



PAYMENT PERFORMANCE IN THE SCOTTISH PUBLIC SECTOR

Extent of compliance with the Procurement Reform (Scotland) Act 2014

*Contracting Authorities' Statutory Duty to
include Measures in their Procurement
Strategies to Ensure 30 Day Payments to
Firms in the Supply Chain*

September 2017

About SEC Group Scotland

SEC Group Scotland is an umbrella body representing the construction industry's premier trade associations with member firms involved in the specialist engineering sector of the construction industry. This is the largest sector in the industry (by value). The overwhelming majority of firms are SMEs. The trade associations in SEC Group Scotland are:

British Constructional Steelwork Association

Building Engineering Services Association

Lift and Escalator Industry Association

SELECT (Electrical Contractors' Association of Scotland)

Scottish and Northern Ireland Plumbing Employers' Federation

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Introduction

As a sector construction suffers more from the problems of late payment, non-payment and other forms of payment abuse than any other industry sector.

“Payment to main contractors from public sector clients is only a small part of the problem, however. There is an endemic culture of extended payment terms in the construction industry (which is not necessarily the same thing as late payment), particularly from larger (tier 1) contractors, to sub-contractors.”

The above extract is taken from the Review of Scottish public sector procurement in construction published on 22 October 2013. One of the recommendations (at paragraph 6.8.19 in the Review) was that:

“Public sector clients need to ensure that there is a clear understanding between those involved in pre-contract award stage and those involved in delivery on the public sector requirement for fair payment.”

Since the Review was published there have been two significant developments. The first was the Procurement Reform (Scotland) Act 2014 which introduced an obligation on contracting authorities to introduce measures in their procurement strategies to ensure 30 day payments **along the supply chain**. The second was the Scottish Government's requirement that, after 31 October 2016, Scottish Government bodies must use project bank accounts for all new building contracts with an estimated value of £4,104,394 (£10 million for civil engineering contracts). This followed the successful trialling of project bank accounts (which was an early implementation of one of the recommendations in the Review).

This short report is based on research carried out by the Specialist Engineering Contractors' (SEC) Group Scotland over May/June 2017, using the Freedom of Information (Scotland) Act 2002. The research aimed to discover the extent to which contracting authorities (other than local authorities) in Scotland were taking steps to ensure that sub-contractors (tier 2 contractors) and sub-sub-contractors (tier 3 contractors) were being paid within 30 days. The majority of respondents were NHS bodies and universities.

The report is part of an on-going effort by SEC Group Scotland to improve payment performance in the construction industry in Scotland. Improved velocity of cashflow along the supply chain enables SMEs to invest in training and skills and the new technologies that, together, help businesses to grow. This, in turn, adds significant value to the communities in which they are based and to the economy as a whole through improved productivity. Moreover, as far as public sector procurers are concerned, they can be better assured that their investment in construction and infrastructure will have an immediate impact on the supply chain which, at the level of tiers 2 and 3 contracting, deliver the overwhelming bulk of project value.

Under the Procurement Reform (Scotland) Act 2014 the Scottish Government has to produce an annual report on procurement activity. To help inform such report, this report will be sent to Derek Mackay, Cabinet Secretary for Finance and the Constitution and to Paul Wheelhouse, Minister for Business, Innovation and Energy.

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Executive Summary

- 1.1 This short report is based on a survey of Scottish contracting authorities (other than local authorities) using the Freedom of Information (Scotland) Act 2002. The survey was conducted over May/June 2017. There were 29 respondents, mainly universities and NHS bodies, but also including Police Scotland and the Scottish Fire and Rescue Service. The information relating to one authority, Disclosure Scotland, was obtained from their website. At Annex 1 to this report is a schedule listing the individual responses.
- 1.2 The survey was directed at establishing the extent of compliance with section 15 (5)(d) of the Procurement Reform (Scotland) Act 2017. This provision requires contracting authorities to set out in their procurement strategies (where they are bound to publish a procurement strategy) how they intend to ensure 30 day payments to sub-contractors in the supply chain.
- 1.3 The statutory guidance accompanying this Act (the relevant extract is at Annex 2) advises on the measures to be undertaken. Four measures are envisaged:
- 30 day payment clauses to flow into tiers 2 and 3 contracts;
 - The contracting authority to reserve a right to obtain information on supply chain payment performance;
 - A procedure for rectifying prompt payment issues; and
 - A monitoring process.

The use of the phrase “**reasonably practicable**” in section 15 (5)(d) suggests that there should be a proportionate response in relation to each of these measures but they should all be considered so that the aim of securing 30 day payments in supply chain contracts is actually achieved. In fact use of the phrase “**reasonably practicable**” may have introduced some uncertainty in the implementation of section 15 (5)(d).

