



PROCUREMENT REGULATIONS DURING COVID-19 OUTBREAK

Purpose

1. This Policy Note raises awareness on handling some procurement related issues as a consequence of the current COVID-19 outbreak. In such exceptional circumstances, public bodies in Scotland may need to procure goods, services and works with extreme urgency. It provides information on options available to purchasers in these circumstances.
2. This SPPN does not offer general or health-specific advice. The Scottish Government provides advice on Coronavirus on its [website](#) and has published a [Coronavirus Action Plan](#).
3. The content of this SPPN is not legal advice and should not be construed as such. Public bodies are advised to seek their own legal advice in relation to any questions and issues they may have.
4. All references to a regulation in this SPPN are to those in the Public Contracts (Scotland) Regulations 2015 unless otherwise stated.

Current contracts

5. If public bodies have not already done so, they may wish to contact suppliers of key contracts to seek assurance they have plans in place to ensure continuing performance of contracts over the coming weeks. The Scottish Government has already taken this step and a copy of the letter issued to suppliers is attached at Annex A to the SPPN. Public bodies may wish to adopt or adapt this letter for their own purposes.
6. To address the consequences of COVID-19 public bodies may be required to make new purchases with extreme urgency. This is permissible under the current procurement regulations. The means of doing so may vary depending upon a number of variables.

Procurements above the OJEU threshold values

7. For OJEU threshold procurements, the following options may be considered as a means of making an urgent purchase:
 - call off contract from an existing framework agreement/Dynamic Purchasing System
 - modification of an existing contract
 - new procurement procedure – using accelerated timescales
 - direct award of a new contract
 - contract awarded under the light-touch regime
 - using the small lots option available in the regulations
8. Depending on the specific nature of a requirement there may be further options under the Public Contracts (Scotland) Regulations 2015 (2015 Regulations), such as the additional delivery of supplies from an existing supplier (regulation 33(4)), additional similar works or services from an existing supplier (regulation 33(8)), or using the services of a subsidiary of another contracting authority (regulation 13). These are not covered in this guidance and do have their own specific requirements.
9. It is important to note that in the absence of a competition, care must be exercised to ensure the contract terms and price are set at what can be described as the market level. Agreeing to pay above the market level/rates could be deemed to be an overpayment constituting an unlawful state aid, and if public bodies have any such concerns, legal advice should be sought.
10. The decision to award a contract without running a competition may be challenged by another supplier. Public bodies should therefore ensure they keep proper records of decisions and actions on individual contracts, as this could mitigate against the risk of a successful legal challenge. If a public body makes a direct award, they must publish a contract award notice (regulation 51) on Public Contracts Scotland (PCS) website, within 30 days of awarding the contract.
11. Public bodies procuring under the Utilities Contracts (Scotland) Regulations 2016 and the Concession Contracts (Scotland) Regulations 2016 will need to check similar provisions in those Regulations.

Procurements below the OJEU thresholds values

12. Procurement officials are reminded that the procurement procedures and associated timescales set out in the 2015 Regulations do not apply to procurement exercises below the OJEU thresholds and thus there is greater flexibility to run competitions quicker for lower value requirements.
13. For contracts regulated by the Procurement (Scotland) Regulations 2016 (£50,000 goods/services £2,000,000 works) public bodies are required to advertise the opportunity on PCS, and apply exclusion and selection criteria.

14. For all contracts below these thresholds, public bodies are free to use any process or procedure they choose to run and are not required to use the standard procurement procedures (open, restricted etc) and are also free to set timescales for the competition as long as they are reasonable and proportionate.

Call-off contract

15. Public bodies should check whether a framework agreement or Dynamic Purchasing System (DPS) can be used to put in place a call-off contract. Call-off procedures are a quick and efficient way to provide services, goods or works from an agreed supply chain and many have direct award ability or a quick minimum 10 day call-off period.

16. Public bodies should check within their own sectors for any framework agreements or DPSs that exist and may offer a quick means of securing any urgently needed goods/services. Annex B provides a list of collaborative resources available in sectors.

17. As always when considering the use of a framework agreement or DPS it is important that the procurement official is satisfied that it was set up in a way that entitles the purchasing body to use it.

Modification of an existing contract

18. Consider whether there is an existing contract which could be modified in order to provide the goods, services or works. A contract established under the 2015 regulations can be modified to cater for the new purchase when certain grounds exist. Details of these grounds are summarised in Annex C.

19. In all circumstances where a contract modification is made, public bodies should keep a written justification and they should limit requirements to only what is absolutely necessary for the period that extreme urgency reasons apply, both in terms of what is being procured and the length of contract.

