

The Defence and Security Public Contracts Regulations 2011

Chapter 1 - Overview

Introduction

1. The Defence and Security Public Contracts Regulations (DSPCR) 2011 implement the European Union (EU) Defence and Security Procurement Directive¹ (the "Directive") into United Kingdom (UK) law. They came into force on 21 August 2011.
2. The DSPCR applies to defence and sensitive security procurements by contracting authorities² and utilities³ (the "procurers") throughout England, Scotland, Wales and Northern Ireland.
3. The Ministry of Defence (MOD) is responsible for the DSPCR including statistical reporting and amendments. We work closely with the Cabinet Office, who are custodians of the UK Government's public procurement policy and implement the other EU procurement directives.

What contracts are covered?

4. The DSPCR covers specific contracts in the fields of defence and sensitive security for the procurement of:
 - a. the supply of military equipment, including any parts, components or sub-assemblies of military equipment;
 - b. the supply of sensitive equipment, including any parts, components or sub-assemblies of sensitive equipment;
 - c. work⁴, works⁵, goods and services directly related to the equipment referred to in sub-paragraphs a. and b. for any and all elements of its life cycle;
 - d. work, works and services for specifically military purposes or sensitive work or works and sensitive services;

including the supply of specific tools, test facilities or support. You can find full guidance on the scope of the DSPCR in Chapter 2.

¹ Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and services contracts by contracting authorities or entities in the fields of defence and security, and amending Directive 2004/17/EC and Directive 2004/18/EC.

² "Contracting authority" is defined by Regulation 2 of the Public Contracts Regulations 2015 and Regulation 2 of the Public Contracts (Scotland) Regulations 2015.

³ "Utility" is defined by Regulation 2 of the Utilities Contracts Regulations 2006 and Regulation 3 of the Utilities Contracts (Scotland) Regulations 2012.

⁴ "Work" means the outcome of building or civil engineering works that is sufficient to fulfil an economic or technical function.

⁵ "Works" means the building and civil engineering activities listed in Schedule 1 of the DSPCR.

5. The DSPCR applies to all contracts within its scope which have a value⁶ (exclusive of VAT) equal to or greater than:
 - a. £363,424 for Goods and Services; and
 - b. £4,551,413 for Works.
6. You can find full guidance on financial thresholds in Chapter 3.
7. The Public Contracts Regulations (PCR) 2015 and the Utilities Contract Regulations (UCR) 2016 and their equivalent Regulations in Scotland cover procurement of civil and non-sensitive security works, goods and services.

What are our obligations to suppliers outside the EU?

8. Our obligation to comply with the DSPCR is solely to potential suppliers in the [Member States of the European Union](#) and Norway who have adopted the Directive under the European Economic Area agreement.
9. The duty to comply with the DSPCR does not extend to potential suppliers established outside the EU and Norway. These suppliers are not economic operators as defined in the DSPCR. They do not have the right to participate in a procurement procedure, and do not have access to the remedies in Part 9 (Applications to the court) of the DSPCR (except to the extent that procurers extend such rights either expressly or by implication).
10. The DSPCR sets out the procurement rules by which we procure defence and sensitive security works, goods and services. Procurers are free to allow potential suppliers from outside the EU to participate in a procurement procedure and MOD procurers should do so as a matter of policy.
11. Procurers should be aware that where you seek and receive responses to an invitation to tender, an implied contract may come into existence, whereby the procurer agrees to consider all tenderers fairly and equally. This may benefit suppliers from outside the EU whom you have allowed to participate in the procurement.

What are the main features of the DSPCR?

12. Procurement under the DSPCR must follow common advertising rules for publishing in the OJEU, where required. You must follow the correct procurement procedures and draft the necessary notices, tender and contract documents with care to ensure you give the correct information.
13. The DSPCR does not include the open procedure, dynamic purchasing systems or particular provisions relating to concession contracts. Nor does it include the many simplified and modernised rules of the PCR 2015. It is important to be aware of this divergence and not assume that the rules are the same. An overview of the main features of the DSPCR is set out below.