- 1.4 Simply having a flow-down of 30 day payments into supply chain contracts without any performance monitoring is not full implementation of section 15(5)(d). **The wording in this provision (particularly the use of the word “ensure”) implies that procurement strategies show some level of proactivity that actually delivers 30 day payments along the supply chain and addresses those instances where this hasn’t happened.**
- 1.5 We considered that **nine** contracting authorities (31% of respondents) had generally complied with section 15(5)(d). This was often done by including a term in tier 1 contracts that required the contractor to insert 30 day payment terms in supply chain contracts with some level of monitoring of actual payment performance taking place.
- 1.6 From the evidence provided by **four** contracting authorities (14% of respondents) we weren’t sure whether the measures they had undertaken were sufficient to comply with the legislation. **Three** authorities (10% of respondents) still had to take steps to comply.
- 1.7 Unfortunately **thirteen** contracting authorities (45% of respondents) had failed to comply with section 15 (5)(d). Many assumed that it was sufficient that they had 30 day payment clauses in their contracts with their tier 1 contractors. Others simply set out

their payment procedures or stated that implementation will be considered on a contract by contract basis.

- 1.8 The statutory guidance will require amending to make clear that section 15 (5)(d) also applies to the timeous release of cash retentions.
- 1.9 This report will be presented to Scottish Government which is required under the Procurement Reform (Scotland) Act to report annually on procurement activity. In addition the report makes a number of recommendations as follows:

RECOMMENDATIONS

1. Scottish Government should appoint a “*Construction Regulator*” with powers to proactively challenge non-compliance (a useful model is the Canadian Office of the Procurement Ombudsman).
2. Every contracting authority should have a compliance “hotline” with a named person appointed to deal with complaints about non-compliance with section 15 (5)(d) from supply chains (if necessary on an anonymous basis).
3. Scottish Government is invited to strengthen the statutory guidance by insisting PBAs are used by contracting authorities to comply with section 15 (5)(d) “*unless there are compelling reasons not to do so*”. Such reasons should be published on an authority’s website and, if necessary, capable of being challenged by a Construction Regulator.
4. In any event the statutory guidance should be re-visited to deal with some uncertainty surrounding the use of the phrase, “***reasonably practicable***”, in section 15 (5)(d). It should make absolutely clear that the measures listed at paragraph 2.7 in this Report should be adopted by all contracting authorities but the extent to which each of the measures are implemented should be related to factors such as contract duration and the number of firms engaged as part of the supply chain.
5. Scottish Government is invited to consider introducing a statutory obligation in all construction contracts that payments are discharged within 30 days from invoice or payment application.
6. The statutory guidance should also be amended so that it deals with the release of retention monies. It is suggested that contracting authorities ensure that in all their contracts, and in sub-contracts and sub-sub-contracts that:
 - the first half of retention monies are released on handover of the works;
 - the second half of the retention monies is released within 12 months of handover of the works.

[“*Works*” refers to works coming within the respective tiers 1, 2 and 3 contracts.]

A draft of this report was sent to all the respondent contracting authorities for comment. There were responses from the following:		
University of St Andrews	Robert Gordon University	NHS Greater Glasgow & Clyde
Glasgow Caledonian University	Heriot-Watt University	University of Edinburgh
University of Dundee	Queen Margaret University	University of Strathclyde
We are grateful to them for their comments which have been fully incorporated into this Report.		

PAYMENT PERFORMANCE IN THE SCOTTISH PUBLIC SECTOR

THE PROCUREMENT REFORM (SCOTLAND) ACT 2014

- 2.1 The broad aim of the Procurement Reform (Scotland) Act 2014 was to focus public sector procurement on driving improvements in Scotland's economy by, amongst other things, "*promoting public procurement processes and systems which are transparent, fair and business-friendly*". Furthermore, as part of the sustainable procurement duty under the Act, contracting authorities are required to consider how, in conducting the procurement process, they can "*facilitate the involvement of small and medium enterprises*".
- 2.2 Some of this is evident in sections 15 and 18 of the Act which require contracting authorities with a significant annual procurement spend – equal or greater than £5 million – to publish annually a procurement strategy and report against the strategy.¹ The Act also requires Scottish Ministers, at the end of each financial year, to publish a report on procurement activity in Scotland (based on information in contracting authorities' procurement reports).
- 2.3 Section 15(5) of the Procurement Reform (Scotland) Act 2014 ("the Act") sets out those matters which must, as a minimum, be included within a procurement strategy.² In relation to supply chain payments section 15 (5)(d) states that procurement strategies must:
- "set out how the authority intends to ensure that, so far as reasonably practicable, the following payments are made no later than 30 days after the invoice (or similar claim) relating to the payment is presented –*
- (i) payments due by the authority to a contractor,*
 - (ii) payments due by a contractor to a sub-contractor,*
 - (iii) payments due by a sub-contractor to a sub-contractor."*
- 2.4 The above provision does not **directly** require contracting authorities to "**ensure**" 30 day payments along the supply chain. However it does this **indirectly** through the vehicle of an authority's procurement strategy. **The first issue is whether the processes set out in the strategy will "ensure" that tiers 1, 2 and 3 contractors will receive their due payments within 30 days of invoice or similar claim. The second issue is that compliance cannot be regarded as a matter of inserting the right text in the procurement strategy. Contracting authorities have to demonstrate implementation particularly when reporting against the strategy in their annual reports.**
- 2.5 The statutory guidance advises on the processes to be adopted, but the extent to which each is adopted is subject to '**reasonable practicability**' (which imports a degree of proportionality). Unfortunately it seems that the use of this phrase has also introduced some uncertainty in the extent of implementation required by section 15 (5)(d).
- 2.6 S15 (5)(d) reflects Scottish Government's desire to overcome the widespread problems associated with lengthy payments that are particularly prevalent in the construction industry. The statutory guidance states:

¹ The Act applies to regulated procurements which involve regulated contracts defined as including public works contracts with an estimated value of equal to or greater than £2 million.

