaluation and engagement;
 - Procurement and service requirements including local ELC delivery plans; and,

- Funding Follows the Child and the underpinning National Standard , (with reference to the [Operating Guidance](#)).

1.3 Decide the frequency of the process

- The local authority should consider how often they will allow new applications to be submitted throughout the contract period.

Step 2: Prepare documentation

2.1 Develop specification and decide evidence requirements

- The local authority should prepare an application form for private and third sector providers to complete with the necessary evidence to meet the National Standard criteria, and request that those applying confirm they have not engaged in criminal activity (mandatory exclusion grounds). This could be in the form of a European Single Procurement Document.
- Local authorities will be required to align the application form and evidence requested with:
 - Law and applicable guidance;
 - The National Standard; and,
 - The applicable procedural standing orders such as the Contract Standing Orders and Financial Regulations.
- The local authority should prepare an evaluation methodology describing the evidence required and how this will be reviewed at point of application.
- Terms and conditions should be prepared, including, but not limited to:
 - the agreed sustainable hourly rate to be paid to a funded provider (and any other payment elements);
 - the roles and responsibilities of both parties; and,
 - what evidence will be required as part of contract management.
- The local authority will need to prepare a document that outlines the anticipated demand of provision across the local area.

2.2 Decide on the platform to receive applications

- PCS-Tender or another platform, such as the local authority's website using an e-form solution could be used to receive the application(s).

2.3 Prepare advert

- The local authority prepares a Contract Notice, which includes reference to the National Standard, which sets the minimum requirements necessary to be a funded provider, and all other relevant information.

Step 3: Advertise opportunity and invite applications

3.1 Open the application process

- The local authority will publish the Contract Notice at this point. Where procurement Regulations apply, this must be published on Public Contracts Scotland (PCS) and where thresholds apply, for onward transmission in accordance with applicable law. The advert can also be publicised on the local authority website, through provider bodies or social media, to attract potential new private and third sector providers to apply.
- The advert should include reference to the National Standard, which sets the requirements for all funded providers, and the information required to comply with procurement rules (see regulation 75(1) of the 2015 Regulations), and any other relevant information.
- The advert should clearly state the deadline for applications and inform private and third sector providers of the next application window.
- All the supporting documents must be available from PCS-Tender (or the platform being used).

Step 4: Applications are submitted

- Private and third sector providers, including childminders, are able to review the Contract Notice (on PCS) and supporting documentation (for example, on PCS-Tender) and decide whether to apply.

Step 5: Review of applications and award of successful providers

5.1 Review of applications

- The local authority should review the application in line with the evaluation methodology and, where necessary, seek clarification from potential funded providers.
- Private and third sector providers, including childminders, that have provided sufficient evidence and meet the criteria should be informed that they have been approved as a funded provider.
- Where a private and third sector provider or childminder has not provided sufficient evidence, they will be informed and feedback provided.
- Where the Light Touch Regime thresholds apply, the 'standstill process' must be followed (see Part 3 of the 2015 Regulations) in accordance with law and guidance.

5.2 Award of contract

- In the event the 'standstill process' passes without formal legal challenge, contract award letters should be issued to successful private and third sector providers, including childminders.
- A Contract Award Notice should be published on PCS, and where thresholds apply, for onward transmission in accordance with applicable law.

Step 6: Contract mobilisation

When starting the contract, the local authority should consider inviting funded providers to a 'mobilisation' or induction session to discuss the contract terms and conditions. It is recommended that a mixture of weekday, weekend and evening sessions will ensure most funded providers are able to attend.

