

Public Procurement Reform Programme

Scottish Procurement Policy Handbook

Legal framework

The legal framework for public procurement includes:

- EC Treaty obligations¹²;
- EC Procurement Directives, as implemented in national law;
- European Court of Justice and national caselaw.

4.1 EC Treaty

The EC Treaty applies to all public procurement activity above the thresholds at which advertising in the Official Journal is required. Contracts which are exempt from application of the EC Treaty include:

- contracts for the purchase of goods or services which are not intended for resale or for use in the economic activity of the contractor;
- contracts for the purchase of goods or services which are not intended for resale or for use in the economic activity of the contractor;
- contracts for the purchase of goods or services which are not intended for resale or for use in the economic activity of the contractor;

Public Procurement Reform Programme

Scottish Procurement Policy Handbook

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ISBN: 978-0-7559-5953-2

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Produced for the Scottish Government by RR Donnelley B58642 12/08

Published by the Scottish Government, December 2008

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Contents

Ministerial Foreword	2	10. Corporate Social Responsibility	25
1. Introduction	4	11. Equality and the Public Sector Equalities Duties	27
2. Application	5	12. Health and Safety	28
3. Procurement organisation and governance	6	13. Freedom of Information and Data Protection Act	29
Scope of public procurement	6	14. Innovation	30
Procurement landscape	7	15. Business processes	31
Procurement function	8	Purchasing authority	31
Role of the procurement function	9	Separation of duties	31
Role of procurement officers	11	Ordering and payment procedures	31
Role of the end user	12	16. Management information and best practice	32
Procurement skills	13	Use of management information	32
Governance and audit	14	Performance measurement and reporting	32
4. Legal framework	15	Best practice	33
EC Treaty	15	17. Gateway Review	34
EC Procurement Directives and implementing Scottish Regulations	15	18. Supplementary guidance	35
European Court of Justice and national caselaw	16	Scottish Procurement Policy Notes	35
Meeting legal obligations	16	Scottish Procurement Action Notes	35
Formal challenges/complaints	17	Scottish Procurement Directorate website	35
5. Value for money	18	Policy Forum	35
6. Competition	19	Annex A Centres of Expertise	36
7. Collaboration	20	Acknowledgements	37
8. Construction projects	21		
9. Working with suppliers	22		
Suppliers' Charter	22		
Standards expected of suppliers	23		
Gifts and hospitality	23		
Involving suppliers	23		
Ethical standards	24		
Handling complaints	24		
Single Point of Enquiry	24		



Ministerial Foreword

Public procurement has a key role to play in supporting sustainable economic growth in Scotland. The public sector spends over £8 billion each year on goods, works and services and it is essential that we make the best use of this significant amount of expenditure. Better procurement can significantly improve the quality of services the public sector delivers to the people of Scotland and can release funds for additional frontline services. How we spend this money is also important for our businesses, who rightly expect that public contracts will be awarded fairly, transparently and on merit.

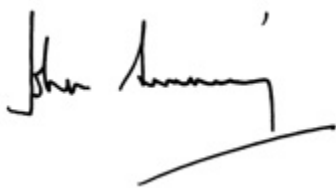
While the public sector in Scotland is made up of many diverse organisations, the fundamental issues that affect public procurement are broadly similar, whichever organisation or sector you work in. John McClelland's *Review of Public Procurement in Scotland* recognised the need for strong, consistent, policy guidance and his report recommended that a "public sector wide Procurement Policy Handbook should be established offering a standard and well-documented approach to be utilised across all of the public sector". This Handbook has been developed in response to that recommendation. It provides an overarching statement of the fundamental rules, behaviours and standards applicable to public procurement activity in Scotland.

The Handbook describes the key roles and responsibilities in relation to the procurement function and outlines the governance and accountability arrangements that organisations should have in place. It addresses key policy issues: the achievement of value for money for the taxpayer through effective competition; the importance of collaboration at a national, sectoral and local level; incorporating environmental and social issues in public procurement; and fostering innovation through procurement.

The Handbook has been developed in consultation with the Procurement Policy Forum. Membership of the Forum comprises key stakeholders from each sector and representatives from each of the procurement Centres of Expertise. I am very grateful to Forum Members for their contribution to the Handbook. It has also been endorsed by the Public Procurement Reform Board and COSLA.

As Chair of the Public Procurement Reform Board, I expect the highest standards of those involved in public procurement in Scotland and I regard compliance with the principles in the Handbook as essential for all public sector procurement organisations. I expect compliance to feature prominently in internal and external audit scrutiny of public procurement in Scotland.

It is very helpful to have, for the first time, a clear statement of the standards that all public sector procurement organisations are required to meet. Under the Public Procurement Reform Programme, we are committed to establishing and embedding appropriate procurement policy and best practice in order to ensure fair and efficient procurement practices. This Handbook forms the cornerstone of work the Scottish Government is taking forward to deliver this commitment.

A handwritten signature in black ink, appearing to read 'John Swinney', with a long horizontal stroke underneath.

JOHN SWINNEY, MSP

Cabinet Secretary for Finance and Sustainable Growth

December 2008

1 Introduction

The Procurement Policy Handbook sets out the fundamental rules, behaviours and standards applicable to public procurement activity in Scotland.

The *Review of Public Procurement in Scotland* by John McClelland (published in March 2006) recommended (section 7.1) that:

“A public sector wide Procurement Policy Handbook should be established offering a standard and well documented approach to be utilised across all of the public sector.”

This document has been developed in response to that recommendation, in consultation with the Procurement Policy Forum. It has been endorsed by the Public Procurement Reform Board (PPRB). Information on the Forum and the PPRB is available on the SPD website:

<http://www.scotland.gov.uk/Procurement>

The Handbook should be read in conjunction with Scottish Procurement Policy Notes (SPPNs) and other supporting documents issued by the Scottish Procurement Directorate (SPD). The Handbook provides an overarching framework; it does not replace an organisation’s policy manual¹ or sector-specific policy guidance issued by the Centres of Procurement Expertise. Each contracting authority is responsible for reviewing its policy and procedures to ensure consistency with the Handbook. Similarly, the Centres of Procurement Expertise should ensure that any supplementary, sector-specific policy guidance is consistent with the Handbook.

The Handbook is available to download from the SPD website, which provides access to published guidance and includes contact details for further enquiries:

<http://www.scotland.gov.uk/Topics/Government/Procurement/policy>

¹ An organisation’s policy manual typically provides detailed information about the procurement process and the procedural requirements that should be met by that organisation.

2 Application

Compliance with the principles in the Handbook is regarded by Ministers and the Public Procurement Reform Board as mandatory. The *Review of Public Procurement in Scotland* stated (section 7.1) that:

“The Policy contents of the handbook should be mandatory for implementation across all public sector organisations and compliance measured and reported upon during audits and other reviews.”

The Handbook applies, therefore, to all Scottish contracting authorities (bodies governed by public law) included in regulation 3 of The Public Contracts (Scotland) Regulations 2006. Compliance with the requirements of the Handbook is expected to feature prominently in internal and external audit scrutiny.