20. This justification should demonstrate that the decision related to the COVID-19 outbreak with reference to specific facts. For example, there is extreme urgency and the circumstances were unforeseen or staff are diverted by procuring urgent requirements to deal with COVID-19 consequences.

New procurement procedure – using accelerated timescales

21. If there is no scope to call-off from a framework agreement or DPS or to modify an existing contract, a public body can consider whether the goods, services or works can be purchased following normal procurement procedures using reduced (sometimes referred to as accelerated) timescales. Details of timescales are at Annex D.

22. A public body must set out in the Contact Notice published on PCS their reason for accelerating timescales, for example:

“The COVID-19 outbreak has given rise to an urgent need for the supply of [description of what is being procured] because [explanation of urgency]. This does not give [name of public body] sufficient time to comply with the standard [open procedure / restricted procedure / competitive procedure with negotiation] timescales for this procurement. [Public body] considers this to be a state of urgency which it has duly substantiated. Accordingly, [contracting authority] is using the accelerated time limits permitted under the Public Contract (Scotland) Regulations 2015 (regulation [28(5) for the open procedure / 29(11) for the restricted procedure / 30(11) for the competitive procedure with negotiation]) in respect of this procurement”.

Direct award

23. COVID-19 is serious and its consequences pose a risk to life. Public bodies are able to enter into contracts without competing or advertising the requirement where specific circumstances apply. See Annex E for a list of options and the tests that apply.

24. In all circumstances where a direct award is made, public bodies should keep a written justification that satisfies these tests and they should limit requirements to only what is absolutely necessary for the period that extreme urgency reasons apply, both in terms of what is being procured and the length of contract.

25. It is also important to undertake a separate assessment of the ongoing applicability of tests before undertaking any subsequent or additional procurement to ensure that they are all still met, particularly to ensure that the events are still unforeseeable. For example, as time goes on, what might amount to unforeseeable now, may not do so in future.

26. Delaying or failing to do something in time does not make a situation qualify as extremely urgent, unforeseeable or not attributable to the public body. This is because procurement rules expect a public body to plan its time in order to use a competitive procedure.

27. It is important that public bodies continue to achieve value for money and use good commercial judgement during any direct award. Whilst prices may be higher than would be expected in a regular market, public bodies should exercise caution if they consider any prices to be abnormally high and may wish to have internal processes in place to review any such pricing. Additionally, public bodies are encouraged to consider contractual mechanisms to ensure that they have the ability to secure pricing reductions through the life of the contract. Where this is not possible, it is recommended a log should be kept and reasoning provided for future auditing.

Light touch regime

28. Public bodies can also consider how they apply the light touch regime in a way that is able to respond to urgent requirements. This regime applies to all social and other specific services, including health and social care related services (see regulations 74-76).
29. While public bodies are required to advertise contracts in OJEU and publish contract award notices, public bodies are free to use any process or procedure and are not required to use the standard procurement procedures (open, restricted etc) and are also free to set timescales for the competition as long as they are reasonable and proportionate.

Separate lots

30. Public bodies may also wish to take account of the flexibility offered by regulation 5(3) to break down an otherwise large contract requirement into smaller contracts (sometimes referred to as lots) that can individually be awarded without requiring a competitive process under the 2015 Regulations provided:
- No smaller, individual contract exceeds £70,778 (or in the case of a works contract £884,720).
 - The estimate total aggregate value of all smaller contracts does not exceed 20% of the estimated total contract requirement.

Action required

31. Public bodies are asked to note the measures and apply the procurement rules on all ongoing public contract requirements.

Dissemination

32. Please bring this SPPN to the attention of all relevant staff within your field of responsibility to whom it may be of interest.

Contact

Any enquiries about this SPPN should be directed to:

Email: scottishprocurement@gov.scot

Scottish Procurement
The Scottish Government
5 Atlantic Quay
150 Broomielaw
Glasgow
G2 8LU

Dear

Contract for the provision of XXXXXXXXXXXXXXXXXXXXXXXXXXXX - Supply Chain Resilience: Coronavirus - COVID-19

We are assessing how our organisation would continue to deliver our core services if a significant number of cases of Coronavirus - COVID-19 arise in the coming weeks and months.

The principal risk to the continuity of critical business functions is the shortage of staff both within organisations and in suppliers and subcontractors.

It is not possible to say accurately how many people will be affected by COVID-19, but as a matter of good practice we are assessing how our business would cope if a significant number of cases arose. Part of this assessment includes considering potential supply chain disruption.

