



Changes to Procurement legislation at the end of the EU Exit Transition Period

UPDATE (19 April 2021): this policy note has been updated to help public bodies in handling procurements linked to European Structural and Investment Funds (ESIF) programmes. It highlights that EU law continues to apply to ESIF procurements which start after the end of the EU exit Transition Period. This means that public bodies should use the European Single Procurement Document for ESIF procurements instead of the new Single Procurement Document. The Q&A section in Annex A has been updated to answer any queries related to ESIF procurement and complements e-bulletins issued to public bodies with ESIF programmes.

Purpose

1. To advise of legislation passed today by the Scottish Parliament which makes changes to current Scottish procurement legislation as the UK's Transition Period on exiting the EU ends at 11pm on 31 December 2020. This note updates earlier advice in [SPPN 1/2019](#).

Key Messages

2. The key points are:
 - Much of Scotland's public procurement legislation comes from European Directives. It contains references and requirements which will no longer make any sense at the end of the Transition Period. These need to be changed.

- Since SPPN 1/2019 was published, further technical changes to procurement legislation have now been laid before the Scottish Parliament.
- None of these technical changes will fundamentally change the procedures and processes of advertising and awarding public contracts.
- As a result of these further technical changes the legislation laid last year, which was due to come into force at the end of the Transition Period, has been revoked and replaced with an updated Scottish Statutory Instrument. This instrument will make all necessary changes to the Public Contracts (Scotland) Regulations 2015, the Utilities Contracts (Scotland) Regulations 2016, the Concessions Contracts (Scotland) Regulations 2016, Procurement Reform (Scotland) Act 2014 and the Procurement (Scotland) Regulations 2016.

Summary of changes

3. At 11pm on 31 December 2020 the Transition Period will end.
4. Changes are being made to the procurement regulations that apply in Scotland to fix deficiencies that would otherwise arise in the regulations as a result of the UK's exit from the EU. The powers to make most of these changes are included in the European Union (Withdrawal) Act 2018 and do not provide an opportunity to undertake a wider review of procurement legislation.

Processes and Procedures

5. The changes are largely technical in nature. They do not impact on procurement procedures which will remain fundamentally unchanged. The basic requirements to advertise contracts, observe minimum timescales, and follow rules on technical specifications and award criteria, for example, will remain in place. The requirement to afford equal treatment to bidders from countries which are signatories to the World Trade Organisation's Government Procurement Agreement (the GPA¹) will also remain. This is due to the UK becoming a party to the GPA in its own right² at the end of the Transition Period; previously it was a party by virtue of being a member State of the EU.

¹ https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm

² https://www.wto.org/english/news_e/news20_e/gpro_07oct20_e.htm

Publishing Notices

6. The requirement to publish notices on Public Contracts Scotland (PCS), which comes from the Procurement Reform (Scotland) Act 2014, remains.
7. Whilst public bodies will no longer be required to publish notices in the Official Journal of the European Union (OJEU), these notices will need to be published on a new UK e-notification system called Find a Tender System (FTS³) instead. FTS has been developed to comply with international agreements such as the GPA, which requires relevant procurements in the UK to be advertised through a single point of access available free of charge. To meet this requirement to publish on FTS, public bodies should continue to use PCS. PCS has been updated so that notices submitted to it by Scottish public bodies before the end of the Transition Period will be forwarded on to OJEU. Notices submitted to PCS after the end of the Transition Period will be forwarded on to FTS. Some procurements (i.e. those that have started⁴ but not concluded before the end of the Transition Period) will continue to be routed via PCS to OJEU for their duration. Notices for contracts awarded under a Dynamic Purchasing System, where the System was put in place prior to 31 December 2020, will require to be published on OJEU. PCS will, again, take care of that.

Threshold Values

8. Threshold values for contracts subject to procurement legislation and for publishing notices, sometimes referred to as OJEU thresholds, remain unaltered (see [SPPN 8/2019](#) for details of current thresholds).
9. Scottish Ministers (and, for the rest of the UK, the UK Government) will be responsible for reviewing and revaluing the financial thresholds every two years. The next review of the thresholds will be implemented by January 2022. However, threshold values must remain aligned to those in the GPA. This means there is no scope to introduce threshold values that vary from those of the GPA or OJEU, and threshold values will remain consistent throughout the UK.