Any contracting authority which fails to comply with the principles and requirements of this Handbook and to apply best practice procurement processes and procedures is unlikely to be able to demonstrate value for money, or be able to demonstrate adequate governance and accountability for the appropriate management of public funds and expenditure.

3 Procurement organisation and governance

3.1 Scope of public procurement

Public procurement can be defined as the acquisition, whether under formal contract or otherwise, of goods, services and works from third parties by contracting authorities.

The scope of public procurement ranges from the purchase of routine supplies or services, to formal tendering and placing contracts for large infrastructure projects by a wide and diverse range of contracting authorities.

This Handbook outlines the principles that should be applied to all procurement. Additional guidance on best practice is provided in the Scottish Public Procurement Toolkit. Further information on the Toolkit can be found in section 16.3. Those who are responsible for procuring, managing or delivering major construction projects should also refer to the Construction Procurement Manual. Further information on the Construction Procurement Manual can be found in section 8.

If contracting authorities employ private sector agents to undertake procurement on their behalf, they should procure these as formal public contracts under EC law, including in the terms an obligation on the provider to:

- require compliance with EC procurement rules;
- ensure clear allocation of responsibilities; and
- where appropriate, obtain the agent's indemnity against any costs incurred as a result of its failure to comply with the legal framework on its behalf.

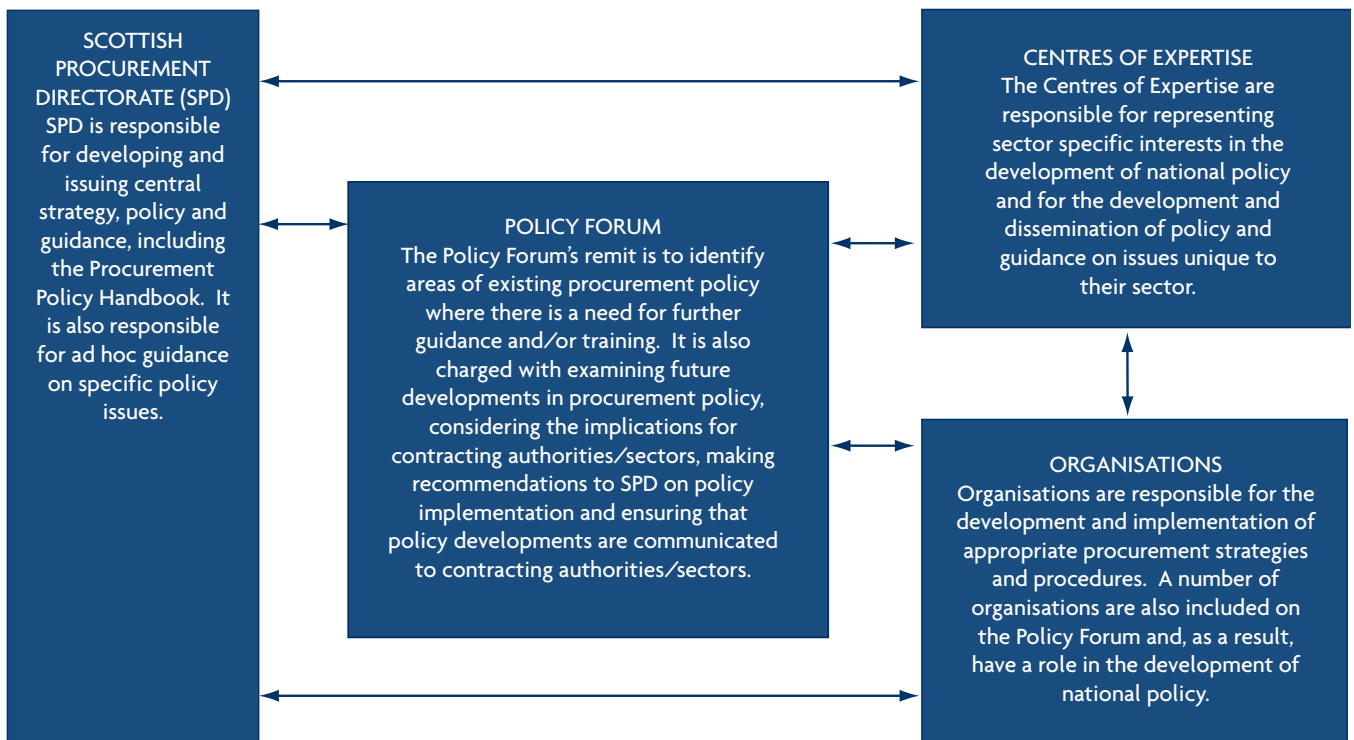
“Procurement” for the purposes of this Handbook is not intended to cover funding agreements or forms of co-operation between contracting authorities which are non-contractual. However, it should be noted that relationships between contracting authorities may constitute contracts for the provision of goods, services or works in certain circumstances. Further information on the application of EC procurement rules to the provision of services between public bodies and/or between public bodies and delivery vehicles intended to support the provision of shared services to more than one public body can be accessed through the following link:

<http://www.scotland.gov.uk/Resource/Doc/1265/0051647.pdf>

Even where funding agreements or other forms of co-operation are not contractual and do not constitute procurement, normal commercial disciplines should be applied wherever possible to ensure that public funds and resources are used effectively.

3.2 Procurement landscape

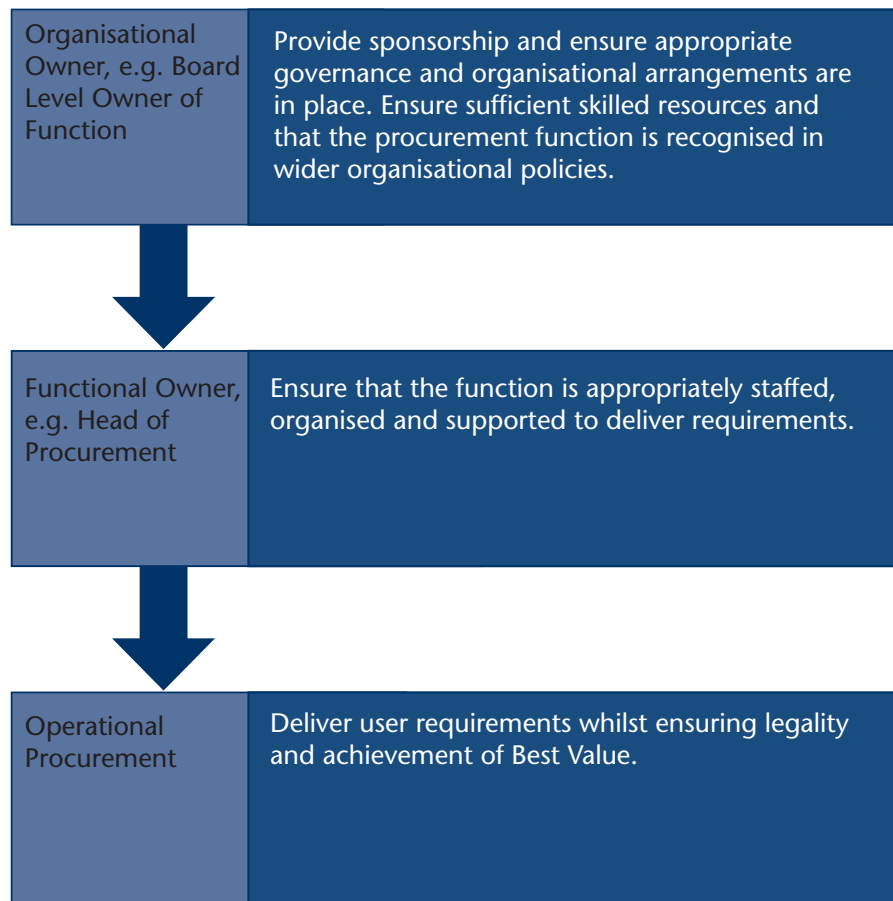
Key roles and responsibilities in relation to the development and implementation of procurement policy are illustrated below:



3.3 Procurement function

Sections 3.3 and 3.4 describe a mature procurement function within a contracting authority. As a result, the text may not be representative of contracting authorities with a less mature procurement function or contracting authorities which share procurement resources. **It should be noted that, even where an organisation is not yet mature, it is the Accountable Officer’s responsibility to ensure that procurement activity is undertaken or overseen only by those formally authorised to act as procurement officers.**

Key roles and responsibilities in relation to the procurement function are illustrated below:



3.4 Role of the procurement function

Each organisation should ensure that its arrangements for procurement are appropriate to the level of procurement undertaken by the organisation and should have, or have access to, a dedicated procurement function. This function should be led by a Head of Procurement with full responsibility for procurement across the organisation².

The Head of Procurement should be at Board level or, at a minimum, one level below with a Board member taking clear ownership for procurement and commercial matters.

The specific role of the procurement function may vary depending upon the size and nature of the organisation it serves. At a high level, however, the primary role of the procurement function is to:

- provide professional, qualified procurement expertise, advice and services;
- provide strategic procurement advice;
- ensure that business needs are met through its procurement of goods, services and works;
- contribute to the aims and objectives of the organisation, as detailed in its business plan;
- pro-actively manage and develop the supplier base, including small and medium-sized enterprises (SMEs) and third sector and voluntary sector organisations, identifying and managing any supply risks or value add opportunities;
- ensure that value for money is achieved, including through implementation of national contracts;
- advise, guide and support the development of and adherence to procurement policy, best practice and law;
- develop, promote and implement appropriate procurement strategies and procedures;
- establish and address training needs, utilising national/sectoral training contracts where appropriate;
- co-ordinate training development and registering of procurement officers across the organisation;
- assess procurement competencies across the organisation, using tools such as the Scottish Procurement Competency Framework³;

² Where procurement is devolved within an organisation, responsibility may be spread across a network of procurement officers, including staff with part-time procurement roles, led by a Head of Procurement.

³ See section 3.7 for further information on the Competency Framework.

- promote and engage in collaboration and information sharing with relevant Centres of Expertise and SPD;
- support sustainable policies through procurement processes⁴;
- comply with and, where appropriate, promote equalities legislation and policy; and
- promote and engage in the implementation of relevant technology solutions, including e-procurement, to minimise purchase to pay costs.

A mature procurement function will encompass the following activities:

- act as the interface between the contracting organisation and the external marketplace on commercial matters;
- determine requirements and establish specifications in collaboration with end users;
- challenge the organisation's/end-users' requirements critically for need and cost effectiveness, taking account of whole life costs and corporate social responsibility/sustainability issues;
- conduct market engagement and research;
- engage effectively with Centres of Expertise and SPD in relation to issues of policy, practice, information sharing and collaboration;
- manage supplier relationships, including responding to suppliers' complaints;
- manage commercial relationships;
- manage procurement competitions;
- manage the award of contracts;
- contract management;
- establish a comprehensive contract register;
- establish arrangements relating to authority to procure;
- measure and report procurement performance, including Best Practice Indicators (BPIs); and
- encourage participation of users/feedback into relevant advisory groups (user intelligence groups).

⁴ Contracting authorities subject to the duty of Best Value are required to secure continuous improvement in their services, having regard to value for money and taking account of equalities and sustainability.

3.5 Role of procurement officers

The term “procurement officer” is used within this document to describe any member of staff who is formally authorised to procure goods, services and works (i.e. to place contracts on behalf of the organisation)⁵.

The key elements of the procurement officer’s role in the procurement process are to provide support and guidance to the end user/customer in:

- market analysis and engaging in initial market dialogue, where appropriate;
- challenging end users’ requirements for cost-effectiveness and need, taking account of whole life costs and corporate social responsibility/sustainability issues;
- identifying and engaging other subject matter experts as required (e.g. end user, legal, finance etc.);
- developing an appropriate output-based specification⁶ which is fashioned to attract market interest and stimulate competition and innovation;
- developing a procurement strategy which requires consideration of existing and/or collaborative contracts;⁷
- ensuring that all procurement processes (tender, order from framework etc.) are compliant with relevant legal and policy obligations, advertising through the national portal where appropriate;
- publicising procurement contact points and making available as much information as suppliers reasonably need to respond to the bidding process;
- understanding and complying with relevant legal obligations relating to the goods, services or works to be purchased, e.g. environmental/health and safety legislation;
- ensuring that procurement decisions take account of wider policy requirements;
- ensuring that procurement decisions are aligned against organisational objectives;
- ensuring that the organisation’s policies on corporate social responsibility/sustainability are adhered to;
- managing the procurement procedure;
- supporting partnership working arrangements;
- conducting any procurement clarification required prior to contract award;
- finalising the contractual agreement and formal contract documentation;

5 For some staff procurement forms only part of their remit.

6 For further information on developing an output-based specification, whereby contracting authorities identify their needs and invite the market to propose appropriate solutions, see section 14.

7 If necessary, in order to tie in with a collaborative approach, consideration should be given to short-term contract extensions.

- establishing a clear audit trail (including recording the contract on the organisation’s contract register);
- notifying the outcome of bids promptly and, within the bounds of commercial confidentiality, debriefing winners and losers on the outcome of the bidding process to facilitate better performance on future occasions⁸;
- ensuring that adequate contract and supplier management arrangements are in place, supporting supplier management as appropriate;
- sharing knowledge to develop best practice: and
- handling Freedom of Information requests on procurement matters in accordance with organisational policy.

Detailed guidance on individual aspects of procurement practice is available in the ‘Scottish Public Procurement Toolkit’ and from SPD/Centres of Expertise websites (see section 16.3 and Annex A).

3.6 Role of the end user

The term “end user” is used within this document to describe the individual with responsibility for formulating the requirement, i.e. the goods, services or works required or the budget from which the requirement will be purchased.

