

# **Guidance on the Procurement of Care and Support Services 2016 (Best Practice): Executive Summary**

**Updated June 2021 to reflect changes that have  
occurred as a result of the UK's exit from the European  
Union and the end of the Transition Period.**



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**Riaghaltas na h-Alba**  
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## Purpose

1. The purpose of this Procurement of Care and Support Services best-practice document is to provide guidance for public bodies<sup>1</sup> in Scotland, where they have chosen to procure (i.e. the process by which public bodies buy goods and services) care and support services from external suppliers. It has been developed to support all staff involved in the procurement of these services, including senior managers, commissioning and contracts officers, care managers, legal officers and finance officers. It will also be of interest to regulators and those responsible for auditing the commissioning of services and to service providers, people who use services and their carers<sup>2</sup>.

The document has been updated to reflect changes that have occurred as a result of the UK's exit from the European Union and the end of the Transition Period at 11pm on 31 December 2020.

## Overview – public procurement rules for care and support services

2. Buying care and support services is a complex area and, as such, it requires special consideration within a public body's overall approach to the procurement of goods and services. This is because the quality or availability of these services can have a significant impact on the quality of life and health of people who might use them and their carers. Also, many of these services are becoming increasingly personalised to better match individual needs.

For these reasons, these types of services are often purchased differently to other services. That is, a public body has some flexibility to decide how to handle these contracts on a case-by-case basis. For example, a public body can decide how it applies the principles (i.e. equal treatment and non-discrimination and transparency and proportionality) that apply to public procurements. This includes whether these require advertising and competition (**only for contracts below the threshold for care and support services as specified in [the Public Contracts \(Scotland\) Regulations 2015](#) and as amended by [the Public Procurement etc. \(EU Exit\) \(Scotland\) \(Amendment\) Regulations 2020](#)**). A public body should also consider other key principles which respect, protect and promote human rights. Further, a public body has a duty of care in relation to people with social care and support needs.

## Procurement rules

3. The development of guidance in 2010 on the procurement of care and support services clearly placed the purchasing of these services within a set of principles which acknowledged a balance between human rights, outcomes

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<sup>1</sup> This guidance uses 'public body' to describe the various organisations which procure care and support services. This includes, for example, local authorities, NHS Boards, housing and criminal justice organisations.

<sup>2</sup> For the purposes of the guidance any reference to 'carers' includes unpaid carers.

for the individual, best value and procurement regulations. This guidance builds on these principles but also provides information on a number of key policy and legislative changes which have an impact on the procurement of care and support services.

**The 'light-touch' regime** for the procurement of these services is described in [regulations 74-76 of the Public Contract \(Scotland\) Regulations 2015](#). It only applies to public contracts which are equal to or greater than the threshold specified by [the Public Contracts \(Scotland\) Regulations 2015](#) and as amended by [the Public Procurement etc. \(EU Exit\) \(Scotland\) \(Amendment\) Regulations 2020](#). This is set at £663,540 from 11pm on 31 December 2020 (see [Scottish Procurement Policy Notes \(SPPNs\) for any updates](#)).

Contracts below that threshold, but which are worth at least £50,000, are regulated by the Procurement Reform (Scotland) Act 2014 ("the Act"). Other changes include the integration of health and social care services as determined by the Public Bodies (Joint Working) (Scotland) Act 2015, Self-Directed Support and other key policy and legislative changes.

Procurement staff should note that Integration Joint Boards are not able to contract or hold contracts with third parties as contractual arrangements remain with either the local authority or the NHS Board. They are responsible, however, for the production of Strategic Commissioning Plans, thereby providing some direction and oversight where a decision has been taken to procure. The key changes to the procurement rules for care and support services are described below.

## Quality and cost considerations

### Quality

4. In accordance with [regulation 76\(9\) of The Public Contracts \(Scotland\) Regulations 2015](#), a policy body may now take account of some other issues when procuring these services including:
  - the quality of the service
  - the continuity of the service
  - the affordability of the service
  - the accessibility of the service
  - the availability and comprehensiveness of the service
  - the needs of people who use services and their carers
  - the involvement of people who use services and their carers
  - innovation
5. This is not an exhaustive list and there may be other considerations that a public body may also take account of and which are relevant on a case-by-case basis.

## Cost

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

### Application of the procurement rules - thresholds and other considerations before procuring care or support services

7. A public body should first estimate the total value of a contract. This includes, where appropriate, any option for an extension of the contract. More detail on **valuing contracts** is in [regulation 6 of the Public Contracts \(Scotland\) Regulations 2015](#).