As a supplier to our organisation, we are seeking assurance that you have appropriate measures in place to support the continuing delivery of the above contract. I would be grateful if you could provide details of the plans that you have in place to ensure business continuity and the continuing delivery of your contractual obligations.

In relation to COVID-19, it would be helpful if your response to this letter could set out in particular:

- Do you know what processes are critical to the continuation of your business, and which are relevant to the service you provide to us?
- How would you ensure continuity of service to us in the event that a large number of your staff were absent?
- Are your suppliers resilient with their own Business Continuity Plans, which are necessary in order for you to deliver your services to us?

The Scottish Government [website](#) has published detailed advice on COVID-19.

If you wish to discuss further please do not hesitate to contact me. I would be grateful for a response within 48 hours of receipt of this letter.

Yours sincerely

Framework agreements / Dynamic Purchasing Systems available

Note - it is important to check that the agreement was set up in a way that entitles the purchasing body to use it.

<p>Scottish Government</p> <p>Available for central government and the Scottish public sector https://www.gov.scot/publications/frameworks-and-contracts/</p>
<p>Crown Commercial Service</p> <p>Available for UK public sector organisations https://www.crowncommercial.gov.uk/agreements</p>
<p>Scotland Excel</p> <p>Available for local authorities and associate members http://www.scotland-excel.org.uk/home/Contractregister/Contract-register.aspx</p>
<p>NHS National Procurement and NHS National Services Scotland</p> <p>Available for all Scottish Health Boards For live frameworks please see Forward Plan document, go to the 'NHS NP' tab at the bottom of the page, this spreadsheet is updated on a monthly basis. https://www.publiccontractsscotland.gov.uk/info/InfoCentre.aspx?ID=1361&Type=1601&Path=1601</p>
<p>APUC</p> <p>Available for client institutions http://www.apuc-scot.ac.uk/#!/contracts</p>

Modification of OJEU value contracts

- for procurements subject to the Public Contracts (Scotland) Regulations 2015
- these principles also apply to the modification of below OJEU threshold value contracts

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

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

Timescales

- for procurements subject to the Public Contracts (Scotland) Regulations 2015

STANDARD MINIMUM TIMESCALE	IF ELECTRONIC TENDER SUBMISSION PERMITTED	IF URGENT *	WHERE PIN PUBLISHED **	IF SUB CENTRAL AUTHORITY ***
Open procedure				
Minimum time limit for receipt of tenders 35 days	Minimum time limit for receipt of tenders 30 days	Minimum time limit for receipt of tenders 15 days	Minimum time limit for receipt of tenders 15 days	Minimum time limit for receipt of tenders 35 days
Restricted procedure				
Stage 1 – requests to participate				
Minimum time limit for requests to participate 30 days	Minimum time limit for requests to participate 30 days	Minimum time limit for requests to participate 15 days	Minimum time limit for requests to participate 30 days	Minimum time limit for requests to participate 30 days
Stage 2 – receipt of tenders				
Minimum time limit for tenders 30 days	Minimum time limit for receipt of tenders 25 days	Minimum limit for tenders 10 days	Minimum time limit for tenders 10 days	Minimum time limit for tenders may be set by agreement with tenderers. In the absence of agreement minimum time limit 10 days.
Competitive procedure with negotiation				
Stage 1 – requests to participate				
Minimum time limit for requests to participate 30 days	Minimum time limit for requests to participate 30 days	Minimum time limit for requests to participate 15 days	Minimum time limit for requests to participate 30 days	Minimum time limit for requests to participate 30 days
Stage 2 – receipt of initial tenders				
Minimum time limit for initial tenders 30 days	Minimum time limit for receipt for initial tenders 25 days	Minimum time limit for tenders 10 days	Minimum time limit for initial tenders 10 days	Minimum time limit for tenders may be set by agreement with tenderers. In the absence of agreement minimum time limit 10 days.
Competitive dialogue and innovation partnerships				
Stage 1 – requests to participate				
Minimum time limit for requests to participate 30 days	Minimum time limit for requests to participate 30 days	Minimum time limit for requests to participate 30 days	Minimum time limit for requests to participate 30 days	Minimum time limit for requests to participate 30 days
Subsequent stages				
No explicit time limits for submission of initial/subsequent tenders.	No explicit time limits for submission of initial/subsequent tenders.	No explicit time limits for submission of initial/subsequent tenders.	No explicit time limits for submission of initial/subsequent tenders.	No explicit time limits for submission of initial/subsequent tenders.