Step 7: Contract management

- Due to the monitoring requirements for quality by both the local authority and through Care Inspectorate scrutiny activity, it may be preferred if procurement contract management activity of a routine or repeating nature is kept to a minimum. A review of funded providers may include:
 - Assessing financial viability;
 - Updating funded providers on local authority policy and practice;
 - Involving funded providers in decision making (where relevant and appropriate).
- It is the responsibility of the funded provider to tell the local authority if there are any significant changes to the setting that could affect their contract with the local authority. For example, the results of Care Inspectorate scrutiny activity should be shared with the local authority once this has been published, if not before, and this will allow the local authority to remain informed about whether the setting is meeting the National Standard.
- There may be other circumstances which occur which the local authority will need to be made aware of and it will be for the funded provider to ensure this is communicated in a timely manner so that appropriate support can be offered and decisions about contracting can be made efficiently.

SECTION 7: FREQUENTLY ASKED QUESTIONS

Step 1: Develop Strategy

1. Are there specific considerations that should be taken into account during market research?

Market research and engagement should be undertaken by local authorities with local private and third sector providers, including childminders.

When active consultation is undertaken with the market, including with private and third sector providers (including childminders), local authorities should consider the requirements of the procurement rules where a public tender is in prospect.

This includes regulations 41 (Preliminary market consultation) and 42 (Prior involvement of candidates or tenderers) and regulation 53 (Publication at national level) of the Public Contracts (Scotland) Regulations 2015. Local authority procurement and legal advisers will be able to provide local authority-specific advice about how this should be reflected in the processes.

2. Can the procurement process for 3 and 4 year olds, and eligible 2 year olds, be combined?

Ideally, the process for applying to offer funded ELC to 3 and 4 year-olds would be combined with the process for eligible 2 year-olds. The same application process and evidence would simplify the process for providers, as well as streamline the process for local authorities.

Local authorities may wish to consider using a risk-based approach to ensure that the evidence requested is aligned with what the provider is able to provide.

3. Are there Cross Boundary considerations that should be included in the process?

The local authority may want to work with other local authorities that it has cross-boundary placements with to confirm if they can have a shared or similar approach to both the process applied and the contracting arrangements they use for funded provision in private and third sector settings. Such an approach could also help simplify the process for private and third sector providers, including childminders, with settings across more than one local authority, and reduce the potential burden of significant variations in process across authorities.

It may be worth considering what common elements of the process could have a shared or similar approach (for example, the evidence requested in order to assure themselves that the provider meets the National Standard) and those that are distinct to each local authority (for example, insurance levels). This could be signposted to providers to reduce the burden on them.

4. Are there considerations that should be taken into account for the length of contract?

The length of contract will be dependent on a number of local factors. Each local authority will be best placed to decide on the length of contract and the mechanism for renewing this based on local and policy requirements, available resource and local market stability.

The key outcome required from the process is that it delivers the flexibility required to meet the needs of children and their families. Therefore, no matter the length of contract the local authority decides on, it is imperative that the process is flexible enough to permit new applicants throughout its lifetime.

The local authority should ensure that the application process is fit for purpose and delivers the outcomes required of it. To ensure this, the local authority may want to build in flexibility to extend or re-develop the procurement process as required throughout its lifetime. The local authority should clearly state this within the initial application documentation, including the Contract Notice.

Step 2: Prepare documentation

5. What considerations should be made regarding the terms and conditions?

Separate guidance will be available later in 2019 regarding template contract terms and conditions that local authorities may wish to draw on. However, in the first instance, the following points should be considered within the contract terms and conditions:

- The payment terms of the contract, in line with the National Standard payment requirements (as set out in Criteria 9 – Payment Processes in the [Operating Guidance](#));
- How the sustainable rate review process will work, specifically in instances where the local authority is requesting evidence or similar from private and third sector providers and the timeline for this;
- Applicable data protection laws; and,
- Community benefits requirements.

It will also be important to include information on the roles and responsibilities of both parties in the documentation, in line with Funding Follows the Child (see in particular the section on Meaningful and Genuine Partnership Working on pages 10-11 of the [Operating Guidance](#)) as this would ensure a clear understanding of how the parties will interact.