The key elements of the end user’s role in the procurement process are to:

- adequately define the user’s needs, identifying minimum and desirable elements and ensuring that there is adequate consultation with users and their representative bodies (where necessary);
- ensure that the requirement takes account of the organisation’s policy requirements, including its corporate social responsibility/sustainability policies, and is aligned against organisational objectives;
- ensure compliance with relevant legal obligations relating to the goods, services or works to be purchased, e.g. environmental/health and safety legislation;
- where appropriate, prepare a business case;
- ensure that funding is in place;
- contribute to drafting the tender specification⁹;
- contribute to development of the procurement strategy;

⁸ This is a requirement of the ECJ judgments in the Alcatel cases (Case C81/98 *Alcatel Austria and Others v Bundesministerium für Wissenschaft und Verkehr* and C212/02 *Commission v Austria*) and has been incorporated in the Public Contracts (Scotland) Regulations 2006 and Utilities Contracts (Scotland) Regulations 2006.

⁹ In some projects, technical experts/end users have a specific responsibility to prepare an appropriate specification.

- be involved throughout the life cycle of the procurement exercise – implementation, review, ongoing intelligence groups;
- provide technical expertise and input to support the bid assessment processes;
- prepare the technical recommendation in any bid assessment report; and
- approve key review stages throughout the procurement process.

End users should not deal directly with bidders or potential bidders during the procurement process without the full involvement of and/or approval by the procurement officer.

3.7 Procurement skills

The *Review of Public Procurement in Scotland* recommended that skill levels of procurement staff should be continuously improved through programmes of professional training and development. Training for staff involved in the procurement process should be considered by organisations as an investment.

The recruitment and retention of suitably qualified staff is essential. Organisations should implement a process to assess, at regular intervals, their organisation's procurement capability and develop training and development strategies which ensure that their procurement activity is both compliant with legislation and obtaining value for money.

The diversity of the work involved in procurement necessitates that procurement staff are required to be competent in a wide variety of generic procurement skills in addition to the specific technical skills and knowledge required when procuring for different sectors and commodities.

A Scottish Procurement Competency Framework has been developed which complements existing staff development tools in organisations by ensuring that the skills are specific to procurement. The flexibility of the framework ensures that it can be utilised by all sectors. It will support the development of procurement staff using a consistent and measurable approach across the Scottish Public Sector. It should be noted that the skills are applicable to all staff where procurement activity is an integral part of their role, not only staff employed in a specific procurement post. The Competency Framework can be accessed through the following link:

<http://www.scotland.gov.uk/Topics/Government/Procurement/npcoe/Capability/CompetencyFramework>

Professional training and development programmes, both nationally and sectorally will be established between the public sector, professional bodies e.g. Chartered Institute of Purchasing and Supply, Society of Procurement Officers (SOPO) and Association of University Procurement Officers (AUPO) and training providers. These programmes will be accessible by all public sector bodies.

3.8 Governance and audit

Contracting authorities are responsible for establishing arrangements for ensuring the proper conduct of their affairs, including conformance to standards of good governance and accountability with regard to procurement. They will usually involve their audit committees or similar groups in monitoring these arrangements.

Internal audit should provide an independent and continuing appraisal of an organisation's internal control system and continuing assurance that its internal control systems are adequate and effective.

Each organisation's audit committee should set the degree of assurance it requires concerning the management of procurement risk, and internal audit should plan its work accordingly. This should address the *Review of Public Procurement in Scotland* recommendation that organisations confirm annually that they comply with minimum standards of governance and accountability for procurement¹⁰.

External audit provide an opinion on contracting authorities' financial statements and the regularity of transactions. As part of the wider scope of public audit, each year they review and report on contracting authorities' corporate governance arrangements, including arrangements to achieve value for money in the use of resources and may seek assurances on compliance with public procurement law.

External audit may review and report on standards of risk management and governance with regard to procurement in any contracting authority. Additionally, Audit Scotland's programme of performance audits¹¹ may scrutinise and report on contracting authorities' procurement systems and effectiveness.



¹⁰ Work is underway to develop a generic tool for the assessment of minimum standards of governance and accountability for procurement. A link to the tool will be added in due course.

¹¹ Audit Scotland does not audit universities in Scotland.

4 Legal framework

The legal framework for public procurement includes:

- EC Treaty obligations¹²;
- EC Procurement Directives, as implemented in national legislation; and
- European Court of Justice and national caselaw.

4.1 EC Treaty

The EC Treaty applies to all public procurement activity regardless of value, including contracts below the thresholds at which advertising in the Official Journal of the European Union is required and including contracts which are exempt from application of the EC Procurement Directives¹³.

Fundamental principles flowing from the Treaty include:

- transparency – contract procedures must be transparent and contract opportunities should generally be publicised;
- equal treatment and non-discrimination – potential suppliers must be treated equally;
- proportionality – procurement procedures and decisions must be proportionate; and
- mutual recognition – giving equal validity to qualifications and standards from other Member States, where appropriate.

4.2 EC Procurement Directives and implementing Scottish Regulations

EC Procurement Directives 2004/17/EC and 2004/18/EC set out detailed procedural rules which are based on the principles outlined in the EC Treaty and which are intended to support the single market by harmonising procedures for higher value contracts, ensuring that they are advertised in the Official Journal of the European Union in standard format.

These Directives are given effect in Scots law by The Public Contracts (Scotland) Regulations 2006 (SSI 2006 No 1) and The Utilities Contracts (Scotland) Regulations 2006 (SSI 2006 No 2) which came into force on 31 January 2006.

A copy of the Scottish Procurement Regulations and amending regulations can be found on the SPD website: <http://www.scotland.gov.uk/Topics/Government/Procurement/Selling/10615>

¹² In addition, World Trade Organisation (WTO) Government Procurement Agreement (GPA) obligations ensure that signatories to the Agreement, of which there are twenty-seven, have equivalent rights of access to bidding for public contracts in the EU.

¹³ with some limited exceptions, e.g. relating to defence and national security.

Prior to implementing EC Procurement Directives in national legislation, the Scottish Government will consult publicly on its approach to implementation and/or draft legislation.

Further information relating to EC procurement law is provided in the Scottish Public Procurement Toolkit (see section 16.3).

4.3 European Court of Justice and national caselaw

Decisions of the European Court of Justice and the national courts provide interpretation of the requirements of the EC Treaty and the EC Procurement Directives and can establish precedents which must be observed. Caselaw, by its nature, is constantly evolving and can have significant effects.

4.4 Meeting legal obligations

The legal framework is not static: it evolves through new/amended legislation, through European Commission decisions/guidelines and through Court judgments. Every contracting authority should therefore ensure that it has appropriate arrangements in place to ensure that staff involved in procurement activity are kept up to date with developments in the legal framework and are equipped to meet their legal obligations. Where appropriate, SPD will issue guidance on changes to the legal framework via Scottish Procurement Policy Notes or Action Notes (see section 18).

Organisations should bring any complex legal issues to the attention of SPD and the relevant Centre of Expertise. This will allow SPD to determine if wider dissemination across the procurement community is appropriate.



