

## Responses to stakeholder engagement

On the 22<sup>nd</sup> October 2020, the Scottish Government and the other administrations began the technical stakeholder engagement phase for the public procurement common framework.

Annex A contains the list of the Scottish Government's stakeholders who were asked to provide comments as well as the comments we received back. These stakeholders represent those who the Scottish Procurement & Property Directorate typically engages with, as well as the Scottish counterpart organisations to those which the other Administrations planned to engage with. Annexes B and C have the documents which were sent to stakeholders as part of this engagement.

Six stakeholders responded; 3 to say they were content with the draft Framework and 3 had some more detailed comments:

Some points relating to the Procurement Common Framework are as follows:

- It is a technical document which sets out the agreed ways of working between the four administrations of the United Kingdom on procurement issues which were previously governed by EU Directives. It recognises that procurement is a devolved matter.
- It is not the forum for the development of procurement policies. Each of the Administrations will continue to develop and publish their own policies for procurement, and the Common Framework provides the vehicle to discuss those policies. The Administrations will ensure that they give full and proper consideration to each other's views and will endeavour to achieve consensus in areas of mutual interest without prejudice to the respective competence of each of the Administrations.
- Some of the Scottish procurement regulations (such as the Procurement Reform (Scotland) Act 2014) are not in scope of this common framework. This is due to the fact that they were not in scope of the EU Procurement Directives.
- The common framework is not a legally binding document but Ministers have agreed to use the common framework to agree common ways of working. The framework's dispute resolution process is a roadmap as to how disputes between administrations may be resolved at the lowest possible level.
- Policy officials from each of the four administrations are working to develop the procurement common framework with a view to having it finally agreed by Ministers and approved by parliament.

There are currently no plans for future stakeholder engagement.

## Annex A

### Summary of technical stakeholder engagement

Stakeholders were sent the two word documents as part of the Technical Stakeholder Engagement Phase: a document explaining what common frameworks are (annex B) and the summary of the common framework (annex C). The list below outlines the stakeholder who were invited to provide comments, the stakeholders who responded and, of the stakeholders who responded, a copy of their comments along with a brief summary of what their comments were.

Stakeholders	Response received?	Summary of stakeholder's comments
Scotland Excel	Yes	Content with the provisional framework.
Scottish Council for Voluntary Organisations	Yes	More reference to the voluntary sector, involvement of the SCVO in future rounds of engagements, raises concerns about the Internal Market Bill.
Advanced Procurement for Universities and Colleges	Yes	Wanted the scope to include WTO members too.
Social Enterprise Network Scotland <i>(formally known as Social Firms Scotland)</i> and Partnership for Procurement	Yes	Provides comments on the scope of the common framework in terms of shared objectives, reconciling divergences and relating policy to practice.
Confederation of British Industry (Scottish branch)	Yes	Acknowledged the benefits of greater engagement between the different administrations. Were unsure how the common framework interacts with devolved legislative structures for procurement, questions around the operation of the framework particularly as it is not legally binding.
Transport Scotland	Yes	Notes that the Procurement Reform (Scotland) Act 2014 and the Procurement (Scotland) Regulations 2016 are out of the scope of the Common Framework for Public Procurement. Wants to know what the status of these regulations.
Convention of Scottish Local Authorities	No	
Society of Local Authority Chief Executives and Senior Managers	No	
Utilities bodies e.g. UK Major Ports Group & British Port Association Airport Operators Association  Scottish Ports (Represents 35 port members in Scotland).	No	
Scottish Chambers of Commerce	No	

Federation of Small Business (Scotland)	No	
Institute of Directors (Scotland branch)	No	
NHS National Services Scotland	No	
Scottish Council for Development and Industry	No	
Coalition of Care and Support Providers	No	
Supplier Development Programme	No	
Scottish Water	No	
Scottish Federation of Housing Associations	No	
Business Services Association	No	
British Association for Supported Employment – Scotland	No	

## Annex B What are common frameworks?



### What are common frameworks?

At the end of the transition period, powers previously exercised at an EU level that intersect with devolved competence will flow directly back to Scotland, Wales and Northern Ireland. In some of these areas, which range from farming to fishing, health to transport, the UK Government, Scottish Government, Welsh Government and the Northern Ireland Executive agree that it is necessary to maintain UK-wide approaches. In these areas we are working together to develop UK common frameworks.

