

# **Procurement of care and support services: best practice guidance**

**Guidance for the public sector on procuring care and support services**

**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.**



**Scottish Government**  
**Riaghaltas na h-Alba**  
**gov.scot**

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## Part 1 – Introduction and context

### 1. Introduction

- 1.1 Procuring care and support services is a complex area. 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 these services as well as their carers<sup>1</sup>. Also, services are becoming increasingly personalised to better meet people's needs which, in turn, has implications for how support is planned and purchased.
- 1.2 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, it can decide how it applies the principles of procurement (i.e. equal treatment and non-discrimination, and transparency and proportionality) that apply to public procurements. A public body should consider other key principles which respect, protect and promote human rights. It also has a duty of care in relation to people with social care and support needs.
- 1.3 This best-practice guidance has been updated to reflect changes that have occurred as a result of the UK's exit from the EU at 11pm on 31 December 2020.
- 1.4 This guidance complements statutory guidance produced under the [Procurement Reform \(Scotland\) Act 2014](#) ('the Act') which includes guidance on the procurement of wider health or social care services. When procuring health or social care services (which includes care and support services) public bodies must have regard to that statutory guidance which covers the main legal rules applying to the procurement of those services.
- 1.5 A public body should also take account of this best-practice guidance specifically when procuring care and support services. It applies to any contract where the estimated value is equal to, or greater than, £50,000 for goods and services which are not otherwise exempt from regulation. It has been updated to outline all other critical considerations including wider principles that a public body should consider when procuring these important services.
- 1.6 This guidance has been produced together with, and has been endorsed by, a Reference Group involving key stakeholder interests. Those organisations represented on the Reference Group are similar to those that contributed to the development of the 2010 Guidance and are listed at [Annex 2](#). The Reference Group's view is that the effective implementation of this guidance is essential to the continued delivery of improvements in the procurement of care and support services.

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<sup>1</sup> References in this guidance to 'carers' include unpaid carers.

This guidance applies to all procurements which commence on or after 18 April 2016. It is best practice guidance and does not constitute legal advice. A public body should always seek its own legal advice where it is procuring a care and support service.

- 1.7 For the purposes of this best-practice guidance the term 'public body' describes the various organisations which procure care and support services. For example, this could include NHS boards, criminal justice organisations and housing organisations.

Integration Joint Boards<sup>2</sup> are not able to contract or hold contracts with third parties as contractual arrangements remain with either the local authority or NHS Board. They are responsible, however, for the production of Strategic Commissioning Plans thereby providing some direction and oversight of what should be procured.

- 1.8 For the purposes of this guidance, any references to wider health or social care services includes care and support.

**Rationale for guidance: New procurement rules for health or social care services (including care and support services) and other changes**

- 1.9 As from 18 April 2016 a key change to the public procurement rules is that the former distinction between Part A and Part B service contracts has been abolished and a new 'light-touch' regime has been introduced for certain services. This includes health and social care services and is the main reason for the update to this best-practice guidance.
- 1.10 Frontline services are also operating in a different adult health and social care environment from that under which the 2010 guidance was first introduced. This is another reason why an update to that guidance is appropriate now.
- 1.11 Overall, this guidance describes the changes to the procurement rules and reinforces a set of best-practice considerations (first set by the 2010 guidance) principally for the procurement of care and support services. Specifically, it provides some information on the changed policy and legal context and outlines some key considerations for a public body to take account of.

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<sup>2</sup> [The Public Bodies \(Joint Working\) \(Scotland\) Act 2014](#) places various duties on the Integration Authorities established by that Act. These are either Integration Joint Boards or health boards and/or local authorities acting as lead agencies to create a 'strategic plan' for the integrated functions and budgets that they control.

## 2. Purpose of This Guidance and Who Should Use It

- 2.1 The purpose of this document is to provide best-practice guidance for use largely by a public body (see [paragraph 1.7](#)) in Scotland where it is procuring care and/or support services from external suppliers. It has been developed to support all staff involved in the procurement (see definition of procurement in the text box at [paragraph 2.3](#)) 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 also their carers.

### Services covered by this guidance

- 2.2 A list of the services covered by this guidance can be found in [annex 7](#). Wider health services are largely not covered by this guidance.

### Definitions of public procurement, strategic commissioning and the Act

- 2.3 The text box below broadly describes what is meant by public procurement and the relationship between it and strategic commissioning.

#### Definition of public procurement

Procurement is the process by which a public body buys goods (e.g. books and computers), works (e.g. building roads, hospitals) and services (e.g. care services) from external suppliers. It is often one element of a wider strategic commissioning process.

#### How does public procurement relate to strategic commissioning?

[National guidance on strategic commissioning](#) defines it as: 'the term used for all the activities involved in assessing and forecasting needs, linking investment to agreed desired outcomes, considering options, planning the nature, range and quality of future services and working in partnership to put these in place.' It is a strategic assessment usually undertaken by local authorities when forecasting overall need for their areas. The Integration Joint Boards - although not directly responsible for procuring - have responsibility for the development of Strategic Commissioning Plans thereby providing some direction and oversight of what should be procured.

#### Procurement Reform (Scotland) Act 2014

These links - between first planning an overall need (commissioning) and then actually buying the service (procurement) - have been reinforced by the [Procurement Reform \(Scotland\) Act 2014](#). That Act requires a public body to prepare a procurement strategy covering all of its regulated procurements where the estimated sum of those procurements, in any given year, is expected to be equal to, or greater than, £5 million. See [section 15 of the Act](#) for more detail about procurement strategies.



## **Where this guidance does not apply**

- 2.4 Procurement is not the only option available to a public body when securing services. There are other options - for example in-house delivery - which are outwith the scope of this guidance. This guidance is, instead, only for use where a public body is procuring a service from an external supplier.

## **Procurement legal and policy context**

- 2.5 Overall, this procurement-focused guidance is intended to help a public body interpret and be compliant with the public procurement rules, introduced by The Public Contracts (Scotland) Regulations 2015, The Procurement (Scotland) Regulations 2016 and the Act, specifically when procuring care and support services.

## **Public procurement legal framework**

- 2.6 Public procurement is governed by a legal framework, which includes:
- the principles of procurement
  - national legislation<sup>3</sup>
  - case law

In combination, this legal framework establishes procedures that must be followed by a public body whenever it purchases goods, works or services from external suppliers or service providers. See [paragraph 2.9](#) for definition/relevance of case law.

## **Principles of procurement**

- 2.7 The principles of equal treatment and non-discrimination, and transparency and proportionality should be considered in all relevant procurement activities.

## **Scottish regulations and rules specific to care and support services contracts**

- 2.8 [The Public Contracts \(Scotland\) Regulations 2015](#) describe the detailed procedural rules that a public body ordinarily follows when buying goods and services regarding care and support contracts 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](#)).

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<sup>3</sup> [The Public Contracts \(Scotland\) Regulations 2015](#), [\(The Utilities Contracts \(Scotland\) Regulations 2016](#), and [The Concessions Contracts \(Scotland\) Regulations 2016](#) are not covered by this guidance), [Procurement Reform \(Scotland\) Act 2014](#) and [The Procurement \(Scotland\) Regulations 2016](#).

## Case law

- 2.9 Decisions of the courts provide interpretation of the principles and the Regulations, and can establish precedents which must be observed.

## Key policies linked to the procurement of care and support services contracts

- 2.10 Together with the specific, legal procurement considerations, the following legislation and policies are also relevant to this guidance and are essential to the effective procurement of care and support services. Principally, these include the **integration of adult health and social care, self-directed support and human rights and equality legislation**. These are summarised below.

### Adult health and social care integration

- 2.11 Adult health and social care integration is about ensuring that people who use, or might need to use services, get the right care and support whatever their assessed needs or desired outcomes at any point in their care journey.
- 2.12 [The Public Bodies \(Joint Working\) \(Scotland\) Act 2014](#) provides the legislative framework for the integration of health and social care services across Scotland. It requires the local integration of these services with statutory partners (health boards and local authorities) deciding locally whether to include children's health and social care services, criminal justice, social work and housing support services in their integrated arrangements. That Act has put in place:
- nationally agreed outcomes, which will apply across health and social care, for which NHS boards and local authorities will be held jointly accountable
  - a requirement on NHS boards and local authorities to integrate health and social care budgets, the legislation listing those functions and budgets that must be delegated as a minimum
  - a requirement on partnerships to strengthen the role of clinicians, care professionals and third/independent sectors in the planning and delivery of services
- 2.13 That Act places various duties on the Integration Authorities established by it. These authorities are either Integration Joint Boards, or, health boards and/or local authorities acting as lead agencies to create a 'strategic plan' for the integrated functions and budgets that they control. Integration planning and delivery principles guide all integration activity in order to achieve the national health and wellbeing outcomes See [Strategic Commissioning Plans Guidance](#) for further information.

## Self-Directed Support (SDS)

- 2.14 Self-Directed Support, or SDS, is targeted at empowering people and putting the principles of independent living into practice. It enables individuals to take different degrees of control directing care or support that they need to live more independently. The [Social Care \(Self-Directed Support\) \(Scotland\) Act 2013](#) (the 'SDS Act') gives people a range of options to decide how much control they wish to have over how their social care needs are met. It places firm duties on local authorities to give people, and their carers, informed choices as to how they will receive that support. See [Statutory Guidance to accompany the Social Care \(Self-Directed Support\) \(Scotland\) Act 2013](#) for further information.
- 2.15 As a result of SDS policy and legislation, the Scottish Government expects local authorities to give people the freedom that they need to choose care packages which suit their needs. [Section 19 of the SDS Act](#) makes clear that a local authority, through its approach to commissioning should ensure, as far as is reasonably practicable, a range of providers and supports in its area.

## Human rights

- 2.16 A public body should apply the human rights principles of fairness, equality, respect and autonomy where procuring care or support services. Individuals should be free to control their own lives and to make properly informed choices. That includes being able to participate effectively where decisions are made by a public body which impact upon their rights (see key considerations described at [paragraph 4.3](#)). The needs and rights of carers and families must be similarly recognised and respected. A public body should ensure that it provides appropriate information and assistance.
- 2.17 These considerations apply whether services are delivered directly, or are procured, from third parties.
- 2.18 For that reason as a matter of general policy, and good practice, a public body is expected to ensure that it is properly informed in relation to its obligations. The specific human rights obligations of public bodies in Scotland are defined in more detail in domestic legislation and in international treaties. Further information on these obligations is available on the Scottish Government website - [Coordinating international human rights treaty obligations](#).
- 2.19 A public body should also be mindful of its responsibilities as a duty bearer in relation to the [United Nations Convention on the Rights of the Child](#) (UNCRC). Specified public bodies should be aware of the duties under [section 2 of the Children and Young People \(Scotland\) Act 2014](#) in relation to the UNCRC to be commenced in April 2017.



Whatever the source of relevant human rights - [European Convention of Human Rights 1950](#) (ECHR), other international treaties or EU law - the responsibilities of public bodies cannot be delegated or transferred. That means that a public body will always remain accountable for a breach of human rights caused by companies or individuals who deliver services on its behalf. The fact that a service is carried out under contract does not remove the requirement for a public body to respect, protect and promote human rights. As part of that it must ensure that all service providers working on its behalf have clear and effective policies and procedures which will enable it to safeguard and uphold human rights.

## Equality

2.20 The [Equality Act 2010](#) includes a public sector equality duty (PSED) which requires public bodies listed in [schedule 19 of that Act](#) to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between people with protected characteristics. The PSED also applies to any other organisation when it is carrying out a public function, for the purpose of that function. The PSED cannot be delegated. [The Equality Act 2010 \(Specific Duties\) \(Scotland\) Regulations 2012](#) introduced Scottish specific equality duties to help public bodies meet the requirements of the PSED. The Scottish specific equality duties include a requirement to equality impact assess new or revised policies and practices and publish the results. Also, a procurement equality duty under [regulation 9 of The Equality Act 2010 \(Specific Duties\) \(Scotland\) Regulations 2012](#) places a requirement on a public body to report (every other year) on how its procurement policy and activity has contributed to achieving the requirements of the Equality Act 2010. Information about [how equality considerations apply in the procurement process](#) is available on the Scottish Government website.

## Local Government in Scotland Act 2003

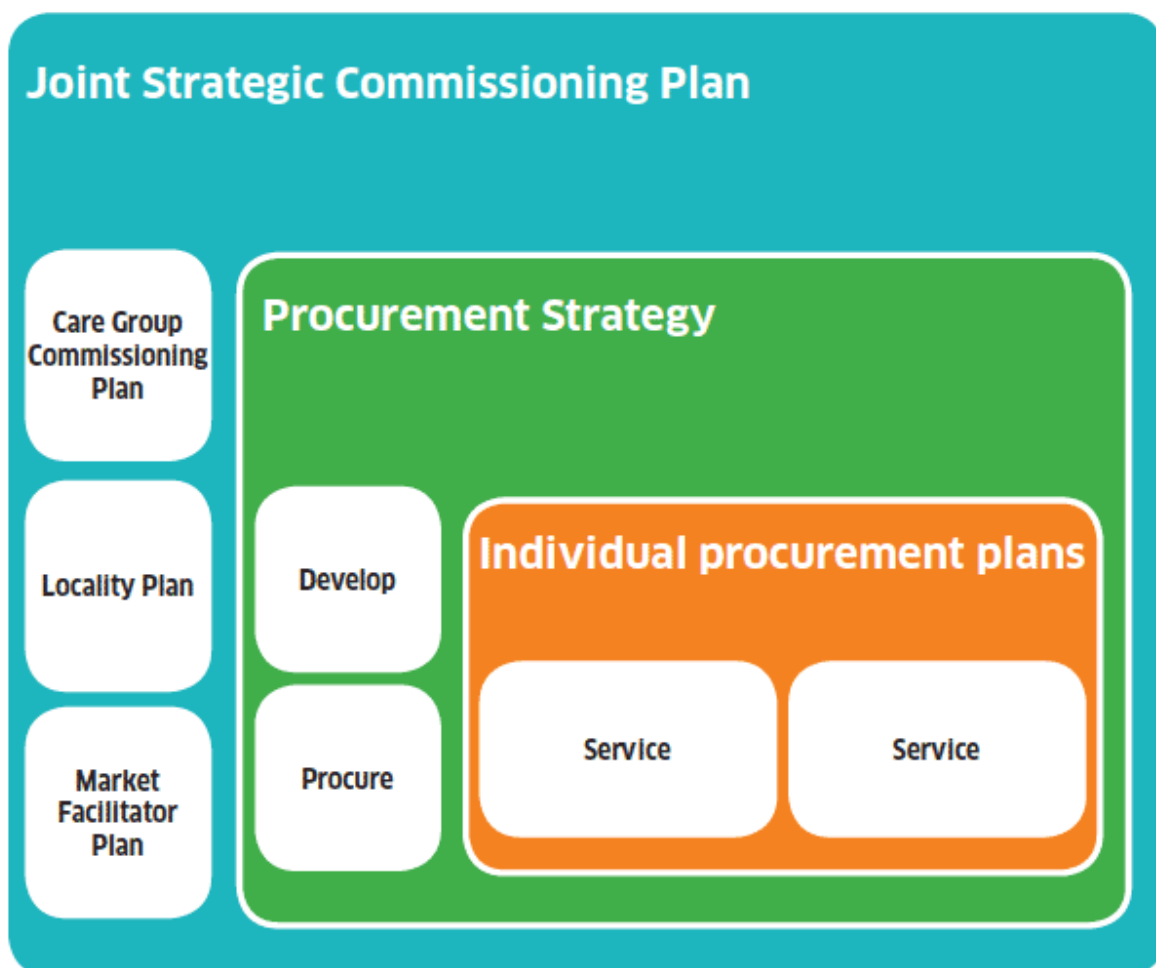
2.21 Under the [Local Government in Scotland Act 2003](#), a local authority has a statutory duty to secure 'best value' in the performance of its functions. The legislation provides that a local authority must maintain an appropriate balance between the quality and cost of directly provided public services and also services purchased from external service providers, having regard to efficiency, effectiveness, economy, equal opportunities and sustainable development. It also gives a local authority the power to do anything that it considers is likely to promote or improve the wellbeing of communities and individuals within those communities.