4.5 Formal challenges/complaints

Regulation 47 of the Public Contracts (Scotland) Regulations 2006 allows suppliers to bring proceedings in the Sheriff Court or Court of Session against contracting authorities which have infringed their obligations to comply with the Regulations, or any other enforceable European Community law provision which may be relevant to awarding a public contract¹⁴.

Any individual may bring an alleged breach of the EC Procurement Directives to the attention of the European Commission. In the event of proceedings by the Commission against a Scottish contracting authority, SPD will co-ordinate the UK response under the arrangements set out in a subject specific Concordat on public procurement which has been published on the SPD website:

<http://www.scotland.gov.uk/Resource/Doc/175738/0049495.pdf>

In co-ordinating the response, SPD will consult with the individual contracting authority or Centre of Expertise (where the challenge/complaint relates to an alleged breach by a Centre of Expertise), as appropriate.

¹⁴ Regulation 47 of the Public Contracts Regulations 2006 (SI 2006 No.5) similarly allows suppliers to bring proceedings in the High Court in England, Wales or Northern Ireland.

5 Value for money

The overarching aim of public sector procurement activity in Scotland must be the achievement of value for money¹⁵ for the taxpayer. Value for money is defined as the optimum combination of whole-life cost and quality (or fitness for purpose) to meet the user's requirement. Depending on the nature of the contract, whole-life cost may include implementation costs, ongoing operating costs and end-of-life disposal.

Regulation 30 of The Public Contracts (Scotland) Regulations 2006 sets out two methods for evaluating tenders: contracting authorities can award contracts on the basis of the most economically advantageous tender or the lowest price. In determining the criteria for the award of contracts, purchasers should rarely rely on price alone. This is because awarding contracts on the basis of the most economically advantageous tender allows purchasers to balance the quality of the goods, services and works they are procuring against price and to frame specifications in a way which encourages innovation rather than defining the solution. Appropriate investment appraisal techniques should be used in assessing which compliant bid offers best value for money.

As part of value for money, due regard to other relevant organisational policies is important, for example, policies in relation to corporate social responsibility/sustainability.

¹⁵ Section 1, Local Government in Scotland Act 2003 places a statutory duty on local authorities to secure best value. Procurement activity which delivers value for money will contribute to the achievement of best value. The achievement of value for money underpins many of the recommendations in the *Review of Public Procurement in Scotland*.

6 Competition

Competition promotes efficiency and effectiveness in public expenditure. Awarding contracts on the basis of value for money following competition contributes to the competitiveness of suppliers.

Goods, services and works should be acquired by effective competition, including adequate publication of the contract opportunity, unless there are convincing and justifiable reasons to the contrary.

Subject to any relevant legal obligations, for example under the EC procurement rules, the form of competition should be appropriate to the value and complexity of the goods, services or works to be acquired. Contracting authorities should keep bidding costs to the minimum necessary for effective competition and should remove barriers to participation by, for example small firms, the self-employed and the third sector without discriminating against others. Consistent with legal obligations, during competition any minimum standards required should be proportionate to the contract in question.

Guidance on publication of contract opportunities is available on the SPD website:

<http://www.scotland.gov.uk/Resource/Doc/1265/0023351.pdf>

To facilitate compliance with the requirement for adequate publicity, the public sector in Scotland has access to a national advertising portal called Public Contracts Scotland through which advertisements for contracts of all levels can be placed. The portal enables free of charge access to public sector contracts for potential suppliers, thereby providing a means of stimulating competition.

The portal is available at:

<http://www.publiccontractsscotland.gov.uk/>

Contracting authorities may also publish advertisements on their own websites or other portals and in trade or other relevant publications or journals.

7 Collaboration

Collaboration across public procurement functions provides opportunities for: better utilisation of procurement skills and resources; greater purchasing leverage through aggregation of spend; encouraging competition or innovation in markets (thereby providing value for money); maximising benefits; and the spread of best practice. Organisations should collaborate to achieve these benefits where it makes logical and commercial sense to do so.

In the absence of comparable local arrangement, where a requirement can be met and value for money achieved through the use of an existing contract (e.g. a contract put in place by one of the Centres of Expertise or another collaborative procurement agency), organisations should utilise the existing contract.

Contracting authorities should seek to collaborate wherever possible with the Centres of Expertise.

The aggregation of purchasing spend has the potential to provide significant value and benefit across the public sector. To assist the realisation of these potential benefits, areas of spend or categories have been grouped by sector specific attributes or commonality. These groupings define how and by whom in the national procurement structure, contracts are established for each of the categories.

Category A – National Contracts are established centrally and will include, for example, stationery and Information and Communications Technologies (ICT). There is a presumption that National Contracts will be used by all organisations funded or owned by the public sector in Scotland unless there are compelling and objective business reasons to the contrary.

Category B – Sector Specific Contracts are established within each sector (local authorities, the health service, universities and colleges, and the Scottish Government and its agencies and Non-Departmental Public Bodies). There is a presumption that Category B contracts will be used by all organisations across the relevant sector unless there are compelling and objective business reasons to the contrary.

Category C – General Contracts for commodities and services which are neither classified as A (National Contracts) or B (Sector Specific Contracts) and which will be conducted as the remit of a single organisation.

Category C1 – Local/Regional Contracts for commodities and services which are neither classified as A (National Contracts) or B (Sector Specific Contracts) and which could be consolidated in a region or other grouping to the benefit of purchasing power and optimisation of skilled resources.

To enable organisations to identify and exploit opportunities for collaboration, contracting authorities should place details of all advertisements and contracts on the national portal:

<http://www.publiccontractsscotland.gov.uk/>.

8 Construction projects

Those who are responsible for procuring, managing or delivering major construction projects¹⁶ should follow the policy and procedural framework set out in the Scottish Construction Procurement Manual, use of which is mandatory throughout the Scottish Government, its Agencies and those contracting authorities which are subject to the Scottish Public Finance Manual. SPD's Construction Advice and Policy Division (CAPD) provides guidance and advice on construction procurement procedures and best practice. Further details and guidance, including guidance on sustainability/use of recycled content, can be found at:

<http://www.scotland.gov.uk/Topics/Built-Environment/Building/Building>



¹⁶ Major projects are defined in the Construction Procurement Manual as those with a total budget exceeding £2 million inclusive of professional fees and VAT.

9 Working with suppliers

9.1 Suppliers' Charter

The *Review of Public Procurement in Scotland* recognised that “The existence of a base of high quality and cost competitive suppliers is the optimum environment in which to achieve Best Value in procurement expenditure”.

A Suppliers' Charter¹⁷ has been established for Scottish contracting authorities. It defines the generic standards which suppliers can expect from contracting authorities and the standards which will in turn be expected of them as suppliers to the public sector.

The Charter sets out a number of commitments for contracting authorities, including:

- adequate publicity¹⁸ of contract opportunities;
- use of a core qualification questionnaire; and
- provision of tender debriefing to any supplier that requests it.

It also commits contracting authorities to ongoing dialogue with businesses to achieve change.