Notes:

All of the timescales in this table are calendar days and the timescale begins at midnight at the end of the day that the notice/invitation is sent by the contracting authority and ends on midnight at the end of the last day of the specified time period. The last day of this timescale must not be a Saturday or a Sunday or a bank holiday in Scotland. In addition any period of time that is referred to here must include at least two working days.

Please also be aware that a Prior Information Notice may be used by sub-central contracting authorities as a call for competition in restricted procedures or competitive procedures with negotiation. Contracting authorities must allow at least 35 days for expressions of interest after which they must simultaneously invite the candidates to confirm their interest and must allow at least 30 days for this. When the invitation to tender is dispatched to the selected candidates contracting authorities must allow at least 30 days for submission of tenders, or at least 25 days where electronic submission tenders is permitted. There is also the option for the sub-central contracting authorities to agree the time limit with the candidates with a default time limit of at least 10 days where there is no mutual agreement.

* This shorter time limit is allowed where a state of urgency, duly substantiated by a contracting authority, renders the minimum time limit impractical.

** This shorter time limit for the receipt of tenders is allowed where contracting authorities have published a prior information notice which was not itself used as a means of calling for competition, provided that **all** of the following conditions are fulfilled:

- a) The prior information notice included all of the information required in section I of the Prior Information Notice referred to in Annex V of the Public Contracts Directive 2014/24/EU, insofar as that information was available at the time that the prior information notice was published.
- b) The prior information notice was sent for publication between 35 days and 12 months before the date on which the contract notice was sent.

*** Sub-central contracting authorities means all contracting authorities which are not central government authorities as listed within Schedule 1 of the Public Contracts (Scotland) Regulations 2015.

Options for direct award

- for procurements subject to the Public Contracts (Scotland) Regulations 2015
- these principles also apply to below OJEU threshold value contracts

Direct award – extreme urgency	
Where all the following tests apply, see regulation 33(1)(c) and 33(3)	<p>There are genuine reasons for extreme urgency, for example, you need to respond to the COVID-19 consequences immediately, for example, because of public health risks, loss of existing provision at short notice, or you are reacting to a current situation that is a genuine emergency - not planning for one.</p> <p>and</p> <p>The events that have led to the need for extreme urgency were unforeseeable, for example, the COVID-19 situation is so novel that the consequences are not something you should have predicted.</p> <p>and</p> <p>It is not possible to comply with the usual timescales in the 2015 Regulations, for example, there is no time to run an accelerated procurement under the open or restricted procedures or competitive procedures with negotiation; or there is no time to place a call off contract under an existing commercial agreement such as a framework or dynamic purchasing system.</p> <p>and</p> <p>The situation is not attributable to the contracting authority, for example, you have not done anything to cause the need for extreme urgency, or you have not failed to do something which has then resulted in the need for extreme urgency.</p>
Direct award - absence of competition or protection of exclusive rights	
One of the following applies, see regulation 33(1)(b)	<p>Competition is absent for technical reasons for example, there is only one supplier with the expertise to do the work, produce the product or with capacity to complete on the scale required;</p> <p>or</p> <p>The protection of exclusive rights, including intellectual property rights for example, the supplier owns those rights (including intellectual property rights) or it has the exclusive right to exploit intellectual property rights.</p>
	<p>But this is only when: there is no reasonable alternative or substitute available;</p> <p>and</p>

	the public body is not doing something which artificially narrows down the scope of the procurement for example, by over-specifying the requirement.
Direct award – supplies in specific circumstances	
Where any of the following applies to the contract, see regulation 33(4)	<p>if the products are manufactured purely for the purpose of research, experimentation, study or development – but not if the products are being manufactured for quantity production, to establish commercial viability or to recover research and development costs.</p> <p>or Additional supplies from the original supplier where it would be disruptive to change to a different product - If additional deliveries are required, where and a change of supplier would mean that the supplies would have a different technical characteristic (for example a new specification), and would result in incompatibility or disproportionate technical difficulties in operations and maintenance - these supplies must be a partial replacement or extension of the supplies / installation.</p> <p>or If supplies quoted and purchased on a commodity market</p> <p>or If the supplies will be purchased on particularly advantageous terms – these supplies must be from a supplier who is definitively winding up its business, or the liquidator in insolvency procedure, an arrangement with creditors, or similar under law.</p>
Direct award – new work and / or service only – same supplier	
Where all of the following applies to the contract, see regulation 33(8)	<p>Where the contract,:</p> <ul style="list-style-type: none"> • was previously awarded following a competition run under one of the procedures of the 2015 Regulations; • indicated the possibility of additional works or services being awarded; • the original procurement process suggested the possible need for this type of modification, and • the original contract was awarded within the last three years