Defence and Security Public Contracts Regulations 2011

Chapter 6 - Classifying Contracts

Purpose

1.   This guidance explains how to classify contracts within the Defence and Security Public Contracts Regulations (DSPCR) 2011 and why classification is necessary.

2.   Specifically, the guidance explains what we mean by "classifying contracts", identifies the applicable legal framework and sets out how to classify contracts.

What is classifying contracts?

3.   By classifying contracts, we mean the way in which we:

    a.   identify whether a contract for the purposes of the DSPCR is a:

        (1)   supply contract;

        (2)   services contract (including Part A or Part B services contract); or

        (3)   works contract; and

    b.   assign the Common Procurement Vocabulary code.

What is the legal framework?

4.   Regulation 3(1) (Interpretation) sets out the definitions for:

    a.   "contract";

    b.   "services contract";

    c.   "supply contract" (and related definitions for "goods", "aircraft", "ship" and "substance"); and

    d.   "works contract" (and related definitions for "work" and "works").

5.   The definitions of "services contract" and "supply contract" in Regulation 3(1) contain specific rules for classifying contracts that have a mix of goods and services.

6.   Regulation 3(2) and 3(3) set out the distinction between Part A and Part B services contracts by reference to a list of different categories of services set out in Schedule 2 of the DSPCR.

7.   Part A services are subject to all of parts of the DSPCR unless an exclusion applies. Regulation 6(3) (Application) explains which parts of the DSPCR apply to Part B services.

What are the types of contract in the DSPCR?

8.　The DSPCR has three main types of contract, i.e. supply contracts, services contracts and works contracts.　However all three types of contract must be in writing and for "consideration" (usually in the form of payment by the procurer).

9.　The rules in the DSPCR vary depending on the type of contract you are awarding, e.g.:

　　a.　different selection criteria are allowed depending on whether your requirement is for goods, works, or services; and

　　b.　different financial thresholds apply for goods / services contracts and works contracts.

What is a supply contract?

10.　A supply contract is a contract for the purchase or hire (lease or rental) of goods (and for the siting or installation of those goods where relevant).

11.　The DSPCR classifies ships, aircraft and vehicles as goods.

What is a works contract?

12.　A works contract is:

　　a.　a contract for the construction or design and construction of a work or works for a procurer; or

　　b.　a contract where a procurer engages a person to procure the construction, or design and construction, of a work corresponding to specified requirements for the procurer.

13.　Works contracts have as their object building or civil engineering activities. A contract is a works contract only if its subject specifically covers execution of activities under Division 45 of the Common Procurement Vocabulary code list. Division 45 is set out in Schedule 1 to the DSPCR.　These can be in the form of:

　　a.　a specific service (e.g. installation of electrical wiring and fittings or plumbing into existing buildings); or

　　b.　a series of services leading to the completion of a work that fulfils an economic or technical function (e.g. a building, bridge, airfield runway or harbour).

14.　If you are procuring an item on Schedule 1 in isolation from building or civil engineering activities then you should not categorise it as works.　For example, you should categorise procurement of a central heating boiler as part of a building refurbishment contract as works.　However, you should categorise procurement and installation of a central heating boiler in isolation to any building or civil engineering activity as a supply.

15.　If the Items on Schedule 1 are just being installed (e.g. air conditioning plants, lift mechanisms, closed circuit television systems) then this is a supply contract.　However, if the item (e.g. double glazed windows) results in a material change to the building then you must classify the contract as works.

16.   A works contract also includes other arrangements such as where the procurer engages:

a.   a person to construct a work (e.g. a building) on land not owned by the procurer but to specified requirements which is subsequently transferred to the procurer; or

b.   a developer to arrange finance, purchase land and devise a project for the procurer.

What is a services contract?

17.   A services contract is a contract under which a procurer engages a supplier to provide services.

18.   The DSPCR does not define "services". For the purposes of the DSPCR, a services contract may include every activity not covered by:

a.   the definition of a supply contract in Regulation 3(1);

b.   the definition of a works contract in Regulation 3(1); or

c.   the defined activities excluded from the DSPCR by reason of their nature in Regulation 7 (General exclusions).

19.   Various non-exhaustive categories of services are set out in Schedule 2 to the DSPCR and linked to their relevant Common Procurement Vocabulary (CPV) Code (see below).

How to classify mixed supply, works or service contracts

20.   Sometimes the contract will be a mix of supply, works or services (e.g. purchase and on-going maintenance of vehicles). If it is a mixed contract, the basic rule is that you will classify the contract according to the element with the greatest value.

21.   If the object of a single contract is the procurement of supplies and services, the contract will be a supply contract if the value of the supplies is greater than the value of the services; otherwise, it will be a services contract.

22.   If the contract involves works the position is slightly different:

a.   If there is a mixture of services and works, the contract will be a works contract if an activity constituting works is the principal subject of the contract. If the works are only incidental to the principal subject of the contract, and are only a possible consequence of, or complement to it, it will be a services contract.

b.   A similar test will apply where the contract is for a mixture of works and supply of goods.

23.   You must objectively justify your choice to award a single mixed contract, e.g. you cannot reasonably disassociate the supply of goods from the services. It will be for you to decide on a case-by-case basis, ensuring consistency in approach within your own area.

24.   The proper classification of mixed contracts is important, as your choice may result in contracts being excluded from parts of the DSPCR which would normally apply to them, e.g.:

    a.   if the service element is a Part B service (see below); or

    b.   if there is a works element (which has a much higher financial threshold).

25.   You must not join or separate requirements solely for the purposes of benefiting from simpler procurement rules.

26.   This is particularly important in cases where the value of the works contract is less than the financial threshold for works (i.e. £4,551,413) but greater than the financial threshold for goods and services (i.e. £363,424).