⁶ The values of the financial threshold are revised every two years and take effect from 1 January on an even numbered year

Procurement Procedures

14. The default procedures in the PCR 2015 are the open and restricted procedures. However, your starting position in the DSPCR will be a free choice of running a competition under the restricted procedure or using the negotiated procedure with prior publication of a contract notice (referred to as the “competitive negotiated procedure” in this guidance).

15. You may only use the competitive dialogue procedure for particularly complex procurements if you cannot place the contract under the restricted or negotiated procedure with prior publication of a contract notice.

16. In the DSPCR, you may carry out non-competitive procurement (or in certain instances limited competition) under the negotiated procedure without prior publication of a contract notice, but only if it is justified for the following reasons:

- a. If you receive irregular, unacceptable, unsuitable tenders or no applications in response to a call for competition during a restricted, competitive dialogue or competitive negotiated procedure.
- b. Where for technical reasons or for reasons connected with protection of exclusive rights you may only award the contract to a particular supplier.
- c. Where the normal and accelerated time limits laid down for the restricted and competitive negotiated procedures cannot be met:
 - (1) for reasons of urgency resulting from a crisis;
 - (2) due to the nature of the market for air and maritime transport services when deploying military or security forces abroad; or
 - (3) for extreme urgency brought about by events not foreseeable or attributable to the procurer.
- d. For additional deliveries by the original supplier ensuring that the length of these contractual arrangements may not generally exceed five years.
- e. Where goods are quoted and purchased on a commodity market.
- f. To benefit from particularly advantageous terms in a closing down sale or where a supplier is bankrupt, insolvent or being wound up.
- g. For research and development services other than those services exempt under the research and development exclusion.
- h. Where you are procuring goods solely for the purpose of research, experiment or development, and not with a view to establishing commercial viability or recovering research and development costs.
- i. For new works or services which are a repetition of the contracted for works or services, as long as you commence the procedure for the new contract within 5 years of the original contract being entered into and the possibility was referred to in the original contract notice.

17. You can find full guidance on procurement procedures in Chapter 8.

Framework agreements

18. The provisions in the DSPCR on framework agreements (Regulation 20) allow you to place a framework agreement with a permitted maximum duration of 7 years.

19. You can place a framework agreement longer than 7 years only in exceptional circumstances. You must determine the circumstances by taking into account the expected service life of any delivered items, installations or systems and the technical difficulties that a change in supplier may cause. You will need to include the justification in the contract notice.

20. You can find full guidance on framework agreements in Chapter 11.

Central purchasing bodies

21. The definition of a central purchasing body in the DSPCR includes a European public body. Although the DSPCR does not define a European public body, it may include, for example, the European Defence Agency.

22. Regulation 22 (Central purchasing bodies) sets out the provisions relating to purchases by central purchasing bodies. If a procurer purchases from or through a central purchasing body, the procurer has complied with the DSPCR:

- a. to the extent that the central purchasing body has itself complied with the DSPCR; or
- b. if the central purchasing body is, for example, a European public body:
 - (1) the contract award rules applied by it are compliant with the DSPCR; and
 - (2) the contracts awarded are subject to efficient remedies provisions which are comparable to those set out in the DSPCR.

What are the rules on technical specifications?

23. The term “technical specifications” means the document identified in the contract documents by the procurer, which sets out their requirements in respect of the provision of works, goods or services.

24. Technical specifications must allow equal access for tenderers and not have the effect of creating unjustified obstacles to open competition. The DSPCR does not permit technical specifications which have the effect of favouring or eliminating particular companies or goods, or their origin.

25. The provisions in the DSPCR takes into account a number of additional defence-specific standards. In order to guarantee interoperability, they refer to technical requirements to be met by the UK under international standardisation agreements.

26. You can find full guidance on technical specifications in Chapter 7.

What are selection criteria?