6. What considerations should be made about the documentation?

Separate guidance will be available later in 2019 regarding template documentation however, in the first instance, the following points may be considered in the approach to documentation:

- Simplified documentation and forms should be used wherever possible;
- Providers should not need to duplicate their work if existing evidence will show they are meeting the National Standard. For example, information requested by the Care Inspectorate should not need to be changed if it can be submitted in its current format and still show how the setting is meeting the National Standard;
- Applications should be easy to submit (for example, electronically);
- The method for receiving questions during the process should be clearly stated within the documentation and at any training events prior to opening the application process.

Local authorities will be required to ensure that the evidence they request is in line with:

- Law and applicable guidance;
- The National Standard for ELC Providers; and
- The applicable procedural standing orders such as the Contract Standing Orders and Financial Regulations.

Whilst individual local authorities will determine how they monitor whether settings are meeting the National Standard and how they will enter into contracts with funded providers who meet the National Standard, there is strong consensus for simplifying processes across Scotland.

Depending on the process a local authority uses to commission the delivery of funded ELC, providers may be required to provide additional information and agree to certain contract conditions to ensure the process complies with the local authorities procedural standing orders, financial regulations and procurement regulations. However, if it is decided that additional information or contractual conditions are required, local authorities must not alter or add to the National Standard criteria.

Particular provision should be made concerning the real Living Wage criteria, with more information given in Appendix 1.

7. What considerations should be given in the evaluation methodology?

Regardless of the exact process used, the evidence required and how this will be reviewed should be transparent and ensure equal treatment amongst those applying to become funded providers. For example, a local authority process should always include:

- Clear, written evaluation methodology which identifies how the evidence provided will be reviewed to assure the local authority that the provider meets the criteria;
- When and why additional evidence may be requested from the private or third sector provider or childminder; and,
- Clear, written guidance on the length of time between a potential funded provider being unable to provide sufficient evidence to meet the National Standard criteria before and when they can apply again.

8. Does a local authority need to use a European Single Procurement Document?

A European Single Procurement Document, whilst not a requirement under the Light Touch Regime set out in the aforementioned 2015 Regulations, does ensure local authorities can satisfy the requirement in the Light Touch Regime to exclude providers who come within any of the 'mandatory exclusion grounds' set out in the Regulations. Those grounds include, for example, where providers have been convicted of certain serious offences, such as money laundering.

However, as the European Single Procurement Document is not mandated within the Light Touch Regime, local authorities have flexibility around how private and third sector providers can be asked to provide information about exclusion grounds and for related 'selection' information (for example, Care Inspectorate registration certificates). Scotland Excel will work with local authorities to establish if an alternative format would be preferred and will consider this further when developing template documentation guidance.

9. How can a local authority advertise the opportunity?

As noted above, a local authority should operate a transparent and flexible process, which allows private and third providers, including childminders, to apply at regular intervals throughout the contract period. Whatever the nature of the process, local authorities should ensure that this opportunity is publicised or advertised appropriately and in accordance with the local authority's own procedural standing orders and related law and policy requirements.

Where a procurement process is followed, the opportunity must be publicised via Public Contracts Scotland and, where thresholds apply, prepared for onward transmission in accordance with applicable law. The opportunity may also be publicised on other media, appropriate to the marketplace. This may include social media, local authority websites or via the provision of indicative information to national provider representative bodies. Where a procurement process is used, local authorities should liaise with their procurement advisers to ensure that the information released is in line with Regulations. For example, it is important to ensure that the same information is given in all public and internal adverts and that the local authority must ensure that information is not issued to local private and third sector providers (including childminders) before the public advert is published.

The local authority may also consider offering training and information events in the lead up to the start of the exercise (or at regular points throughout the year) to explain the relevant processes which apply, provide further information and answer questions from prospective funded providers, with the aim of ensuring a better response to the exercise.

Where a local authority has a flexible process which allows providers to apply at different points during the year, they need to ensure they advertise this opportunity appropriately. This should be done via Public Contracts Scotland, for onwards transmission in accordance with applicable law (where relevant) and other media, appropriate to the marketplace. This may include social media, local authority websites or with the support of national provider representative bodies.