## Linked Statutory Guidance

2.22 This guidance is one of a set of documents that support the implementation of the public procurement rules in Scotland. As mentioned at [paragraph 1.4](#) the best-practice guidance complements [chapter 6 of the Procurement Reform \(Scotland\) Act 2014: statutory guidance](#) which public bodies should also have regard to for procurement of health or social care services. Other key statutory guidance is described briefly in the following paragraphs.

- 2.23 The Scottish Government has published [statutory guidance on fair work and procurement](#). A bidder's approach to fair work practices can have a direct impact on the quality of services it delivers. Fair work practices will be particularly relevant where the quality of the service being delivered is directly affected by the quality of the workforce engaged in the contract. For example, the continuity and quality of care and support services are likely to be closely related to a provider's approach to its workforce in respect of matters relating to recruitment, remuneration and other terms of engagement. As stated in the key considerations described in [chapter 4](#), a public body should ensure that the procurement of care and support services takes account of the importance of a skilled and competent workforce in delivering positive outcomes for people who use services. It should also consider the statutory requirements which may apply to the service and the workforce in relation to the [Regulation of Care \(Scotland\) Act 2001](#).
- 2.24 [Section 15 of the Act](#) also requires a public body to prepare a procurement strategy covering all of its regulated procurements where the estimated sum of those procurements, in any given year, is expected to be equal to, or greater than, £5 million.

- 2.25 A public body is required to set out, in its procurement strategy, amongst other things, how its regulated procurements comply with the sustainable procurement duty. The table immediately below illustrates the relationship between a procurement strategy and joint strategic commissioning plans (see [Strategic Commissioning Plans Guidance](#) for further information).



The procurement strategy required under the Act is quite different from - and should not be confused with - individual procurement plans that a public body would usually undertake as a matter of routine when carrying out individual procurement exercises.

- 2.26 Joint Strategic Commissioning Plans pull together the forecast of overall need across a local authority area, together with the availability of services or resources to meet that need and makes recommendations following an option appraisal for how it should be met. The number of key considerations that need to be taken into account in the development and delivery of these various plans are outlined in [chapter 4](#) of this guidance.

## Key messages

Procuring care and support services is a complex area. It requires special consideration within a public body's overall approach to the procurement of those services. Many of these services are becoming increasingly personalised.

This means that these care and support services are purchased differently to other services and are broadly subject to two main sets of principles:

- a public body has some discretion in how it complies with the principles (equal treatment and non-discrimination, and transparency and proportionality) that apply to public procurements
- other key principles are those which respect, protect and promote human rights.

A public body also has a duty of care in relation to people with social care and support needs.

Procurement is not the only option available to a public body when providing services. There are other options - e.g. in-house delivery. **These other options are outwith the scope of this guidance.** Instead, it is only for use where a public body has decided to procure a service from an external supplier.

Overall, this is procurement-focused guidance and is intended to help public bodies interpret, and be compliant with, the procurement rules introduced by the Regulations and the Act.

This guidance applies to all regulated procurements which commence on or after 18 April 2016 and reflects changes that have occurred as a result of the UK's exit from the EU at 11pm on 31 December 2020. It is best practice guidance and does not constitute legal advice. A public body should always seek its own legal advice where it chooses to procure a care and/or support service.

### 3. Local arrangements

- 3.1 This chapter summarises some of the policies and procedures that a public body will likely have in place where it is procuring care and support services. There are various responsibilities, the interaction between which, require a public body to give special consideration to its approach to the procurement of care and support services. For example, a public body has a duty of care in relation to people with social care and support needs. It is also subject to the public sector equality duty and is responsible for demonstrating cost effectiveness and securing best value, while maintaining expenditure within available resources and ensuring compliance with procurement legislation.
- 3.2 All of this means that a public body should have written and approved policies and procedures for the procurement of these services. A checklist (**not exhaustive**) of considerations which may be taken into account by a public body is described in the table below:

#### Policies/Procedures should:

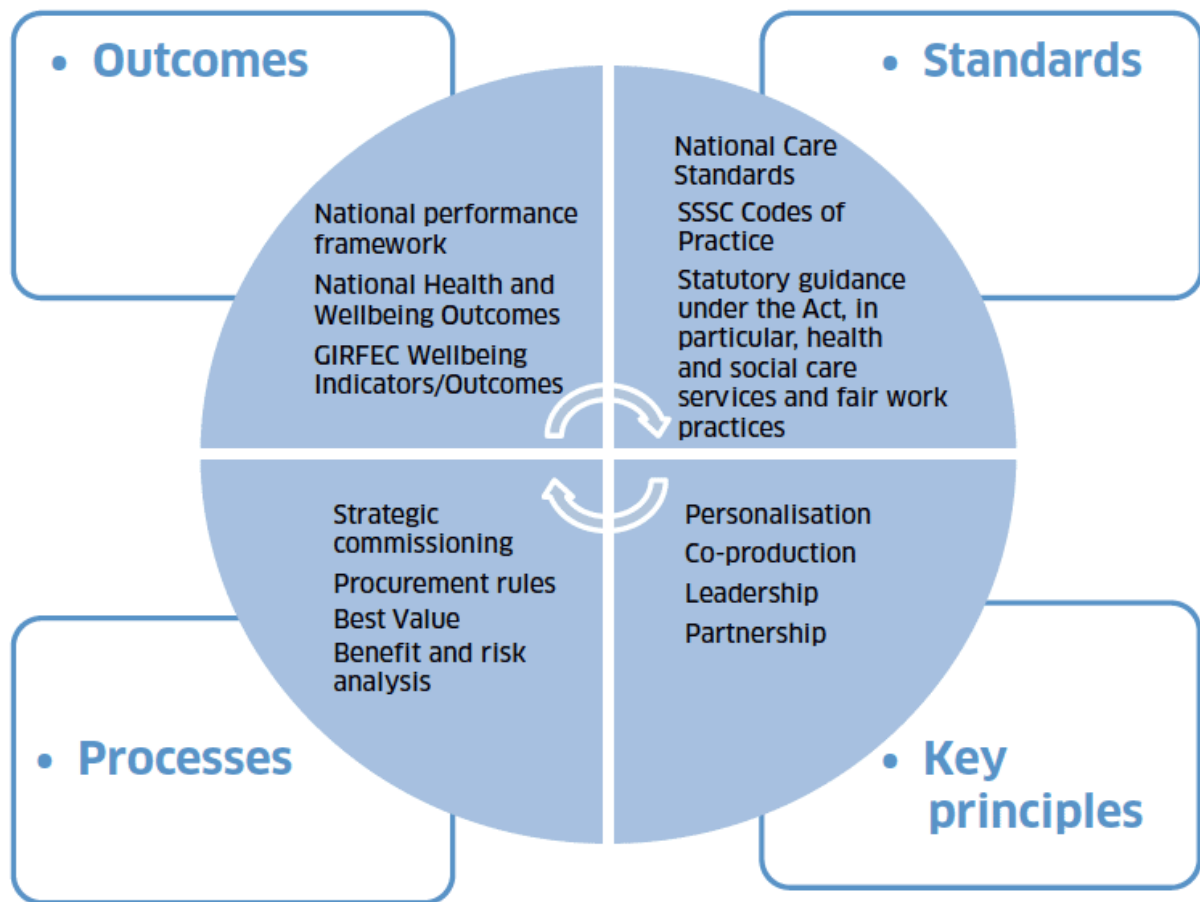
1.	Comply with all relevant legislation (e.g. procurement, human rights and equality legislation), self-directed support, guidance and local financial regulations/standing orders
2.	Identify the roles and responsibilities of all staff involved
3.	Outline its policy and approach to the delivery of services in-house
4.	Outline arrangements for jointly procuring services with other public bodies
5.	Reflect the distinctive and complex needs of vulnerable individuals for whom services are to be purchased
6.	Describe how it will promote the involvement of people who use services and their carers in service design and procurement exercises
7.	Describe how it will ensure that choice is available to people who use services and its approach to self-directed support
8.	Describe how it will communicate with stakeholders prior to, and during, individual procurement exercises
9.	Set out how to ensure that staff involved receive the training required to develop and maintain knowledge/skills
10.	Explore opportunities for developing collaborative procurement approaches
11.	Set out the procurement processes that will be used to select service providers and the circumstances in which these will apply

<b>12.</b>	Identify an appropriate range of contracting mechanisms and provide a rationale for selecting different mechanisms, based on best value, the need for service continuity and desired outcomes for individuals
<b>13.</b>	Describe local arrangements for contract management, managing its relationship with service providers and service review
<b>14.</b>	Set out the transitional arrangements that will be made if a service is transferred to a different service provider or is decommissioned
<b>15.</b>	Consider the development of the market and promote partnership working with external service providers



## 4. Key considerations for procuring care and support services

- 4.1 This chapter describes those **key considerations** that bring together all of the critical themes outlined in the preceding chapters. That is, compliance with the public procurement rules combined with the principles of SDS and integration policy and also human rights and equality considerations. These considerations are for a public body to consider before and when procuring care and support services. These are grouped and summarised in the diagram immediately below:



- 4.2 These key considerations reflect the complexity of procuring care and support services and the challenges associated with upholding the values, delivering high standards and responding to individuals' needs while complying with the procurement legislation and securing best value as described in earlier chapters. Taken together, these serve as a best-practice framework.

4.3 A public body should seek to ensure that its procurement policies and procedures for care and support services reflect these and are informed by its procurement strategy. These should also be used as a framework for evaluating local practice.

- **Outcomes** - achieve positive outcomes for people who use services and also their carers through the delivery of good quality, flexible and responsive services which meet individuals' needs and respect their rights and which improve the economic, social and environmental wellbeing of a public body's area. For example, see the [National Performance Framework](#).
- **[National Care Standards](#)** - ensure services meet the National Care Standards and adhere to the principles underpinning those standards. That is, to provide safe and compassionate care and support, help promote positive outcomes for people, support early intervention and empower people to live full and healthy lives in a way which upholds their human rights and reflects their needs and wishes.
- **[Codes of Practice \(Scottish Social Services Council\)](#)** –
  - ensure staff involved in procuring services promote the interests and independence of people who use services and their carers, protect their rights and safety and gain their trust and confidence
  - ensure employers provide learning and development opportunities which enable staff involved in procuring services to strengthen and develop their skills and knowledge
- **Fair Work First** - ensures the procurement of services, in support of delivering positive outcomes for people who use services, values a workforce that is treated fairly, is well-rewarded, well-motivated, well-led, has access to appropriate opportunities for training and skills development and is a diverse workforce. A public body must have regard to the [statutory guidance on fair work and procurement](#). Public bodies and bidders should also refer to the [Fair Work First Guidance](#).
- **Best value** - secure best value by balancing quality and cost and having regard to efficiency, effectiveness, economy, equal opportunities and sustainable development. Should also have regard to innovation, the accessibility, continuity, availability and comprehensiveness of services.
- **[Strategic commissioning](#)** - place the procurement of services within the wider context of strategic commissioning, reflecting strategic and service reviews.

- **Procurement rules** - ensure procurement exercises comply with the principles of procurement (equal treatment and non-discrimination, and transparency and proportionality), the legal requirements of the [Procurement Reform \(Scotland\) Act 2014](#), [The Public Contracts \(Scotland\) Regulations 2015](#), [The Procurement \(Scotland\) Regulations 2016](#), statutory guidance issued under the Act and Scottish public procurement policy generally and including the Scottish specific equality duty.
- **Benefit and risk** - base strategic decisions concerning the procurement of services on benefit and risk analysis of the potential effects on:
  - the safety and wellbeing of people who use services and their carers
  - the quality and cost of services
  - partnership working with service providers and workforce issues.
- **Personalisation** - secure personalised services which provide independence, choice and control for people who use services and take account of the specific needs of different circumstances of people who use services.
- **Co-production** - development of services with, and the empowerment of, people who use care and/or support services and also their carers.
- **Leadership** - ensure senior managers give a high priority to the procurement of care and support services, setting clear strategic goals and managing performance.
- **Partnership** - promote collaboration between public bodies and partnership working across the public, private and third sectors to make the best use of the mixed economy of care and bring about cultural change in all sectors.

#### **Summary of key messages from this section:**

There are various responsibilities on a public body when procuring care and support services. For example, a public body has a duty of care in relation to people with social care and support needs. It is also responsible for demonstrating cost effectiveness and securing best value, while maintaining expenditure within available resources. The interaction between these responsibilities requires a public body to give special consideration to its approach to the procurement of care and support services.

[Chapter 4](#) describes the key considerations that bring together some of these critical themes (for example compliance with the public procurement rules combined with the principles of SDS and integration policy and also human rights and equality considerations). These key considerations are for a public body to consider before and when procuring care and support services.

## 5. Linking Strategic Commissioning and Procurement

- 5.1 This chapter describes the links between strategic commissioning and procurement. That is, once a public body has chosen to procure a care and support service, in accordance with the key considerations described in [chapter 4](#), the procurement of those services should be placed within the wider context of strategic commissioning. This is reflected in the diagram below adapted from a model produced by the Institute of Public Care (IPC). The commissioning cycle (**the outer circle in the diagram**) should drive procurement activity (**the inner circle**) and should, in turn, inform the ongoing development of strategic commissioning.



- 5.2 A public body should be linking strategic and financial planning with assessment and care management and making decisions about how to use resources most effectively to achieve desired outcomes for people. In doing so, a public body may adopt a long-term view which considers the needs of the whole community. Although there is a legal requirement for Integration Joint Boards to develop plans that will be reviewed at least every three years, commissioners should be planning at least 10-15 years ahead and considering a mix of services that will best meet predicted needs, SDS choices and best value.

## **6. Suggested best-practice for the effective involvement of people who use care services and their Carers/partnership working with service providers**

- 6.1 This chapter describes how a public body, when procuring a care and/or support service might effectively involve people who use those services and their carers.
- 6.2 In accordance with the key considerations described in [chapter 4](#), it is crucial that the views of people who use services and their carers are considered (aiming, where possible, to engage with a diverse group of service users) in the commissioning and procurement processes for care and support services. It is also important to consider what knowledge, skills and support they will require to participate in the procurement process.
- 6.3 Consideration should also be given to expectation management taking account of the feasibility and affordability of meeting the wishes and choices expressed.

### **Personalisation of health and social care services**

- 6.4 As described in the introduction, policy and legal developments in Scotland are increasingly focused on the personalisation of services. This includes the development of the [National Strategy on Self-Directed Support](#) in 2010 to help take forward the personalisation of health and social care services. This was given a legislative framework through the [Social Care \(Self-Directed Support\) \(Scotland\) Act 2013](#).
- 6.5 The fundamental principles of SDS are choice and control. Choice is evident where people are able to choose how they live their life, where they live and what they do. People can also have control of the supports they receive by determining the who, what, when and how of that provision.
- 6.6 SDS is targeted at empowering people and putting the principles of independent living into practice. It describes the ways in which individuals and families can exercise some choice about the way their support needs are met from available resources.
- 6.7 The National SDS Strategy describes the activity required to mainstream self-directed support. It identifies that service providers and individuals should have shared responsibility for agreeing the best approach to meeting quality of life outcomes. This can be achieved best by commissioning for outcomes.



