

# Scottish Procurement Policy Note:

## SPPN 7/2021

06 December 2021

Preparing to transition towards a National Care Service for Scotland

### **Purpose**

To advise public bodies involved in the commissioning and procurement of social care services of the action they can take now to prepare for the transition toward a National Care Service for Scotland (NCS).

### **Key Points**

Commissioning and procurement decisions being taken now can support the transition towards a National Care Service for Scotland. Public bodies should therefore:

- review current Strategic Commissioning Plans to identify opportunities for alignment with ethical commissioning and procurement principles, see annex A.
- consider the impact of decisions on resources and the social care market to enable our collective focus on implementation and consider the use of contract extensions or modifications where feasible.
- maximise opportunities in new procurement decisions to introduce ethical procurement principles and use the flexibility of the Light Touch Regime.

### **Background**

The Scottish Government have committed to implementing the recommendations of the Independent Review of Adult Social Care (IRASC). We are working to introduce new legislation in the Scottish Parliament in summer 2022 and intend to establish a NCS by the end of the Parliamentary term.

These proposed reforms have the potential to be the biggest public sector reform in Scotland for decades. They will affect the way we plan, commission, procure and deliver social care support and services. Steps can be taken now as we start the transition to new ways of working.

A public consultation, which ran from 9 August to 2 November 2021 included proposals to change responsibilities for the commissioning and procurement of social care services. Further engagement will take place to help understand barriers

and opportunities to support the transition to a NCS and any tools / guidance that may be helpful going forward.

Commissioning and procurement decisions being taken now impact on

- people who use services;
- providers' ability to respond to ethical commissioning and procurement requirements;
- public bodies' ability to fully engage in the new and changing responsibilities for a NCS, for example by over committing resources on legacy projects.

The IRASC included a recommendation to explore pressing pause on the current procurement system to support a move from competition based on task and price, to collaboration focused on person centred, quality and outcomes. To enable procurement to support that shift, public bodies need to take action now to begin this journey.

### **Strategic Commissioning Plans**

Strategic Plans should be reviewed to ensure that there would be nothing which would inhibit a new National Care Service operating in line with ethical commissioning and procurement principles, see Annex A – ethical commissioning and procurement.

### **Procurement pipelines, [forward plans](#) and market engagement**

Pipelines and plans should be reviewed, updated and communicated to affected providers to alert them to the shift in commissioning and procurement approach. Portfolio and procurement strategies should signal the importance of transparency and ongoing dialogue to be clear that change may affect the long term delivery of services and contracts. Providers should be made aware of the [IRASC report and recommendations](#) and the proposals for commissioning, which were set out in the public consultation for a [National Care Service](#).

### **Use of existing contracts**

Existing Framework Agreements (FA) and Dynamic Purchasing Systems (DPS) are an effective and accessible mechanism for arranging service provision. Owners should consider options to maximise their use. This could include, extending their term and making modifications now to reflect the ethical commissioning principles, including as a minimum fair work practices and cost transparency.

A contract established under the Public Contracts (Scotland) Regulations 2015 can be modified when certain grounds exist. Details of these grounds are summarised in Annex B – modification of higher value contracts.

In all circumstances, where a contract modification is made, public bodies should keep a written justification, which demonstrates the basis for the decision to modify the contract.

## **New procurement requirements**

Procurement teams should engage with providers and people using services to determine whether new procurements are required.

Consideration should be given to whether making full use of existing FAs / DPSs for ongoing call-off arrangements would fit with the ethical principles for a NCS. It may also be possible to extend or modify an existing contract in the interim, in order to provide the services or support needed, in this way, for the short to medium term.

It is important to balance the need for new services or support with the risk of overcommitting budgets, resources and the market in the short term. Interim measures such as shorter term contracts could be considered, in order to avoid over committing providers and to support market readiness to engage and support the mobilisation of the market to introduce a NCS.

Where a new procurement process is required, the procurement strategy should be based on ethical commissioning and procurement principles. This should be done in order to improve services for the benefit of service users and to embrace the principles of ethical commissioning and procurement as set out in the NCS consultation, see annex A – ethical commissioning and procurement principles. This will ensure that all required social care procurement includes: ethical procurement, fair work practices, cost transparency and user involvement in decision making.

## **Contact terms and break clauses**

In all cases, it is advisable to consider establishing contract terms with multiple options for extension and to include break clauses as standard to enable termination of the contract should policies change during the life of the contract. For example, novation or assignation clauses can facilitate a change in buyer or provider, to enable a third party, to take up the rights and obligations of the original contract.

The National Care Service will consider what services are purchased and how they are delivered. Buyers should consider how they might seek to amend contracts in the light of new advice and guidance. Including statements in Invitations to Tender and contracts to the effect that the contracting authority reserves the right to seek changes to the services, in order to align with the NCS will help facilitate such changes.

Buyers should consider the commercial impact of change, novation and break clauses. Such clauses introduce risk to providers that they will have to consider when developing terms and prices for public contracts. The more collaborative and consultative the process for terminating a contract early, or for novating it to a third party, the less risk a provider is likely to perceive.