Each policy area has been carefully considered. In some areas it will be beneficial for each nation of the UK to work in a way befitting of that part of the country, potentially differing from a UK-wide approach. However, in other areas it is agreed that we will need to continue to work together on a UK- or GB-wide basis in order to protect our economy and give maximum certainty to businesses, consumers and our international partners. These are the areas in which frameworks are being created.

### What will common frameworks do?

In order to realise the benefits of EU exit, the different nations of the UK will work together to ensure that we maintain necessary, consistent, and easy to understand rules and regulations for our citizens, consumers, businesses and trading partners.

Frameworks will allow our governments to work together effectively to manage areas where different policies emerge, ensuring there is minimal undesirable impact on citizens and businesses.

Frameworks will enable the effective functioning of the UK internal market. They will make shopping and use of services straightforward for UK citizens, ensuring day-to-day life and work is not burdened by additional regulations. They will give businesses a clear set of rules for working across the UK and they will give our international trading partners certainty as they enter into trade agreements with us.

### How are frameworks being developed?

Frameworks are truly a joint endeavour. All frameworks are being developed collaboratively and by agreement between the four governments of the UK, underpinned by principles of good communication, consultation and cooperation.

Frameworks will vary in the policy areas that they cover and in how complex or detailed they are. Individual frameworks may require different types of legislative or non-legislative arrangements to enable them to function, and each framework will be flexible enough to meet the needs of each nation.

UK-wide legislation may be used if necessary, for example the Fisheries framework will rely on legislation within the Fisheries Bill, however the UK Government and devolved administrations agree that the vast majority of frameworks will be best implemented through non-legislative arrangements such as formal agreements between Ministers.

### Where can I find out more?

As a stakeholder who may be affected by or who has expertise in a framework which is currently in development, we are now inviting you to learn more about and feedback on policy decisions that are being made within that framework. This is your chance to directly

influence policy that may impact upon you and your business or organisation. You will find more information on the specific framework and how to ensure your voice is heard on the accompanying documents in the email you have received.

For further information on common frameworks, the UK Government publishes the EU (Withdrawal) Act and Common Frameworks report every quarter. The Framework Analysis Report was published in September 2020. It can be found on the gov.uk website.

Please contact [frameworks.engagement@cabinetoffice.gov.uk](mailto:frameworks.engagement@cabinetoffice.gov.uk) for further details.

# Summary of proposed Common Framework for Public Procurement, for which Cabinet Office and the devolved administrations hold policy responsibility

## Introduction

Officials from the UK Government (UKG) and the Devolved Administrations (DAs) have been jointly developing a UK-wide Common Framework for Public Procurement. This paper summarises those jointly developed proposals.

The purpose of this summary is to communicate the progress made so far on the development of joint working across the UK, following our exit from the European Union.

## Background on Common Frameworks

EU law currently creates a consistent legal framework across the UK in a range of policy areas that are devolved. As the UK leaves the European Union the four UK administrations have agreed to work together to establish common approaches, known as Common Frameworks, in these policy areas.

Frameworks may consist of: common principles or goals, a collective evidence base, harmonisation, limits on action, mechanisms for coordination and cooperation or mutual recognition, depending on the policy area and the objectives being pursued. Frameworks being developed across government may be implemented in a number of ways, including legislation, executive action, Concordats, or other means depending on the context in which the framework is intended to operate. These common frameworks provide a number of benefits, including making it simple for businesses from different parts of the UK to trade with each other thereby enabling a functioning UK internal market, and helping the UK to fulfil its international obligations.

The Joint Ministerial Committee (EU Negotiations) (JMC(EN)) on 16 October 2017 agreed on a set of [principles](#) (Annex A) that would determine the creation of common frameworks.