² Section 15 came into force on 18 April 2016.

“High quality public procurement is dependent on good practice not only by a contracting authority and its purchasers but also by economic operators. Economic operators need to play their part by.....maintaining the highest possible business standards and ethics, including prompt payment to their sub-contractors.”

- 2.7 The Scottish Government’s Procurement Strategy 2017-2019 states that a 30 day payment clause term must be inserted in all Scottish Government contracts and also in supply chain contracts. The statutory guidance advises that this approach be adopted by contracting authorities in complying with section 15(5)(d). The statutory guidance also advises that there is put in place a monitoring regime:

*“Effective contract management and monitoring should be undertaken to ensure that prompt payment continues to be applied throughout the duration of the contract, for example, by requesting information on prompt payment at **all levels of the contract**. A contracting authority and economic operator should then, where relevant, take any necessary steps to rectify any prompt payment issues experienced.*

A contracting authority should also consider monitoring the prompt payment of sub-contractors, for example, by carrying out spot checks and/or using project bank accounts or trusts, where relevant and proportionate”. (emphasis added)

The full extract from the statutory guidance is attached at Annex 2.

- 2.8 Therefore, according to the statutory guidance, compliance with section 15(5)(d) should, at least, embrace the following measures:

- an obligation to make 30 day payments (after presentation of invoice or similar claim) flow through to tiers 2 and 3 contracts;³
- contracting authorities should have the right to request information on payment performance along the supply chain;
- a procedure for rectifying prompt payment issues;
- a monitoring process to check payment performance in the supply chain utilising relevant and proportionate measures such as spot checks and project bank accounts.

- 2.9 In analysing the responses from the 29 contracting authorities it became apparent that the majority of contracting authorities had not fully considered the measures needed to comply with section 15(5)(d).⁴ Some, if not all, of the above measures were absent from many of the responses. It is acknowledged that factors such as contract duration and the number of firms involved in the supply chain will affect the degree to which these measures will be undertaken but this should be clearly set out in the strategies. Furthermore section 15 (5)(d) states that payments are to be made no later than 30 days from presentation of an invoice or similar claim. Often this was not reflected in the wording of the contracts.

³ The Late Payment of Commercial Debts (Scotland) Regulations already places an obligation on contracting authorities to pay their commercial suppliers within 30 days.

⁴ One of the 29 contracting authorities, Disclosure Scotland, was not sent a Freedom of Information Act request.

THE EXTENT OF COMPLIANCE WITH SECTION 15 (5)(d)

3.1 The questions sent under the Freedom of Information Act were as follows:

Q1: What steps have you taken (in accordance with section 15(5)(d) Procurement Reform (Scotland) Act 2014) to ensure that payments in construction works sub-contracts and sub-sub-contracts are made no later than 30 days after presentation of invoice or similar claim?

Q2: If you haven't taken any steps, please indicate when you intend to take such steps?

The schedule at Annex 1 of this report details the responses received from each contracting authority.

3.2 These are the 13 contracting authorities which we suggest are non-compliant:

- Robert Gordon University
- Orkney NHS Board
- Queen Margaret University
- NHS Greater Glasgow & Clyde
- Police Scotland
- NHS Forth Valley
- NHS Tayside
- Royal Conservatoire of Scotland
- Dumfries and Galloway NHS
- NHS Highland
- University of Aberdeen
- University of Stirling
- Heriot Watt University

3.3 Based on the evidence provided we cannot be absolutely sure that the following 4 contracting authorities are compliant (in many cases because it wasn't clear whether requirements relating to 30 day payments stipulated that the 30 days commenced from presentation of invoice or similar claim; extended to tier 3 contractors; and more critically, whether there was monitoring of actual payment performance):

- University of the West of Scotland
- Glasgow School of Art
- Glasgow Caledonian University
- University of Dundee

3.4 We suggest that the following 9 contracting authorities are generally compliant⁵:

- NHS Fife
- Edinburgh Napier University
- University of Edinburgh
- Scottish Fire and Rescue Service
- University of Glasgow
- Western Isles NHS Board⁶
- University of Strathclyde
- NHS Borders
- Disclosure Scotland

3.5 There were 3 contracting authorities which, although not currently compliant, are taking positive steps to comply:

- Ayrshire & Arran NHS
- University of St Andrews
- NHS Scotland

(In its comment on the draft Report the University of St Andrews stated that it was reviewing its construction contracts so that 30 day payment clauses would cascade through all levels of the supply chain.)

⁵ We use the word "*generally*" because the evidence provided by these contracting authorities showed that they were proactive in implementing section 15 (5)(d) although not necessarily in every respect (e.g. ensuring that the 30 day payment period commenced from presentation of invoice or similar claim).

