The Defence and Security Contracts Regulations (DSPCR) 2011 Frequently Asked Questions

These FAQs are split into the following areas to correspond with the Chapters of Guidance:

Overview
Scope
Financial Thresholds
Exclusions and Exemptions
Technical Specifications
Procurement Procedures
Framework Agreements
Security of Information and Security of Supply
Subcontracting
Supplier Selection
Tendering and Contract Award
Remedies and Legal Challenges
The Defence and Security Public Contracts Regulations
2011 (DSPCR)

1. What is the DSPCR?
The DSPCR 2011 are the UK regulations which transpose the EU Defence and Security Procurement Directive (Directive 2009/81/EC). They apply specifically to defence and sensitive security procurement.

Scope

2. What are the types of procurement to which DSPCR applies?
The DSPCR applies to:

- military equipment and associated work, works, goods and services;
- sensitive security equipment and associated work, works, goods and services; and
- works and services for specifically military purposes; and sensitive works and services.

It also includes the supply of specific tools, test facilities or support for the items listed above.

You must get the classification of the proposed contract correct as the rules within the DSPCR operate differently according to whether it is a works, goods or services contract. This is especially relevant for services contracts which operate under two very different regimes (Part A and Part B services).

3. How do I decide whether my requirement falls within the scope of the DSPCR?
Your starting point in any public procurement is an assumption in favour of using the Public Contracts Regulations (PCR) 2015. Then you need to look at categories of procurements that fall under the DSPCR. If the procurement is within scope of the DSPCR then you will use the DSPCR to award your contract / framework agreement.

4. What about mixed procurements?
If any part of your requirement falls within the scope of the DSPCR, then the DSPCR applies. If the PCR element is severable, you may, depending on the circumstances break it out and place a contract under PCR. However, you must ensure you do not do this with the single aim of avoiding the thresholds of the regulations.

5. Does the DSPCR allow me to place requirements with other Crown bodies?
Yes, you can continue to procure works, supplies and services from a Crown body e.g. Defence Science and Technology Laboratory (DSTL), as in-house procurement is not within the scope of the Regulations.

Financial Thresholds

6. What are the financial thresholds in the new DSPCR?
The main financial thresholds are set out below:

<table>
<thead>
<tr>
<th>Type of contract (s)</th>
<th>Amount (£)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Goods and Services</td>
<td>378,660</td>
</tr>
<tr>
<td>Works</td>
<td>4,773,252</td>
</tr>
</tbody>
</table>

The financial thresholds are reviewed on a biannual basis.

7. **What happens if my requirement is below the financial threshold, do I revert to using the PCR?**

No, the DSPCR does not apply to procurements within its scope below the thresholds (even if they are above the thresholds in the PCR), however you are still required to follow the principles in the DSPCR and comply with the rules regarding equality of treatment amongst suppliers, mutual recognition and transparency.

**Exclusions and Exemptions**

8. **What rights does Article 346 Treaty on the Functioning of the European Union (TFEU) give the UK?**

Article 346 TFEU allows the UK to:

a. withhold information if disclosure is considered contrary to the essential interests of its security (Article 346(1)(a)); and

b. take such measures as it considers necessary for the protection of the essential interests of security which are connected with the production of, or trade in, arms, munitions and war material (Article 346(1)(b)) (Warlike Stores).

9. **Should we use Article 346 TFEU for procurements under the DSPCR?**

The DSPCR contains a number of provisions which enable the UK to protect its interests. We retain the right to use Article 346 TFEU in exceptional cases, taking into account the UK’s national security interests.

10. **What grounds are there for an exclusion from the DSPCR?**

A procurement can be excluded from the DSPCR for a number of reasons, ranging from Security of Information to Research & Development (R&D). The exclusions can be found in Regulation 7 of the DSPCR. If you choose to use an exclusion, it has the effect of dis-applying the DSPCR for that particular procurement and not the category of procurement as a whole.