The table below summarises the different rules that apply to care and support contracts at different threshold levels.

Equal to or greater than the £663,540 threshold specified in the <a href="#">Public Contracts (Scotland) Regulations 2015</a> and as amended by <a href="#">the Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020</a>	Light touch provisions in the Public Contracts (Scotland) Regulations 2015 apply. Must be advertised on <a href="#">Public Contracts Scotland</a> (PCS) for onward transmission to the UK <a href="#">Find a Tender service</a> (FTS) or the EU <a href="#">Tenders Electronic Daily</a> (TED) depending on the start date of the procurement process or whether it is a <a href="#">European Structural and Investment Fund</a> (ESIF) project: <ul style="list-style-type: none"><li>• procurements which start before 11pm on 31 December 2020 and those which are part of ESIF projects, on or after this time, must be advertised on TED</li><li>• procurements which start on or after 11pm on 31 December 2020, and are not part of ESIF projects, must be advertised on FTS</li></ul>	
£50,000 – £663,539.99	May award without seeking offers, but should consider the principles of procurement where relevant. For contracts over £50,000, a contract award notice must be published	May choose to seek offers: in which case all provisions of the Procurement Reform (Scotland) Act 2014 apply

<b>Below £50,000</b>	on PCS and certain other rules apply (see <a href="#">paragraph 13</a> ).	Non-regulated Procurement
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8. The **specific** rules that apply to the procurement of care or support contracts, at these different threshold levels, are described in some more detail below.

### **Specific rules for care and support contracts under the Public Contracts (Scotland) Regulations 2015**

9. For contracts or framework agreements with a value equal to or greater than £663,540, all of the 'light-touch' provisions (**introduced at [paragraph 3](#) above and described in the Public Contracts (Scotland) Regulations 2015**) will apply. Specifically, public bodies must :
- publish a contract notice or prior information notice (PIN) as a call for competition (unless it is a direct award without competition) on PCS for onward transmission to FTS (or TED where applicable)
  - publish a contract award notice
  - continue to follow a process that ensures the observance of principles of procurement

Also [regulations 58\(1\) and 58\(3\) of the Public Contracts \(Scotland\) Regulations 2015](#) require that a public body must consider whether any of the mandatory exclusion grounds referred to in those regulations apply in respect of the potential service provider.

### **Specific rules for care and support contracts between £50,000 and £663,450 - award with advertising**

10. For contracts or framework agreements with a value of £50,000 or more, but less than £663,450, a **public body should decide on a case-by-case basis** whether to seek offers in relation to the proposed contract.
11. The [flowchart at the Annex](#) to this Executive Summary provides some illustration of the sort of things that might be considered by a public body when deciding whether to seek offers. A number of factors may influence this decision, as explained below, including:
- the estimated value of the contract
  - the application of the procurement rules, procurement policy and benefits and risks to people who use services
  - application of local financial regulations and standing orders
  - benefits and risks to people who use services and service delivery
  - the specifics of the sector concerned (for example, the size and structure of the market and commercial practices).
12. Where a public body chooses to seek offers in relation to a contract, then as with all contracts with a value of £50,000 or more, it must be advertised on PCS. **All** of the provisions of the Act apply in that case.



## Specific rules for care and support contracts between £50,000 and £663,450 - award without advertising

13. For contracts of this value, a public body may choose to award a care or support service contract, or framework agreement, without seeking offers in relation to the proposed contract. This is consistent with the provisions of [section 12 of the Act](#) and the 2016 best-practice guidance should be read together with that section.

Under the Act there are some provisions that will still apply when a public body chooses to award without advertising. These are:

- [section 23\(2\) of the Act](#): a public body must publicise the **award of a contract** on PCS
- [section 27 of the Act](#): a public body must consider whether any of the **mandatory exclusion grounds**, referred to in The Procurement (Scotland) Regulations 2016, apply in respect of the potential contractor/service provider
- [section 35 of the Act](#): a public body must **keep and maintain a register of contracts**

And more generally:

- [section 15 of the Act](#): a public body which expects to have significant procurement expenditure (equal to or greater than £5,000,000) in the next financial year must, before the start of that year –
  - (a) prepare a procurement strategy setting out how it intends to carry out regulated procurements or
  - (b) review its procurement strategy for the current financial year and make such revisions to it as the body considers appropriate
- [section 18 of the Act](#): a public body which is required to prepare or revise its procurement strategy in relation to a financial year must prepare an annual procurement report on its regulated procurement activities as soon as reasonably practicable after the end of that financial year<sup>3</sup>

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

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<sup>3</sup> Sections 15 and 18 of the Act are **not** just relevant to health or social, or care and support, services contracts **but apply more generally to public procurements**.