⁶ The benefit of the doubt was given to Western Isles NHS which explained that the majority of sub-contractors were local firms and there was an "*aspiration target*" to pay them within 10 working days.

COMMENT FROM THE UNIVERSITY OF ST. ANDREWS

The narrative of the report was found to be selective and it is highlighted that section 15 (5)(d) of the Procurement Reform (Scotland) Act 2014 sets out the actions to be undertaken “**so far as reasonably practicable**”.

- 3.6 One respondent, Robert Gordon University (RGU), stated that it had amended its procurement strategy to comply with section 15(5)(d). But RGU’s strategy simply states:

“RGU complies with the Late Payment legislation and will review on a contract by contract basis whether such obligations should be enforced and monitored further down its supply chain.”

A similar response was received from the Universities of Stirling and Aberdeen. The above statement, without more, makes it doubtful whether RGU’s amended procurement strategy in this regard complies with the statute.

COMMENT FROM ROBERT GORDON UNIVERSITY

“The university, following guidance received from its sector wide specialist procurement team at APUC (under whose guidance our strategy was developed to comply with the 2014 Act), believes that it is compliant with the Act. The statutory guidance to the Act says as follows: *‘The authority has a degree of flexibility to tailor its approach to its particular procurement exercises and the method of monitoring payments.’* We already know that we are obliged to ensure only ‘so far as is reasonably practicable’ and the university’s view, and that of APUC, is that consideration of this on a contract by contract basis is the only practicable way (as possibly envisaged in the statutory guidance itself) to ensure we comply with both the intent and the spirit of the Act.”

[If the above reflects the view of APUC we believe – for reasons already explained in the text of this Report – that it does not comply with the Act and the Statutory guidance.]

- 3.7 The approach of eight contracting authorities in seeking to comply with section 15(5)(d) was to insert a term in their tier 1 contracts that required the tier 1 contractor to insert a 30 day payment term in their tier 2 contracts. It was not always clear whether tier 1 contractors were also required to insert in tier 2 contracts that a similar term had to be inserted in tier 3 contracts. Three contracting authorities decided that the better approach was to monitor payments along the supply chain although there was little indication of the extent or type of monitoring that was to take place. One respondent mentioned that this would take place in progress meetings with the tier 1 contractor but, whilst very helpful, it should be noted that feedback in these meetings may not always reflect the true picture within the supply chain. The only way to obtain this is to carry out spot checks or obtain direct feedback from tiers 2 and 3 contractors.
- 3.8 It seems that Glasgow University has adopted a fairly robust way of ensuring that payments have been discharged to, at least, tier 2 contractors. Where the University is using the NEC 3 ECC form of contract it will delay payment to the tier 1 contractor until the project manager has ensured that tier 2 contractors have been paid all their due amounts.

CLAUSE ADOPTED BY GLASGOW UNIVERSITY

Where the Supplier enters into a sub-contract for the purpose of performing the Contract, the Supplier shall cause a term to be included in such sub-contract which requires payment to be made to the sub-contractor within a specific period not exceeding 30 days from the receipt of a valid invoice as defined by the sub-contract requirements and provides that, for the purpose of payment alone, where the University has made payment to the Supplier and the sub-contractor’s invoice includes Services in relation to which payment has been made by the University then, to the extent that it relates to such Services, the invoice shall be treated as valid and payment shall be made to the sub-contractor without deduction.

SUMMARY AND RECOMMENDATIONS

- 3.9 It is of some concern that 13 of the responses (45%) appeared to be non-compliant with the requirements of section 15(5)(d). In the odd case it was possible that the respondent did not procure a sufficient amount of works for them to qualify as regulated procurements. Even so it would generally be considered to be good practice for every contracting authority to comply with section 15 (5)(d). Some of the comments received from those contracting authorities considered to be non-compliant suggested that it was sufficient for them to have an exemplary payment record at the tier 1 contractor level. But this is not always reflected along the supply chain (which was the reason for introducing section 15(5)(d)). Some respondents answered the questions by describing the procedures in place for processing payments (which we assume to be the procedures in place at tier 1 level).

COMMENT FROM THE UNIVERSITY OF EDINBURGH

“We were the first university to endorse the Scottish Business Pledge, a voluntary code for employers to commit to the best of modern business practices, including prompt payment of invoices.”

- 3.10 In all we consider that 9 of respondents (31%) were generally adhering to section 15 (5)(d) other than the 3 (10%) which indicated they intended to comply. The evidence provided by 4 contracting authorities (14%) was not sufficient to enable us to discern whether they were compliant. It is our view that they weren't compliant.

COMMENT FROM GLASGOW CALEDONIAN UNIVERSITY

“With regards to the draft report “Payment Performance in the Scottish Public Sector”, we believe that there has been a misunderstanding of the law relating to the questions posed in formation of the report, and that assertions of non-compliance with the Procurement Reform Act appear to be inaccurate. The Procurement Reform Act does not impose 30 day payment terms throughout the supply chain for public contracts although monitoring is encouraged. Our institution will continue to operate in line with the Procurement Reform Act and where it is appropriate, apply conditions in relation to payment terms within the supply chain.”

[The above paragraph also appeared – almost word for word - in the comments received from the University of Edinburgh, Heriot-Watt University and University of Strathclyde.]