10. What considerations should be made regarding the frequency and duration of the application process?

It is important for the local authority to consider the length of time before the application process re-opens for new private and third sector providers, including childminders, to apply to become a funded provider.

Where a regulated tender procedure is used based on the Light Touch Regime, there are no minimum timelines stated that would affect the duration of the application process, only a general requirement that there should be sufficient time allowed.

In particular, Regulation 76(7) setting out the Light Touch Regime in the Public Procurement (Scotland) Regulations 2015 states that all time limits must be:

“reasonable and proportionate having regard to the nature of the requirement and the needs of service users.”

In the case of ELC, the 'needs of the service users' is an important requirement to consider, however, local authorities also need to ensure that this is balanced with the local resource requirement to review evidence appropriately. The local authority may also consider the impact that re-opening the process has on market stability in the area, settings admissions policy and timescales and how they manage their process for allocating spaces.

To manage resources appropriately, the local authority may set specific periods throughout the year where new applications for funded provider status can be made, based on local requirements. It should be noted that long periods between application processes would not reflect the policy objectives and may not provide the flexibility required, therefore, this should be avoided wherever possible.

This is a decision for each local authority, however, information regarding the timescales for applications must be communicated to private and third sector providers, including childminders, as part of the process.

Step 3: Applications are submitted

11. Where applications are accepted continuously, how will they be reviewed?

The local authority may choose to review applications and award funded provider contracts at regular intervals, for example, every 6 months. In this circumstance, the application can be completed at any point, however, these would be reviewed and contracts awarded every 6 months. Another model would be for an application to be submitted and the local authority reviews it when it is received. This would allow new private and third sector providers, including childminders, to apply and be awarded funded provider status continuously. Whichever model is chosen, this should be communicated clearly to potential funded providers as part of the application process.

Step 4: Review of applications and award of successful providers

12. How does a local authority make the documentation available to providers?

The local authority may make the documentation available through PCS, PCS-Tender or another platform, such as the local authority's website using an e-form solution, to receive the application(s).

Note: The notice used to publicise the opportunity must be published on PCS and where Light Touch Regime thresholds apply, for onward transmission in accordance with applicable law.

13. How does a local authority publicise the contract award?

Publishing a Contract Award Notice is a mandatory requirement and must be published on PCS, where the Light Touch Regime thresholds apply this will include onward transmission in accordance with applicable law, where relevant. If the process is being opened continually or at a regular interval, the local authority will need to consider how to publicise any updates to the established arrangements, for example, when additional funded providers are awarded a contract. The procurement Regulations allow Contract Award Notices to be grouped on a quarterly basis. Regulation 75(4) details that grouped notices must be sent within 30 days of the end of each quarter.

It should be noted that each local authority will be required to follow their Contract Standing Orders for awarding contracts.

Step 5: Contract mobilisation

14. What should be considered once a contract is awarded?

When starting the contract, the local authority should consider inviting funded providers to a 'mobilisation' or induction session to discuss the contract terms and conditions. It is recommended that a mixture of weekday, weekend and evening sessions will ensure most funded providers are able to attend.

Step 6: Contract management

15. What procurement considerations are there for managing contracts with funded providers?

Any contract management activity should be carefully considered by the local authority to ensure that it is undertaken within the commitment of reducing the burden on providers, with any activity of a routine or repeating nature kept to a minimum and based on the level of risk.

It will also be important for the local authority to consider how often they would expect funded providers to re-submit evidence for review. This could be:

- Annually
- Upon request
- Related to key areas of focus on quality in the local authority area; or
- Following changes to the service or the evidence relating to the National Standard criteria.

It is for the local authority to decide on how this is managed based on availability of resources to manage this monitoring whilst also considering their role as the guarantors of quality.

ANNEX A: IMPLEMENTING THE REAL LIVING WAGE COMMITMENT

51. The National Standard includes criteria regarding the real Living Wage and Fair Work Practices (see Box 2). This criteria needs to be included in the process used by local authorities to contract with ELC providers.