The Charter commits business organisations to encourage their members to adhere to the Charter, recognise the legislative framework in which public procurement operates and make effective use of their skills and resources in bidding competitively for and providing specified quality/delivery on public sector goods, services and works.

¹⁷ The Suppliers' Charter is available at <http://www.scotland.gov.uk/Topics/Government/Procurement/Selling/Supplierscharter2>.

¹⁸ This requires public sector organisations to ensure “a degree of advertising and follow a procedure leading to the award of the contract which is sufficient to enable open competition and meet the requirements of the principles of equal treatment, non-discrimination and transparency” (Regulation 8 (21), Public Contracts (Scotland) Regulations 2006). This can be achieved by advertising a contracting opportunity on the national portal, Public Contracts Scotland: <http://www.publiccontractsscotland.gov.uk/>. Contracting authorities may also publish advertisements on their own websites or other portals and in trade or other relevant publications or journals.

9.2 Standards expected of suppliers

Suppliers to the public sector are expected to maintain high standards of business and professional conduct e.g. in relation to legislative and policy requirements on the environment, equality issues, health and safety, employment and taxation. Bidders should generally be required to disclose any recent adverse court or tribunal rulings regarding their business/professional conduct. Where a bidder has failed to comply with relevant legal obligations, consideration should be given to whether it should be excluded from competition on grounds of its unsuitability. In deciding whether or not a bidder should be excluded, account should be taken of the seriousness of the ruling/offence, whether or not the ruling/offence indicates that the bidder is of poor reputation and whether or not the bidder has taken appropriate action to remedy the problem which was the subject of the ruling¹⁹.

9.3 Gifts and hospitality

It is an offence under the Prevention of Corruption Act 1906 for those employed by contracting authorities in their official capacity corruptly to accept any gift or consideration as an inducement or reward for doing, or refraining from doing, anything or showing favour or disfavour to any person.

Under the Prevention of Corruption Act 1916, any money, gift or consideration received from a person or organisation holding or seeking to obtain a contract will be deemed by the courts to have been received corruptly unless proved to the contrary.

Organisations should ensure that they have guidance in place²⁰, which is specific to the needs of those engaged in the commissioning of tenders/contracts, on the propriety of accepting gifts or hospitality.

9.4 Involving suppliers

Suppliers from all sectors are represented on the Public Procurement Advisory Group (PPAG).²¹ The purpose of the group is to provide the framework for an ongoing dialogue, about, and influence upon, public procurement practices as they affect suppliers.

¹⁹ A bidder who has been convicted of any of the criminal offences listed in Regulation 23(1) of The Public Contracts (Scotland) Regulations 2006 should be excluded from competition unless there are overriding requirements in the general interest which justify that bidder's inclusion.

²⁰ Such guidance should be consistent with organisations' HR policies.

²¹ The Advisory Group reports to the Public Procurement Reform Board; it has no executive authority to enforce change.

9.5 Ethical standards

In all dealings with suppliers and potential suppliers, contracting authorities must preserve the highest standards of honesty, integrity, impartiality and objectivity. In particular, those engaged in commissioning of tenders/contracts must:

- be fair, efficient, firm and courteous;
- maintain the highest possible standard of integrity in all business relationships;
- acquire and maintain current technical knowledge;
- achieve appropriate professional standards in the management of contracts;
- foster appropriate standards of professional competence amongst those for whom they are responsible;
- comply with the law, guidance on professional practice and contractual obligations;
- declare any personal interest which may affect or be seen by others to affect impartiality;
- respect the confidentiality of information received in the course of duty and ensure that information given in the course of duty is honest and clear; and
- respond promptly, courteously and efficiently to suggestions or enquiries, including handling Freedom of Information obligations according to organisational policies.

9.6 Handling complaints

Contracting authorities should have in place a formal process to ensure that any complaints from suppliers are dealt with in a professional, objective and timely manner. Effective analysis and handling of complaints will benefit both suppliers and contracting authorities, in terms of future business and practices. When dealing with a complex complaint, contracting authorities may wish to seek advice from the relevant Centre of Expertise and/or SPD.

9.7 Single Point of Enquiry

A Single Point of Enquiry (SPoE) has been established, as recommended by the *Review of Public Procurement in Scotland*, to which suppliers can address concerns about public procurement practices. The SPoE will work with the Centres of Expertise and contracting authorities to review issues raised by suppliers and to work towards improvements in public procurement practices in Scotland.

In all cases, suppliers should seek to resolve issues with the relevant contracting authority before submitting an enquiry to the SPoE.

Suppliers can submit an enquiry to the SPoE by completing the online form on the SPD website:

<http://www.scotland.gov.uk/Topics/Government/Procurement/Selling/supplier-enquiries/submit-an-enquiry>

10 Corporate Social Responsibility

Corporate Social Responsibility (CSR) in public procurement (including sustainable procurement) is essentially about how, as part of overall value for money and affordability considerations, contracting authorities take account of the economic, social, environmental and equality impacts of their purchasing activity, maximising the positive outcomes and minimising the negative.

It is essential that when contracting authorities buy goods, services and works they spend public funds in a way that achieves value for money. Contracting authorities and end-users can make a significant contribution towards meeting wider CSR objectives by including, wherever it is sensible and legitimate to do so, such objectives within the overall assessment of value for money and affordability. Generally CSR issues can be taken into account only where they are directly related to the subject matter of the particular contract in question. It is generally not permissible to take into account aspects such as an organisation's overall company policy on Corporate Social Responsibilities or the environment, where such policies are not directly relevant to the performance of a particular contract.

A short introduction to incorporating CSR in procurement is available at:

<http://www.scotland.gov.uk/Topics/Government/Procurement/policy/Subject-Specific/corporate-responsibility/susdevsummarynote>

Guidance on how to incorporate environmental issues in public procurement is available at:

<http://www.scotland.gov.uk/Resource/Doc/1265/0009333.pdf>

Guidance on how to incorporate social issues in public procurement has been published by the Scottish Procurement Directorate and is available at:

<http://www.scotland.gov.uk/Resource/Doc/116601/0053333.pdf>

The key messages are that it is possible and very often desirable to incorporate economic, social and environmental issues in public procurement²², provided that doing so offers a value for money outcome, complies with legislative requirements and is directly related to the subject matter of the contract.

The greatest impact will be gained by considering such issues at the outset and building them in at the beginning of the procurement process. Further guidance on CSR issues is available at:

<http://www.scotland.gov.uk/Topics/Government/Procurement/policy/Subject-Specific/corporate-responsibility>

²² Contracting authorities subject to the duty of Best Value are required to secure continuous improvement in their services, having regard to value for money and taking account of equalities and sustainability.

The Office of Government Commerce's Centre of Expertise on Sustainable Procurement can be accessed using the following link:

<http://www.ogc.gov.uk/procurement.asp>

Further information on the EU Green Public Procurement initiative is available at:

http://ec.europa.eu/environment/gpp/index_en.htm



11 Equality and the Public Sector Equality Duties

There is a range of equality legislation protecting people from discrimination on the grounds of race, disability, gender, age, sexual orientation and religion or belief. In addition, there are three public sector equality duties that require public authorities to take proactive steps to eliminate discrimination and harassment and to promote equality of opportunity with regard to race, disability and gender.