“We would also like it noted in the report that as part of our standard Ts and Cs, we have a payment contract term that “the Contractor shall include a provision in each Sub-Contract requiring the Contractor to pay the relevant Sub-Contractor not more than 30 days after the receipt of a valid and payable invoice”.

- 4.1 The primary beneficiaries of section 15 (5)(d) are tiers 2 and 3 contractors which do not have direct contracts with contracting authorities. Anecdotal evidence from these contractors in the engineering supply chain suggests that there has been little or no improvement in payment performance since April 2016 when section 15 was implemented.⁷ We accept that it is still “early days” but having an insight into current compliance with section 15 (5)(d) enables a comparator to be established for tracking improvement over time.

⁷ A survey is currently being carried out by SEC Group Scotland for Paul Wheelhouse MSP (Minister for Business, Innovation and Energy) to identify serious cases of payment abuse.

- 4.2 The survey has revealed that there is a lack of understanding by some contracting authorities of the statutory obligation placed upon them by section 15 (5)(d). It appears that, in many cases, the accompanying statutory guidance has not been adopted. It isn't sufficient, without more, to have a clause in the tier 1 contract that requires the contractor to ensure that 30 day payment terms are replicated along the supply chain.
- 4.3 Section 15 (5)(d) is devoid of substance unless there is in place some monitoring or checking that ensures that tiers 2 and 3 contractors are, in fact, receiving their payments within 30 days of presentation of invoice or similar claim. The phrase "*so far as reasonably practicable*" does not provide an opt-out; it simply imports the concept of proportionality into the extent to which the required measures, such as monitoring of payment performance, have to be undertaken.
- 4.4 Where a tier 2 or tier 3 contractor is not receiving 30 day payments there is very little it can do to enforce the statutory obligation placed on the contracting authority. Seeking judicial review of failure by the authority to take the necessary steps to ensure 30 day payments along the supply chain is an option but it is wholly unrealistic. Construction SMEs often exist within a climate of fear; they are unlikely to challenge their tier 1 contractors, let alone contracting authorities.
- 4.5 The concern is that some contracting authorities may decide that they can safely ignore section 15 (5)(d) because the chances of enforcement are remote. Therefore it is necessary to consider whether additional measures need to be put in place to help enforcement; not just in respect of section 15 (5)(d) but also in regard to other obligations under the Act.

RECOMMENDATIONS 1 AND 2

1. Scottish Government should appoint a "*Construction Regulator*" with powers to proactively challenge non-compliance (a useful model is the Canadian Office of the Procurement Ombudsman).
2. Every contracting authority should have a compliance "hotline" with a named person appointed to deal with complaints about non-compliance with section 15 (5)(d) from supply chains (if necessary on an anonymous basis).

- 4.6 Two contracting authorities – Edinburgh Napier University and NHS Fife – referred to the use of project bank accounts (PBAs) to facilitate compliance with section 15 (5)(d). The statutory guidance also advocates the use of PBAs in this context since they enable project participants to be paid simultaneously from the same account. Payments to supply chain firms made through a PBA are made within a period that is usually far less than 30 days. Further, PBAs reduce the administration involved in monitoring compliance since, once set up, they provide greater transparency over payment performance. NHS bodies qualify as Scottish Government public bodies and, therefore, it was of some concern that – other than NHS Fife – there was no reference in their responses to the use of PBAs (given that these have been mandated for Scottish Government bodies procuring building projects over £4 million). This concern would equally apply in the case of Police Scotland, Scottish Fire and Rescue Services and Disclosure Scotland.

RECOMMENDATION 3

Scottish Government is invited to strengthen the statutory guidance by insisting PBAs are used by contracting authorities to comply with section 15 (5)(d) "*unless there are compelling reasons not to do so*". Such reasons should be published on an authority's website and, if

necessary, capable of being challenged by the Procurement Regulator (if one is appointed). A compelling reason could be that the contract in question is of short duration.

RECOMMENDATION 4

In any event the statutory guidance should be re-visited to deal with some uncertainty surrounding the use of the phrase, “**reasonably practicable**”, in section 15 (5)(d). It should make absolutely clear that the measures listed at paragraph 2.8 in this Report should be adopted by all contracting authorities but the extent to which each of the measures are implemented should be related to factors such as contract duration and the number of firms engaged as part of the supply chain.

- 4.7 **We will continue to monitor payment performance in public sector construction supply chains. However we are doubtful whether section 15 (5)(d) – as it stands – will be able to achieve 30 day payments for all those contracts coming within the remit of this provision. In fact, our view is that a maximum period of 30 days (from invoice or similar claim) should apply to all construction contracts and sub-contracts within both the public and private sectors.**

In order to achieve this legislation will be necessary. This has already been addressed in Canada, Australia and in Sweden.

- 4.8 The statutory duty to include measures in procurement strategies that ensure 30 day payments along the supply chain should also apply to the release of cash retentions (where they have been deducted). However it is doubtful whether contracting authorities would regard the prompt release of cash retentions as necessarily coming within the ambit of this duty. The statutory guidance will require amending to make clear that this is the case.