- 6.8 As mentioned in [chapter 2](#), SDS includes a number of options for getting support. The person's individual budget can be:
- taken as a direct payment (a cash payment) (**Option 1**)
  - allocated to a provider the individual chooses. The public body or a third party holds the budget but the person is in charge of how it is spent (this is sometimes called an individual service fund) (**Option 2**)
  - the individual can choose a service arranged by a public body (**Option 3**)
  - the individual can choose a mix of these options for different types of support (**Option 4**)
- 6.9 SDS also enables people to make some purchases from outwith the traditional provider market and to spot purchase for more general goods and services.

## **SDS and Procurement**

- 6.10 SDS **Option 3** is mainly where this best-practice guidance has some focus.
- 6.11 There can also be procurement considerations for other elements of SDS, in particular, some aspects of **SDS Option 2**. This would only be in those circumstances where a public contract is in place - i.e. where a public body has formed a contract with a provider. Where this has been established, there are no legal requirements that stipulate a public body must follow a procurement process to meet the obligations of SDS Option 2. That said, it might choose to include procured services as part of its Option 2 considerations - in some circumstances - where it decides this best matches local need and meets any wider policy aims such as ensuring quality standards. This could be where a public body chooses, for example, to establish a framework of providers. This decision, and decisions about SDS implementation generally, are however largely local operational matters for individual public bodies to consider.
- 6.12 It is also for a public body to decide whether an existing service should be re-tendered when a contract expires. This guidance makes clear that, in doing so, it should take account of the procurement rules, local and national policy and legislation and the benefits and risks to those people who use services.
- 6.13 Given that self-directed support also includes statutory responsibilities, it is important that consideration of the principles and also the mechanisms that are best to promote it should be part of the strategic commissioning process and, where relevant, reflected in individual procurement exercises.

6.14 The SDS Strategy provides a checklist of areas where advancements in self-directed support may impact on procurement activity. These include:

- the extent and measurement of quality of life outcomes and service level satisfaction
- providing information about procurement to citizens
- involving individuals and family carers in the development of commissioning strategies, procurement policies and individual procurement plans
- development of the social and health care market
- new forms of financial planning and financial management
- balancing risks and responsibilities
- systems to deliver direct services or purchase other services in line with personally determined support plans
- aggregating data from support plans to inform procurement exercises
- means to support service purchase by people who use services if this option is chosen
- maintaining quality standards and ensuring cost-effectiveness
- flexibility in service specifications and contracts
- contract monitoring and review

6.15 As policy and legislation on self-directed support is embedded in practice, public bodies will need to continually consider how this is reflected in commissioning strategies and also their local procurement policies and procedures.

### **Involvement of people who use services and also their carers**

'A human rights based approach to social care means that people who use the services participate in their design and delivery. The involvement of communities increases the likelihood that the needs of the community will be met more effectively and thus contribute to achieving better social care. Furthermore, participation helps ensure that the social care system is responsive to the particular needs of disadvantaged groups.' (Scottish Human Rights Commission)

6.16 A public body should consult widely on any proposals for new services. Also, where decisions have to be taken about the continuation of existing services there is a need for more focused engagement with people receiving those services. A public body should take account of the views expressed by people who use services and their carers at the analysis stage (see [commissioning cycle diagram in chapter 5](#)) when:

- establishing individual needs and intended outcomes
- analysing existing arrangements for delivering the service
- deciding if a service should be provided, for example in-house, under a shared service arrangement, or if it should be procured from an external service provider

6.17 A public body should also take account of the views, benefits and risks expressed by people who use services and their carers at the planning stage when:

- advertising the requirement and awarding the contract or framework agreement by competition
- developing the service specification
- developing the evaluation criteria
- preparing questions for use in interviews with potential service providers

In doing so, a public body should continue to be careful to ensure compliance with the procurement rules for example by ensuring that any approaches taken do not have the effect of distorting competition or preventing the equal treatment of bidders.

6.18 The views expressed by people who use services and their carers during ongoing consultation, for example during assessments and the development of care plans, should inform the development of individual procurement plans. These should describe when and how a public body will communicate its intentions to people who use services and their carers and seek their views on the particular procurement exercise. These should also describe when and how a public body will communicate the outcome of the procurement exercise.

6.19 A public body should consider the following factors to ensure effective consultation with, and the involvement of, people who use services and their carers:

- timing, method and frequency of communication
- resource implications
- responsibility for communicating with people who use services and their carers
- arrangements for facilitating the involvement of people who use services and their carers
- the appropriate level of involvement, given the nature and scale of the service and diversity of people who use services and their carers
- methods of recording the views expressed by people who use services and their carers

6.20 When determining what type of communication is appropriate for a particular procurement exercise, a public body should consider the preferred methods of people who use services and their carers. It should consider different methods of written communication (taking into account diverse needs to ensure that people who use services are able to participate), for example letters, story board publications and the publication of information on its website. It should consider whether to undertake a survey of people who use services and their carers and how to seek comments from user-led organisations. It should also consider different methods of communicating face to face, for example in open meetings, or meetings with particular groups of people who use services and their carers.

If procurement activity may result in a change of service provider or change to service provision, information about the procurement process should be provided to people who use the services and their carers who may be affected. Where relevant, they should also receive information on the choices available to them and the availability of SDS.

6.21 It is important to consider what knowledge, skills and support people who use services and their carers will require in order to participate in the procurement process. Consideration should be given to using advocacy services to enhance their confidence in participation.

It is important that a public body is very clear when providing guidance to people who use services and their carers about a formal procurement exercise. Consideration must be given to how compliance with the principles of procurement (e.g. equal treatment) can be secured. For example, people who use services and their carers should be made aware, during a procurement process, that there must be no bias towards, or against, service providers that they do, or do not know, or service providers which are established in or outside Scotland. Decisions must be focused on a provider's ability to meet the requirements of the specification in the most efficient way.

The expression of choice from people who use services and their carers in a formal procurement exercise can differ from the choices available more widely through SDS. It is therefore important that a public body manages the expectations of people who use services and their carers taking account of the feasibility and affordability of meeting the wishes and choices expressed. It is important that people who use services and their carers are enabled to make formal representations about any procurement exercise involving their support and are aware of their rights to exercise choice through Self-Directed Support.

Overall, taking account of these considerations, consistent with [section 15\(5\)\(b\)\(ii\) of the Act](#), a public body should set out in its procurement strategy a statement of its general policy on consulting and engaging with those affected by its procurements.

## **Accessibility of information and terminology**

- 6.22 Where possible, information about local policies and procedures for the procurement of care and support services and proposed service changes should be available in plain language. Consideration should be given to the development of easy-to-understand versions and to providing information in alternative formats. For example, a public body should consider whether information should be provided in paper format or electronically (on websites, by e-mail or via social networks). It should also consider whether there is a need for information to be provided in minority languages and the use of large print, audio tape, Braille, DVD or British Sign Language DVD.
- 6.23 Communication with people who use services and their carers must take account of individual needs. For example, the use of text messages may be suitable for people with hearing impairments but may be inappropriate for someone with a learning disability. A public body has a duty to make 'reasonable adjustments' under the [Disability Discrimination Act 2005](#) and should evidence what it has done to take account of individual need.

## **Partnership working with service providers**

- 6.24 The procurement of care and support services should promote partnership working across sectors. Successful partnership working must be built upon openness and transparency, mutual respect and a joint understanding of the roles and responsibilities of each partner and the challenges that they face. To achieve this, as best practice, a public body should:
- recognise service providers' contributions to achieving positive outcomes for people who use services
  - involve service providers in the development of local commissioning strategies and local policies and procedures for the procurement of care and support services
  - be proactive in involving service providers in service design and the development of service specifications
  - in doing so, continue to ensure compliance with the procurement rules - for example by ensuring that there is no conflict of interest which could distort competition or prevent the equal treatment of bidders
- 6.25 A public body should ensure that its procurement plans for individual procurement exercises describe how and when it will communicate its intentions to service providers. Where the procurement exercise involves an existing service, a public body should ensure that sufficient information is given to incumbent service providers to enable them to:
- direct people who use services to the relevant contact within the public body
  - properly inform their staff about developments
  - plan for their involvement in the procurement exercise
  - respond to requests under the [Transfer of Undertakings \(Protection of Employment\) Regulations 2006](#) ('TUPE') as amended for information relating to staff transfers

- 6.26 It should also ensure that its procurement plans describe how it will engage with service providers (for example, by holding an open day) and how service providers will be involved in developing the service specification.
- 6.27 It is also important to consider the appropriateness of language and terms used in a procurement exercise. For example, although the term 'lots' in a procurement context refers to groups of services and not those who use them, the absence of a clear distinction can be misconstrued. The use of the term 'lots', for example, should therefore be avoided, wherever possible, in documentation relating to the procurement of care and support services. Efforts should be made to ensure that terminology reflects the principles of dignity and respect and that jargon is kept to a minimum.

This guidance focuses on a public body's role in the procurement of care and support services. Accordingly, the preceding paragraphs describe some of the actions that a public body can take to promote effective partnership working with service providers. It should be noted that service providers have specific responsibilities in the procurement process and share responsibility for promoting effective partnership working.

### **Service continuity**

- 6.28 Any need for service continuity should be a key consideration in the procurement of care and support services. A public body should:
- assess that need when analysing existing arrangements for delivering the service at the analysis stage
  - take into account the need for service continuity when analysing the benefits and risks to people who use services and service delivery of advertising the requirement and awarding the contract or framework agreement by competition
  - consider the implications of self-directed support
  - determine which contracting mechanism (for example use of a framework agreement) will deliver the required outcomes in terms of continuity of care
  - determine the appropriate contract duration to ensure continuity of care for people who use services while taking account of the procurement rules and best practice
  - allow sufficient time to ensure that services are appropriately registered to undertake the care service functions
  - consider what will happen at the end of the contract term and plan accordingly

The need for service continuity should be balanced against the need for service reform and re-design in certain situations to move services forward.



## Fair Work First

- 6.29 As stated in the key considerations in [chapter 4](#) a public body should ensure that the procurement of care and support services considers how to take account of a bidder's approach to fair work practices, including their commitment to progressing towards adopting the Fair Work First criteria (see the [statutory guidance on fair work and procurement](#)).
- 6.30 The nature of care and support services means that the quality of these services is highly dependent on whether a provider has a diverse workforce and whose staff are well-rewarded, well-motivated, well-led and who have appropriate opportunities for training and skills development. This means that a provider's approach to fair work practices would normally be expected to include a commitment to progressing towards adopting the Fair Work First criteria, including an expectation to commit to fair pay for workers (for example, the real Living Wage) and should be evaluated during the procurement process. The Scottish Government considers the payment of the real Living Wage to be a significant indicator of an employer's commitment to fair work practices and that payment of the real Living Wage is one of the ways that an employer can demonstrate that it takes a positive approach to its workforce. Where a provider does not pay its employees the real Living Wage, however, it does not necessarily mean that its approach to its employees fails to satisfy the Fair Work First criteria.
- 6.31 As part of considering how to approach fair work practices in care and support services, a public body should:
- ensure, in designing services, that it consults with and involves staff and their representatives (including the trades unions) when appraising the options for service delivery
  - fully consider the implications of potential staff transfers under the [TUPE Regulations](#)
  - outline proposals for addressing adopting Fair Work First, in the procurement strategy which could include:
    - considering how to promote suitable staff management practices
    - a fair and equal pay that can include a commitment to supporting the payment of the real Living Wage
    - support for learning and development and stability of employment and hours of work by appropriately defining, in a specification, the level of quality required
  - when considering how to weight a question on Fair Work First it is important to be proportionate by:
    - taking into account the likely impact on the quality of the service delivery or the works performed
    - ensuring the appropriate balance between the quality and cost of operating different kinds of care and support services

## Key messages

- Where procurement activity results in a change of service provider or change to service provision, information about the procurement process should be provided to people who use the services and their carers who may be affected. They should also receive information about the choices available to them where applicable.
- It is important that a public body is very clear in providing guidance to people who use services and their carers when it is involved in a formal procurement exercise. Consideration must be given to how compliance with the principles of procurement can be secured. There must be no bias towards, or against, service providers which are established in or outside Scotland. Decisions must be focused on providers' ability to meet the requirements of the specification in the most efficient way.
- The expression of choice from people who use services and carers in a formal procurement exercise can differ from the choices available more widely through SDS. It is therefore important that a public body manages the expectations of people who use services and their carers taking account of the feasibility and affordability of meeting the wishes and choices expressed.
- Overall, taking account of these considerations, and in being consistent with [section 15\(5\)\(b\)\(ii\) of the Act](#), a public body should set out in its procurement strategy a statement of its general policy on consulting and engaging with those affected by its procurements.
- Also once a decision to procure services has been taken, the possible application of the procurement rules must be taken into account, notwithstanding the preferences of people who use services or their carers' preferences.
- See **annex 5** for a summary of the key actions required by a public body to implement the guidance.

## Part 2 – Specific guidance for use where a public body is procuring a care and support service – the procurement process

### 7. Key stages of the procurement process – introduction

- 7.1 The second part of this best-practice guidance focuses on the procurement of care and support services.
- 7.2 Detailed consideration of other methods of securing services is outwith the scope of this guidance. The following chapters are therefore only relevant where a public body has either decided to, or is required to, procure a service from an external service provider.
- 7.3 Where a public body is procuring a care and support service, the [commissioning cycle diagram in chapter 5](#) of this guidance envisages four stages to that procurement whereby public bodies should:
- **stage 1: analyse** individual needs, intended outcomes and service providers
  - **stage 2: plan** the procurement process and develop the service specification
  - **stage 3: do** the procurement exercise and award and manage the contract
  - **stage 4: review** the arrangements and individual outcomes
- 7.4 [Chapter 8](#) focuses on the first stage (analysing individual needs). It is worth noting that much of the information described will likely be routinely collected by a public body as part of its wider commissioning process, to inform procurement strategies, and/or to support statutory and local performance indicators and contract management. Information is also available from public bodies' finance systems. Public bodies should make use of all existing information in their analysis.

### Rules specific to the procurement of care and support services

- 7.5 As mentioned in **part 1** of this guidance, the quality or availability of care and support services can have a major impact on the quality of life and health of people who might use these services and also their carers. Also, many of these services are being increasingly personalised to better meet people's needs. For these reasons, these services are often purchased differently to other services that generally apply to public procurements and human rights and equality principles.
- 7.6 [Chapter 8](#) also introduces the specific public procurement rules that apply to care and support contracts (including those that apply at different contract value/threshold levels) and which public bodies should familiarise themselves with before taking forward a procurement exercise.

- 7.7 In summary, [the Public Contracts \(Scotland\) Regulations 2015](#) provide for the 'light-touch' regime that applies to the procurement of certain health or social (including care and support) and some other services where these have a value equal to or greater than £663,540. See Annex 7 which describes the range of health or social care services covered by that regime. This guidance is concerned with those services that are principally care and support in focus.
- 7.8 [Chapter 8](#) describes the procedures for handling lower-value procurements for these types of care and support services and which are regulated by the Act.
- 7.9 These rules which are described in the context of the key stages of the procurement process as illustrated in the [commissioning cycle diagram in chapter 5](#) and are the main focus of the following chapters.

## 8. Stage 1 of the Procurement Process - Analyse

- 8.1 This chapter highlights that effective planning should be carried out before any procurement process begins. This planning should include consultation with stakeholders, those who might use the services, and their carers (see [chapter 6](#)), about what is needed and the available budget. It should also include early market engagement to understand the solutions that might be available and to understand how a requirement can best be met.

This chapter also describes the main procurement rules that apply, at different thresholds, where a public body is procuring a care and/or support service.