For further information on common frameworks, please refer to the UK Government's statutory reports and the Revised Frameworks Analysis Report:

- First Parliamentary Report: [The European Union \(Withdrawal\) Act and Common Frameworks Report \(26th June 2018 to 25th September 2018\)](#)
- Second Parliamentary Report: [The European Union \(Withdrawal\) Act and Common Frameworks Report \(26th September 2018 to 25th December 2018\)](#)
- Third Parliamentary Report: [The European Union \(Withdrawal\) Act and Common Frameworks Report \(26th December 2018 to 25th March 2019\)](#)
- Fourth Parliamentary Report: [The European Union \(Withdrawal\) Act and Common Frameworks Report \(26th March 2019 to 25th June 2019\)](#)
- Fifth Parliamentary Report: [The European Union \(Withdrawal\) Act and Common Frameworks \(26 June 2019 to 25 September 2019\)](#)
- Sixth Parliamentary Report: [The European Union \(Withdrawal\) Act and Common Frameworks \(26 September 2019 to 25 December 2019\)](#)
- Seventh Parliamentary Report: [The European Union \(Withdrawal\) Act and Common Frameworks \(26 December 2019 to 25 March 2020\)](#)
- Eighth Parliamentary Report: [The European Union \(Withdrawal\) Act and Common Framework \(26 March 2020 to 25 June 2020\)](#)
- [Revised Frameworks Analysis Report \(Sept 2020\)](#)

## Public Procurement Common Framework

Public Procurement was one of 78 policy areas identified in the Frameworks Revised Analysis, published in April 2019, where it was determined that common rules or ways of working would be needed, and where this could be implemented through a non-legislative common framework agreement (e.g. a concordat).

It has been agreed across all four administrations that it is desirable to maintain a close collaboration in development of Public Procurement policy. Officials have worked together to draft an 'Outline Framework' document. This paper summarises the areas that have been agreed in principle. It should be noted that these proposals are without prejudice to the views of Ministers. Annex B sets out the definitions for any abbreviations used within this paper.

It should be noted that the Public Procurement framework would respect the devolution settlements<sup>1</sup>, as well as all established constitutional conventions and practices where relevant, to ensure that the decision-making powers of Ministers of the DAs are protected.

The Public Procurement Framework would also work consistently with the common frameworks principles agreed at JMC (EN) (Committee's Communiqué of 16 October 2017 – see Annex A).

The framework is still in the policy development stages, and as such there are aspects which are still under discussion, specifically around the internal market and international agreements. These aspects will be included in the final framework, once they have been agreed between the Parties involved, and thereafter by Ministers. An outline to the development stages is included here at Annex C.

It is anticipated that provisional agreement to the Public Procurement Framework will be sought at JMC(EN) towards the end of 2020, after which the framework can be implemented. This would be followed by revision, as necessary. As revised consideration of key cross-cutting issues such as domestic governance will continue after the transition period prior to finalisation of the framework.

## Scope of Framework

The scope of the Public Procurement Framework extends to all areas of Public Procurement policy currently harmonised at EU level. The EU procurement directives have been transposed into UK law by a series of regulations (“the Procurement Regulations”):

- the Public Contracts Regulations 2015;
- the Concession Contracts Regulations 2016; and
- the Utilities Contract Regulations 2016;

In Scotland the following regulations apply:

- the Public Contracts (Scotland) Regulations 2015;
- the Concession Contracts (Scotland) 2016; and
- the Utilities Contracts (Scotland) Regulations 2016.

or as they are amended from time to time.

These regulations were transposed from the following EU Directives:

2014/23/EU Concession Contracts Directive 2014

2014/24/EU Public Contracts Directive 2014

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<sup>1</sup> The Acts of Parliament dealing with devolution: the Scotland Acts 1998, 2012 and 2016, the Government of Wales Act 1998 and 2006 and Wales Act 2014 and 2017, and the Northern Ireland Act 1998.



2014/25/EU Utilities Contracts Directive 2014  
89/665/EEC Remedies Directive as amended by 2007/66/EC

The procurement regime provides rules for the procurement of goods, services and works above certain thresholds by public authorities and utilities, unless they are otherwise excluded from the scope of the Regulations. It also regulates the process for awarding concession contracts above certain thresholds made by public authorities and utilities. It provides decisions on what constitutes a regulated utility, and Implementing Regulations for standard forms and notices including the European Single Procurement Document (ESPD).

The Directives provided a framework based around the treaty principles of equal treatment, non-discrimination, proportionality, transparency.