RECOMMENDATION 5

Scottish Government is invited to consider introducing a statutory obligation in all construction contracts that payments are made within 30 days.

RECOMMENDATION 6

Scottish Government is invited to amend the statutory guidance so that it deals with the release of retention monies. It is suggested that contracting authorities ensure that in all their contracts, and in sub-contracts and sub-sub-contracts that:

- the first half of retention monies are released on handover of the works;
- the second half of the retention monies is released within 12 months of handover of the works.

[“Works” refers to the works coming within the respective tiers 1, 2 and 3 contracts.]

SCHEDULE OF INDIVIDUAL RESPONSES TO THE FOIA QUESTIONS

	Name of contracting authority	Steps taken to ensure 30 day payments made to tiers 2 and 3 contractors	Steps to be taken to implement 30 day payments to tiers 2 and 3 contractors	Non-compliance	Comments from the public body
1.	Ayrshire & Arran NHS Board		Currently the Board is reviewing its procurement strategy 2013-2018 to include steps to ensure prompt payment to contractors/sub-contractors.		<i>"In 2016/17 average credit taken was 8 days from date invoice received."</i>
2.	Robert Gordon University (RGW)			RGU stated that its procurement strategy was amended to conform to s.15(5)(d) Procurement Reform (Scotland) Act. But the statement in the Strategy suggests otherwise (see para. 3.5 in the Report).	<i>"Since the Act came into force the University has had no regulated procurements....."</i>
3.	University of the West of Scotland (UWS).	UWS - standard Ts & Cs require tier 1 contractors to have 30 day payment terms in sub-contracts and sub-sub-contracts. [NB. It's not clear whether there is any monitoring of performance.]			<i>"Suppliers will be..... advised that any invoices without purchase order numbers on them will be returned unpaid."</i>
4.	Western Isles NHS Board	There was no direct answer to Q1 but, from the Board's comment opposite, it may be inferred that there is compliance with section 15 (5)(d).			<i>"Within the Western Isles the majority of sub-contractors are local firms and.... [we] make an extra effort to ensure their invoices are paid within the aspiration target of 10 working days."</i>

	Name of contracting authority	Steps taken to ensure 30 day payments made to tiers 2 and 3 contractors	Steps to be taken to implement 30 day payments to tiers 2 and 3 contractors	Non-compliance	Comments from the public body
5.	Royal Conservatoire of Scotland			From the response there doesn't appear to be compliance with the Act but it is not clear whether the Royal Conservatoire carries out sufficient works to qualify as regulated procurements under the Act.	<i>".....we use the SBCC form of contract which we believe complies with the Act." [NB. At tier 2 and 3 levels there is no guarantee that SBCC forms will be used unamended or used at all.]</i>
6.	Glasgow Caledonian University	The University insists in their contracts with tier 1 contractors that sub-contractors are paid within 30 days of receipt of a valid and payable invoice. [NB. Not clear whether this extends to tier 3 sub-contractors and whether any monitoring takes place.]			<i>"On a contract by contract basis, we require all contractors to sign up to our supply chain code of conduct. We ask our suppliers to sign up to confirm that they will not force unsustainable or unfair contract terms on their suppliers."</i>
7.	Glasgow School of Art (GSA)	GSA requires main contractors to pay sub –contractors within 30 days of receipt of a valid and payable invoice. [NB. It's not clear whether this continues into sub-sub- contracts and whether any monitoring takes place.]			<i>"In our construction contracts such as Stow and the Mackintosh building we have included the right to audit this and request reports at progress meetings."</i>
8.	Orkney NHS Board			It's not clear from NHS Orkney's Procurement Strategy 2016-2019 whether 30 days payment cycles are being insisted upon along the supply chain.	<i>"NHS Orkney is committed to ensuring its suppliers receive payment within 30 days of delivery of agreed goods or services and to this end monitors effectiveness of payments as part of our balanced scorecard."</i>

	Name of contracting authority	Steps taken to ensure 30 day payments made to tiers 2 and 3 contractors	Steps to be taken to implement 30 day payments to tiers 2 and 3 contractors	Non-compliance	Comments from the public body
9.	Edinburgh Napier University	For all regulated procurements the University – on a contract by contract basis – monitors payments to tiers 2 and 3 sub-contractors. [It is assumed that the purpose of the monitoring is to ensure payments are made within 30 days.]			<i>“Appropriate mechanisms to ensure adherence to payment terms (appropriate forms of contract, project bank accounts, performance measures/KPIs etc. will be introduced/adopted as and when required/appropriate.”</i>
10.	Dunfries Galloway NHS Board			The current procurement strategy doesn't stipulate payment terms and there is no reference to ensure that 30 day payments are made to tiers 2 and 3 contractors.	<i>“.....The Board's Standing Financial instructions make reference to [undisputed invoices being paid within] 10 working days as well as the aspiration for payment to be made within 30 days as are the principles outlined in the Scottish Public Finance Manuel.....”</i>
11.	University of St Andrews		The University is presently working on a review and update of contract preliminaries and construction contracts to state 30 day terms for main, sub, and sub-sub-contractors.		<i>“In addition to standard 30 day payment terms for suppliers, we also operate shorter terms (for example 14 and 10 days) for many suppliers (including local businesses and SMEs)”.</i>
12.	University of Dundee	Clause 24 of the University's General Conditions of Contract requires tier 1 contractors to have a sub-contract clause requiring tier 2 contractors to be paid within 30 days of receipt of a valid invoice. [NB. It's not clear whether this extends to tier 3 contractors or whether there is any monitoring of performance. Furthermore section 15 (5)(d) requires the 30 days to commence			<i>“.....the University seeks to process architect certificates with the related invoices to allow them to be paid within 14 days of invoice date. All other invoices are processed to allow payment within 30 days.”</i>