### Quality and cost considerations before procuring

#### Quality

- 8.2 In accordance with [regulation 76\(9\) of The Public Contracts \(Scotland\) Regulations 2015](#), a public body may now also 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 availability and comprehensiveness of the service
  - the accessibility of the service
  - the needs of different types of service users
  - the involvement of service users
  - innovation
- 8.3 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

- 8.4 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](#), contracts for these services must be awarded on the basis of both quality and price.

### Application of the rules - Thresholds and other considerations before procuring care and support services

- 8.5 A public body should first consider the total value of a care and support 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](#).

8.6 The table below summarises the rules that apply to care and support contracts at different threshold levels. It should be referred to when reading the following paragraphs 8.8 to 8.18.

<p><b>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></b></p>	<p>Light touch provisions in the Public Contracts (Scotland) Regulations 2015 apply. Must be advertised on <a href="#">Public Contracts Scotland</a> (PCS) and 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:</p> <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>	
<p><b>£50,000 – £663,539.99</b></p>	<p>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 on PCS and certain other rules apply (see <a href="#">paragraph 8.12</a>).</p>	<p>May choose to seek offers: in which case all provisions of the Procurement Reform (Scotland) Act 2014 apply</p>
<p><b>Below £50,000</b></p>		<p>Non-regulated procurement</p>

8.7 The **specific** rules that apply to the procurement of care and support contracts at these different threshold levels are described in more detail below.



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

- 8.8 For contracts or framework agreements with a value equal to or greater than £663,540, **all of the 'light-touch' provisions (described in [regulations 74-76 of the Public Contracts \(Scotland\) Regulations 2015](#))** apply. Specifically, the following applies. 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 submission to FTS (or TED where applicable)
  - publish a **contract award notice**
  - continue to follow a process that ensures the observance of the principles of procurement

Also, [regulation 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 £663,540 - award with advertising**

- 8.9 For contracts or framework agreements with a value of £50,000 or more, but less than £663,540, a public body should decide, on a case-by-case basis, whether or not to seek offers in relation to the proposed contract.
- 8.10 The flowchart at Annex 6 provides some illustration of the sort of things that might be considered by a public body when deciding whether to seek offers for contracts of this value. A number of factors may influence this decision, as explained below, but are not limited to:
- the estimated value of the contract
  - the application of the procurement rules, procurement policy and benefits and risks to people who use services and service delivery
  - application of local financial regulations and standing orders
  - the specifics of the sector concerned (for example, the size and structure of the market and commercial practices)
- 8.11 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 the [Public Contracts Scotland \(PCS\) website](#). **All** of the provisions of [the Act](#) will apply in that case.

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

8.12 For contracts of this value, a public body may choose to award care or support contracts, or framework agreements, without seeking offers in relation to the proposed contract. This is consistent with the provisions of [section 12 of the Act](#) and this best-practice guidance should be read together with that. Under the Act, there are some provisions that still apply when a public body chooses to award without advertising. These are:

- [section 23\(2\) of the Act](#): a public body must publicise a contract award notice on PCS
- [section 27](#) and [section 28](#) 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 (a 'contracts register')

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 authority considers appropriate
- [section 18 of the Act](#): a public body which is required to prepare or revise a 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>4</sup>.

8.13 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](#))
- charges for participation in the procurement process ([section 31 of the Act](#))

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

8.14 Care and support 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 however consider following a procurement process that is proportionate to the value of the contract.

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<sup>4</sup> Sections 15 and 18 are not just relevant to care and support services contracts but apply more generally to public procurements

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

8.15 Albeit not the main subject of this best-practice guidance, there are some other services covered by the 'light-touch' regime that are not health or social care. [Schedule 3 of the Public Contract \(Scotland\) Regulations 2015](#) also describes those services. The 'light-touch' rules also apply to these other services for contracts equal to or greater than £663,450. Any procurement below the threshold for these services is regulated by [the Act](#).

Procurement staff should note how these other services (i.e. non-health or social or indeed, care and support) are managed. The 'light-touch' rules apply to contracts equal to or greater than £663,450. See [paragraph 8.8](#) for the main rules applying at that level. For contracts between £50,000 and £663,450 - 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 not regulated by either the Act or Regulations.

### **Compliance**

8.16 The principles of procurement apply to all relevant procurement activity regardless of value. This includes the principles of equal treatment and non-discrimination, and transparency and proportionality which should be adopted by a public body when running a competition.

8.17 It is the responsibility of an individual public body to decide whether, and at what level, advertising is required taking account of the procurement rules.

8.18 A public body is largely free to decide to use the procurement procedures, tools and techniques of its own choosing where procuring a health or social care services contract. That said, as a matter of best practice, it is likely it will want to follow a procurement procedure that is proportionate to the value of the contract and to take account of some fundamental considerations (for example Fair Work First and other matters described in more detail in the [statutory guidance](#) which support the Act).

### **Analysis - Establishing individual needs and intended outcomes**

8.19 As a matter of best practice, a public body should have a local commissioning strategy and/or service(s) plan which establishes strategic and individual needs and determines what type of service should be put in place to meet those needs and deliver the intended outcomes. A public body should ensure that there is clarity about:

- the needs to be met and the outcomes to be delivered by the service taking into account requirements of the public sector equality duty

- how people who use services and their carers will be involved in defining their needs, expressing their wishes and choices and influencing the design of the service
- what positive outcomes the service is intended to deliver
- what choice and control the service will provide for people who use services
- how the service will meet the [National Care Standards](#)
- how the service will contribute to the public body's organisational objectives

### **Analysing existing arrangements for delivering the service**

8.20 A public body should review its existing arrangements for delivering the service with a view to:

- identifying if and how the service needs to change in order to meet individual needs and intended outcomes
- considering afresh the application of the procurement rules to the public body's existing arrangements and future proposals
- evaluating existing arrangements for delivering the service against best value principles

8.21 Evaluating existing arrangements for delivering the service against best value principles will require a public body to consider:

- whether the service is effective and of good quality
- what it costs and whether it is cost-efficient
- whether it promotes equal opportunities
- whether it contributes to sustainable development

8.22 A public body should assess whether the service has met specified key performance indicators and other contractual requirements. It should seek feedback from people who use services and their carers and review other information relating to the quality of the service, including information from contract management and service review and information from the regulatory bodies, including any complaints about the service.

### **Budget and anticipated contract value**

8.23 When a public body is considering budget and anticipated contract value it may take the following into account:

- the balance between small/short-term funding and larger/long-term funding
- whole-life costs, including set up, running and decommissioning costs
- the cost of meeting all regulatory requirements
- additional costs related to location (for example rurality)
- the complexity of the service
- training and continuing development of staff
- potential costs of staff transfers under [TUPE Regulations](#)
- additional costs of inflation

- any commitments to three-year funding cycles (or longer) where appropriate

8.24 A public body should also consider whether its own systems (for example, the operation of different administrative systems) and practices contribute to service providers' costs and, if so, whether modifications can be made.

8.25 A public body should assess if, and how, a service needs to change in order to meet individual needs and intended outcomes and consider how it can be improved. It should also assess the need for service continuity.

### **Considerations when attaching a value to care and support contracts**

The direct award of a contract or framework agreement considered to be below £663,540 might be challenged on the basis that the legitimate value of the contract (or contracts awarded under a framework agreement) actually exceed the thresholds in [The Public Contracts \(Scotland\) Regulations 2015](#) and that the procurement should, as a result, have been conducted in accordance with those Regulations.

Attaching a value to a contract (or contracts awarded under a framework agreement) for care and support services can be subject to a number of variables. A public body should consider first whether the contract is a public contract - i.e. is the awarding body a contracting authority as described in The Public Contracts (Scotland) Regulations 2015 and should, where relevant, also consider the SDS points set out in [chapter 6](#) of this guidance.

For public contracts, ordinarily, where a contract is one of a series of similar contracts, the value of each must be aggregated to determine the estimated value. The care and support landscape is however complex and the needs of those receiving the services also needs to be carefully considered. This includes ensuring compliance with self-directed support legislation and, in particular, assessing the full range of contract types available to deliver individual care provision.

All of this means that a public body should also take account of the key considerations described in [chapter 4](#) of this guidance and which a public body should ordinarily be thinking about when procuring a care and support service. Linked to this is advice also about determining the type and duration of a contract. Ultimately though, a public body should take its own legal advice when seeking to attach a value to a contract in a complex care and support context.

8.26 A public body should undertake research and hold discussions with potential service providers in order to map the market for the particular service. It should take into account service providers which already deliver services locally or more widely to particular care groups and in-house service provision. It should also assess whether other service providers and/or new providers are likely to be interested in delivering the service and might have the capability and capacity to do so. It should consider if there is a need to stimulate and/or shape the market, for example to promote interest from providers with specialist expertise or encourage the growth of social

enterprise/community business models. In doing so, it should continue to ensure compliance with the procurement rules, e.g. by ensuring that it does not distort competition or prevent the equal treatment of bidders.

8.27 Prior Information Notices can be used to give prior notification of a requirement to the market.

8.28 As part of its analysis, a public body should consider:

- capability - is the market capable of meeting the requirement?
- capacity - are there enough service providers with sufficient capacity to deliver the service?
- maturity - is the market ready to deliver what is required?
- competitiveness - what is the anticipated level of interest from service providers?
- culture - will delivery of the service require cultural change?
- how the market is structured - will delivery of the service require service providers to work together in a new way?
- how secure the market is - how will future arrangements impact on the security of the market and/or services?

8.29 A public body should also take account of the policy and approach adopted by its organisation to the delivery of services in-house.

8.30 Comprehensive analysis of the market and the early engagement with potential service providers can provide valuable information on developments in service delivery which can be used to inform the service specification. It enables the public body to understand the number, type and size of potential service providers and to take account of this in determining future arrangements for service delivery. It also enables the public body to identify any barriers to the involvement of potential service providers in the procurement process.

8.31 Guidance on developing Strategic Commissioning Plans highlights the need to incorporate a market facilitation plan which is described as:

'Based on a good understanding of need and demand, market facilitation is the process by which strategic commissioners ensure there is diverse, appropriate and affordable provision available to meet needs and deliver effective outcomes both now and in the future.'

8.32 It should present a picture of current supply and demand, what that might look like in the future, and how a public body can support and intervene in the market to deliver this vision. It should set out a clear direction and bring together and analyse a range of data and information. This should include a strategic needs assessment, contract monitoring information, the views and preferences of supported people and the current state of the market (including market gaps). This analysis should be set out in such a way that it supports providers and potential providers to develop their business plans. A public body should do this by engaging with providers throughout the process, sharing intelligence on trends and costs. This dialogue should cover how the

public body might structure, support and intervene in the market through investment and disinvestment allowing for planned growth and retraction.

- 8.33 Further information on market analysis is in the [Procurement Journey](#) which is the electronic procurement guidance linked to PCS - the Scottish Government's main advertising portal for all public contracts in Scotland above £50,000. Further advice on market facilitation will also be available from the [Scottish Government Community Health and Social Care Directorate](#).

## **Financial planning**

- 8.34 At the analysis stage, a public body should determine what resources are available for delivery of the service. Financial planning is essential to ensure that service specifications are realistic in specifying requirements and outcomes which can be delivered within the available budget and should be informed by a public body's analysis and benchmarking of costs. A public body should consider what funding it can commit to the delivery of a service and for what period of time. In particular, consideration should be given to the anticipated size and shape of service contracts in light of the promotion of self-directed support and any growth in direct payments.

## **Equality Impact Assessment (EQIA)**

- 8.35 The public sector equality duty set out in the [Equality Act 2010](#) specifically requires public bodies to assess new or revised policies and practices on people with different protected characteristics, taking into account the three needs of the public sector equality duty:
- to eliminate discrimination
  - advance equality of opportunity
  - foster good relations between people with different protected characteristics

The protected characteristics are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

- 8.36 Public bodies may also wish to consider the integration of human rights considerations into their impact assessments to help them to meet their obligations under the [Human Rights Act 1998](#). Further information about how to conduct equality impact assessments is available on the [Equality and Human Rights Commission \(EHRC\) website](#).

## **Options appraisal**

- 8.37 Information gathered during the 'analysis' stage should inform the public body's appraisal of the options for service delivery, including:
- in-house provision
  - shared services
  - procurement



- 8.38 Although consideration of other methods of securing services is outwith the scope of this guidance, it is worth noting that:
- Local policies and procedures for the procurement of care and support services should set out the principles and rationale for selecting providers, including in-house provision. Provision of a service by an arm's length body may be deemed to be 'in-house' in certain circumstances.
  - Contracts between a public body and other public bodies (including shared service delivery vehicles) for the provision of services are, in certain circumstances, exempt from the procurement rules.
  - A public body should seek legal advice/consider [regulation 13 of the Public Contracts \(Scotland\) Regulations 2015](#) to establish whether an exemption from the public procurement rules may apply.
- 8.39 In appraising the options for service delivery, a public body should take into account:
- the timing, cost and nature of the requirement
  - geographic location and/or rurality
  - whether relevant expertise exists within the public body or another public body
  - the potential for innovation
  - whether there is a market of capable service providers
  - the views of people who use services and their carers
  - the views of service providers, their staff and trade unions
  - the benefits and risks to people who use services and service delivery
  - regulatory requirements relating to services and workforce



## 9. Stage 2 of the Procurement Process – Plan

- 9.1 This chapter focuses on the **planning stage** of a procurement exercise. It is essential that a public body develops a comprehensive procurement plan (that is, an individual plan which lays out the direction of how a particular procurement exercise should be organised in order to align with procurement policy) and build in adequate time for the completion of the exercise. In particular, a public body should allow for an appropriate lead-in period prior to commencement of the contract.

### **Procurement procedures described in the Public Contracts (Scotland) Regulations 2015**

- 9.2 For many care and support services contracts, a public body may use the procurement procedures, tools and techniques of its choosing. It will likely want to follow a procurement procedure, as a matter of best practice, that is proportionate to the value of the contract and to take account of some fundamental considerations (for example, the principles of procurement where relevant and Fair Work First).
- 9.3 When doing so, a public body may choose to adapt or streamline one of the procurement procedures described in the [Public Contracts \(Scotland\) Regulations 2015](#) (see paragraphs below). If it decides to do so, it is not obliged to follow the detailed procedural requirements set out in those Regulations. A public body should therefore not refer to the Regulations in the tender documentation issued to participants, as this may create an expectation that the detailed procedural requirements will be followed. In all cases, a public body should ensure that the procurement process is described accurately and clearly and then adhered to.

### **Developing a procurement plan**

- 9.4 At the planning stage, a public body must decide how the service will be put in place and develop the service specification. A public body should develop a procurement plan which describes:
- the introduction and description of the purchase (considering the purpose, critical nature of it and any sensitivities etc.)
  - whether it is advertising the requirement and awarding the contract or framework agreement by competition, extending an existing contract or making a direct award without competition
  - the reasons for that decision
  - the procurement process (for example, open procedure) that will be followed and relevant timescales
  - how it can be demonstrated that the procurement exercise will be fair, transparent and non-discriminatory, i.e. compliant with procurement legislation
  - the roles and responsibilities of staff involved in the procurement process
  - the applicable governance arrangements and approval process

- how and when it will communicate its intentions to people who use the service and also their carers and proposals for their involvement in the procurement process
- how it proposes to handle fair working practices
- how the service specification will be developed with the involvement of people who use the services and also their carers and service providers in its development (including any opportunities to contribute to economic, social and environmental wellbeing and to reduce inequality)
- the type and duration of the proposed contract or framework agreement, available budget and estimated contract value
- research of the supplier market to identify current suppliers providing the same or similar service and any spend analysis available
- risks identified that may impact on the progress of the procurement
- anticipated benefits and outcomes
- what criteria will be used to select service providers and award the contract or framework agreement (including whether award criteria or performance indicators should include equality considerations)
- what transitional arrangements will apply if an existing service transfers to a different service provider
- how the contract or framework agreement will be managed
- how the relationship between the public body and service provider(s) will be managed
- arrangements for reviewing the service
- what action it proposes to take at the end of the contract term
- how the procurement exercise will be evaluated

9.5 Examples of individual procurement plans can be found in the [Procurement Journey](#).

### **Advertising the requirement and awarding a contract or framework agreement by competition**

9.6 A public body should decide, on a case-by-case basis, whether or not to advertise the requirement and award a contract or framework agreement by competition. A number of factors will influence this decision, as explained below and illustrated in the flowchart at Annex 6.