27. The purpose of selection criteria is to ensure that the tenderers have sufficient financial, economic, technical and professional capacity to fulfil the

contract. However, you are also able to limit the number of suitable candidates through the application of additional objective and non-discriminatory criteria

28. You will have to draw up clear and non-discriminatory selection criteria regardless of the value of the contract and the type of procurement procedure you use.

29. The chosen selection criteria must not go beyond what is relevant and proportionate to the subject matter of the contract. You must declare the criteria in full in the contract notice.

Personal situation of the candidate or tenderer

30. The selection criteria for the rejection of potential suppliers now include convictions for terrorist offences or offences linked to terrorist activities as mandatory grounds for exclusion. There are several defence and sensitive security specific discretionary grounds for exclusion.

31. A procurer may exclude candidates or tenderers from a procurement if they have committed an act of grave misconduct in the course of their business. An act of grave misconduct could include a previous breach of contractual obligations relating to security of supply or security of information, which were imposed in a previous contract.

32. There is also a provision that gives you the ability to exclude a candidate or tenderer where you can establish, through any evidence (which may include evidence provided by a protected data source) that the candidate or tenderer lacks the “reliability” necessary to exclude risks to the security of the UK. You can find guidance on this in Chapter 12 – Security of Information.

Economic and financial standing

33. The selection criteria for economic and financial standing set out in Regulation 24 (Information as to economic and financial standing) ensure the prospective tenderers are capable of handling the commercial and financial risks of the proposed contract. The suppliers must be in a sound financial position to participate in the procurement. You may wish to state what level of financial standing is acceptable. You could use this level as a trigger for seeking bank or parent company guarantees to ensure the supplier has the financial capability to carry out the work.

Technical and professional ability

34. The selection criteria for technical or professional ability are specifically suited to the defence sector. For example, in terms of the evidence of technical and professional ability for suppliers to provide, the DSPCR permits:

- a. The required list of principal deliveries or services provided up to 5 years.
- b. Checks on production capacities, study and research facilities and quality control measures may be carried out as a matter of course rather than just where the products or services to be provided are complex or required for a special purpose.

- c. A description of the tools, materials, technical equipment, staff numbers, know-how and sources of supply available to:
 - (1) perform the contract;
 - (2) demonstrate the ability to cope with additional purchases resulting from a crisis, if required; or
 - (3) carry out maintenance, modernisation or adaptation of the goods covered by the contract.
- d. Evidence of the ability to process, store and transmit classified information at the level of protection required by the procurer. This may include evidence of holding a security clearance, recognised by the UK, equivalent to the relevant protective marking.

35. A procurer may grant additional time, where appropriate, for a supplier to obtain necessary security clearances.

36. You may ask suppliers to provide evidence of their technical or professional ability by other documents as considered appropriate in the event that, for valid reasons, e.g. obligations of confidence to third parties, the supplier cannot provide the required references.

37. You can find full guidance on selection criteria and choosing tenderers in Chapter 15 – Supplier Selection.

Quality assurance standards

38. The selection criteria for quality assurance changed the previous reference from “independent bodies” to “independent accredited bodies” which conforms to European accreditation and certification standards. However, procurers can accept, if they consider it appropriate, other evidence of conformity to equivalent quality management system standards.

What award criteria can I use?

39. You must award the contract based on either the “lowest price” or the “most economically advantageous tender”.

40. If the award criterion chosen is “lowest price”, after checking to ensure the tenders meet the requirement, you must award the contract to the tender who offers the lowest price.

41. If the award criterion chosen is “most economically advantageous tender”, you must use award criteria that are objective and linked to the subject matter of the contract in order to assess the tenders and determine which is most economically advantageous.

42. You must publish the weightings or rankings applied to the award criteria in the contract documents. The DSPCR provides a non-exhaustive list of examples of criteria, and includes new criteria such as security of supply, interoperability and operational characteristics.

43. You can find full guidance on award criteria and tendering in Chapter 16 – Conducting the Tendering Exercise.

What special contract conditions can I use?

44. The DSPCR allows you to impose special contract performance conditions if you indicate them in the contract notice or contract documents and are compatible with EU law.