Box 2: CRITERIA 8 – Fair Work Practices, including Payment of the Real Living Wage

Settings, including childminders where workers are regularly employed to provide direct care to children, who agree to deliver the funded entitlement will, in accordance with the supporting guidance on Transition Options, pay the real Living Wage to all childcare workers delivering the funded entitlement and commit to adopting and demonstrating Fair Work practices in their setting. In committing to Fair Work practices, settings must take into account:

- a fair and equal pay policy across their setting (including a commitment to supporting the real Living Wage);
- ELC managers/lead practitioners/employers (in the case of childminders who employ staff) have clear managerial responsibilities to nurture talent and help individuals fulfil their potential;
- promoting equality of opportunity and developing a workforce which reflects the population of Scotland in terms of characteristics such as age, gender, religion or belief, race, sexual orientation and disability;
- security of employment and hours of work, avoiding exploitative employment practices such as unfair zero hours contracts, or pregnancy and maternity discrimination;
- consideration of patterns of working (including, for example, part-time working and/or term-time working) and support for family friendly working and wider work life balance; and,
- support progressive workforce engagement, including trade union membership or alternative arrangements, to give staff an effective voice, for example, through regular staff meetings, where possible.

A.1: The real Living Wage

52. A private and third sector providers' proposed package of Fair Work Practices would be expected to include fair and equal pay, including a commitment to supporting the real Living Wage. The Scottish Government considers the payment of the real Living Wage to be a significant indicator of how a provider of ELC funded provision is committed to Fair Work practices.

53. To support this, the Scottish Government and COSLA agreed a multi-year funding package which includes funding to enable the payment of sustainable rates to funded providers delivering the funded entitlement – including funding to enable payment of at least the real Living Wage to all childcare workers delivering the funded entitlement.
54. The Scottish Government has developed information sheets on both the [real Living Wage](#) and [Fair Work Practices](#).
55. [Statutory Guidance](#) has been published, which public bodies must have regard to when addressing Fair Work practices, including the real Living Wage, when selecting tenderers and awarding contracts.

A.2: Can Fair Work Practices be evaluated in a contract for ELC services?

56. Fair Work Practices are particularly relevant where the quality of the service being delivered is directly affected by the quality of the workforce engaged in the contract. It is possible, therefore, to take account of a private and third sector provider's approach to Fair Work practices. In addition, the Scottish Government considers the payment of the real Living Wage to be a significant indicator of a provider's commitment to Fair Work practices and that payment of the real Living Wage is one of the clearest ways to demonstrate that it takes a positive approach to its workforce.

A.3: How can the local authority make this commitment clear?

Pre-contract notification

57. Funded providers can be notified of this commitment along with other aspects of the National Standard in the Contract Notice. An example statement for a Contract Notice or Prior Information Notice, is shown below:

“Section of Contract Notice: (VI.3) Additional Information

“[the organisation] is committed to ensuring delivery of high quality early learning and childcare services and to achieving best value. Fair Work practices, including payment of the real Living Wage, are particularly relevant to the delivery of quality early learning and childcare services, as the service is directly affected by the quality of the workforce engaged in the service. Payment of the real Living Wage will be viewed by the local authority as a key indicator of ‘Criteria 8 – Fair Work Practices, including Payment of the real Living Wage’ being met.”

Terms and conditions

58. Within the terms and conditions the local authority will also highlight that in accepting the sustainable rate, a provider acknowledges that an element of this rate reflects an expectation that there is payment of at least the real Living Wage to all childcare workers delivering the funded hours.

Requesting evidence

59. The single most important driver of the quality of a child's ELC experience is a high quality workforce. The promotion of fair work practices, including payment of at least the real Living Wage, is a key way of supporting a high quality workforce, and forms a key part of the National Standard. As with all aspects of the National Standard, evidence must be sought from the provider to demonstrate how the criteria is being met. If the provider does not provide sufficient evidence to the local authority that this criteria is met, the local authority may not contract with the provider.