The race, gender and disability equality duties apply to public functions which are carried out through procurement as well as those carried out directly by a public authority. This means that a private or voluntary organisation must have due regard to the general duties relating to race, disability and gender when carrying out the function on behalf of a public authority.

Contracting authorities must comply with all relevant equality legislation. Where a contractor is carrying out a public function on behalf of a public authority, the legal liability for the duties in relation to that function remains with the public authority which contracts out the function.

The degree to which equality and diversity requirements are specified and incorporated within procurement documentation will vary according to the goods, services or works being purchased and should be assessed on a case by case basis. This will ensure that full consideration is given to the needs of, and the likely impact on, all users and others who will be affected by the contract.

Further information on equality legislation, including guidance on the public sector equality duties, can be found on the Equality and Human Rights Commission (EHRC) website:

<http://www.equalityhumanrights.com>

12 Health and Safety

The degree to which health and safety requirements are specified within procurement documentation will vary according to the goods, services or works being purchased. For example, particular health and safety legislation applies in the context of construction. The potential health and safety risks arising from a contract should be assessed on a case by case basis. Contracting authorities should ask suppliers to provide evidence to demonstrate that their organisation complies with current health and safety legislation and actively promotes and manages good health and safety practice. Where particular health and safety risks are identified, suppliers should be asked as part of the procurement process to provide information on the measures that they would put in place in response to the identified risks. Contracting authorities should monitor contracts to ensure compliance with health and safety requirements.



13 Freedom of Information and Data Protection Act

In relation to public procurement, the Freedom of Information (Scotland) Act 2002 provides a general right of access to information about all public contracts and procurement activity held by contracting authorities, subject to certain conditions and exceptions. It also imposes a duty on contracting authorities to adopt and maintain a scheme for the publication of information. Organisations must comply with the provisions of the 2002 Act when responding to requests for information about public sector procurement. SPD has produced guidance on responding to such requests:

<http://www.scotland.gov.uk/Resource/Doc/1265/0006892.pdf>

Annex A of the guidance provides examples of the main classes of procurement information that contracting authorities may be asked to disclose.

The above guidance also provides advice on responding to an individual's request under the Data Protection Act for information held about that individual.

Organisations should bring any complex issues relating to requests under the Freedom of Information Act or Data Protection Act to the attention of SPD. This will allow SPD to determine if wider dissemination across the procurement community is appropriate.

14 Innovation

The procurement of innovative goods, services and works by contracting authorities can contribute to improvements in the quality and delivery of public services and lead to growth in the Scottish economy by encouraging suppliers to invest in and deliver pioneering solutions to current and future public service needs. Contracting authorities should identify their needs (often through consultation with service users and their representative bodies) without always identifying an appropriate solution, although for highly technical equipment reference to standards or benchmarks is also important²³. In many circumstances it may be more appropriate to ask the market what solutions are currently or potentially available prior to advertising a contract. This encourages suppliers to be creative in the potential solutions they come up with, in turn, informs the decisions of contracting authorities as to when and how to procure the best available solutions to their particular needs. Market sounding can be beneficial as a long term strategy, even where the purchaser does not intend to carry out a procurement in the immediate future.

There are different ways of testing the market, such as the publication of a Prior Information Notice (PIN) in the Official Journal of the European Union (OJEU). However, it should be remembered that even at this early stage, all potential tenderers must be treated equally. This may mean, for higher value contracts, that any market sounding is carried out on an EU-wide basis.

Contracting authorities should also take full advantage of the more flexible procurement procedures available in the Regulations where the Regulations permit them to do so. For example, the competitive dialogue procedure, which can only be used for the award of complex contracts, allows scope for early discussion with suppliers to determine how their solution meets the needs expressed. In addition, contracting authorities can procure works for purely research and development purposes using the negotiated procedures. This allows them to test the suitability of new designs and materials for future use.

When it comes to publishing a contract notice and drawing up the contract documents, specifications should be expressed in terms of outputs/outcomes and performance. Describing what is to be achieved rather than specifying how it should be done will maximise the scope for the tenderers to propose innovative solutions.

Guidance on market engagement and developing “outcome” specifications is available from the Scottish Public Procurement Toolkit:

<http://www.scotland.gov.uk/Publications/2006/11/16102303/whatshouldbeinaspec#a2>

²³ Technical specifications must comply with Regulation 9, The Public Contracts (Scotland) Regulations 2006 and Regulation 12 of The Utilities Contracts (Scotland) Regulations 2006.

15 Business processes

15.1 Purchasing authority

No member of staff may award a contract²⁴ without written delegated purchasing authority. This delegated authority to commit to a contract (purchasing authority) is entirely separate from delegated budgetary authority, including that detailed in individual financial responsibility statements.

15.2 Separation of duties

In any procurement process, the key roles of budget holder and purchaser should not be performed by the same individual. The budget holder should have authority to commission goods, services or works and to provide financial authority for the expenditure. The purchaser should have authority to commit the organisation to a contract for the purchase of goods, services or works.

Separation of these roles within a procurement process provides necessary safeguards against impropriety or unethical practice. Accountable officers are required to ensure that procedures exist that allow only those staff with appropriate purchasing authority to commit the organisation to a new contractual relationship.

15.3 Ordering and payment procedures

All valid invoices should be paid on time. All public sector organisations are bound by the Late Payment of Commercial Debts (Interest) Act 1988, under which suppliers have a right to claim interest on payments made outside the agreed terms, or 30 days after receipt of a valid invoice where no payment terms are agreed. Where there is no contractual provision or other understanding to the contrary, suppliers should therefore be paid within 30 days of receipt of a valid invoice or similar correct and due demand for payment.

The payment of invoices that do not have a pre-requisite contract or order for the goods, services or works provided tends to facilitate unofficial buying by allowing the procurement function to be bypassed. It also means that authority to procure is retrospectively given rather than pre-approved. Therefore, suppliers should be given notice that goods, services and works should only be provided on receipt of appropriate contract or order reference information and within that same written notice informed that invoices received without contract or authorised order references will require special approval if they are to be paid. At a later and appropriate point in time invoices received without a pre-approved contract or order number should be returned to suppliers for this information. The payment cycle should not commence until a valid invoice with all required data is received.

Procurement arrangements should be reviewed periodically to consider whether ordering and payment procedures could be streamlined and value for money improved through implementation of relevant technology solutions, including e-procurement.

²⁴ All contracts should be made in writing unless there are exceptional circumstances. In this context, it is worth noting that a verbal agreement can create a legally binding contract.

16 Management information and best practice

16.1 Use of management information

Management information is key to making informed decisions in procurement related activities. SPD has developed a management information tool (the Scottish Procurement Information Hub) which analyses spend by organisation, type of goods, services or works procured and the geographical location of suppliers. Organisations should use this information to develop appropriate national, regional and local sourcing strategies and to identify opportunities for collaborative buying.