45. Contract conditions must not therefore breach EU principles of transparency, non-discrimination, and proportionality. If you consider that a proposed contract condition may breach these principles you should seek legal advice.

Security of Information

46. The DSPCR are intended to provide procurers with the ability to protect classified information throughout the tendering and contracting process, which includes the ability to:

- a. impose obligations on contractors and require flow-down of those obligations to subcontractors to safeguard information throughout the tendering and contracting process;
- b. reject contractors and subcontractors where they:
 - (1) do not possess the necessary reliability to exclude risks to national security; or
 - (2) have breached obligations relating to security of information during a previous contract in circumstances amounting to grave misconduct;
- c. request information from contractors and subcontractors to assess their ability to protect information;
- d. impose contractual obligations to protect information to the required level.

47. You can find full guidance on security of information in Chapter 12.

Security of Supply

48. The DSPCR includes provisions to enable the procurer to assess the capability of a contractor and its subcontractors to meet the procurer's security of supply requirements.

49. You can, for example, require tenderers to provide information:
- a. demonstrating that they are able to honour their contractual obligations by obtaining the necessary export licences;
 - b. identifying any restrictions on the disclosure, transfer or use of technology arising out of export controls or security arrangements;
 - c. demonstrating that their supply chains will be able to comply with the security of supply requirements set out in the contract documents.

50. You can also require suppliers to provide commitments on security of supply. These can include commitments from the supplier to:
- a. ensure that changes in their supply chain during the performance of the contract will not adversely affect the security of supply requirements;
 - b. establish or maintain the industrial capacity required to meet additional needs arising from a crisis on terms to be agreed;
 - c. carry out the maintenance, modernisation or adaptation of the goods covered by the contract;
 - d. provide the procurer with all necessary licences and information to produce spare parts, components, assemblies and testing equipment in the event that the supplier is no longer able to provide these goods.
51. These requirements and any award criteria must be relevant and proportionate to the subject matter of the contract. You can find full guidance on Security of Supply in Chapter 13.

Directing Subcontracts to Third Parties

52. The DSPCR gives you the option to:
- a. require tenderers to indicate what they propose to subcontract and to whom;
 - b. require tenderers to indicate any planned changes of subcontractors before or during the life of the contract;
 - c. oblige successful tenderers to award all or a certain portion of its proposed subcontracts to third parties through advertising in OJEU;
 - d. reject a subcontractor selected by a tenderer at any stage of the contract award procedure or during contract performance in accordance with all or part of the selection criteria for the main contract.
53. Generally, the tenderer you select will take full responsibility under the contract for delivering the requirement. That said, even if you do not mandate advertisement of proposed subcontracts in the OJEU, you should encourage the prime contractor where appropriate to use competition to select subcontractors and advertise subcontract opportunities on the Government's Contract Finder portal.
54. Using the DSPCR to direct the successful tenderer to advertise subcontracts to third parties requires very careful consideration. Inappropriate use of these measures will add costs and delays to the procurement without providing benefits to either the procurer or the contractor. You will need to justify any mandate by taking into account:
- a. the value of the contract (e.g. it may be disproportionate to mandate subcontract competition for contracts valued below £10M as it would discourage small to medium sized enterprises (SMEs) from bidding for these contracts);

- b. the nature of the contract (e.g. using subcontract competition for high technology equipment may not be possible due to exclusive intellectual property rights or technical reasons); and
- c. the structure of the market (e.g. is there likely to be a sufficient response from the market to challenge the existing supply chain).

55. You can find full guidance on directing subcontracting to third parties in Chapter 14 – Subcontracting under the DSPCR.

How is Article 346 TFEU used?

56. The principles of the [Treaty on the Functioning of the European Union](#) (TFEU) generally apply when procurers are awarding contracts. Our main obligations from the TFEU are:

- a. non-discrimination on the ground of nationality;
- b. equal treatment of all suppliers;
- c. transparency of the procurement process;
- d. mutual recognition, i.e. acceptance of equivalent documents, certificates and standards amongst EU Member States; and
- e. proportionality, i.e. any measure the procurer takes must be proportionate to the requirement they are procuring.