- application of the procurement legislation, procurement policy and risk of legal challenge
- application of local financial regulations and standing orders
- benefits and risks to people who use services and service delivery

## Identifying care and support services

[Schedule 3 of The Public Contracts \(Scotland\) Regulations 2015](#) confirms those services that are health or social care and which includes care and support services.

Where a contract includes a mix of services, the categorisation of the contract into a care and support contract will likely depend on whether the majority of the cost of the contract is for those services. Where the cost is made up of more than 50% of those services, then the contract will be a care and support services contract and vice versa. For contracts valued between £50,000 and £663,540 where the cost of the services is evenly split (i.e. 50-50), the contract is deemed to be a care and support services contract.

## Application of the procurement rules to a contract or framework agreement for care and support services

- 9.7 At the analysis stage, a public body should consider the procurement rules that apply at different threshold levels as described in [chapter 8](#). That chapter makes clear that contracts or framework agreements with a value of £50,000 or more but less than £663,540, a public body should decide, on a case-by-case basis, whether or not to seek offers in relation to the proposed contract and in accordance with [section 12 of the Act](#).
- 9.8 Such decisions should also take into account the principles of procurement which include:
- treating economic operators equally and without discrimination
  - acting in a transparent and proportionate manner.
- 9.9 A public body should also consider if national or local policy requires them to advertise and compete a contract. Advertising and competition **may not** be required, for example, where:
- advertising the contract at the current time would result in the loss of a linked service, for example, where the separate competitive tendering of a housing related support service would result in the withdrawal of the accommodation currently provided for people who use services and those units of accommodation could not be replaced
  - it is possible to extend an existing contract under the scope and terms of that contract

## **Risk of legal challenge for breach of the procurement rules**

9.10 A public body should assess the risk of legal challenge if it decides not to advertise the requirement and proceeds to award the contract or framework agreement without competition. A legal challenge may have serious implications for procurement activity and future service delivery. For example, for a 'light-touch' contract with a value of at least £663,540, if a court grants an ineffectiveness order together with damages, legal costs and/or compensation, this may divert monies from service provision and may cause significant disruption and uncertainty to people who use services. Also, standstill rules apply to care and support contracts of that value. The relevant legislation is [part 3 of the Public Contracts \(Scotland\) Regulations 2015](#).

## **Application of legal remedies to contracts and framework agreements services covered under the 'light-touch' regime**

9.11 The award of a contract or framework agreement for one of these services may be challenged on the basis that a public body has failed to ensure publication of the contract opportunity on the Find a Tender Service (or Tenders Electronic Daily where applicable) and follow a procedure sufficient to ensure observance of the principles of procurement. In relation to a contract or framework agreement worth at least £663,540 such a challenge would be pursued as a commercial action.

## **Community benefit requirements**

9.12 The use of community benefit requirements provides a method of including economic, social and environmental matters in contracts that do not conventionally have these requirements as defined or measured outcomes. They provide a means by which new and innovative ideas concerning social issues can be inserted into contract specifications while ensuring value for money in their delivery.

9.13 [Section 25 of the Act](#) requires a public body to consider community benefit requirements for all contracts valued at £4 million or more. This value will be subject to review. [Chapter 4 of the Procurement Reform \(Scotland\) Act 2014: statutory guidance](#) provides guidance on community benefits, which includes:

- defining the appropriate community benefit requirements through stakeholder engagement
- what to say in the contract notice and contract award notice
- circumstances where community benefit requirements would not be relevant or proportionate
- reporting of expected and achieved benefits

9.14 A public body should consider community benefit requirements even if these contracts are not in excess of £4 million or where these are not covered by the Act.

## **Application of local financial regulations and standing orders**

- 9.15 In deciding whether to advertise the requirement and award the contract or framework agreement by competition, a public body must ensure that it complies with local financial arrangements and standing orders.
- 9.16 These will typically refer to the requirements of the [Public Contracts \(Scotland\) Regulations 2015](#) in respect of contracts worth at least £663,540. These should also establish local requirements for advertising contracts of different values. A public body should ensure that its local financial arrangements and standing orders comply with this guidance and legal requirements.

## **Benefits and risks to people who use services and service delivery**

- 9.17 As described in [chapter 6](#), a public body should analyse the benefits and risks to people who use services, and also to service delivery, of advertising the requirement and awarding the contract or framework agreement by competition. For existing services, this will require consideration, through consultation with people who use services and their carers, of the impact that any change in service provision or provider will have on:
- people who use services and their carers
  - continuity of care
  - the quality of the service and the outcomes delivered
  - the cost of the service
  - the market
  - the workforce
- 9.18 This analysis may suggest that, where a public body is satisfied with the quality of a service and that best value is being achieved, the existing service provider should continue to deliver the service. If a public body's contract with the existing service provider includes an extension option that is within scope, the contract may be extended for the specified period. In the absence of an extension option, any decision by a public body to renew (or 'roll forward') its contract with the existing service provider must be compliant with public procurement legislation. Legal advice should always be sought in respect of any procurement decisions.
- 9.19 Alternatively, the analysis may suggest that the requirement should not be advertised at the current time and that a staged approach should instead be adopted. If a public body decides to adopt a different timetable for advertising the requirement, it should describe this in relevant procurement documents and set out how it intends to move towards competition in the future.

## **Contract renewal or direct award without competition**

9.20 Where a public body decides to renew an existing contract, or to award a new contract without competition, it should ensure that:

- its decision is based on sound and objective business reasons and that this is fully documented
- its decision not to award the contract or framework agreement by competition is permissible (see [threshold diagram at paragraph 8.6](#)) and compliant with the public procurement Regulations and the principles of procurement
- its decision is consistent with local financial regulations and standing orders and local policy and procedures for the procurement of care and support services
- it is able to demonstrate that best value has been achieved
- the decision is subject to regular review (e.g. a decision not to advertise and tender a contract because of its low value will need to be reviewed should the total sum to be paid under that contract increase)

The renewal of an existing contract is likely to involve negotiation between a public body and service provider about aspects of service delivery, the outcomes required and the costs.

9.21 The competitive procedures which a public body may choose to follow, broadly, where it has chosen to compete a care and support services contract are:

- open procedure
- restricted procedure
- competitive procedure with negotiation

For further information on the procedures, please refer to the [Public Contracts \(Scotland\) Regulations 2015](#) and guidance in the Procurement Journey.

## **Strategic partnerships**

9.22 A public body may seek a long-term (for example, over a period of 10 or 20 years) strategic partner or partners to redesign and achieve major changes in the delivery of a service and/or the use of resources. For example, it may decide to work with a service provider or providers to determine what could be provided across a range of services within the available resource, rather than tendering for particular services. In this situation, the choice of strategic partner(s) should be on the basis of a transparent and competitive process in accordance with the public procurement rules.

## **Public Social Partnerships (PSPs)**

9.23 PSPs are strategic partnering arrangements, based on a co-planning approach, through which the public sector can work with third sector organisations to share responsibility for designing services based around service user needs.

9.24 A PSP typically comprises three stages:

- third sector organisations work with public sector purchasers to design a service
- a consortium of third sector organisations, which may also involve the public sector, conduct a short-term pilot, helping to refine service delivery parameters and maximise community benefit
- if the service is deemed successful, commissioners then need to consider the most appropriate approach to sustaining the PSP. This could involve a competitive tendering process but other methods of securing service delivery should also be considered

9.25 The Scottish Government published guidance on developing and running [Public-Social Partnerships](#) in July 2011.

## **Developing the service specification**

9.26 The service specification is critical when procuring a care and support service contract as it provides detailed information to potential service providers about the public body's requirements. It describes what type of service a public body wishes to purchase in order to meet individuals' needs and the standards and outcomes that the service is required to deliver. The service specification will subsequently form part of the contract between the public body and service provider(s). A public body should ensure that service specifications are sufficiently flexible to take account of redesign and innovation, particularly where the contract will be for a longer duration. Any changes which are subsequently made to the contract may otherwise constitute material changes and may require the contract to be re-tendered.

9.27 Wherever possible, service specifications should be outcome-based. This encourages a public body to focus on the results it wants the service provider to achieve, instead of prescribing in detail how the service should be delivered. It gives the service provider greater flexibility to develop services (in consultation with people who use services) which meet individuals' needs, propose innovative solutions and direct resources.



Service specifications for certain social care services, for example home care services, can be very prescriptive about the tasks to be carried out by the service provider within the specified time. A public body should consider the extent to which task and time-based specifications will result in a service which achieves the desired outcomes for people who use services. Where task and time based specifications are deemed appropriate, these should be written in such a way as to ensure that the time allowed for the specified tasks is sufficient to provide a good quality of service, achieve the desired outcomes for people who use services and give a service provider flexibility to respond to immediate and changing needs.

9.28 Service specifications should make specific reference to the [National Care Standards](#) (which apply to registrable services) and the national health and wellbeing outcomes and integration indicators. Service specifications should also state the public body's expectations in relation to the personalisation of services.

9.29 In addition, a public body should ensure that service specifications:

- support the priorities contained in its procurement strategy
- are realistic in specifying requirements and outcomes which can be delivered within the available budget
- are developed in consultation with people who use services and service providers
- consider all aspects of the service and highlight, for example, whether premises will be required
- identify delivery requirements, including eligibility criteria and access to other services
- incorporate, insofar as relevant and proportionate, equality and human rights standards
- identify responsibilities and risks and determine who has responsibility for those risks
- incorporate key performance indicators and describe the mechanism for measuring performance and managing the contract

9.30 A public body should ensure that people who use services are involved in defining their needs and the outcomes they require and that their views inform the development of the service specification. It should also be proactive in involving service providers in the development of the service specification, whilst ensuring that they do not gain a competitive advantage in the subsequent procurement process. Under [regulation 42 of The Public Contracts \(Scotland\) Regulations 2015](#) (**prior involvement of candidates or tenderers**) public bodies must take appropriate measures to ensure that competition is not distorted by a tenderer where that tenderer has been involved in the preparation of the procurement. Caution must therefore be exercised to ensure that service providers which are involved in the development of the service specification do not have an unfair advantage in any tendering process.



A public body should not assume that an existing service specification will reflect future requirements. Specifications which are already in use should be reviewed and updated to ensure that these are fit for purpose.

Also, a public body must ensure that there is no conflict of interest which could distort competition or prevent the equal treatment of bidders. This may include where individuals have a direct, or indirect, financial, economic or other personal interest which might be perceived to compromise their impartiality and independence of the procurement process.

### **Determining the conditions for participation**

9.31 A public body must determine at the planning stage what criteria it will use to select potential service providers and what criteria it will use to evaluate tenders. The mandatory exclusion grounds must be applied and a public body may also choose to apply discretionary exclusion grounds, selection criteria and award criteria. Where it is appropriate and proportionate to apply other selection and award criteria, these can enable a public body to select service providers which are capable of delivering the service and to eliminate those which are not capable of delivering that service. These criteria can help clarify the conditions for participation and help a public body to consider the degree to which potential providers will meet the specification for service delivery and provide best value. A public body should:

- where it is appropriate to do so, use set selection and award criteria which are relevant and can be objectively measured and are non-discriminatory
- consider the involvement of people who use services and their carers in developing any criteria, preparing questions for use in interviews with potential service providers, and the nature and level of support they will require
- develop an evaluation template which clearly states the selection and award criteria and the scores and any weightings that will be applied
- disclose the selection and award criteria, and an indication of the scores and any weightings that will be applied, to potential service providers in the contract notice or contract documents
- establish a process for selecting potential service providers and evaluating tenders and agree the timescales and resources required for each stage of the process
- establish whether specialist input, for example from legal or finance teams, will be required and at what stage of the process

### **Distinguishing between selection and award criteria**

9.32 Where a public body chooses to apply selection and award criteria, it should ensure that there is a clear distinction between them. This applies whether assessment of a service provider's suitability to deliver the service and assessment of the service provider's proposals for delivering the service are assessed in two separate stages (as in the restricted procedure) or at the same time (as in the open procedure). Further information on selection and award is available in the [Procurement Journey](#).

## **Selection criteria: evidencing capability and experience**

9.33 Where used, selection criteria may, for example, include:

- track record (relevant experience and expertise)
- provider capability/capacity
- policies and procedures
- awareness of National Care Standards (where applicable)
- non-subjective references, including from other public bodies
- skilled and competent workforce (including registration requirements and staff training/learning)
- business probity
- financial viability

9.34 A public body should have regard to relevant information held by the regulatory bodies in relation to registration, inspection, complaints and enforcement activity in order to inform the assessment of a service provider's track record, quality of provision and/or capability.

9.35 A public body may ask potential service providers to submit recent inspection reports relating to similar services which they deliver within the same geographic area and similar services provided in other geographic areas. A public body should consider asking for copies of previous inspection reports and outcomes of other regulatory activities, for example enforcement notices and complaint information and action plans. A public body should also take into account improvement action taken by service providers in response to inspection reports.

9.36 A public body should also ask potential service providers to submit a statement which summarises the quality grades of all of their registered services within the service category and geographic area. Account should be taken of the quality grading of these services. Where a public body considers that prior experience of service delivery within a registration category is essential, consideration should be given to how to apply quality grades in decision making. Caution should be exercised in using quality grades as a threshold, as the relevance of individual reports to the service in question is likely to vary.

9.37 It is important to note that some potential service providers may not have experience of delivering registered services in Scotland and may therefore be unable to submit inspection reports or details of quality grades. To allow for this, a public body should invite service providers to submit reports from other regulators or other evidence of their track record in delivering similar services. Where the Public Contracts (Scotland) Regulations 2015 or principles of procurement apply, a public body must not limit eligibility to Scottish-established service providers.

9.38 A public body could analyse the financial position of potential service providers and determine the level of risk that it would represent to the public body, having regard to the contract requirement and value.

- 9.39 Care should be taken to ensure that any selection criteria relating to financial viability are proportionate to the contract in question, do not unreasonably exclude SMEs or third sector service providers and genuinely reflect ability to perform the contract.

### Single Procurement Document (SPD)

- 9.40 Mandatory exclusion grounds must be applied to care and support services, and a public body can also choose to apply the discretionary exclusion grounds, selection criteria and award criteria. A public body can choose to use the SPD in respect of exclusion grounds and selection criteria, and it is a matter of best practice to do so.