There is flexibility within the rules for Parties to transpose differently under the current regime, however they have not diverged significantly when transposing the Directives. Each of the Parties publish their own policies for procurement. It is not considered likely that new procurement policies and legislation, which result in increased divergence, would negatively impact on the functioning of the UK internal market.

Public procurement is governed by legislation and seeks to align itself with other policies/principles where appropriate and proportionate including, but not limited to-

- [Anti-corruption strategy 2017-2022](#)
- Value for public money principles (see HMT [Managing Public Money](#) , WG [Managing Welsh public money](#), [Scottish Public Finance Manual](#), [NI Public Expenditure Guidance](#))
- [Transparency policy](#) , [Welsh government Publication Scheme](#), [Scottish Procurement Open Contracting Strategy](#), [NI Publication Scheme](#)
- Social value/wellbeing legislation e.g. Wellbeing for Future Generations Act 2015, [Northern Ireland Public Procurement Policy](#)<sup>2</sup>, [UKG Public Procurement Policy](#)<sup>3</sup>, [Scottish Government's National Performance Framework](#)<sup>4</sup>.
- Public sector duties/code of conduct/[Corporate Governance Code](#)/[Open government](#)
- Government funding policies
- CIPS membership requirements – eg License to Practice/Ethics module

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<sup>2</sup> <https://www.finance-ni.gov.uk/topics/procurement/public-procurement-policy-northern-ireland>

<sup>3</sup> <https://www.gov.uk/government/collections/procurement-policy-notes>

<sup>4</sup> <https://nationalperformance.gov.scot/>

## Out of Scope

Areas that are out of scope are:

- Procurement Reform (Scotland) Act 2014 and Procurement (Scotland) Regulations 2016.
- Procurements below the WTO/GPA threshold are not in-scope of the Common Framework, and can be tailored to the policies of each Administration.
- contract award procedures which were, prior to the UK's exit from the EU, covered by the Defence and Security Public Contracts Regulations 2011.
- award procedures in respect of contracts which would, immediately prior to exit day, have been otherwise excluded from the scope of the Procurement Regulations.

## Summary of Proposed Approach

It is proposed that the Common Framework will be implemented by a multilateral Concordat which will be signed at Ministerial level in each government.

Specifically, the Public Procurement framework will cover:

1. Consultation and exchange of information;
2. Development of policies and legislation;
3. World Trade Organisation Government Procurement Agreement (WTO GPA) business;
4. International agreements;
5. Procurement related proceedings; and
6. Resolution of disputes

The Public Procurement framework is intended to guide the actions of the Parties (see definitions in Annex B) in respect to these matters, in particular the actions of officials working on procurement policy.

With due regard to the democratic accountability of the UK Parliament and the devolved legislatures, in a way that respects the devolution settlements, the Common Framework will ensure that decision making in relation to public procurement is carried out consistently with the principles agreed at the Joint Ministerial (EU Negotiations) Meeting (JMC (EN) Communique of 16 October 2017). Such decision making should ensure adherence to the UK's international agreements and enable the functioning of its internal market, while acknowledging policy divergence, and respecting devolution and the democratic accountability of all the legislatures.

The Parties will ensure that they give full and proper consideration to each other's views and will endeavour to achieve consensus in areas of mutual interest without prejudice to the respective competence of each of the Parties. The Parties undertake to conduct their relationship on a "no surprises" basis. The Parties also agree to the

need for confidentiality of discussions, without which it would be impossible to maintain such close working relationships.

To ensure that matters falling within the responsibility of the UK Government which may affect matters falling within the responsibility of the devolved administrations (and vice versa) are considered fully, Ministers and officials of each of the Parties will maintain close working relationships and will inform each other at an early stage of any relevant proposals or other developments at international and domestic level on, or affecting public procurement, including any proposals to legislate or litigation of potentially wider significance.

## Governance and Ways of Working

In considering any new such policies relating to public procurement, and any proposals to legislate, the Parties commit to work consistently with the Frameworks Principles agreed at JMC(EN). The Parties will also maintain principles of non-discrimination, equal treatment and transparency in respect of economic operators from the UK.

The Parties acknowledge that contracting authorities and UK businesses can benefit from consistent approaches to public procurement policy and regulation and will therefore, where it is deemed advantageous, seek to identify common approaches in these areas. Any common approach will be subject to agreement between the Parties. The Parties reserve the right to develop policies and regulate independently in accordance with their respective competence where they consider it appropriate.