57. You can only justify failure to comply with these TFEU obligations based on a treaty exemption in the TFEU. Treaty exemptions also allow us not to use all or part the DSPCR for specific procurements. Article 346 TFEU is the main treaty exemption in the TFEU.

58. You may still use Article 346 TFEU to exempt all or part of the procurement from the TFEU and the DSPCR if, exceptionally, it is strictly necessary to protect the essential interests of national security. Any measures under Article 346 TFEU must be proportionate and the minimum necessary to protect the essential interests of national security.

Article 346 (1) (a) TFEU - the Security of Information Exemption

59. You are still able to use Article 346 (1) (a) TFEU to exempt all or part of the procurement from the TFEU and the DSPCR if using the DSPCR would oblige you to supply information, the disclosure of which you consider contrary to the essential interests of UK security.

60. This could occur where the contract requires that the contractor's staff have personal security clearances and are citizens of the purchasing nation. Such a "national eyes only" condition infringes the obligation of non-discrimination on the ground of nationality in the TFEU and you can only justify it on the basis of Article 346 (1) (a) TFEU.

61. Article 346 (1) (a) TFEU allows you to withhold the information. Procurers may use Regulation 7(1) (a) (General exclusions) of the DSPCR (described below) with Article 346 (1) (a) TFEU if exempting the contract from the DSPCR is strictly necessary and proportionate.

Article 346 (1) (b) TFEU - the Warlike Stores Exemption

62. You are still able to use Article 346 (1)(b) TFEU to exempt all or part of the procurement from the TFEU and the DSPCR if you need to take specific measures when procuring warlike stores which you consider necessary in order to protect the essential national security interests of the UK.

63. The rules for using Article 346 (1) (b) TFEU have not changed. Very simply, these are:

- a. seeing whether the goods appear on the [official translation](#) of the list of warlike stores in Council Decision 255/58. This exemption also covers the procurement of services and works directly related to the goods on this list; and
- b. if the works, goods or services are warlike, deciding whether the protection of essential national security interests requires that all or part of the procurement should be exempt by evaluating and recording:
 - (1) the essential security interest concerned;
 - (2) the connection between this security interest and the procurement decision; and
 - (3) why using the exemption in this specific case is necessary for the protection of the identified essential security interest.
- c. ensuring that application of the exemption does not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.

64. Whilst the rules for using Article 346 (1)(b) TFEU have not changed, the DSPCR provide specific measures to protect, among other things, security of information and security of supply. If they fully meet our security needs, you must use these measures instead of the exemption.

65. You can find full guidance on treaty exemptions in Chapter 4.

What general exclusions are in the DSPCR?

66. In addition to the TFEU exemptions, there are general exclusions in the DSPCR which allow you not to apply the DSPCR, including exclusions for:

- a. contracts awarded in accordance with specific procedural rules of:
 - (1) international agreements or arrangements between EU Member State(s) and one or more third countries;
 - (2) international agreements or arrangements on the stationing of troops between an EU Member State and one or more third countries;or
- (3) international organisations that have specific procurement rules;
- b. contracts which would oblige EU Member States to supply information, the disclosure of which is contrary to its essential security interests;
- c. contracts for intelligence activities;

- d. cooperative programmes between EU Member States based on research and development for a new product;
- e. contracts awarded in a third country during military or security operations if operational needs require them to be placed with local suppliers;
- f. research and development services except where the benefits accrue exclusively to the procurer for the conduct of its own affairs and where the procurer wholly pays for the service.

67. You can find full guidance on exclusions in Chapter 5.

What about “in-house” procurement?

68. You also need to consider whether the works, goods or services you are procuring are from an “in-house” body (e.g. Defence Science and Technology Laboratory) as this may determine whether the DSPCR applies.

69. The DSPCR will not apply if the procurement is from:

- a. organisations which are part of the same legal person, e.g. MOD procuring from DECA or DSTL; or
- b. organisations which are legally separate but so closely connected that it is inappropriate to make their dealings subject to EU law, and they are therefore considered to be indistinguishable for procurement purposes.

