

**Extract from Advanced Procurement for Universities and Colleges (APUC) 'ezine' 21/08/2014**



Advanced Procurement  
for Universities & Colleges

**For Information: Clarification on Energy Savings Opportunity Scheme for Scottish Universities and Obligations to Comply (and coverage and obligation to comply with Public Procurement Legislation)**

Colleagues from across the sector may have seen information on compliance requirements in relation to the Energy Savings Opportunity Scheme (ESOS) in communications from BUFDG and the EAUC. We have been asked by several parties to provide clarification on this as it relates to institutions' procurement status.

Guidance from the UK government on the ESOS scheme states that bodies that are subject to the Public Contracts Regulations (Public Contracting Authorities) are **not** required to take part. Under public procurement law, (non-commercial sector owned) universities and colleges are by default, all considered Public Contracting Authorities and therefore subject to the Public Contracts Regulations.

There is a difficulty to achieve potential opt-out in law (for some, but not all universities, and some, but not all non-incorporated colleges; depending on their formation status) from being required to be Public Contracting Authorities but the test is stringent and is based on the need for substantial private income levels (it is known as the "Cambridge" case – which was heard in the European Court from 1998-2000). The opt-out however, is not automatic and, it requires specific actions each and every year by institutions to actually opt-out and not be considered a Public Contracting Authority.

We are advised that an opinion has apparently been issued by part of the UK Government Department of Business Innovation and Skills (BIS) (although we cannot identify the source of this) stating that rUK funding via the Student Loans Company (SLC) should be treated as entirely private for establishing (university) status as to whether they are a Public Contracting Authority or not, and therefore conversely if they are in the scope of ESOS or not. This is causing some confusion in the sector. We believe this assumption is taken from a statement made by David Willets some time ago which was however, effectively retracted shortly afterwards (due to the lack of clarity over what proportion of rUK funding via the SLC would ultimately be funded from the public purse). We would like to clarify that the regulating bodies for public procurement law in England (Treasury/Cabinet Office) and Scotland (Scottish Government SPCD) have not yet confirmed what proportion of rUK funding can be considered private – ultimately the issue of what proportion of rUK funding from the SLC can be deemed private or public may need to go to the European Court (as it is fundamentally linked to the Cambridge case). Due to the different proportions of funding via SLC, whatever the eventual assumed private/public proportion, it is likely that this will have a material effect in English HE but little or no effect within Scottish HE and FE.

Although this information does not constitute legal advice, based on the data available to us, we believe all universities and colleges in Scotland to be Public Contracting Authorities and fully in scope of the Public Contracts Regulations. Only one institution appears to be close to having the potential to opt-out of being a Public Contracting Authority and their Director of Procurement is aware of the knock-on impact in relation to ESOS compliance this would have, so will liaise internally within their institution should they exercise the opt-out at any time. If any institution believes that their position is not in line with that noted, or if they have any concerns or queries, please do not hesitate to contact [Angus Warren](#) at APUC.