Where one or more of the Parties does identify an area in which they wish to take a policy or regulatory approach which is different in substance from that taken by the other Parties, they should assess the impact of that approach on the other Parties and its compatibility with the Frameworks Principles. In accordance with the mechanisms set out in the Common Framework, where such an approach is likely to impact upon another of the Parties, the party or Parties will notify and consult the other Parties in respect of their intended action. Should any of the Parties object to the action in question on the grounds that it is contrary to the provisions set out in the Common Framework, the Parties will endeavour to identify a mutually acceptable approach which would achieve an equivalent, or preferably identical, outcome. If no mutually acceptable resolution is found, the objecting party or Parties may initiate the formal resolution procedure set out in the Common Framework.

Decisions will be tracked through the sharing of minutes of the meetings and documented in the Framework Agreement. They will also be tracked by an official level working group, which will include representatives from each of the Parties. Individual administrations will clear any amendments/updates to the Common Framework through their own processes.

## Dispute Prevention and Dispute Resolution

A difference may arise in cases where one or more of the Parties consider that another of the Parties has taken or intends to take an action which does not adhere to the provisions set out in the Common Framework. This is termed a 'disagreement'. A disagreement between Parties of this Common Framework becomes a 'dispute' when it enters the formal dispute avoidance and resolution process set out in the overarching MoU on Devolution that is currently under review.

The main intention of the Common Framework is to provide a framework for full and proper consultation and cooperation. The Parties intend that this will minimise the chances of disagreements and disputes occurring. Where differences do arise, the Parties should endeavour in good faith to resolve them at the earliest and lowest possible level, through the general framework for consultation set out in the Common Framework, with the involvement of senior officials if necessary, to avoid unnecessary escalation and the invoking of the dispute resolution mechanism in the overarching MoU on devolution.

If it is not possible to resolve a difference at the lowest level, a formal disagreement may be triggered by one or more of the Parties. In such a case, the complaining party or Parties will notify the other Parties in writing, detailing the disagreement and establishing the reasons for invoking the Common Framework's formal resolution process. This mechanism will be utilised only when genuine agreement cannot be reached and divergence would impact on the ability to meet the Common Frameworks principles.