³ www.find-tender.service.gov.uk

⁴ A procurement will be deemed to have been started where a contract notice or any other invitation to submit interest (such as a PIN which is being used as a call for competition) has been published or, where permitted by the Regulations, a public body/public entity contacts suppliers in relation to the procurement.

Practical Impact

10. Annex A contains a short Q&A on some of the practical aspects associated with this SPPN.

Supply Chain Continuity

11. As we approach the end of the Transition Period, public bodies should be taking steps to assure themselves that services will continue to be delivered and goods end up where they should be, while adverse commercial impacts are minimised, irrespective of the status trading relationship with the EU from January 2021. Public bodies should carry out risk assessments for all key contracts that will be “live” at the end of the EU exit Transition Period, considering a range of indicators as the basis of the risk impact assessments, including exchange rates, movement of people, data flows, tariffs and border issues. It is also important that discussions are initiated with suppliers to ensure they have appropriate mitigations in place. These include increased stock holding, alternative transport routes, and measures to manage risk around currency fluctuations (e.g. hedging). Alternative sources of supply should also be considered.

12. Purchasers may wish to undertake relevant training guided by the risk assessments. There are a range of providers of procurement training available through PCS. Furthermore, the Scottish Government is developing training for public procurement professionals on an Introduction to International Trade. To note interest in this offering please contact commercialcapability@gov.scot.

Dissemination

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

Contact

14. If you have any questions about this SPPN, please contact us at scottishprocurement@gov.scot.

Q&A on practical aspects of changes to procurement legislation

Publishing Notices

Question	Answer
<p>If I have already started my procurement before the end of the Transition Period (31 December 2020) will I have to republish all of my previous notices on the new UK portal, Find a Tender?</p>	<p>Public Contracts Scotland (PCS) remains the main advertising portal for Scottish public bodies. This means that at the practical level there should be no changes in the way that public bodies submit contract opportunity notices – they should still be submitted to PCS in the first instance.</p> <p>In addition to publication of these notices on PCS, for procurements that have started but not concluded before the end of the Transition Period, notices will also require to be published on Tenders Electronic Daily (OJEU/TED) and will be routed there via PCS. Notices for procurements started after the end of the Transition Period will be routed to Find a Tender (FTS).</p>
<p>When publishing to both Public Contracts Scotland and Find a Tender, do I have to publish to FTS first?</p>	<p>The publication of notices for relevant procurements launched after 11pm on the 31st December 2020 must be published on FTS before PCS.</p> <p>However, as is the case with notices published on OJEU/TED, buyers only need to ensure their notice is submitted to PCS. PCS will handle the timing of publication on both PCS and FTS.</p>
<p>What will happen to any OJEU notices currently in progress / live as at 11pm on 31 December 2020?</p>	<p>PCS will continue to meet buyers' advertising obligations.</p> <p>Where procurement procedures have been launched but are not yet finalised, any notice submitted to PCS will be published on PCS. This will also be forwarded on to both FTS and OJEU/TED for publication there as well.</p>
<p>Who do I contact, if I have a problem publishing a notice?</p>	<p>Users should continue with current arrangements and continue to contact the PCS help desk as they would normally.</p>

General

Question	Answer
If the EU introduces any new procedures, will they be relevant to new procedures commenced after the end of the Transition Period?	No, we will not be required to give effect to any further EU Directives or regulations in the field of public procurement. This is unless coming within the scope of the Withdrawal Agreement or a Future Relationship Agreement with the EU,
Are grounds for excluding bidders changing after the end of the Transition Period?	Yes, but only slightly. For procurements launched after the end of the Transition Period, the exclusion grounds based on convictions for offences relating to fraud affecting the European Communities' financial interests will no longer apply as a mandatory exclusion (see regulation 58(1)(e) of the Public Contracts (Scotland) Regulations 2015, regulation 40(1)(e) of the Concession Contracts (Scotland) Regulations 2016 and regulation 8(1)(e) of the Procurement (Scotland) Regulations 2016).
What happens to the European Single Procurement Document (ESPD)?	The ESPD will be renamed the Single Procurement Document (SPD) for new procurements. There will be minor changes to the SPD and an updated version will be available from the Procurement Journey in January 2021.
How will the remedies regime be affected at the end of the Transition Period?	There is no effective change to the remedies regime.
If I receive an abnormally low tender and I think it might be because the bidder has received EU State Aid - what action should I take since the facility to exclude just on the grounds of State Aid has been omitted?	Unless coming within the scope of the Withdrawal Agreement and in particular, the Northern Ireland Protocol, from the end of the Transition Period, for new procurements, the UK will no longer be subject to the EU's State aid regime, and will not be required to report instances to the EU Commission. The UK will have its own subsidy framework. After the end of the Transition Period there is still a duty on the contracting authority to require the bidder to explain its price or costs should a contracting authority consider that a bid appears to be abnormally low. The supplier's explanation should be assessed by applying the principles of fairness, equality of treatment, objectivity, transparency and proportionality. Although the facility to reject a tender solely because the bidder has obtained incompatible State aid has