### Award criteria: evaluation of a service provider's tender

- 9.41 While not required, award criteria can enable a public body to assess a service provider's bid to deliver the service in question. They must be relevant and proportionate to the particular requirement and should therefore be determined on a case-by-case basis. Award criteria may, for example, include:
- understanding service requirements and implementation proposals
  - achieving outcomes for people who use services
  - staffing structures and how these have been calculated to meet the needs of the people that use services group
  - proposals for service improvement/development
  - proposals for monitoring and evaluating service delivery outcomes and user satisfaction
  - whole life costs
- 9.42 A public body should award a contract or framework agreement on the basis of the tender which represents best price quality ratio. In doing so, a public body should determine how it intends to evaluate quality and cost or price and whether, for example, it intends to apply a minimum pass mark to an individual technical question. A public body should consider inviting people who use services to contribute questions which can be put to potential service providers at interview. Any questions must be relevant to the contract outputs and outcomes and the contract award criteria established for the procurement process. These must also be objective and agreed and disclosed to service providers in advance. These should be evaluated, scored and be objective.
- 9.43 A public body should also determine the appropriate best price quality ratio for the particular procurement. For example, it may be appropriate for a tender for equipment to be conducted on the basis of 30% quality, 70% cost if the equipment meets manufacturing quality standards. **However, when procuring care and support services, greater emphasis should be placed on quality rather than cost or price.** In this instance, it might be appropriate, for example, to use a ratio of 70% quality, 30% cost.
- 9.44 Where a public body applies award criteria, a public body must make this available to potential service providers in advance as part of the requirement to publish in the contract notice the conditions for participation. It cannot score

with reference to other factors or change the award criteria without communicating this to the tenderers and this may require a fresh tendering period. A public body should ensure that it clearly specifies the information it requires to allow a valid comparison of unit costs and to ensure that, for example, there is clarity about whether bids include the cost of potential staff transfers under the [TUPE Regulations](#).

### **Use of e-auctions as part of the tender evaluation process**

- 9.45 E-auctions are compatible with procurement law, subject to certain pre-conditions. The e-auction stage of the evaluation process allows tenderers to submit new prices/values throughout each phase of the auction. When the e-auction closes, the contract must be awarded on the basis of the result of the auction - no further evaluation or clarification is allowed.
- 9.46 Legislation does not preclude the use of an e-auction as part of the tender evaluation process for care and support services. However, its use is not appropriate in the context of social care procurement. This is because of the risk that an e-auction's focus on reducing costs will impact on the quality of care that can be delivered for the amount bid. E-auctions should not, in any circumstances, be used as part of the tender evaluation process for the procurement of care and support services.

### **Social issues in public procurement**

- 9.47 It is possible to incorporate social issues in public procurement as award criteria provided that doing so offers a value for money outcome, complies with legal requirements and is directly related to the subject matter of the contract. It is important that social issues are considered at the planning stage and built into the procurement process. The Scottish Government has published guidance on this in SPPN 8/2012 - [Equalities: Duty to consider award criteria and conditions in relation to public procurement](#).

### **Taking account of resources which service providers are able to bring to bear in delivering the service**

- 9.48 Where the availability of resources, for example a building, has a bearing on a service provider's ability to perform the contract, it may be assessed as part of the evaluation of the quality of the service being offered.

## **Variant bids**

- 9.49 A public body can consider whether or not it will accept variant bids, i.e. whether it will allow service providers to propose an alternative solution to that set out in the service specification. Where a public body chooses to allow variant bids, it must disclose this.
- 9.50 Variant bids can be useful because these allow service providers to suggest innovative ways of meeting a public body's requirements and delivering the outcomes in the specification. However, a public body should set out clear parameters within which such variants may be made, that is, which areas may be varied. All variant bids should be evaluated using the same criteria as the standard bids and compared on a like-for-like basis.
- 9.51 A public body should also consider whether to allow potential service providers to set out options in relation to different TUPE scenarios within its tenders. If so, it should provide clear directions to tenderers to ensure that bids can be compared on a like-for-like basis.

## **Indicative budget**

- 9.52 A public body may choose to indicate the available budget for delivering the service in question, specify the outcomes desired and invite providers to submit proposals for achieving the outcomes within the resources available. Stating an indicative budget ensures that service providers' tenders for delivering the service are affordable. This may be appropriate if, for example, a procurement exercise fails and the public body moves to negotiation with service providers. In other circumstances, stating an indicative budget may make it difficult for a public body to assess that the service represents value for money.

## **Establishing a timetable for the procurement process**

- 9.53 To ensure that suppliers and service providers have sufficient time to respond to any advertisements published on FTS (or TED where applicable) and on PCS, a public body should take into account the complexity of the tender and the resource implications for service providers and should consider allowing additional time, where appropriate.
- 9.54 Where a public body advertises a contract or framework agreement for care and support services below £663,540, it should ensure that any timescales are compliant with legislation and where relevant, are realistic and take into account the complexity of the tender and the resource implications for service providers. This is particularly important if there is an expectation that service providers will submit consortia bids to allow discussions between service providers to take place.
- 9.55 In determining the start date of the contract, a public body should take into account any process and timescales for registering a care service where this involves a new service or change in the registration of a service. In all cases, a

public body should seek to observe the timescales it has set for decision making.

### **Determining the type and duration of the contract**

9.56 A public body's policies and procedures for the procurement of care and support services should identify an appropriate range of contracting mechanisms and provide a rationale for selecting different mechanisms, based on best value, the need for service continuity and desired outcomes for individuals. Individual procurement plans (see [diagram at paragraph 2.25](#)) should describe the type and duration of the proposed contract or framework agreement.

9.57 A public body should determine the most appropriate contractual mechanism on a case-by-case basis and ensure that suitable contracts are in place with all providers delivering care and support services.

9.58 Contracts will typically comprise a number of documents:

- the general terms and conditions which set out the obligations of the public body and service provider
- schedules, including the service specification, which set out the specific details of the services to be provided and the arrangements for their provision

9.59 Contracts for care and support services have traditionally required specific activities to be undertaken at specific times, with payment contingent upon inputs (resources) and outputs (service levels). The success of a contract has been determined by the extent to which the service provider has delivered the prescribed service. Contracts should be outcome-based. Outcome-based contracting is designed to shift the focus from activities to results. The success of a contract is determined by the extent to which the service provider can demonstrate progress towards achieving the specified outcomes. An outcome-based contract should include:

- the outcomes to be achieved - these must be realistic and take account of external factors which might impede progress
- clear performance expectations and measures
- key milestones which indicate progress and dates for achieving these
- monitoring arrangements which ensure performance is being achieved

9.60 In addition, all contracts should be:

- clear, concise and written in plain English
- complete and unambiguous - contracts should set out the obligations of the parties in a way that does not allow for differing interpretations of what is required
- comprehensive and consistent - there should be no contradiction of requirements or approach (a public body should ensure that all the documents which comprise the contract support the achievement of the required outcomes)

- flexible - contract conditions should be adjusted to take account of provider requirements for example, frequency of payment to smaller providers to maintain cash flow (but care must be exercised if conditions are amended after a competition as this would have the effect of distorting that competition)
- detail shared risk - contracts should seek to reduce both the impact and the likelihood of risk within acceptable levels and to define what each party must do to make this possible
- contain appropriate equalities and human rights clauses

9.61 Contracts should also make appropriate provision for dealing with poor performance.

#### **Contract duration**

Unlike framework agreements there are no explicit limits in public procurement law on the duration of a contract, although excessively long contracts may be open to challenge on the grounds that they are designed to distort markets/competition. Contract duration should be determined on a case-by-case basis, taking into account the public body's requirements and the needs of the people who use the services. Contracts should be subject to a review of service delivery at appropriate intervals.

A public body may decide to award contracts of longer duration, where necessary, to ensure continuity of service for people who use the services. It is possible to frame contracts in a way which would allow the service provider to continue to provide a service to a person who uses the service for an extended period. For example, it may be appropriate to specify that the service provider should (subject to satisfactory performance) provide continuous support for that individual for as long as support is required.

9.62 Decisions about contract duration should also include consideration of the importance of having a skilled, engaged and stable workforce in social care. Frequent re-tendering may have adverse implications for staff morale and conditions of service and can lead to the loss of highly motivated staff. Local authorities may, where appropriate, take a three-year (or longer) approach to funding, offering service providers the necessary stability to retain and train their staff and to plan for service development. It is, however, recognised that short-term funding may be appropriate in certain circumstances in order to encourage innovation in service delivery and respond to the changing needs of local communities.

9.63 It is also possible to provide that a contract will (subject to satisfactory performance) be extended by a certain period of years. Any option to extend the contract must be made clear at the outset in the contract notice. A public body should consider whether the circumstances make it appropriate to award a contract of longer duration (rather than providing an extension option), thereby offering itself and service providers greater certainty.

9.64 It might be appropriate to include price adjustment clauses in service contracts of longer duration, for example over two years. Price adjustments clauses determine the parameters for adjusting price (upwards or downwards) during the term of the contract. The inclusion by a public body of 'no-fault' termination, or break, clauses and successor body clauses in contracts of longer duration can provide flexibility in the event of a change in the public body's requirements.

### **Clauses relating to transitional arrangements**

A public body should include clauses which specify the arrangements that will apply in the event that a service is transferred to a different service provider, including lead-in, exit and handover clauses. For example, consideration should be given to identifying the requirements on the incumbent service provider to transfer information such as care plans to the new provider.

9.65 A public body should also include a clause requiring the incumbent service provider to provide information about staff, conditions and costs to potential service providers during a procurement exercise. This allows a potential service provider to assess the staffing and financial implications of TUPE transfers prior to submitting its tender.

### **Determining the transitional arrangements that will apply**

A public body should determine the transitional arrangements that will apply when a new service is established or if an existing service transfers to a different service provider. As part of the planning process, it should address:

- the timescale and arrangements for the service transfer
- how it will communicate the outcome of the procurement exercise and the transitional arrangements to people who use the services and their carers, service providers and relevant staff within their own organisation (including assessment and care management staff)
- what information will be provided to people who use the services and their carers about SDS, including direct payments and arrangements for dealing with applications additional support arrangements for people who use the services and their carers during the transition period

9.66 A service provider also has a legal obligation to notify people who use services about care service cancellation.

9.67 A public body may have legal obligations under the TUPE Regulations where it is outsourcing a service or bringing a service back in-house, in which case it should seek legal advice on the application of the Regulations to the particular circumstances. In all cases, public bodies should consider the potential impact of staff transfers under the TUPE Regulations:

- on continuity of support to people who use services and their carers
- on the cost of delivering the service
- on the affected workforce



It should also consider what action they will need to take to facilitate the exchange of information between service providers or the transfer of staff should the TUPE Regulations apply.

### **Other issues for consideration at the planning stage**

9.68 At the planning stage, a public body should also consider:

- how the contract will be managed
- how the relationship between the public body and service provider(s) will be managed
- arrangements for reviewing the service
- how the procurement process will be evaluated

Some of these issues are considered in detail in the following chapters.

## **10. Stage 3 of the procurement process – do**

- 10.1 This chapter highlights that the purpose of this stage of the procurement process is to implement the agreed procurement plan and to secure services that will deliver the identified outcomes for people who use those services and also their carers.

### **Communication with people who use services and their carers**

- 10.2 Having finalised and agreed the procurement plan, a public body should communicate its intentions to people who use the services and also their carers/representatives. It is important that a public body provides clear and unambiguous information at this stage and that this information is tailored to the particular audience.
- 10.3 In these communications a public body should explain:
- how long it will take to decide who will provide the service
  - what will happen at different times in the process
  - how people who use the services and their carers will be involved in the process
  - who will make the final decisions and how these will be made
  - (where appropriate) why there may be a change in service provider
  - how service provision may change as a result of the procurement process

A public body should also provide contact details for further information.

- 10.4 A public body should ensure that people who use services and also their carers have help to understand the process and what, if anything, they are being asked about. It should also ensure that these people have sufficient time to consider how they might be affected and to formulate their views before having to respond.

### **Provider engagement**

- 10.5 A public body should consider whether to hold an open day, or workshop, for potential service providers in order to provide additional information about their requirements and to explain how the procurement process will operate. This might not be possible in every procurement exercise because of the level of resource required, but where there is a market interest in the service this approach, where proportionate can be helpful to engage the market in innovative service redesign.

### **Electronic tendering**

- 10.6 Electronic tendering enables a purchasing body to manage the procurement process online. It reduces the paperwork involved in tendering exercises, provides an electronic audit trail and allows a public body to provide a faster response to questions and points of clarification during the tender process.

- 10.7 A public body should ensure that potential service providers are given full instructions on how to access and respond to tender documentation online.

### **Tender process**

- 10.8 A public body should determine, at the planning stage whether they will broadly follow one of the procedures in the Public Contracts (Scotland) Regulations 2015 where a public body is competing a requirement for care and support services. A public body should then decide what procedure to follow. Further information on the procurement processes and tender procedures can be found in the [Procurement Journey](#).

### **Selection process**

- 10.9 Details of the exclusion and selection process and the Single Procurement Document (SPD) can be found in the [Procurement Journey](#).

### **Evaluation of tenders**

- 10.10 Tender documentation should provide tenderers with background information about the services required, as well as setting out the detailed requirements. Tender documentation will typically comprise instructions to tenderers with the conditions to participate. Information on the tender process and evaluation of tenders can also be found in the [Procurement Journey](#).
- 10.11 For the procurement of care and support services a public body should consider whether it is appropriate for people who use services and their carers to be involved in decision making, through, for example, participation in site visits and interviews with service providers or representation on the evaluation panel. The participation of these people must be consistent throughout the process. For example if they are involved in interviews with service providers, they must participate in all of the interviews arranged with service providers. Care must be taken, when involving people who use services and also their carers in the evaluation of tenders, to ensure that they:
- understand the evaluation process and are clear about their role in it
  - understand the criteria against which tenderers are to be evaluated
  - understand their obligation to be objective and impartial and to treat tenderers equally
  - understand issues relating to the commercial confidentiality of service providers
  - are able to commit the necessary time
  - receive appropriate training and support
- 10.12 The involvement of people who use services and their carers in decision making should be considered on a case-by-case basis. It may, for example, be appropriate to involve them in the evaluation of tenders for the delivery of a discrete service for a small number of individuals.

## **Contract award decision**

- 10.13 Specifically in relation to the procurement of care and support services, on the award of a contract or conclusion of a framework agreement, public bodies should communicate the outcome of the procurement exercise to people who use services and also their carers.
- 10.14 A service provider should notify people who use services of a cancellation of a care service's registration and any arrangements which are to be put in place to ensure that those who use its services and their carers receive an ongoing and similar service. It would be appropriate for this to be done in collaboration with the public body. A public body should also communicate the outcome of the procurement exercise to any existing service providers that have chosen not to tender.
- 10.15 A contract award notice must be published on PCS for regulated contracts and must be sent to the Find a Tender Service (or Tenders Electronic Daily where applicable) for contracts or framework agreements with a value equal to or greater than £663,540 no later than 30 days after the contract award or conclusion of the framework agreement. Where notices have been grouped it will be 30 days from the end of each quarter.
- 10.16 Full details of the evaluation process and contract award procedures can be found in the [Procurement Journey](#).

## **Transitional arrangements**

- 10.17 It is important that this stage of the procurement process is managed successfully to ensure minimum disruption to people who use services and their carers. This will require close co-operation between different teams within a public body and between it and service providers.
- 10.18 This is particularly important where the outcome of the procurement exercise involves the transfer of an existing service to a new service provider. This is because there is some potential for the transfer process to be demanding and consume significant amounts of staff time. A public body should facilitate the transfer of accurate, up to date information to the new service provider and ensure that the handover arrangements are appropriate and fully implemented.
- 10.19 Service providers will need to satisfy the Care Inspectorate that it can adhere to the Public Services Reform (Scotland) Act 2010 and Regulations and also meet the relevant National Care Standards. The Care Inspectorate can take up to approximately six months to register a new care service. This depends on a range of issues, including provision of a competent application and the complexity of the service being provided.
- 10.20 Where an existing service provider seeks to deliver a new service under the existing registered care services, this should be discussed with the Care

Inspectorate. It may be possible to vary the registration to include the new contract. However, consideration would need to be given to:

- the current conditions of registration
- the size of the service management and staff support arrangements
- geography
- client group and needs of those people who use services
- transferability of staff across the service
- staff skills and training
- the aims and objectives of the service

10.21 If a service provider applies to cancel its registration, it is legally required to state whether notice has been given to those people who use the services and their carers about the changes to its service and how their needs will be met if the application to cancel is approved by the Care Inspectorate. A public body should provide the necessary support and information to a service provider to enable it to meet its legal obligations.