60. Providers should be asked to provide evidence of Fair Work practices in their setting(s), in line with the National Standard criteria. Evidence may include (but not limited to):

- Policy documents;
- Induction documentation;
- Ongoing training and development information/examples;
- Director/owner statement on rates of pay;
- Terms and conditions of employment contracts.

OR

- A qualitative response from the private or third sector provider to a set question on Fair Work practices.

61. Fair Work practices, including payment of the real Living Wage, are relevant to the delivery of high quality ELC settings, as the service is directly affected by the quality of the workforce engaged in the service. For the avoidance of doubt, being unable to provide evidence of paying the real Living Wage will not necessarily cause a provider to be excluded from the process, however, payment of the real Living Wage will be viewed by the local authority as a key indicator as to whether Criteria 8 – Fair Work Practices, including Payment of the real Living Wage is being met.

62. A local authority may request that the provider evidences how the commitment will be met, including signing up to a commitment or action plan to deliver this commitment during the term of their contract as a funded provider.

A.4: How can a local authority review the evidence requested?

Size and status of providers

63. It is important to treat all applications equally and not to discriminate based on size or status. This includes taking into account the relative differences in a provider's approach when evaluating responses.

64. It may not be proportionate for small (<50 employees) and micro businesses (<10 employees), or small third sector providers to have teams of staff in place who are responsible for processes, procedures and controls to enforce their stated policies on promoting Fair Work practices. Such settings may, however, be able to offer different approaches to give staff an effective voice given the nature of relationships that will exist due to their size.

65. Third sector providers may take a different approach to the Fair Work Practices they offer, taking account of the resource constraints under which they operate, and may not be able to commit resources to longer term investments in workforce practices.

Evaluators

66. Evaluators of the criteria (whether procurement, ELC or other members of local authority staff) should be briefed on what is expected of private and third sector providers when assessing this criteria.

67. For example, the local authority may have training on Fair Work practices as this is often used in other procurement exercises. An [example checklist for an evaluator](#) considering Fair Work practices is available for local authorities to consider when deciding on the process for contracting with funded providers.

68. The Scottish Government has also provided [guidance that indicates good answers to Fair Work Practice questions](#) and includes an example within a 'Care Service Contract' which is also relevant to ELC contracts.

69. When a local authority is considering applications from potential funded providers and the supporting evidence which accompanies it, they must take into account the complete package of Fair Work Practices a provider offers and the impact those practices can have on the way the ELC provision is delivered in a way that demonstrates that the National Standard criteria are being met.

70. Individual elements of a package of Fair Work practices must not be considered or evaluated separately.

71. Where evaluators are unsure or unassured regarding the evidence given, clarification may be sought from the potential funded provider, in line with relevant local authority requirements and applicable regulations and/or from relevant members of staff, such as procurement colleagues.

ANNEX A: GLOSSARY

| Term | Explanation |
|---|---|
| Common Procurement Vocabulary (CPV) Code | CPV codes are a system used (across the European Union) for classifying public procurement which uses standardised vocabulary to help classify Contract Notices consistently and to make it easier for stakeholders to find notices |
| Contract Award Notice | The Contract Award Notice is a public announcement of the outcome of a public procurement exercise. In Scotland, these are advertised on PCS (Public Contracts Scotland). |
| Contract Notice | The Contract Notice is used to advertise a contract opportunity. In Scotland, these are advertised on PCS (Public Contracts Scotland). |
| Contract Standing Orders | Contract Standing Orders are specific to each local authority and ensure that uniform contracting procedures are used. They promote consistency, transparency, fair opportunity and equality of treatment. |
| COSLA | COSLA, the Confederation Of Scottish Local Authorities, is the voice of Local Government in Scotland. They provide political leadership on national issues, and work with local authorities to improve local services and strengthen local democracy. |
| Early learning and childcare / ELC | The relevant legislation defines early learning and childcare as: <i>“a service consisting of education and care, of a kind which is suitable in the ordinary case for children who are under school age, regard being had to the importance of interactions and other experiences which support learning and development in a caring and nurturing setting.”</i> |
| European Single Procurement Document (ESPD) | The European Single Procurement Document replaces the Standard Pre-Qualification Questionnaire (sPQQ) and it is mandatory to use the ESPD (Scotland) for |