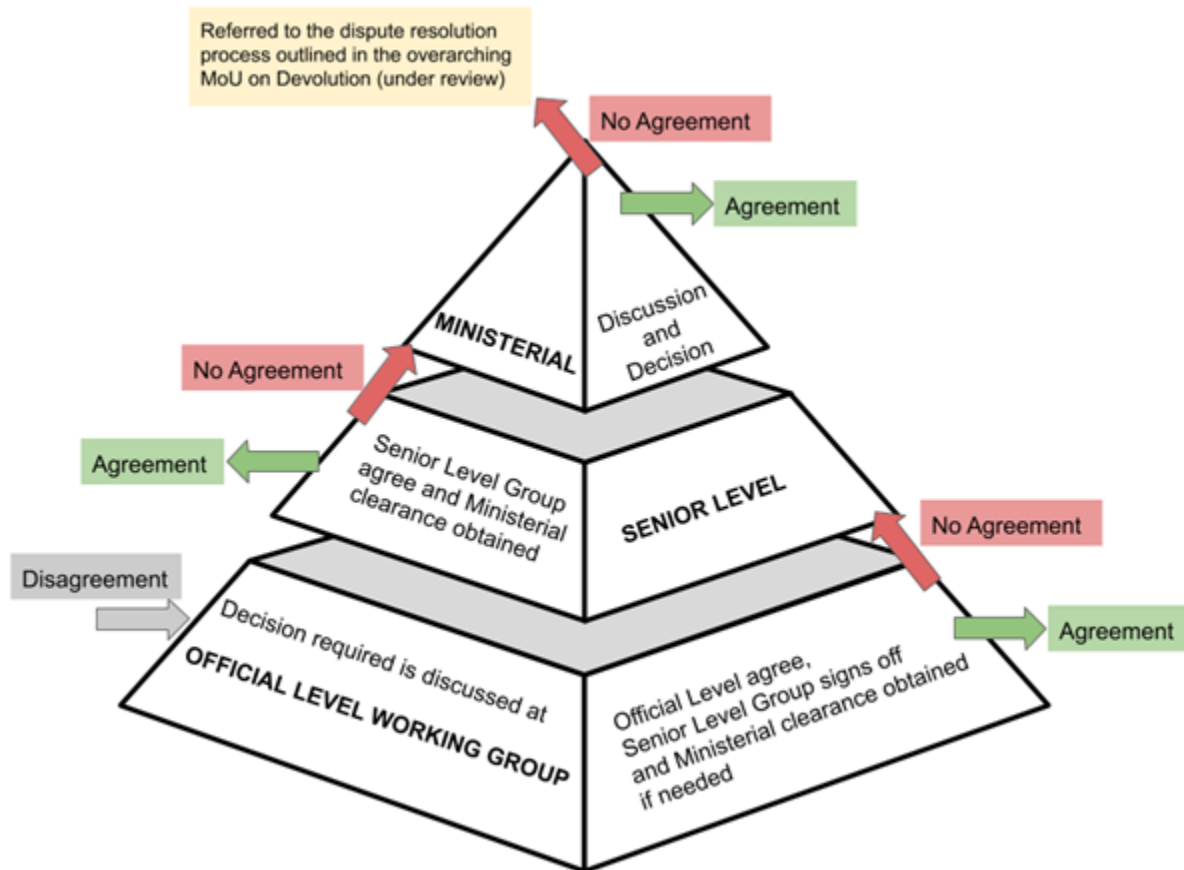
In the first instance, a meeting will be convened involving officials from each of the Parties, in addition to representatives of Cabinet Office's Governance Group and, if appropriate, the Parties' respective legal departments. The purpose of such a meeting will be to identify a course of action acceptable to all of the Parties, in accordance with the mechanisms and principles set out in the Common Framework and the MoU. If no mutually acceptable resolution is identified during this meeting, a further meeting of senior officials, at director or deputy director level, will be convened with a view to identifying a mutually acceptable resolution.

In the unlikely event that senior officials are unable to find a mutually acceptable resolution, the disagreement may be escalated to the Parties' respective Ministers, who will provide a steer to their officials for further engagement. At this point or subsequent to this, Ministers may also, subject to mutual agreement, choose to engage informally at pre-existing Ministerial fora or to convene a formal quadrilateral meeting.

Where no satisfactory resolution is found regarding a disagreement, despite the best endeavours of the Parties to do so via the procedures set out in the Concordat, then

a formal dispute may be referred to the JMC(EN) in accordance with the relevant procedures set out in the MoU.

The below diagram states the levels of escalation of a disagreement to a dispute and the interaction between each level:



### Pre-existing Divergence

- The Procurement Reform (Scotland) Act 2014 and Procurement (Scotland) Regulations 2016 apply in Scotland but not the rest of the UK.
- Part 4 of Public Contracts Regulations 2015 does not apply to Contracting Authorities undertaking mainly or wholly devolved functions.
- Public Contracts Regulations 2015 require award criteria based on most economically advantageous tender, and does not exclude the use of price only. Public Contracts (Scotland) Regulations 2015 stipulate that a contracting authority may not use price only or cost only as the sole award criteria.
- Public Contracts (Scotland) Regulations 2015 do not include the provision to allow contracting authorities to reserve participation in certain procurement competitions to mutuals and other similar entities. The Public Contracts Regulations do contain this option.

- Public Contracts (Scotland) Regulations 2015 contain an additional mandatory exclusion where the contracting authority is aware that the economic operator has committed an act prohibited under the Employment Relations Act 1999 (Blacklists) Regulations 2010 (and the commission of such an act has been admitted by the economic operator or established by a judicial decision having final and binding effect).
- Various aspects of remedies regime vary between the two sets of Regulations.

## NEXT STEPS

UKG and DA officials will continue to work together to refine and draft the Outline Framework and Concordat, taking into account any useful feedback gained from engagement, review and assessment. The phases of development are outlined in Annex C.

### Questions

1. Do you agree with the scope we have set out for this framework, and the exclusions?
2. Do you agree that the proposals meet the requirements of the JMC (EN) Principles (Annex A)?