10.22 A public body which is outsourcing a service or bringing a service back in-house will have to meet its legal obligations under the TUPE Regulations. It should, in all such cases, seek legal advice on application of the TUPE Regulations. In other cases involving the transfer of an existing service, a public body should consider whether it needs to take any action, for example to facilitate the exchange of information between service providers, should the TUPE Regulations apply.

### Key messages

The opening chapters of this part of the guidance describe the types of things that a public body may consider at key stages of a procurement exercise. Specifically, those chapters describe some considerations for attaching a value to a contract, contract duration, reviewing contracts, handling of transitional arrangements and communication with people who use services and their carers and also contract award.

[Chapter 8](#) describes the specific public procurement rules that apply to health or social (and including care and support services) contracts. It highlights the rules that apply and at what levels. In doing so, it describes the circumstances where a public body may award a **regulated** contract with a value of £50,000 or more, but less than £663,450, for a care and support service without seeking offers and in accordance with [section 12 of the Act](#).

Chapter 8 also makes clear that a public body should seek advice from legal and/or procurement specialists about the application of the procurement rules, as this will vary depending on the type and value of a contract.

Although not the main subject of this guidance, chapter 8 also briefly touches on the rules that apply to some other services (i.e. not principally health or social, or care and support, in focus) but that are subject to the 'light-touch' regime.

## 11. Stage 4 of the Procurement Process – Review

11.1 This chapter highlights the importance of reviewing the ongoing procurement process. A public body should ensure that appropriate arrangements are made for:

- managing the contract (or call-off contracts under a framework agreement)
- managing the relationship between the public body and service providers
- reviewing the service
- preparing for the end of the contract, including the possibility of early termination

Depending on the value and complexity of the procurement, a post-project review may be undertaken to consider any lessons learned and take these into account in any future planning. Further information on post project reviews can be found in the [Procurement Journey](#).

Such arrangements should, in turn, inform the ongoing development of local commissioning strategies.

### Managing the contract

11.2 The purpose of contract management is to:

- ensure that the service is delivered as agreed to appropriate quality standards and is providing value for money
- allow a public body to manage any risks which may impact on a service provider's ability to deliver the service, or to deliver it to the required quality
- ensure that the correct administrative procedures are followed, for example in the event of a change to the contract or to put into effect a price adjustment

11.3 Every contract for care and support services should be managed by a nominated member of staff ('contract management officer'). In a collaborative setting, public bodies should determine which public body will take the lead in managing the contract. A public body should ensure that there is clarity about the distinction between:

- contract management (the responsibility of the public body)
- service management (the responsibility of the service provider)
- the role of the care manager (who has overall responsibility for ensuring that the totality of care and support for an individual is achieving the desired outcomes)

11.4 Service specifications (which form part of the contract) should incorporate key performance indicators and describe the mechanism for measuring performance. In order to evaluate performance, public bodies should consider all potential sources of information on the delivery and quality of the service, including:

- views expressed by people who use services and also their carers in questionnaires, meetings and focus groups and through peer inspection (views of diverse groups of users should be heard, where possible, to ensure that the service is meeting diverse needs)
  - reports submitted by a service provider
  - self-assessment by a service provider
  - meetings with service providers
  - planned and unannounced visits
  - feedback from their frontline staff
  - the records of those who use services
  - review of compliments, complaints and serious incidents
  - information from the regulatory bodies, including inspection reports, complaints and enforcement
- 11.5 A public body should ensure that the approach adopted to reporting is proportionate and seeks to minimise demands on service providers for information about the delivery of the service. The frequency and level of reporting should be informed by a risk assessment and may increase in certain circumstances, for example if a complaint is made about the service. The reporting arrangements might be built into the service specification and/or the terms and conditions of a contract.
- 11.6 A public body should avoid duplicating information which is collected by and is available from the regulatory bodies. This can be achieved through the development of Memoranda of Understanding and regular discussions between the public body and the regulatory bodies. In some areas, contract management officers routinely attend the Care Inspectorate's post-inspection feedback sessions with service providers.
- 11.7 Contract management officers should present information gained through contract management in regular reports to senior managers. In order to fulfil their role, they should:
- prepare and issue reports summarising their actions, identifying any significant issues and detailing the conclusions that they have reached
  - consider the consistency of their conclusions with those arising from the work of the regulatory bodies
  - clearly identify the nature and grounds for any concerns and the action that is required to secure improvement
  - consult service providers on the factual accuracy of all reports
  - communicate regularly with service providers and ensure that emerging findings are discussed at an appropriate level within their organisations
- 11.8 Contract management arrangements should identify what will happen in the event that the service is not being delivered as agreed, or, the agreed quality standards are not being met. For example, these should describe the process for agreeing the necessary improvements (where appropriate, in discussion with the Care Inspectorate) to the service and the timescales that will apply. The contract itself should specify the circumstances in which the

public body has a right to terminate the contract (for example, insolvency, service failure, loss of registration).

### **Relationship between a public body and service providers**

- 11.9 The success of the relationship between a public body and service providers depends on the extent to which there is:
- mutual respect and trust
  - a joint understanding of the roles played and challenges faced by each partner
  - openness and excellent communications
  - a joint approach to managing delivery
- 11.10 Managing the contractual relationship with service providers comprises a discrete set of responsibilities and activities and should be the responsibility of a nominated member of staff. A public body should consider how to ensure that:
- roles and responsibilities are clear
  - relationships are equal and reporting arrangements are fair and proportionate
  - the relationship is championed at senior levels in the public body and provider organisations
  - information sharing is encouraged
  - its processes do not duplicate those of the Care Inspectorate
  - concerns about the relationship, from either party, can be discussed frankly
  - the relationship allows for long-term strategic issues to be considered as well as issues relating to the day-to-day delivery of the service

This might be built into the service specification and/or the terms and conditions of the contract.

### **Reviewing a service**

- 11.11 The purpose of a service review is to identify any improvements that need to be made to the care and support received by people who use services and their carers and/or to the service as a whole. Individual services should be reviewed at regular intervals to determine if the service is:
- meeting quality standards and delivering the right outcomes for people who use services and their carers
  - responsive to current demand and potential future need
  - in line with a public body's strategic objectives and those of its partners, as described in local commissioning strategies
  - continuing to provide value for money
- 11.12 Service reviews for individual services should consider the quality of service delivery and any issues that the public body is aware of through managing the current contract. A public body should benchmark the quality and cost of the service against similar services and consider the extent to which different



arrangements could achieve the desired outcomes. It should involve service providers and people who use services and their carers in identifying changes that would improve the way the service is delivered and the outcomes for people using the service.

- 11.13 A public body should work with the service provider to agree the actions required to implement the changes identified by the service review. These should be set out in an action plan which allocates responsibility for the agreed actions and the relevant timescales for their implementation.
- 11.14 A public body and the service provider should agree how information about the changes will be communicated to people who use services and their carers. If significant change is proposed, a public body should consider if it can be delivered under the current contractual arrangement. If 'material' changes are made to an existing contract, such as an extension beyond the advertised scope of the contract, the effect is to establish a new contract: ([regulation 72 of the Public Contracts \(Scotland\) Regulations 2015](#)). In this situation, a public body should determine if the service should continue to be procured from an external service provider and, if so (and subject to the value of the contract), whether or not the contract must be advertised and subject to competition.
- 11.15 A public body and a service provider should consider ways in which service improvement can be incentivised. Incentives can be provided through recognition of good outcomes for people who use services and their carers and positive reviews, both of which enhance a service provider's reputation.

#### **Link to local commissioning strategies**

- 11.16 Contract management and service reviews should, in turn, inform the ongoing development of strategic commissioning plans. Both should encapsulate the views of a public body, service providers and people who use services and their carers about existing arrangements for delivering the service and changes that could be made to improve outcomes for them.

## 12. Evaluating Procurement Activity

### Internal scrutiny

- 12.1 This chapter highlights the importance of evaluating a procurement exercise and scrutiny. A public body should evaluate each procurement exercise to determine what worked well and areas which could be improved in future procurement exercises. Its evaluation should consider:
- the difference (if any) in the quality of the service and outcomes for people who use services and their carers
  - the total cost of the exercise to the public body, including staff costs
  - the total savings achieved on contract value
  - the effectiveness of their assessment (at the planning stage) of the benefits and risks to people who use services and service delivery
  - the effectiveness of its communication with, and the involvement of, people who use services and their carers
  - the impact of the exercise on people who use services and their carers
  - the impact of the exercise on the market
  - to what extent it helped to meet the requirements of the public sector equality duty
  - the impact of the exercise on the workforce
  - the learning for any future procurement activity
- 12.2 To inform its evaluation, a public body should collate feedback from all staff involved in the procurement process, other teams within the public body, service providers and people who use services and their carers.
- 12.3 A public body should refer to the [Procurement and Commercial Improvement Programme](#) which enables them to assess its procurement capability against common criteria and standards, to identify where best practice already exists and where improvements can be made.

### External scrutiny

- 12.4 Healthcare Improvement Scotland (HIS) is a statutory body, part of NHS Scotland, that works with healthcare providers to drive and support improvements in the quality of healthcare, and empower patients and the public. HIS does this through a combination of evidence-based standards and guidelines, a scrutiny and assurance approach, and quality improvement implementation support.
- 12.5 The Care Inspectorate regulates and inspects care services in Scotland to make sure that these meet the right standards. If services are found not to be good enough the Care Inspectorate will help them to improve. It offers advice, guidance and suggestions to help services reach the highest standards. The Care Inspectorate can issue recommendations for improvement and requirements for change and check these have happened. The Care Inspectorate wants to make sure services safeguard

people, that these are well-managed, well-led and make a positive impact on people's lives, based on their needs, rights and choices.

- 12.6 As part of their wider powers the Care Inspectorate and Healthcare Improvement Scotland are able to scrutinise commissioning plans and make recommendations in its joint reports.
- 12.7 Audit bodies also have regard to a public body's compliance with procurement obligations.

### **Key messages**

These final **parts of Section 2** describe those elements that a public body may consider at the review and evaluation stages of a procurement exercise.

That is, depending on the value and complexity of the procurement, stakeholders may wish to conduct a post-project review in order to consider any lessons learned and take these into account in any future planning.

Also, individual services should be reviewed at regular intervals to determine if the service is:

- meeting quality standards and delivering the right outcomes for people who use services and their carers
- responsive to current demand and potential future need
- in line with the public body's strategic objectives and those of its partners, as described in local commissioning strategies
- continuing to provide value for money

## Annexes

### Annex 1: Glossary

**Advertisement** - the method by which potential service providers are alerted to contract opportunities (otherwise known as 'contract notices'). A standard format is used for advertisements which are published on Public Contracts Scotland (PCS) and the Find a Tender Service (FTS) or, if applicable, Tenders Electronic Daily (TED).

**Award criteria** - criteria against which a service provider's proposals for delivering the service are assessed.

**Best value** - an appropriate balance between the quality and cost of services, having regard to efficiency, effectiveness, economy, equal opportunities and sustainable development. Local authorities have a statutory duty to secure best value in the performance of their functions and the continuous improvement of services.

**Call-off contracts** - specific contracts entered into under a framework agreement which (unlike the framework agreement itself) bind a public body and a contractor/provider.

**Care and support services** - all social care and support services for children and families, younger people and adults (including older people) and housing support services. Any references to 'social care services' and 'care services' should all be taken to mean social care services which provide care and/or support.

**Carers** - carers who provide care to people of any age affected by physical or mental illness, disability, frailty or substance misuse. In the case of this document, this term includes paid and unpaid carers.

**Commissioning** - all the activities involved in assessing and forecasting needs, linking investment to agreed desired outcomes, considering options, planning the nature, range and quality of future services and working in partnership to put these in place.

**Contract (or 'public contract')** - a legally binding agreement between a public body (the purchaser) and a contractor/provider for the supply of goods, works or services.

**Contract award notice** - notification of the award of a contract or framework agreement which is published on the PCS website and, in the case of contracts with a value of at least £663,540, FTS (or TED where applicable).

**Contracting authority** - For the purposes of the Act, a contracting authority is  
(a) a body, office-holder or other person listed in the schedule to the Act, or  
(b) any other person who is a contracting authority for the purposes of the Public Contracts Regulations and whose functions-

- (i) are exercisable in or as regards Scotland, and
- (ii) do not relate to reserved matters within the meaning of the Scotland Act 1998.

**Contract management** - management of an individual contract to ensure that:

- obligations under the contract are delivered
- any risks are managed
- the correct administrative procedures are followed

**Equality legislation** - legislation protecting people from discrimination on the grounds of the protected characteristics of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation (Equality Act 2010).

**Find a Tender Service (FTS)** - the UK e-notification service for regulated procurements that are governed by the Public Contracts (Scotland) Regulations 2015. Following EU Exit, and the end of the Transition Period at 11pm on 31 December 2020, this replaced the function of TED other than for some transitional procurements and those linked to EU-funded programmes (see [SPPN 11/2020](#)).

**Fair Work First** - is the Scottish Government's flagship policy for driving high quality and fair work across the labour market in Scotland by applying fair work criteria to grants, other funding and contracts being awarded by and across the public sector, where it is relevant to do so. Fair Work First consists of core criteria. Please see the [Fair Work First Guidance](#) for more information

Issues related to the involvement of skilled and competent people in delivering services which impact on the quality of services, which may achieve positive outcomes for people who use services and their carers.

**Financial regulations** - regulations which describe the financial systems in operation within a public body to enable it to achieve good financial control.

**Framework agreement** - an agreement between one or more public bodies and one or more service providers which sets out the terms and conditions under which specific contracts can be entered into throughout the term of the agreement.

**Invitation to Tender (ITT)** - the issue of tender documentation to potential service providers setting out the public body's detailed requirements and specifying the information that must be included in service providers' tenders.

**Outcomes** - used to describe the results that a service is expected to deliver and the contribution that delivery of the service is expected to make to meeting individuals' needs. Determining outcomes allows a public body to understand its performance locally, articulate its priorities at a strategic level and improve outcomes for people who use services or support.

**Personalisation** - the shaping of the support required by a person to their needs, preferences and outcomes: securing services which give them independence, choice and control.

**Principles of procurement** – key obligations of public procurement include:

- equal treatment and non-discrimination
- transparency and proportionality.

**Prior Information Notice (PIN)** - a notice published on FTS (or TED where applicable) which advises potential service providers of the public body's future procurement plans.

**The Procurement (Scotland) Regulations 2016** - regulations made under the Procurement Reform (Scotland) Act 2014.

**Public body** - used to describe the various organisations which procure care and support services including, for example, local authorities, NHS Boards and Community Health Partnerships, housing and criminal justice organisations.

**Public Contracts Scotland (PCS)** - the national advertising portal for use by Scottish public bodies to publish contract opportunities and contract award notices: [www.publiccontractsscotland.gov.uk](http://www.publiccontractsscotland.gov.uk).

**The Public Contracts (Scotland) Regulations 2015** - Regulations which govern regulated procurements at thresholds specified in [regulation 5](#) of the legislation.

**Public sector equality duty** - The Equality Act 2010 includes a public sector equality duty (PSED) which requires public bodies listed in schedule 19 of that Act to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between people and protected characteristics.

**Relationship management** - used to describe activity undertaken by a public body to promote effective communication and maximise its relationship with service providers.