	<p>been removed, bidders can still be asked to explain the abnormally low bid.</p> <p>Further detailed guidance will be provided on State aid and the UK subsidy framework once this is clarified by the UK Government.</p>
<p>Can I just buy British? What do I do with non-UK bidders?</p>	<p>The UK's obligations under the Government Procurement Agreement (GPA) and other international agreements require suppliers from countries party to those agreements to be treated equally and fairly through open competition. This means decisions cannot be taken on the basis of the location of a supplier.</p>
<p>How do I know which services or goods are covered by the WTO GPA rules?</p>	<p>The coverage schedules for the WTO's Agreement on Government Procurement (GPA) can be found here. The schedule of each party contains several annexes which define the concerned party's commitment with respect to the following areas of coverage:</p> <ul style="list-style-type: none"> • the procuring entities covered by the GPA • the goods, services and construction services covered by the GPA • the threshold values above which procurement activities are covered by the GPA • exceptions to the coverage. <p>All suppliers should continue to be treated equally and fairly through open competition.</p>
<p>I used to use E-Certis to check certificates. Will this be replaced? Can I still use it?</p>	<p>You can still access E-Certis to check equivalency for EU member states' certificates. However information on UK certificates will no longer feature for new procurements.</p>

European Structural and Investment Fund (ESIF) Procurements

Question	Answer
<p>What happens to procurements which start after the end of the Transition Period but are part of ESIF programmes?</p>	<p>Procurements which are part of ESIF programmes remain subject to EU procurement law. This means that they should be treated as any procurement which started before the end of the Transition Period. At a practical level, public bodies should continue to upload these procurements to PCS as normal for them to be forwarded to OJEU/TED. However, instead of using the new Single Procurement Document (SPD) template, buyers should use the European Single Procurement Document template which can be found and uploaded from:</p>

	https://www.procurementjourney.scot/espdsdp/espdsdp-documents .
Are there any practical implications?	<p>There are two things that buyers must do to ensure that an ESIF procurement complies with EU law:</p> <p>1) They must confirm, in section II.2.13 of the contract notice on PCS, that the procurement is related to a project and/or programme financed by European Union funds. This will ensure that the ESIF contract notice is forwarded for publication to OJEU/TED.</p> <p>2) They must exclude suppliers from the competition which have committed fraud against the European Communities' financial interests. Such instances can be determined by ensuring that the ESPD is used for ESIF procurements.</p>
I have used the SPD instead of the ESPD for an ESIF procurement. What should I do?	If the SPD has been used, the public body should contact those who have expressed an interest in bidding and ask them to answer the questions contained in Part III, A (Grounds Relating to Criminal Convictions) of the ESPD separately. Doing this as part of the procurement process will ensure that EU requirements with respect to mandatory exclusions can be met.
What happens if I have already advanced to the selection phase or awarded the contract but have not used the ESPD?	<p>You must still ask the selected bidders or contractor to answer the questions in Part III, A (Grounds Relating to Criminal Convictions) of the ESPD separately and take account of the response. This is permitted under the regulations.</p> <p>If the contract has already been awarded, and the contractor's answer to the exclusion question warrants it, the regulations allow for the termination of a contract if the contractor is discovered to be subject to one of the exclusion grounds.</p>
Can I use a Prior Information Notice (PIN) for information only purposes for an ESIF procurement after the end of the Transition Period?	No, the European Commission has decided that a PIN used for information only purposes will not be accepted for publication on OJEU/TED after the end of the Transition Period. However, a PIN can be used as a call for competition if it confirms that European funding is involved in section II.2.13.
What should I do if I have further questions about ESIF procurements?	There is a dedicated mailbox where you can send questions related to ESIF Procurements. This is ESIFProcurements@gov.scot .