## Specific rules for care and support contracts below £50,000

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

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

16. There are some other services covered by the 'light-touch' regime that are not health or social, or care and support services. [Schedule 3 of the Public Contract \(Scotland\) Regulations 2015](#) describes the range of services covered by that regime. The 'light-touch' rules also apply to these other services **for contracts with a value equal to or greater than £663,450**. Below that threshold, but worth at least £50,000, any procurement of these services is regulated by the Act. The specific rules, applying to these services, are described in more detail in the text box immediately overleaf.

Together with health and social care services, [schedule 3 of the Public Contracts \(Scotland\) Regulations 2015](#) also lists those other services to which the 'light touch' rules apply to contracts with a value equal to or greater than £663,450. Below that threshold - and unlike for health or social services contracts (including care and support) of the same value - there is no bespoke provision which allows general exemption from advertising these other services. This means that contracts of that value, for these services, are subject to the full provisions of the Act. Contracts below £50,000 are regulated neither by the Act nor the Regulations.

## Compliance

17. The principles of procurement apply to **all** relevant procurement activity and regardless of value. This includes the equal treatment and non-discrimination, and transparency and proportionality which should be adopted by a public body when running a competition. This also includes contracts which are exempt from application of the Regulations.
18. It is the responsibility of an individual public body to decide whether, and if so at what level, advertising is required taking account of the procurement rules.
19. A public body is largely free to decide to use the procurement procedures, tools and techniques of its own choosing where procuring care and support services. That said, as a matter of best practice, a public body will likely want to follow a procurement procedure that is proportionate to the value of the care and support contract and to take account of some fundamental considerations (for example, Fair Work First) and other matters described in more detail in other procurement guidance.

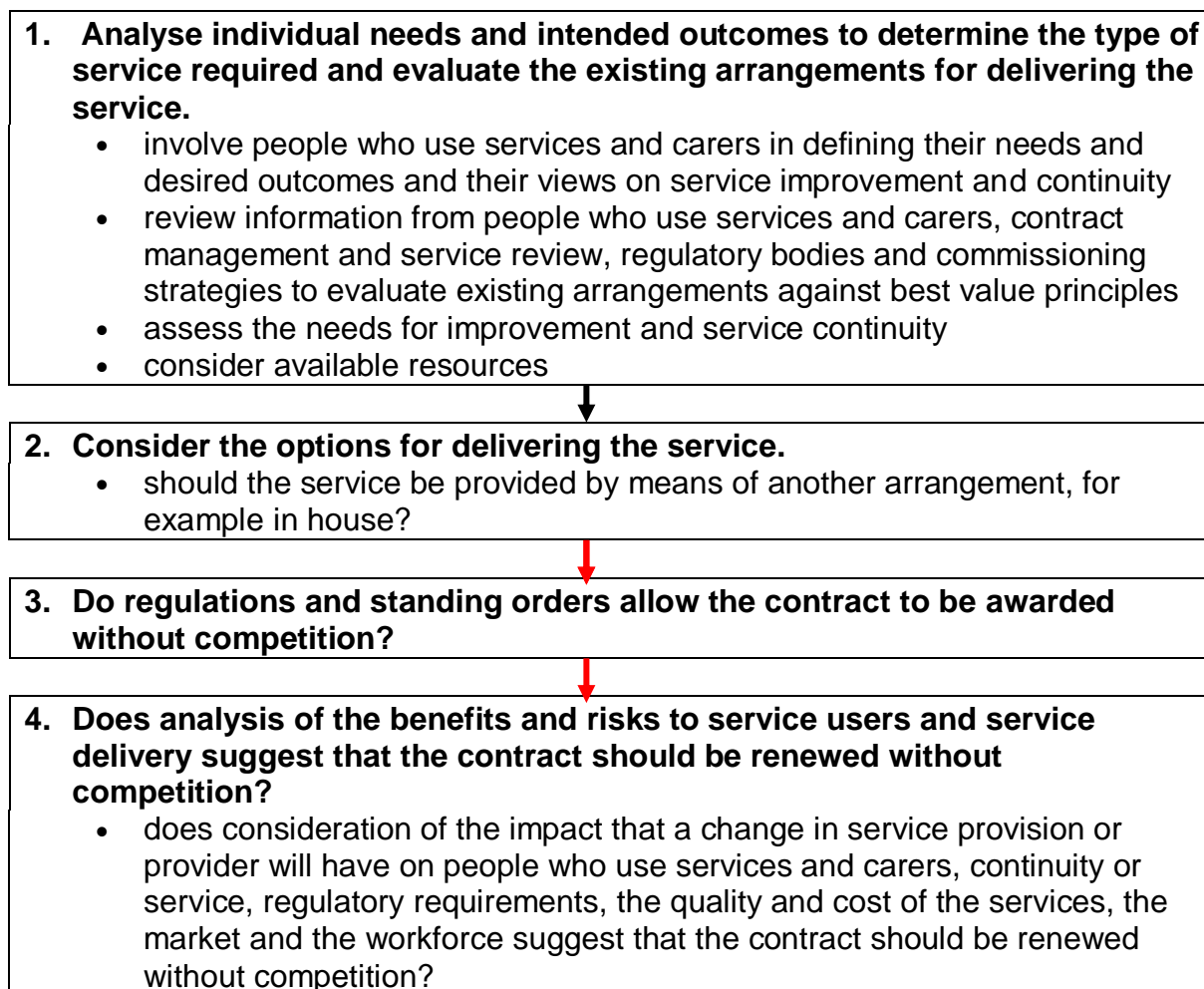
## Summary - development and scope of this guidance