Public sector procurement organisations can access the management information tool via <http://www.spikescavell.net/>

16.2 Performance measurement and reporting

The *Review of Public Procurement in Scotland* set out a vision of increased efficiency and professionalism through structured collaboration and a national effort to adopt best practice.

To track progress with the reform programme, procurement organisations will need to monitor, manage and report on their performance in a consistent way. A common, core set of National Procurement Best Practice Indicators (BPIs) has been developed to ensure that public procurement in Scotland operates according to identified core values, and to monitor national progress against the priority areas of efficiency, collaboration, compliance, skills and e-procurement.

Best Practice Indicators for Public Procurement In Scotland: Guidance sets out the definition, rationale, calculation method, and expected trend for each BPI. The document is available at:

<http://www.scotland.gov.uk/Publications/2008/05/29141216/0>

The BPIs are not intended to replace any local performance measures that may already be used by individual organisations. Contracting authorities may find it useful to gather additional management information on their business practices in a variety of ways. The BPIs are intended to allow organisations to monitor their progress against the national vision for excellent public procurement practice over time, against their peers, and against national trends. To make reporting and analysis as easy as possible for organisations, a web based reporting tool has been developed alongside the Scottish Procurement Information Hub.

16.3 Best practice

The Scottish Public Procurement Toolkit provides best practice guidance and downloadable templates to assist in the development and implementation of market-facing commodity strategies, which in turn can help deliver improvements in financial, supplier relationship and contract management, priority areas of the Best Practice Indicator project.

The Toolkit provides guidance on the following areas:

- ▶ project start-up and initial analysis, including pre-contract risk assessment;
- ▶ commodity profiling;
- ▶ developing commodity strategies;
- ▶ guidance on EC procurement rules;
- ▶ supplier selection and pre-qualification questionnaires (PQQs);
- ▶ tender preparation, issue and analysis;
- ▶ post tender clarification;
- ▶ contract award and debriefing; and
- ▶ contract and supplier management.

The Toolkit can be found on the SPD website:

<http://www.scotland.gov.uk/Topics/Government/Procurement/Resources/SPDToolkit>

17 Gateway Review

For those parts of the public sector subject to the Scottish Public Finance Manual (SPFM), the Construction Procurement Manual also applies. The Major Investment section of the SPFM and the Construction Procurement Manual both provide mandatory policy and procedures in respect of the Gateway Review of capital projects. Further guidance on Gateway Review is available from the Scottish Government's Centre of Expertise for Programme, Policy and Project Delivery:

<http://www.scotland.gov.uk/Topics/Government/ProgrammeProjectDelivery/Gateway-Review>

In the case of public bodies, including local authorities, which are not subject to the Scottish Public Finance Manual, they should incorporate in their projects (particularly those considered by them to be highly complex or critical to the delivery of their business and services) review or assurance processes at key decision stages, conducted independently from the project team.

18 Supplementary guidance

18.1 Scottish Procurement Policy Notes

SPD produces Scottish Procurement Policy Notes (SPPNs) on an ad hoc basis on current procurement policy issues. SPPNs are circulated widely to Scottish public sector organisations and are also published on the SPD website. SPPNs supplement the policy guidance in this Handbook. Every contracting authority should ensure that it keeps up to date with and takes appropriate action in response to policy developments disseminated via SPPNs.

SPPNs can be found on the SPD website:

<http://www.scotland.gov.uk/Topics/Government/Procurement/policy/manual/policy-notes>

18.2 Scottish Procurement Action Notes

SPD also produces Scottish Procurement Action Notes (SPANs) on an ad hoc basis. One use of SPANs is to alert organisations to recent court decisions which do not influence procurement policy but which are nonetheless of interest to procurement professionals. SPANs are circulated widely to Scottish public sector organisations and are also published on the SPD website:

<http://www.scotland.gov.uk/Topics/Government/Procurement/policy/manual/SPAN>

18.3 Scottish Procurement Directorate website

The SPD website has a section dedicated to procurement policy:

<http://www.scotland.gov.uk/Topics/Government/Procurement/Policy>

18.4 Policy Forum

Membership of the Policy Forum comprises key stakeholders from each sector and representatives from each sectoral Centre of Expertise (COE). Its purpose is to advise on and support the development of new procurement policy. It will be consulted on all major policy development issues.

Further information on the Policy Forum has been published on the SPD website:

<http://www.scotland.gov.uk/Topics/Government/Procurement/policy/procurepolicyforum>

Annex A

Procurement Centres of Expertise

Procurement Scotland

Procurement Scotland is responsible for all national (Category A) contracts.
<http://www.procurement.scotland.gov.uk>



Central Government Centre of Procurement Expertise

Central Government Centre of Procurement Expertise (CGCoPE) is the procurement centre of expertise for Central Government departments, its agencies and NDPBs.

<http://www.cgcopecotland.gov.uk>



Scotland Excel

Scotland Excel is the procurement centre of expertise for local authorities.
<http://www.scotland-excel.org.uk/>



National Procurement, NHS National Services Scotland

National Procurement (NP) is the procurement centre of expertise for all NHSScotland organisations.

http://www.nhsnss.org/pages/divisions/national_procurement.php?id=30



Advanced Procurement for Universities and Colleges

Advanced Procurement for Universities and Colleges (APUC) is the procurement centre of expertise for Scotland's 62 universities and colleges.

<http://www.apuc-scot.ac.uk/home.htm>



Acknowledgements

The Scottish Procurement Directorate would like to thank all members of the Procurement Policy Forum, and others who have participated on this project, in particular:

David Alexander – Stevenson College Edinburgh

Gordon Beattie – NHS Greater Glasgow and Clyde

Ian Burdon – eProcurement Scotl@nd

John Cosgrove – Fife Council

Dorothy Cowie – Scotland Excel

Richard Dennis – Finance Directorate, Scottish Government

Neil Dickson – Visit Scotland

Calum Elliot – National Procurement Centre of Expertise

Colin Elliott – Stirling University

Helen Foster – Advanced Procurement for Universities and Colleges

Charlie Fisher – Construction Advice and Policy Division, SPD

Dick Gill – Audit Scotland

Ashley Gould – Highland Council

Barry Graham – Central Government Centre of Procurement Expertise

Lesley Horne – Association of Directors of Social Work Contracts and Commissioning Group

Ian Kelly – Strathclyde Police

Tommy Mann – Chief Fire Officers Association (Scotland)

Stephen McDonagh – Chief Fire Officers Association (Scotland)

Jim Miller – National Procurement, NHS National Services Scotland

David Wares – Scottish Prison Service

Alistair Wyllie – Construction Advice and Policy Division, SPD

Judith Young – Greener Scotland Division, Scottish Government

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This document is also available on the Scottish Government website:
www.scotland.gov.uk

RR Donnelley B58642 12/08

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ISBN 978-0-7559-5953-2



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