	Name of contracting authority	Steps taken to ensure 30 day payments made to tiers 2 and 3 contractors	Steps to be taken to implement 30 day payments to tiers 2 and 3 contractors	Non-compliance	Comments from the public body
		from presentation of an invoice or similar claim.]			
13.	Queen Margaret University			The University weekly reviews invoices to ensure there is timely payment. The only time there would be an issue would be if the invoice was in dispute. However it is not clear what level of monitoring is undertaken to check compliance along the supply chain.	<i>"We comply with Late Payment legislation, adhere to our Business Pledge and manage and monitor finance control process to pay due invoices efficiently and pay suppliers according to terms. We seek to agree appropriate terms for firms who are sub-contracting."</i> (extracted from the University's Procurement Strategy 2016) <i>"It is part of Queen Margaret University's terms and conditions to pay all suppliers within 30 days. Please refer to our website: http://www.qmu.ac.uk/finance."</i>
14.	NHS Highland			From the response it is not clear whether there is compliance since there is no reference to the steps being taken to ensure 30 day payments to tiers 2 and 3 contractors.	<i>"We ensure all invoices are electronically scanned, processed and approved and invoices are tracked through the system. Problems usually occur only when the correct information is not supplied to allow the invoices to be processed. We have started to monitor payments and are devising a system to check the 30 day target is being met."</i>
15.	NHS Fife	30 day payment clauses flow through the supply chain.			<i>"There are steps in place to monitor [compliance with the Act] and under new Frameworks 2 Contracts a project bank account is set-up."</i>
16.	NHS Greater Glasgow & Clyde			The response does not demonstrate compliance because it's not clear on the extent to which this is	<i>"The NHSGGC policy is that all authorised invoices are paid within 30 days. Any invoices which are not paid within these terms are due to</i>

	Name of contracting authority	Steps taken to ensure 30 day payments made to tiers 2 and 3 contractors	Steps to be taken to implement 30 day payments to tiers 2 and 3 contractors	Non-compliance	Comments from the public body
				enforced along the supply chain.	<i>queries being raised by the authoriser of the invoices."</i>
17.	University of Aberdeen			The response did not demonstrate the steps taken to ensure that payments along the supply chain are made within 30 days.	<i>"The University will comply with the Late Payment legislation and will review, on a contract by contract basis, whether such obligations should be enforced and monitored further down the supply chain."</i>
18.	University of Strathclyde	Where the University uses NEC contracts payment terms and performance are monitored along the supply chain. [NB. The extent to which this is done where other contracts are used was not made clear.]			<i>"The use of industry standard contracts as referenced includes consideration of appropriate mechanisms to monitor payment terms. For example, under NEC3 the provision for fair payment under clause X20, this KPI is monitored by the Project Manager and sets out that payment to sub-contractors is within 19 calendar days from the due date and 23 calendar days for payment to sub, sub-contractors. The appropriate terms for use are assessed on a contract by contract basis."</i>
19.	Police Scotland			The response did not demonstrate the steps taken to ensure that payments along the supply chain are made within 30 days.	<i>"Unless otherwise stated in the contract, the SPA aims to pay for contracts and services within 10 working days from either the receipt of goods or the presentation of a valid invoice, whichever is later."</i>
20.	University of Stirling			The response did not demonstrate the steps taken to ensure that payments along the supply	<i>"The University complies with the Late Payment of Commercial Debts (Scotland) Regulations 2013 and will review on a contract by contract basis whether such obligations should be</i>

	Name of contracting authority	Steps taken to ensure 30 day payments made to tiers 2 and 3 contractors	Steps to be taken to implement 30 day payments to tiers 2 and 3 contractors	Non-compliance	Comments from the public body
				chain are made within 30 days.	<i>enforced and monitored further down its supply chain."</i>
21.	NHS Shetland		By September 2017 NHS Shetland intends to include a clause in tier 1 contracts requiring tier 1 contractors to pay tier 2 contractors within 30 days. Contractors will have to report regularly on their payment performance to sub-contractors. [Not clear whether sub-sub-contractors included with this arrangement.]		
22.	NHS Forth Valley Board			The response does not appear to address the question.	<i>"As part of the monthly monitoring return and Annual Accounts submitted to Scottish Government NHS Forth Valley reports on all invoice payments within 10 days and also within 30 days."</i>
23.	NHS Tayside			NHS Tayside specifies this requirement in its Ts and Cs with its contracted suppliers but doesn't indicate the extent to which this is enforced along the supply chain and whether there's any monitoring of performance.	
24.	Heriot Watt University			The University originally states it was currently	<i>"...when it comes to construction contracts we would expect payment to be made in the next (bi-</i>