70. The classification of bodies of the type referred to in paragraph 69(b) above as “in-house” follow the decision of the European Court of Justice in the Teckal case (Case C-107/98). You can find further guidance on in-house procurement in Chapter 2 - Scope.

What about industrial participation or offset?

71. The DSPCR do not mention industrial participation, offset or any other form of economic compensation for awarding a contract to a foreign supplier.

72. The legal opinion of the Commission is very clear – the TFEU does not permit industrial participation or offset, unless properly justified under Article 346 TFEU, as it breaches EU Member States’ obligations on non-discrimination and equal treatment of suppliers across the EU.

73. When placing a contract under the DSPCR, you must not:

- a. actively seek offers of industrial participation or offset as part of the tendering procedure;
- b. include industrial participation or offset in either the award criteria or contract conditions;
- c. include performance conditions that pertain to requirements other than those relating to performance of the contract itself; or
- d. require the contractor to discriminate against potential subcontractors on grounds of nationality.

74. If in any doubt you should consult your legal advisers.

What do I need to consider for my procurement strategy?

75. You need to consider as a minimum the following questions to decide if the DSPCR will apply to your procurement:

- a. Does the procurement involve a new contract(s) or a material amendment to an existing contract?
- b. Is the procurement from an in-house body?
- c. Are you a procurer?
- d. Does Article 346 TFEU apply to the procurement?
- e. Does the procurement fall within the scope of the DSPCR?
- f. Does the value of the procurement exceed the threshold?
- g. Does an exclusion set out in Regulation 7 apply to the procurement?

76. The flowchart at Annex A illustrates the decision making process which you should use as part of drawing up the procurement strategy.

Can procurement decisions be challenged?

77. The DSPCR contains review procedures that enable suppliers to challenge procurement decisions and provide effective remedies to protect their rights. These procedures are very similar to those in the PCR 2015 but contain important elements that are tailored to the defence and sensitive security market.

78. In particular, you must be aware that any procurement decision may be subject to a legal challenge. This includes but is not limited to any decision:

- a. to apply an exemption in the TFEU or exclusion in the DSPCR;
- b. to use the negotiated procedure without prior publication of a contract notice;
- c. to not select a supplier to tender after it has expressed an interest in the requirement;
- d. to award the contract to a particular supplier.

79. You must ensure that you record the reasons for taking any procurement decision, including any defence or security issues, at the time that the decision is made. This evidence will be required in the event of future challenge.

80. In particular, any decisions to exempt procurements from the DSPCR are likely to come under greater scrutiny. You should only use an exemption or general exclusion for the purpose that it is intended (i.e. to protect the interests that it is designed to safeguard).

81. You must consult your legal advisers if you are not clear whether you can use an exemption or general exclusion for a specific procurement.

82. Any failure to comply with the DSPCR could result in an aggrieved supplier or would-be supplier bringing an action in the UK courts for damages and / or for the decision or action to be set aside, or both.

83. Similar to the PCR 2015, the DSPCR requires a 'standstill period', before concluding a contract. This gives rejected tenderers the opportunity to start a review procedure at a time when the Court can correct unfair decisions. If a procurer has not respected this standstill period, the DSPCR requires the UK courts under certain conditions to set aside a signed contract, by rendering the contract "ineffective".

84. The DSPCR also seek to combat illegal direct awards of contracts, which is the most serious infringement of European procurement law. The UK courts may render contracts ineffective if the procurer has awarded the contract without a contract notice in OJEU where the DSPCR requires one. In these cases, you will need to run the contract award procedure again, this time according to the DSPCR.

85. The UK courts will have to take into account defence and sensitive security interests when considering applications for interim orders (such as injunctions) or when deciding whether to make a declaration of ineffectiveness.

86. You must maintain an audit trail of any major procurement decision (e.g. use of an exemption) in case of a legal challenge.

Annex A

Decision Making Process for Using DSPCR