Choosing the Common Procurement Vocabulary code

27.   The Common Procurement Vocabulary (CPV) is a single classification system used in public procurement to standardise the references used by procurers to describe the subject matter of the contract. Procurers may also use CPV Codes for management information purposes.

28.   You must assign supply, works and services contracts a CPV code number. You must use this 9-digit code when advertising requirements in the Official Journal of the European Union (OJEU).

29.   The DSPCR provides cross-references to the broad groups of relevant CPV codes for works (Schedule 1) and services (Schedule 2) but not for goods.

30.   The current CPV code list (dated 2007 but issued on 15 Sep 08) contains links to a CPV search facility (via keyword or CPV code) and a downloadable spreadsheet document of CPV descriptions.

31.   It is important to identify the right CPV code(s) for the OJEU contract notice, as suppliers often identify contract opportunities by searching the OJEU using CPV codes.

32.   For service contracts, after you choose the CPV code you need to identify whether the service is categorised as Part A or Part B as this makes a difference to how the rules apply.

Part A and Part B service contracts

33.   The DSPCR divides service contracts into Part A (or "priority") services and Part B (or "residual") services. Only Part A services are fully subject to the DSPCR. Part B services are subject to a lesser regime, with only a few of the detailed rules of the DSPCR applying to contract awards.

34.   After you have chosen the CPV code for the service(s) required, you must then decide whether the contract is a Part A services contract or a Part B services contract by looking at the relevant categories of services set out at Schedule 2 of the DSPCR.

35.   Part B services are only subject to parts of the DSPCR in respect of:

    a.   the general principles of equal treatment, non-discrimination and transparency as set out in Regulation 5 (Economic operators);

    b.   the specific provisions including those relating to technical specifications and contract award notices as follows:

    (1)   parts 1 (General), 9 (Applications to the court) and 10 (Consequential amendments and transitional provisions); and

    (2)   the following provisions in Parts 2 (Technical specifications) to 8 (Miscellaneous):

    (a)   Regulation 12 (Technical specifications in the contract documents);

    (b)   Regulations 32 (Contract award notice);

    (c)   Regulation 46(2) (Statistical and other reports);

    (d)   Regulation 47 (Provisions of reports); and

    (e)   Regulation 48 (Publication of notices); and

    c.   the legal review and remedies regime in respect of the general treaty principles as described in Regulation 5 and the rules on technical specifications and contract award notices.

36.   There is no legal obligation to place a contract notice in the OJEU for a proposed Part B service as the advertising requirements of Part 3 of the DSPCR do not apply to Part B services. However, Regulation 32 does apply and requires you to publish a contract award notice in the OJEU.

37.   If you are procuring a Part B service, you should be aware of the European Commission's opinion on the application of treaty obligations to procurement of Part B services in their Interpretive Communication on contracts not fully subject to the existing Regulations. This also applies to Part B service procurements under the DSPCR.

How to classify mixed Part A and B service(s) contracts

38.   If a contract has as its object, services which are partly Part A services and partly Part B services, you must classify it as Part A services where the value of the Part A services is greater than the value of the Part B services. Where this is not the case, you must classify it as a contract for Part B services.

39.   You cannot artificially package Part A services with Part B services of a greater value in order to categorise the packaged contract as a Part B service to avoid the full rigours of DSPCR.

40.   You must objectively justify a single contract, i.e. you cannot reasonably disassociate the supply of Part A and Part B services from each other. Again, you will have to decide on a case-by-case basis, ensuring consistency in approach within your own area.

41.   A framework agreement that covers both Part A and Part B services, even where the Part A element is only a small element, will be subject to the full force of the DSPCR.

Changes to Part A and B service contracts

42.   The Public Contracts Regulations 2015 (PCR) have abolished Part A and B service contracts and has introduced, in Chapter 3 of the PCR, the so called 'Light Touch Regime'. The categories of services set out in the DSPCR are not the same as those set out in the PCR, Public Contracts Scotland Regulations (PCSR) 2015, Utilities Contracts Regulations (UCR) 2016 or the Utilities Contracts Scotland Regulations (UCSR) 2012.

New categories added to Part A services

Category	Services
2	Foreign military aid related services
3	Defence services, military defence services and civil defence services
20	Training and simulation services in the fields of defence and security

Categories transferred from Part B to Part A services

Category	Services
4	Investigation and security services
8	Rail transport services
9	Water transport services
10	Supporting and auxiliary transport services

Amendment to Part A services categories

Category	Services
14	Research and development services, including "evaluation tests"

Categories omitted from Part B services

Category	Services
24	Education and vocational educational services
26	Recreational, cultural and sporting services

Service and works concessions

43.   Service(s) and works concessions are contracts of the same type as service and works contracts except for the fact that the consideration for the provision of services or works consists either solely in the right to exploit the service or works or in this right together with payment.

44.   The PCR, PCSR, UCR and UCSR have exclusions and special provisions for service and works concessions, which do not appear in the DSPCR. You will use

the contract award procedures in the DSPCR for service and works concessions until the introduction of the Concessions Contracts Regulations in the UK.

What are the key points to remember?

1.   You must get the classification of the supply, works or service contract right, as the rules in the DSPCR vary depending on its classification.

2.   You must assign the correct CPV code to the subject of the contract.

3.   You must get the classification of the Part A and Part B service contract right, as Part B services come under a lesser procurement regime.

4.   If a contract has elements with different classifications, the basic rule is that you must classify the contract according to the element of the contract with the greatest value.

5.   You must not join requirements or separate them solely for the purposes of benefiting from simpler procurement rules.