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| | <p>all Route 3 procurements which begin on or after 18 April 2016.</p> <p>In the case of Care and Support Services, the mandatory exclusion grounds (regulations 58(1) to (3) of Public Contracts (Scotland) Regulations 2015) must be applied to all procurements, and an organisation can choose to apply the discretionary exclusion grounds and selection criteria and can choose to use the ESPD (Scotland) for this purpose without amending the questions, and it is a matter of best practice to do so.</p> |
| Funded hours | The hours of funded ELC provision for children which are funded through the local authority up to the statutory entitlement of 600 hours per year or (from August 2020) 1140 hours of funded ELC per year for all 3 and 4 year olds and eligible 2 year olds. |
| Funded Provider | An ELC setting who meets the National Standard and offers the ELC funded entitlement to children. |
| Financial Regulations | The financial regulations and associated procedures provide the financial governance and accountabilities for a local authority in relation to the overall financial management of the local authority. |
| National Standard | The Standard that all funded providers in Scotland will need to meet to offer the funded entitlement to children from August 2020. This is regardless of whether the funded hours are provided by a setting in the public, private or third sectors, including provision offered by childminders. It is aligned to the guiding principles for the expansion to 1140 hours: quality; flexibility; accessibility, and affordability. It is also underpinned by the regulations in the Public Services Reform (Scotland) Act 2010 which applies to all care services across Scotland, including daycare of children and childminding settings. |

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| PCS | Public Contracts Scotland (PCS) is the national advertising portal for the Scottish public sector and their prime contractors to advertise their contract and sub-contract opportunities, and publish contract awards. |
| PCS-Tender | PCS-Tender is the national eSourcing system provided free of charge by the Scottish Government. It is currently used by over 60 public sector organisations in Scotland including Local Authorities, NHS, HE/FE and Scottish Government sector for their route 2 and 3 procurement exercises. |
| Provider | Any organisation offering ELC provision registered with the Care Inspectorate under daycare of children or childminding registrations. |
| Public Contract | Subject to regulation 98(6) of the The Public Contracts (Scotland) Regulations 2015, means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as its object the execution of works, the supply of products or the provision of services. |
| Scotland Excel | The Centre of Procurement Expertise for the local government sector. Their services are designed to help local authorities meet the twin challenges of reducing budgets at a time of growing demand. Collaborative procurement increases efficiency and ensures money is saved to protect front line services. By working together through Scotland Excel, local authorities work to realise a host of social, economic and environmental benefits from their spend. |
| Service Model Working Group | A group established in 2017 to bring together Scottish Government, COSLA and local authorities to work in partnership to develop Funding Follows the Child and the underpinning National Standard for ELC providers. |
| Setting | Any service offering ELC provision registered with the Care Inspectorate under |

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|-------------------|--|
| | daycare of children or childminding registrations. |
| Standstill | The standstill period is a defined period of time between the notice of the contract award decision and the award of the contract. The purpose of the standstill period is to enable unsuccessful providers to consider the feedback on their submissions and to allow them an opportunity to seek further information or call for a review of the decision. |
| Standstill Letter | The letter sent to a provider to commence the standstill period. |
| Sustainable rate | <p>The hourly rate that is paid to funded providers in the private and third sectors, and childminders, to deliver the funded entitlement.</p> <p>The rate will support delivery of a high quality ELC experience for all children; reflect the cost of delivery, including the delivery of national policy objectives; allow for investment in the setting – staff, resources and physical environment; and enable payment of the real Living Wage for those childcare workers delivering the funded entitlement.</p> |



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