## **Support and guidance available**

A suite of [statutory guidance is available on public bodies joint working on health and social care commissioning](#)

Statutory and Best Practice Guidance on the procurement of health or social care services is available, and is incorporated into the Procurement Journey, which includes details the flexibilities available when using the 'light-touch' regime [Procurement Reform \(Scotland\) Act 2014 \(the Act\): statutory guidance - updated June 2021 - gov.scot \(www.gov.scot\)](#) / [Procurement of care and support services: best practice guidance - updated June 2021 - gov.scot \(www.gov.scot\)](#).

## **Monitoring**

We would ask that you advise the Scottish Government of any new procurement processes, or contract extensions, which are unable to be aligned with the ethical commissioning principles.

## **Action required**

Integration Joint Boards and public bodies are asked to review their Strategic Commissioning plans, portfolio of social care contracts and pending procurement process and take action now to support a transition to a National Care Service.

## **Dissemination**

Please bring this policy note to the attention of all relevant staff, including those agencies, non-departmental public bodies and other sponsored public bodies within your area of responsibility.

## **Contact**

For procurement queries:  
Email: [scottishprocurement@gov.scot](mailto:scottishprocurement@gov.scot)

For strategic commissioning queries:  
Email: [jonathan.hamilton@gov.scot](mailto:jonathan.hamilton@gov.scot)

## **Ethical commissioning and procurement - as described in A National Care Service for Scotland consultation**

Ethical commissioning, in relation to social care services, has a person-centred care first/human rights approach at its core, ensuring that strategies focus on high quality care. This includes fair work practices which encourage the development of a quality, sustainable, and appropriately valued work force; climate and circular economy considerations in our service footprint to support a just transition to net zero; financial transparency and commercial viability of any outsourced services; full involvement of people with living experiences throughout, putting the person at the centre of making the choice; and a shared accountability between all partners and stakeholders involved in delivery.

Where a service is to be outsourced, procurement is the process of engaging collaboratively with the market, key stakeholders, strategic partners, and representative users of the service to deliver the commissioning strategy, policy, and service in practice.

Ethical and Sustainable Procurement ensures that these are not only delivered to the right quality, in a timely, efficient, legal, and commercially sustainable way, but that we use the power of procurement to meet those broader social, economic and environmental objectives agreed in the vision.

### **Ethical commissioning principles**

- person-centred care first
- human rights approach
- full involvement of people with lived experiences
- fair working practices
- high quality care
- climate and circular economy
- financial transparency and commercial viability
- shared accountability

## Annex B – Modification of Higher Value Contracts

### Modification of higher value contracts

- for procurements subject to the Public Contracts (Scotland) Regulations 2015
- these principles also apply to the modification of contracts subject to The Procurement (Scotland) Regulations 2016

Permissible modifications	Value of the modification
<p><b>Contractual provision</b> The contract terms and conditions describe what modifications are permitted in what circumstances <b>and</b> the modification does not change the overall nature of the contract or framework agreement. regulation 72(1)(a)</p>	<b>any value</b>
<p><b>Additional goods, services or works</b> The modification is where it has become necessary in order to be able to meet the obligations for delivery of the contract from the same supplier <b>and</b> a new supplier could be disruptive to services, goods provision or works <b>and</b> would be inconvenient or would add to costs Note: a contract award notice must be published. regulation 72(1)(b)</p>	<b>Up to half the original contract value*</b>
<p><b>Unforeseeable circumstances</b> It was not possible to predict the circumstances which gave rise to the need for the change to the contract or framework <b>and</b> the modification does not change the overall nature of the contract Note: a contract award notice is must be published. regulation 72(1)(c)</p>	<b>Up to half the original contract value*</b>
<p><b>Change of contractor</b> A replacement supplier is necessary, for example after a takeover. regulation 72(1)(d)</p>	<b>n/a</b>
<p><b>The modification is not substantial</b>, if any of these apply</p> <ul style="list-style-type: none"> <li>• the nature of the contract will not be changed materially.</li> <li>• if the modification had been part of the initial procurement procedure and would not have: <ul style="list-style-type: none"> <li>○ allowed for another candidate to have been selected, or</li> <li>○ allowed another tender to have been accepted, or</li> <li>○ attracted other suppliers to have participated in the process.</li> </ul> </li> <li>• it would not change the economic balance of the contract or framework in favour of the contractor in a manner which was not provided for in the initial contract.</li> <li>• the modification does not extend the scope of the contract or framework considerably. regulation 72(1)(e)</li> </ul>	<b>any value</b>
<p><b>Limited in value</b> The modification does not change the nature of the contract <b>and</b> is less than 10% of the contract value for goods / services or 15% for works. regulation 72(5)</p>	<b>below higher threshold values **</b>

\* - Multiple modifications are permissible, however each one should not exceed the 50% of the original contract value.

\*\* - Threshold values that apply to contracts subject to the Public Contracts (Scotland) Regulations 2015