20. The best-practice guidance has a specific focus on care and support services. It complements and should be read together with [chapter 6 of the Procurement Reform \(Scotland\) Act 2014: statutory guidance](#) which provides statutory guidance on the procurement of health or social care services. When procuring care and support services a public body must have regard to that statutory guidance which covers the main legal rules applying to the procurement of health or social care services contracts, including care and support services.
21. The best-practice guidance also describes those same legal rules that public bodies should follow (to ensure compliance with the Regulations and the Act) leading to the specific award of a contract for care and support services. It also describes other considerations that a public body should otherwise take account of specifically when procuring care and support services. That is, it makes it clear that:
- the best-practice guidance is based on, and reinforces, many of the messages and key considerations (**i.e. the key outcomes, strategic commissioning, personalisation, involvement, national care standards, codes of practice, best value, benefit and risk, procurement rules, leadership, Fair Work First and partnership principles**) that were described in the earlier 2010 Procurement of Care and Support Services Guidance
  - a public body should make sure that the way it procures care and support services includes a focus on personal outcomes, strategic planning (as defined by the [Public Bodies \(Joint Working\) Scotland Act 2014](#)), the involvement of those people who might use care and/or support services and their carers and take a human rights based approach
  - a public body should continue to take account the principles of procurement of equal treatment and non-discrimination and transparency and proportionality where relevant when awarding these contracts
  - decisions about the procurement procedures which a public body uses, including decisions about advertising (for contracts below £663,540), should otherwise largely be up to it
  - a public body should be free to judge how all of these principles might best be applied on a case-by-case basis.
22. The above, in effect describes a broad framework for a public body to consider first when deciding whether to, and then how best to, procure a care and support service.



23. Overall, this best-practice guidance sets out the process in relation to the procurement of those services and that this should be considered within the wider context of strategic commissioning. Strategic commissioning requires a public body to work together and with people who use services, carers, providers and communities to determine the services required for the future, how these services will be provided and by who they will be provided. This may mean disinvesting in current provision to reinvest in different things. It also requires consideration of the market of service and support providers. Procurement is not the only way to secure services, but as a process it is pivotal to ensuring that the outcomes determined by strategic commissioning plans are achieved. The decision, whether or when, to implement procurement and the process itself, will ultimately impact on the quality of life and health of individuals and communities.

## Annex: Flowchart - decision making in relation to the continuation of an existing service



A public body will want to consider the answers to all of these types of questions - and any other relevant considerations on a case-by-case basis - before reaching a decision about whether it needs to compete, or direct award, a health or social care services contract.

There is no discretion for a public body to directly award health or social care contracts that are equal to, or greater than, [the Public Contracts \(Scotland\) Regulations 2015](#) threshold . See [paragraph 9](#) for more details about the rules that apply at that level. A contract notice is required in all cases except where the circumstances described in [regulation 33 of the Public Contracts \(Scotland\) Regulations 2015](#) apply.



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Any enquiries regarding this publication should be sent to us at  
The Scottish Government  
St Andrew's House  
Edinburgh  
EH1 3DG

ISBN: 978-1-80004-324-4 (web only)

Published by The Scottish Government, June 2021

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA  
PPDAS817166 (06/21)

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