	Name of contracting authority	Steps taken to ensure 30 day payments made to tiers 2 and 3 contractors	Steps to be taken to implement 30 day payments to tiers 2 and 3 contractors	Non-compliance	Comments from the public body
				reviewing its payment procedures but, in a comment subsequently received from the University, it stated that it is compliant with the Act but there is no explanation of the steps taken to comply with the Act.	<i>monthly) payment run following receipt of a certified invoice and completion certificate.” You quote section 15 (5)(d) Procurement Reform (Scotland) Act 2014 and payments no later than 30 days; please also note that the Act states ‘as far as reasonably practicable”.</i>
25.	The University of Edinburgh	Payment of certified work is made within 14 days of issue of the certificate. The <i>Estates Procurement Protocol</i> requires the University, as part of the ITT process, to consider measures to ensure prompt payment to tiers 2 and 3 contractors. Tier 1 bidders will have to accept ongoing performance management of the contract throughout the supply chain (including 30 day payments to sub-contractors).			
26.	NHS Borders	NHS Borders aims to settle invoices within 30 days (monitored through financial KPIs). Once the tier 1 contract is awarded payment of sub-contractors is monitored through project meetings with the principal contractor. [NB. It is assumed that the monitoring of tiers 2 and 3 contractor payments relates to payments being made within 30 days].			

	Name of contracting authority	Steps taken to ensure 30 day payments made to tiers 2 and 3 contractors	Steps to be taken to implement 30 day payments to tiers 2 and 3 contractors	Non-compliance	Comments from the public body
27.	Scottish Fire & Rescue Service (SFRS)	SFTS's Ts & Cs require payment within 30 days of receipt of a valid invoice. This 30 days will be replicated in sub-contracts. SFRS will monitor that 30 day payments are included in sub-contracts. [NB. No reference to tier 3 contractors.]			
28.	Disclosure Scotland	It is a standard condition in tier 1 contracts that sub-contracts must contain a clause requiring payment of invoices to sub-contractors within 30 days; this clause to be replicated through supply chain; complaint will be monitored and appropriate action taken.			<i>"The condition must also make clear that if a sub-contractor believes that invoices are not being paid within the 30 day period the sub-contractor may raise the issue directly with the Scottish Government and is not required to first raise the issue up through the various tiers of the supply chain."</i>
29.	University of Glasgow	The University imposes a standard payment clause of 30 days from invoice receipt or, in the case of works contracts, 30 days from the due payment date. This cascades down to tier 2 contractors although not clear whether it continues to cascade down to tier 3 contractors.		Where NEC 3 ECC is used the final date for payment is the later of 30 days from the payment due date or "receipt by the Project Manager of sufficient evidence (in form and substance satisfactory to the Project Manager, acting reasonably) showing that all sub-contractors and all of the contractor's suppliers used in providing the Works have been paid all sums due and which ought to have been paid under their relevant contracts at the assessment date".	

EXTRACT FROM THE STATUTORY GUIDANCE ON COMPLYING WITH SECTION 15 (5)(d), PROCUREMENT REFORM (SCOTLAND) ACT

2.5.12. The authority must set out how it intends to ensure that, so far as reasonably practicable, the following payments are made no later than 30 days after the invoice (or similar claim) relating to the payment is presented:

- (i) payments due by the authority to a contractor;
- (ii) payments due by a contractor to a sub-contractor;
- (iii) payments due by a sub-contractor to a sub-contractor (section 15(5)(d) of the Act).

Late payment legislation places a statutory duty on all public bodies to pay commercial debt within 30 days. [European Directive 2011/7/EU](#) allows businesses to claim interest and recovery costs if goods and services are not paid for on time.

High quality public procurement is dependent on good practice not only by a contracting authority and its purchasers but also by economic operators. Economic operators need to play their part by delivering high quality, cost-effective goods and services and by maintaining the highest possible business standards and ethics, including prompt payment to their sub contractors.

The Scottish Government is committed to ensuring that businesses are paid on time because we understand how important it is to pay businesses promptly once a service has been performed or goods delivered. Late payment is particularly detrimental to SMEs, third sector bodies and supported businesses.

A contracting authority is required by [section 15\(5\)\(d\) of the Act](#) to set out in its procurement strategy how it intends to ensure that, so far as reasonably practicable, payments to contractors and sub-contractors are made within 30 days of a valid invoice, or similar claim, being received.

The Scottish Government's policy and approach to ensuring prompt payment in its procurements asks a contracting authority to adopt the standard contract clause or an equivalent provision in its procurement contracts. Prompt payment for goods, works and services can be enforced by including clauses into the terms and conditions of the contract.

Effective contract management and monitoring should be undertaken to ensure that prompt payment continues to be applied throughout the duration of the contract, for example, by requesting information on prompt payment at all levels of the contract. A contracting authority and economic operators should then, where relevant, take any necessary steps to rectify any prompt payment issues experienced.

A contracting authority should also consider monitoring the prompt payment of sub-contractors, for example by carrying out spot checks and/or using project bank accounts or trusts, where relevant and proportionate.