

New legislation came into force on 18 April 2016

Overview of the Public Procurement Regulations

The rules for public procurement in Scotland changed on **18 April 2016** with the introduction of new legislation and statutory duties that all public bodies must comply with.

This guidance is aimed at suppliers to help explain how these changes affect what buyers have to do and the impact that this has on suppliers. Whilst it is not necessary for a supplier to know all the details of the legislation, it is important for suppliers to understand the key steps of the procurement process and this guidance aims to explain how the legislation informs that process.

The changes to EU Procurement Directive 2014/24/EU on public contracts resulted in the **Public Contracts (Scotland) Regulations 2015** ensuring that public purchases are made in a transparent and fair manner.

For Scotland only, the **Procurement Reform (Scotland) Act 2014** was introduced to build upon the Public Procurement Reform Programme encompassing sustainability and socially responsible purchasing. As a result of the Act, the **Procurement (Scotland) Regulations 2016** have been implemented which provide the rules for lower value contracts.

1 “What are the different types of legislation and at what thresholds do they apply?”

The procurement regulations define how the procurement exercise must be carried out and the legislation to be applied to this will be considered on the basis of the value of the contract.

There are 3 key pieces of legislation that are relevant to procurement in the Higher and Further Education Sector:

- **Public Contracts (Scotland) Regulations 2015;**
- **Procurement Reform (Scotland) Act 2014 and**
- **Procurement (Scotland) Regulations 2016.**

Further legislation relating to Utilities and Concessions Contracts are in place but as these are seldom used in the HE/FE sector they are not included in this guidance.

The [procurement thresholds](#) vary and these are summarised along with the legislation that applies to it in the table below:

Procurement Thresholds

	Supplies/Services	Works
OJEU Thresholds under the Public Contracts (Scotland) Regulations 2015¹	£181,302	£4,551,413
Regulated Procurement Thresholds under the Procurement Reform (Scotland) Act 2014	£50,000	£2,000,000

¹ biannual thresholds valid from 1 January 2018

2 “What are the key changes?”

2a Public Contracts (Scotland) Regulations 2015

Often referred to as OJEU procurements, this legislation relates to public contracts over the value of £181,302 for supplies and services, and over £4,551,413 for works contracts.

All contracts at this level are subject to the **Public Contracts (Scotland) Regulations 2015** which replaced the Public Contracts (Scotland) Regulations 2012. The key changes to be aware of are:

Tendering Procedures and Timescales

The new regulations have introduced some new tendering procedures as well as reduced timescales for advertised procurements. The most common tendering procedures used are the **Open Procedure and Restricted Procedure**. The main difference is that anyone can submit a bid in an Open Procedure whereas the Restricted Procedure is a 2-stage process and only shortlisted bidders who have met the selection and exclusion criteria will be issued with an ITT. It should be noted that even in an Open Procedure, there will still be a selection stage that bidders must pass, however the bidder will already have submitted their tender. The information for the selection stage is obtained from a document called the **ESPD** (European Single Procurement Document).

The table below provides a summary of the various tendering procedures and the minimum timescales that must be observed for suppliers to respond.

Summary of Tendering Procedures and Timescales (days)

	Open	Restricted	Competitive Procedure with Negotiation	Competitive Dialogue	Innovation Partnership
Selection Stage	n/a	30	30	30	30
ITT (electronic)	30*	25*/10^	25*/10^	No minimum	No minimum
ITT (with Prior Information Notice)	15	10	10	No minimum	No minimum
Urgency	15	15/10^	15/10^	No minimum	No minimum

**these are the reduced timescales if all documentation is sent/returned by electronic means*

^this can be reduced to 10 days for sub-central contracting authorities with mutual agreement from suppliers

Sustainability

Sustainability in the procurement process has increased in scope from only **environmental** considerations and now allows bidders to include **social** and **economic** aspects. Sustainability considerations must be linked to the subject matter of the contract; however, the new regulations have broadened this definition in that environmental, social and economic considerations can relate to any stage of the life cycle of the contract even where it is not directly related to the end product. As an example, a buyer may ask about specific packaging requirements and request that the packaging used has come from recycled materials.

The new legislation allows buyers to ask suppliers to guarantee that they can meet certain environmental or social aspects that link to the subject matter of the contract and this can be done by asking for compliance with particular labels such as Fairtrade or FSC. You should be able to demonstrate you can meet the requested standards or provide evidence of equivalent standards that demonstrate compliance.

2b Procurement Reform (Scotland) Act 2014

Along with introducing new lower thresholds, the Procurement Reform (Scotland) Act 2014 has placed several general duties on contracting authorities aimed at promoting transparency and consistency in procurement. There are additional administrative and reporting requirements for contracting authorities further strengthening the transparency for suppliers.

Contracts Register

All contracting authorities must have a **Contracts Register** in place for all contracts over the value of £50k (i.e. the regulated procurement threshold). This will be published externally and as a minimum it must contain details of the date of award, the name of the supplier, start and end dates, subject matter and estimated value.

Procurement Strategy and Annual Report

Organisations that spend over £5m each year on regulated procurements have now published a **Procurement Strategy**. These published documents explain the process that a contracting authority will follow when carrying out regulated procurements, how they will meet their obligations under the Act and statements on institutional policies.

From 2018, all contracting authorities must produce and publish an **Annual Report** describing how they have met the Procurement Strategy. The Annual Report will also include a forward contracting plan for the following 2-year period providing visibility of potential future contracts.