**Selection criteria** - criteria against which a service provider's suitability in principle to deliver the service is assessed taking account of capability and experience.

**Self-directed support (SDS)** - used to describe the ways in which individuals can exercise choice about the way their support needs are met from available resources, including direct payments, having a direct payment managed by a third party or directing an 'individual budget'.

**Service providers** - used to describe all providers of care and support services, including in-house, private and voluntary sector service providers.

**Service review** - the review of an individual service to identify if action is required to improve delivery of the service and/or the outcomes for people who use services.

**Service specification** - detailed description of the type, nature and scale of a service a public body wishes to purchase in order to meet individuals' needs and the quality standards and outcomes that the service is required to deliver.

**Shared services** - the provision of services from one public body to one or more other public bodies either directly or via a separate legal entity established for the purpose.

**SPD** - Means the Single Procurement Document referred to in regulation 60(1) (single procurement documents: Use, content and form of SPD) of The Public Contracts (Scotland) Regulations 2015.

**Standing orders** - the rules by which a public body conducts its business, including arrangements for entering into a contract.

**Standstill period** - a defined period of time between the contract award decision and the award of the contract which allows service providers to examine the contract award decision and to assess whether it is appropriate to challenge that decision.

**Sustainable procurement** - the process whereby a public body meet its needs for goods, services, works and utilities in a way that achieves value for money on a whole-life basis and generates benefits not only to the organisation but also to society, the economy and the environment.

**Tenderers** - service providers which have submitted a tender for evaluation during a procurement exercise.

**Tenders Electronic Daily (TED)** – the e-notification platform of the European Union which includes details of contract opportunities across the EU and contracts awarded by public bodies in EU Member States.

**TUPE Regulations** - means the Transfer of Undertakings (Protection of Employment) Regulations 2006 as amended.

**Value for money** - defined under the Scottish Model of Procurement as the appropriate balance of cost, quality and sustainability.

## **Annex 2: Reference Group Membership**

The Scottish Government invited the following bodies to participate and is grateful for all contributions received:

Scottish Government - Scottish Procurement and Commercial Directorate (SPCD)  
Association of Local Authority Chief Housing Officers  
Scotland Excel  
NHS National Services Scotland  
Scottish Care  
Coalition of Care and Support Providers in Scotland (CCPS)  
Coalition of Carers in Scotland  
Convention of Scottish Local Authorities (COSLA)  
Health and Social Care Alliance Scotland  
Audit Scotland  
Scottish Human Rights Commission  
Joint Improvement Team (JIT)  
Scottish Government - Office of Chief Social Work Advisor  
Scottish Government - Health and Social Care Integration  
Scottish Government - Human Rights  
Scottish Government - Third Sector  
Scottish Government - Self Directed Support (SDS)  
Scottish Social Services Council (SSSC)  
The Care Inspectorate  
Social Work Scotland



## **Annex 3: Wider legislation, standards, policies and procedures**

### **Scottish Procurement Policy Notes (SPPNs)**

Scottish Procurement Policy Notes also describe any changes to, or points of clarification about, the public procurement rules and are published on the Scottish Procurement and Commercial Directorate (SPCD) website on a regular basis.

### **Procurement Centres of Expertise**

There are also a number of Procurement centres of expertise in Scotland.

- Scotland Excel is the centre of expertise for local authorities
- National Procurement NHS National Services Scotland is the centre of expertise for all NHS Scotland organisations a
- Advanced Procurement for Universities and Colleges (APUC) is the centre for Scotland's Universities and colleges

### **National Care Standards**

National Care Standards are intended to ensure the same high standards in all registered care services. These standards explain what people can expect from any social care and support service, written from the point of view of the person using the service. The National Care Standards are currently being reviewed with proposed changes expected in 2016.

### **National Performance Framework**

This underpins delivery of the Scottish Government's agenda - which supports the Outcomes Based approach to performance.

### **The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) as amended**

The application of the TUPE Regulations will vary on a case-by-case basis and public bodies and service providers should seek legal advice on the TUPE implications of a procurement exercise which might involve a change of service provider.

The intention of the TUPE Regulations is to preserve the continuity of employment and terms and conditions of employees who are transferred to a new employer when a business (or part of one) is transferred or when there is a 'service provision change'. The TUPE Regulations may therefore apply when a public body outsources a service or brings a service back in-house or when a service transfers from one service provider to another.

The TUPE Regulations place duties on both the transferor and transferee employers to inform and consult with affected staff. The transferor employer is required to provide certain specified information about the transferring workforce to the transferee employer a minimum of 28 days before the transfer occurs. Where the Regulations apply, employees whose job is transferring automatically become employees of the new employer on the same terms and conditions (except for certain occupational pension rights).

The Department for Business Innovation and Skills produced a guide to the 2006 TUPE Regulations for employees, employers and representatives.

## **Children's Services Planning**

Children's Services Planning relates to the planning and co-ordination of service provision as opposed to procurement but it is perhaps helpful, in the context of this guidance, to make some cross-reference. [Part 3 of the Children and Young People \(Scotland\) Act 2014](#) places a duty on each local authority and the relevant health board to jointly prepare a Children's Services Plan (CSP) for the local authority area covering a 3 year period and to jointly publish an annual report. These detail how the provision of children's services and related services in that area have been provided in accordance with the CSP.

## **Getting it Right for Every Child GIRFEC**

GIRFEC is the national approach to improving outcomes through public services that support the wellbeing of children and young people. Based on children's and young people's rights, it supports children, young people and their parents to work in partnership with the services that can help them. The Named Person and Child's Plan are introduced as part of the GIRFEC provisions in the Children and Young People (Scotland) Act 2014, although more widely, all 18 parts of the Act are underpinned by the GIRFEC approach. The wellbeing of children and young people can be described using eight indicators and is at the heart of the GIRFEC approach. More information on GIRFEC can be accessed at: <http://www.gov.scot/Topics/People/Young-People/gettingitright>.

## **Social Work (Scotland) Act 1968**

This is the primary Act regarding the general social work functions of a local authority. The central duty, under section 12 of that Act, gives every local authority the duty to 'promote social welfare'. This should be:

- through making available advice, guidance and assistance on a scale appropriate to the area
- by providing or securing suitable and adequate facilities and assistance to persons over eighteen years who are in need and requiring assistance.
- It is the duty of a local authority to enforce and execute all the provisions of this Act where such a duty is not imposed on another body. They can, however, make arrangements with voluntary organisations or other persons, to assist in the performance of their functions. Before deciding whether to assist a person a local authority must consider the availability of assistance to them from any statutory body.

## **Community Empowerment (Scotland) Act 2015**

The Community Empowerment Act will help to empower community bodies through the ownership of land and buildings, and by strengthening their voices in the decisions that matter to them. It will also improve outcomes for communities by improving the process of community planning, ensuring that local service providers work together even more closely with communities to meet the needs of the people who use them.

## **Carers (Scotland) Act 2016**

The provisions of the Act are applicable only to unpaid carers or young carers. The Act enshrines the rights of unpaid carers in law. It places a duty on local authorities to provide support to unpaid carers, based on their identified needs which meet the local eligibility criteria. The Act will be commenced in 2017-18.

## **Annex 4: Useful Tools**

### **PCS**

The [Public Contracts Scotland](#) advertising portal enables a public body to advertise all contract opportunities, irrespective of value, and thereby to meet their obligations in relation to the advertisement of public contracts. The portal also provides a 'quick quote' facility for low value contracts. Suppliers and service providers can access the portal free of charge and use it to identify contract opportunities.

### **Procurement Journey**

The [Procurement Journey](#) is intended to support all levels of procurement activities and to help manage the expectations of stakeholders, customers and suppliers alike and facilitates best practice and consistency across the Scottish public sector.

### **National Occupational Standards**

National Occupational Standards have been developed to provide consistent and clear benchmarks for effective performance. Further information on the units and elements related to the National Occupational Standards and to the relevant skill sets is available on the [Scottish Social Services Council's website](#).

### **National Health and Wellbeing Outcomes**

[The National Health and Wellbeing Outcomes](#) are high-level statements of what health and social care partners are attempting to achieve through integration and ultimately through the pursuit of quality improvement across health and social care.

### **Talking Points: A Personal Outcomes Approach**

This approach has involved the development of a range of tools, guidance and resources to:

- support a focus on outcomes at assessment, care planning and review place the person at the centre of a more personalised approach
- enable information on people who use services and carer outcomes to be systematically gathered during assessment and review processes
- support organisations to use this information to improve outcomes at individual service and organisational levels

### **Performance Improvement**

Guidance on the creation of a performance information and assessment framework.

### **[Procurement and Commercial Improvement Programme \(PCIP\)](#)**

The Procurement and Commercial Improvement Programme enables a public body to assess its procurement capability against common criteria and standards, to identify where best practice already exists and where improvements can be made. It helps a public body to identify improvements to its structure, capability, processes and ultimately performance which are appropriate to the scale and complexity of its business.

**Social Work Inspection Agency: Guide to Supported Self-evaluation**

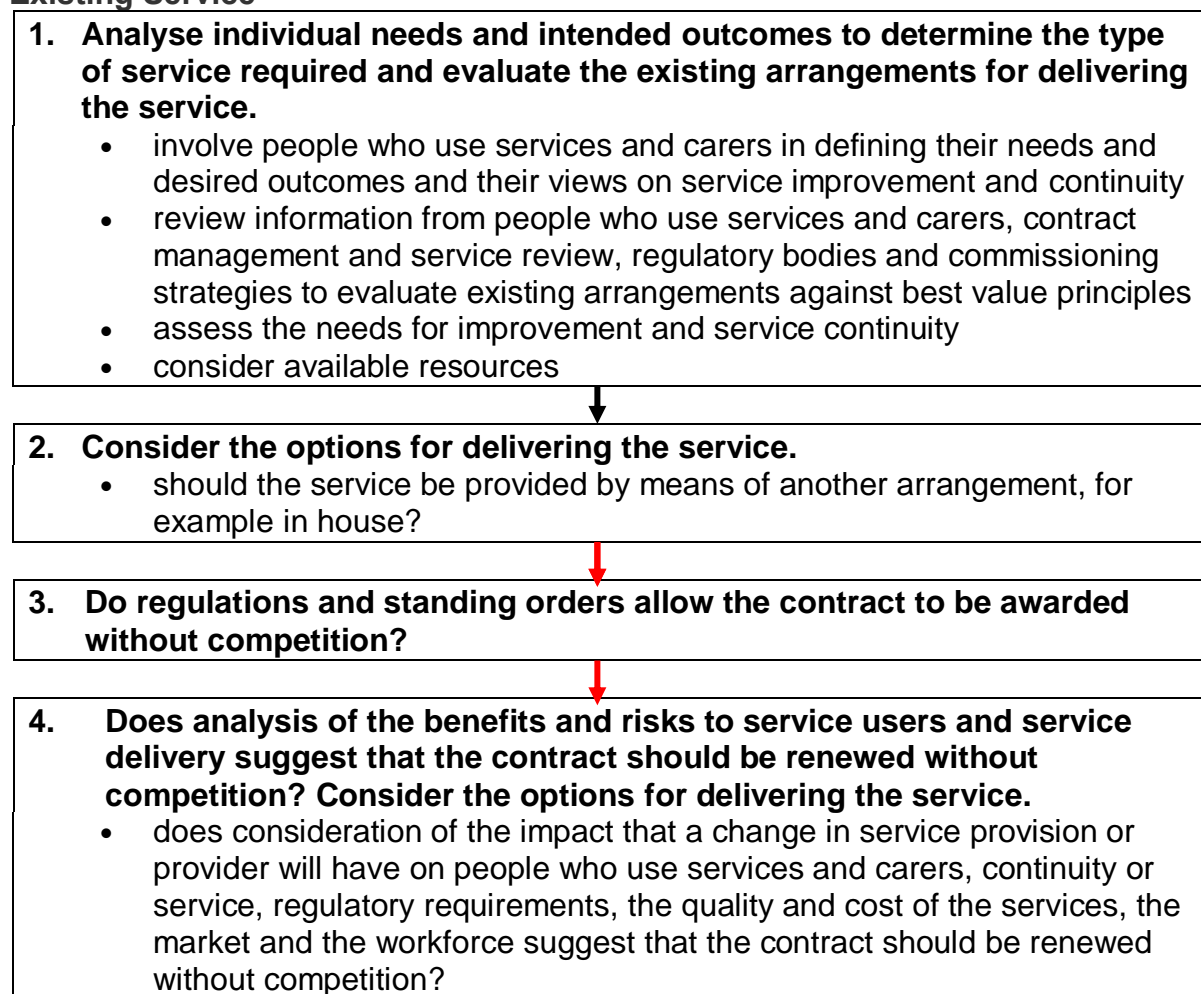
The Guide to Supported Self-Evaluation enables social work services to carry out self-evaluation with the aim of securing continuous improvement in service performance and better outcomes for people who use services. The Guide describes the expectations and standards in relation to commissioning arrangements and provides illustrations of 'very good' and 'weak' commissioning and procurement practice.

## **Annex 5: Summary of Key Actions Required by a Public Body to Implement the Guidance**

A public body should ensure that activity to procure care and support services is fully assessed as part of its procurement capability (PCIP) assessments which are returned to the Scottish Government. In particular, it should focus on the key actions described below:

<b>1. Local strategies, policies and financial regulations/standing orders</b>	<ul style="list-style-type: none"> <li>• a public body should have Strategic Commissioning Plans for all main care groups which are supported by delivery plans and should work progressively towards an overarching commissioning strategy</li> <li>• a public body should have written and approved policies which reflect developments in Self-Directed Support and the Key Considerations in this guidance</li> <li>• a public body should review its financial regulations and standing orders to ensure that it makes appropriate provision for the procurement of care and support services</li> </ul>
<b>2. Leadership and governance</b>	<ul style="list-style-type: none"> <li>• a public body's local financial regulations and standing orders should describe the governance arrangements for the social care procurement function and individual procurement exercises.</li> <li>• these arrangements should articulate roles and responsibilities and ensure clear leadership and accountability</li> <li>• a public body should also outline the process for decisions to be approved by the appropriate decision-making forum</li> </ul>
<b>3. Knowledge and skills</b>	<ul style="list-style-type: none"> <li>• a public body should ensure that staff involved in the procurement of care and support services receive the training required to develop and maintain their knowledge and skills</li> </ul>
<b>4. Defining the requirement and securing services</b>	<ul style="list-style-type: none"> <li>• a public body should produce a procurement plan for every procurement exercise</li> <li>• a public body should ensure that it undertakes all consultation, where appropriate, with people who use services and their carers, service providers and trade unions</li> </ul>
<b>5. Contract and relationship management</b>	<ul style="list-style-type: none"> <li>• a public body should ensure that suitable contracts are in place with all providers delivering care and support services</li> <li>• every contract for care and support services should be managed by a nominated contract management officer</li> <li>• managing the relationship with service providers should be the responsibility of a nominated member of staff</li> </ul>

## Annex 6: Flowchart to Help Decision Making for 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 8.8](#) 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.

**Annex 7: List of Services Covered by this Guidance**

<b>CPV Codes</b>	<b>Description</b>
75200000-8; 75231200-6; 75231240-8; 79611000-0; 79622000-0 (Supply services of domestic help personnel); 79624000-4 (Supply services of nursing personnel) and 79625000-1 (Supply services of medical personnel) from 85000000-9 to 85323000-9; 98133100-5, 98133000-4; 98200000-5; 98500000-8 (Private households with employed persons) and 98513000-2 to 98514000-9 (Manpower services for households, Agency staff services for households, Clerical staff services for households, Temporary staff for households, Home-help services and Domestic services)	Health, social and related services



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