You must only use an exclusion for the purpose for which it is intended, for example, to protect the interests that it is designed to safeguard.

11. **Does an exemption or exclusion give me authority to use single source procurement?**
No, even if you apply an exemption or exclusion you should still aim to follow the principles of the DSPCR, including the use of competition, where appropriate.

You can find further information about exemptions and exclusions from the DSPCR in Chapter 4 – Treaty Exemptions and Chapter 5 – General Exclusions

**Technical Specifications**

12. **Can my technical specification refer to specific brands, sources or processes?**

You should avoid doing referring to specific brands, sources or processes in your technical specification, but where it is necessary you must include the words ‘or equivalent’ after the description.

13. **Why do I have to include the words ‘or equivalent’ after the description?**

Technical specifications have to provide open and equal access to procurement opportunities. Specifying particular (proprietary) brands or makes would be discriminatory and restrict competition. You must also ensure that technical specifications do not include requirements that would favour or exclude certain suppliers unfairly.

14. **Can I accept a tender that conforms to a different technical rules or specifications than those in the Invitation To Tender (ITT)?**

Yes. You must not reject a tender simply because it does not meet the specified standard. However the tenderer must demonstrate that the standard it does conform to provides equivalent functionality or performance to that requested in your ITT.

15. **One of my tenderers did not submit a required certificate of conformity, citing factors beyond their control, and instead provided a file of technical data; can I eliminate them from the competition?**

No. You must evaluate the data to see if it meets the requirements of the technical specification; if it does prove conformity then you must accept the data as being equivalent to the certificate of conformity.

**Procurement Procedures**

16. **What are the procurement procedures in the DSPCR?**

The Regulations set out three main procurement procedures:

a. restricted procedure;

b. competitive procedure with negotiation;

c. competitive dialogue procedure.

You have a free choice between using the restricted procedure and the competitive procedure with negotiation. Where these two procedures are inadequate for the complexity of the requirement, the competitive dialogue procedure is available.
17. **How about single source?**

You should only use the negotiated procedure without prior publication of a contract notice (the term used in the DSPCR for single source or a limited competition) when strictly necessary and under strictly defined circumstances. Justifications include:

   a. where competition is not possible due to exclusive rights, including where intellectual property rights are held by one supplier, or on technical grounds;

   b. where no tenders or expressions of interest are received during a competitive procurement procedure;

   c. in extreme urgency but not due to the poor planning of the MOD;

   d. for Research and Development (R&D);

   e. for limited amounts of additional deliveries by the original supplier;

   f. for supplies quoted and purchased on the commodity market or on particularly advantageous terms following an insolvency event; and

   g. for limited amounts of repetition of works or services from the original supplier; and

   h. where there are grounds to do so, based on the exclusions in the DSPCR.

You must publish a Voluntary Ex Ante Transparency notice (VEAT), also known as a Voluntary Transparency Notice (VTN) within the MOD as soon as possible after your decision to use single source. You must apply the 10 day mandatory standstill period before awarding the contract.

18. **Is the procurement of a UOR justification enough for using single source?**

No, you must consider competition in accordance with the DSPCR as your starting position. The DSPCR contains provisions which allow the use of an accelerated procedure where it can be justified. Evidence shows that placing a contract using the procedures within the DSPCR are actually quicker than placing a single source contract through negotiation.

### Framework Agreements

19. **What is the permitted duration of a framework agreement under the DSPCR?**

The DSPCR permits framework agreements to last for up to seven years, unlike the PCR which limits framework agreements to four years.

20. **Do I have to compete orders or tasks (contracts) under a multi-supplier framework agreement?**

No, you may award orders or tasks under a framework agreement by either applying the terms laid down in the agreement, if possible, or holding a further mini-competition that involves refining or supplementing the basic terms in the agreement.
21. Should I use a standstill period for a competitive tender under a framework agreement?

You may use a standstill period if you believe there is a material risk of a legal challenge to the order or task but this is not a requirement of law or policy for framework agreements.