Sustainable Procurement Duty

The **Sustainable Procurement Duty** came into effect on 1 June 2016 placing a duty on all contracting authorities to consider the following in any regulated procurement exercise including OJEU procurements:

- How to improve the **economic, social and environmental wellbeing** of the authority's area
- How they can involve **SME, third sector and supported businesses** in the process
- How to promote **innovation**

Tender specifications and tender questions will incorporate these areas where suitable.

Community Benefit Clauses can provide a route to achieving sustainability in public contracts and these must be considered in all contracts over £4m.

2c Procurement (Scotland) Regulations 2016

The **Procurement (Scotland) Regulations 2016** is the legislation that gives effect to the Act. They are comparable with the Public Contracts (Scotland) Regulations 2015 which relates to higher value contracts to ensure a consistent approach is applied.

Advertising, Tendering Procedures and Timescales

In contrast to the rules for OJEU procurements, there are no specific tendering procedures for a regulated procurement. It is either **single stage** (equivalent to the open procedure) or **2-stage** (equivalent to the restricted procedure). There are no minimum timescales and it is up to the buyer to determine what is proportionate. All regulated procurements must be advertised on the **Public Contracts Scotland** web portal.

It is encouraged that the **ESPD (Scotland)** is used for a regulated procurement to ensure that there is a consistent approach. Where it has not been used in a tender there will still be selection and exclusion criteria applied.

Debrief and Remedies

The Procurement (Scotland) Regulations 2016 has introduced new legislation that requires unsuccessful suppliers to be notified of the outcome of a procurement with details of the criteria and scoring. Suppliers can request further information within 30 days of being issued with a debrief or award letter. A further change to lower value procurements is that there are now remedies available to suppliers if an authority has not complied with certain duties defined in the Act.

3 “What is the ESPD?”

The European Single Procurement Document, or **ESPD**, was introduced under the EU Procurement Directive and came into force on 18 April 2016. It is now a mandatory requirement for all procurements above OJEU to include an ESPD. It is recommended that it is used for the lower value regulated procurements to maintain a consistent approach. It is a standard form and its purpose is to remove some of the barriers to participating in a public procurement.

The **ESPD (Scotland)** replaces the sPQQ and contains a number of standard questions about a supplier's background. The document is slightly amended from the ESPD used across EU member states to reflect more commonly used terms and additional sub-questions to meet Scottish legislation. The buyer can amend the ESPD (Scotland) by removing any questions that are irrelevant to the contract and providing further details of the minimum standards that they will accept for the selection criteria which will be advertised in the Contract Notice. The ESPD (Scotland) is a self-declaration by the supplier and the buyer will state when they will request to see the supporting documentation, this may not be until they are ready to award the contract.

For further information, the Scottish Government have published a list of [FAQs](#) about the ESPD and free training is available from the [Supplier Development Programme](#).

4 “What about Community Benefit Clauses?”

A Community Benefit Clause is a contractual requirement imposed by a contracting authority and these can relate to:

- Training, recruitment and the availability of sub-contracting opportunities
- Other economic, social or environmental requirements that will improve the wellbeing of the authority's area in addition to the main purpose of the contract.

As part of the Sustainable Procurement Duty, the inclusion of Community Benefits Clauses must be considered in all contracts over £4m, and it is encouraged that they are also considered for lower value contracts.

5 “How do these changes affect me?”

Sustainability and the Sustainable Procurement Duty

The Sustainable Procurement Duty affects all regulated and OJEU procurements so tenders will include questions on economic, social and environmental aspects. This could include for example, community benefit clauses, life cycle costing, innovation such as new technologies or improving processes (e.g. e-catalogues and e-invoicing), training and development, access to education, recycling and reduced emissions. Bids should be prepared to meet these requirements.

Increased Access for SMEs

Opportunities for SMEs, third sector and supported businesses will be more accessible and contracts can be split into smaller lots providing further access for smaller companies. Where a minimum turnover requirement is specified, this can be no more than twice the value of the contract and this will allow small and new companies to participate. Contracts can also be reserved so that they are only open to supported businesses.

Thresholds and Advertising

Contracts at lower thresholds are now required to be advertised on PCS. What previously might have been a quote could now be subject to a full tender process. The £50k threshold covers a 4-year period for goods or services that are regularly supplied so contracts over £12,500 per annum are now be subject to a regulated procurement process and must be advertised on PCS.

Transparency

The introduction of a Contracts Register and the forward contracting plan that will be available as part of the Annual Report increases visibility of current future and contracts, helping suppliers plan for future bids.

Simplification

Information provided in the ESPD (Scotland) can be reused but suppliers are responsible for ensuring that it remains up to date and relevant.

Supporting documentary evidence with the ESPD (Scotland) does not have to be submitted with the tender, this will be requested by the Procurement Officer at the relevant stage in the process which reduces the burden of supplying this in advance.

5 “Where do I find opportunities?”

It is easy to find contract opportunities as all contracts above the specified thresholds are advertised on Public Contracts Scotland (PCS). Depending on their internal financial regulations, some colleges and universities may have lower thresholds for advertising so it is worth checking for contracts opportunities of all values.

Registration on PCS is free at www.publiccontractsscotland.gov.uk. Please also refer to the **PCS Supplier User Guide** for help with setting up a profile.

6 Further Information

For further information and any queries, please do not hesitate to contact the Development and Sustainability Team:

[Stephen Connor](#)

[Douglas Bell](#)

[Emma Nicholson](#)