Security of Information and Security of Supply

22. Am I permitted to impose obligations on suppliers throughout the supply chain to safeguard sensitive information / assets?

Where a procurement process involves access to classified information, you must consider imposing obligations on suppliers and require flow-down of those obligations to subcontractors, to safeguard that information throughout the tendering and contracting procedure. Those obligations must be proportionate and relevant for the particular procurement process.

23. What am I permitted to do in order to mitigate the risks associated with security of supply?

Where security of supply is an issue, you must include a detailed description of the security of supply requirements in the contract documents. You must also specify in the contract documents the commitments, certificates, documentation and information that a tender must include in their tender.

Subcontracting

24. I am concerned about visibility of the Supply Chain, what does the DSPCR allow me to do?

The DSPCR allows you the option to require tenderers to:

- indicate what they propose to subcontract and to whom;
- indicate any planned changes of subcontractors before or during the life of the contract.

You may also:

- 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.

There are certain constraints on how you can apply these options. You must read Chapter 14 – Subcontracting under the DSPCR to consider your options.

Supplier Selection

25. How do I make suppliers aware of the minimal levels of standards / technical ability / economic and financial standards they are required to meet at supplier selection stage?

You must set out in the contract notice any minimal levels of economic or financial standing, any applicable minimum technical capacity, and the
information and evidence you require from the suppliers to prove that they satisfy the set selection criteria.

26. My procurement requires the information associated with it to be protected by the contractor, what am I permitted to do at PQQ stage to ensure the contractor is capable of protecting the information?

You are allowed to reject suppliers and subcontractors where they do not possess the necessary reliability to exclude risks to national security or have breached obligations relating to security of information during a previous contract in circumstances amounting to grave misconduct.

You must request information from suppliers and subcontractors to assess their ability to protect information if they will have access to classified information marked OFFICIAL-SENSITIVE or above.

27. It is essential to have security of supply for the supplies / services I am procuring, what am I permitted to do at the supplier selection stage to ensure a supplier can meet this need?

The DSPCR allows you to establish selection criteria at PQQ stage, for prospective tenderers related to security of supply. You may exclude potential tenderers based on past grave professional misconduct in relation to security of supply or not possessing the reliability necessary to exclude risks to the security of the UK.

Tendering and Contract Award

28. What award criteria am I permitted to use?

You must award a contract on the basis of Lowest Price or Most Economically Advantageous Tender (MEAT). The chosen option, including your evaluation criteria, must be made clear in the Contract Notice as well as the tender documents.

29. When do I need to use a standstill period?

You must use a standstill period after you have selected the winning tenderer, at which point you notify all tenderers. The notification to tenderers signals the start of the standstill period, which must be observed for at least 10 calendar days, before you enter into the contract.

30. Do I have to use a standstill period in a single source contract?

No but you must follow the same duration as the standstill period, after you have published a VEAT (VTN), before you enter into a contract.

Remedies and Legal Challenges

31. What do I do if a contractor threatens to make a legal challenge or claim?

You must take your own legal advice, MOD procurers must contact CLS-CL to review their case and CLS-CL will provide the support required when responding to a contractor’s concerns. A legal challenge or claim is a formal challenge of the
Authority’s decision or action via the Courts, anything else is a grumble, but you must still manage them with the support from your legal team.

32. **Can a supplier outside of the EU make a legal challenge or claim?**

No, our obligation to comply with the DSPCR is solely to potential suppliers in the [Member States of the European Union](https://www.gov.uk/government/publications/the-european-union-defence-and-security-public-contracts-regulations-dspcr-2011) and Norway who have adopted the Directive under the European Economic Area agreement.

33. **What remedies are available through the courts?**

The remedy of ineffectiveness enables a Court to strike down a contract subject to the DSPCR, when awarded in serious breach of the relevant procedures in the DSPCR. You must be aware that the Court can award other remedies in addition to, or instead of, ineffectiveness that include civil financial penalties, damages and contract shortening.