



Department
for Transport

Driver and Vehicle Standards Agency Theory Test Competition – Review of Lessons Learned

March 2014

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Department for Transport
Great Minster House
33 Horseferry Road
London SW1P 4DR
Telephone 0300 330 3000
Website www.gov.uk/dft
General enquiries <https://forms.dft.gov.uk>

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Background

1. In September 2012, the Government Procurement Service (GPS) an executive agency of the Cabinet Office and the then Driving Standards Agency (DSA) an executive agency of the Department for Transport, jointly ran a competition to appoint a supplier for a framework contract to provide computer-based testing for government. The competition was concluded in early 2013.
2. The overall outcome of this competition was a success. A call-off contract for the driving theory test - an essential part of arrangements to learn how to drive – has been awarded under this framework. As a result of new contract arrangements, the Driver and Vehicle Standards Agency (DVSA) the now merged DSA and Vehicle and Operator Services Agency, will be able to reduce the cost of the driving theory test from September this year. Savings in excess of £100 million will be achieved over the next nine years.
3. The decision to award the framework agreement was, however, subject to a legal challenge. It is a key and welcome principle of public procurement arrangements that bidders are able to challenge procurement decisions. But a full challenge necessarily delays the award of contracts and unavoidably involves all parties in some time and expense and is, therefore, not a decision to be taken lightly.
4. Clearly, all parties want to avoid this course of action if possible. The Department for Transport aims to run all of its competitions in accordance with government policy in an open and transparent way to give bidders and other stakeholders confidence in their rigour and fairness. Its ambition to improve continuously its practices and processes is, therefore, in everyone's interest. Thus, in the light of the challenge in this case, and as a matter of good practice, the Department has conducted a lessons learned exercise with a view to sharing good practice more widely.
5. In this particular case, the dispute was resolved by agreement. It is government policy to manage disputes by the most effective and appropriate means possible and to pursue sensible commercial arrangements that avoid

unnecessary litigation costs and the ultimate costs and uncertainty of delays. The details of the agreements reached in this case are subject to confidentiality agreements to protect commercial interests and the competitiveness and integrity of future competitions.

6. The commercial resolution in this case has enabled the award of a government framework agreement to learndirect Ltd on 18 October 2013. Further, DSA and the Driver and Vehicle Agency Northern Ireland agreed that the driving theory test will be provided by learndirect Ltd from September 2016 and that the current provider, Pearson Driving Assessments Ltd, should continue to provide the test until that date.
7. The result of these contract arrangements has been to secure a very good, value for money deal. The reduction in net cost per test, allied to the DVSA's forecast of increased test volumes as a result of the economic recovery, means that more than £100m will be saved over the next nine years. In addition, national coverage will be improved with tests becoming available at more locations.

Lessons Learned

8. The competition had a number of unique characteristics and arguably some complications which made management of the process more challenging. First, the procurement began as an exercise within DSA to let a fourth generation contract for the driving theory test but, following discussion with the Cabinet Office, became a GPS framework contract for the broader provision of computer based testing for government. The call-off contract for the theory test was thought likely to account for over 80% of the value of the framework and, in any event, would be let simultaneously. The length of the framework was four years and the call-off for the theory test was longer at eight years.
9. Second, the DSA was acting as the agent for GPS. Although not exceptional in itself, such arrangements demand clear governance and decision making.

10. Third, the competition was pursued using the open procedure. Again, this in itself was not exceptional but the procedure had not been used on this scale within DSA or more widely within government. DSA had previously used the competitive dialogue process for which it had originally planned.

Acting as the framework authority

11. Determining the commercial and procurement strategies is an important part of any competition. It is a key consideration in the Department's business case assessments in line with Her Majesty's Treasury (HMT) guidance. When considering whether to broaden or restrict the scope of a competition, there is a balance to be drawn between achieving a better price through greater volumes and economies of scale, and achieving a better price through more, and more frequent, competitions. The latter is particularly valuable in a competitive and evolving market place which relies on rapidly advancing technology.

12. As there is no right or wrong answer, the decision should be given close scrutiny before opening a competition and judged on its merits. In this case, the decision to let a framework rather than a single contract was taken by DSA in agreement with GPS after the Department had agreed a Strategic Business Case. When such changes of approach occur in the middle of a process, it is important to revisit the business case as a whole to ensure that the implications for all parts of the competition - and the ultimate policy outcomes which the procurement supports - are fully understood and aligned.

13. The Department's revised procurement assurance processes will give specific attention to the merits or otherwise of competitions to let government frameworks. It will consider the potential impacts on the conduct of the competition as a whole. Should the procurement strategy change mid competition, the issue should be revisited as part of the business case approvals process.

Acting as the procurement agent for another department

14. The joint approach to this procurement was helpfully assisted by a document setting out the principles of the relationship between DSA and GPS, and an agreed structure and approach. The document focuses more on the definition of roles and responsibilities than it does on overall accountability and governance and was not completely agreed by DSA and GPS prior to the commencement of the competition. Complicated procurements such as these require an appropriate level of scrutiny and challenge and a clear and auditable decision making structure. Agreements, should be comprehensive and able to address how to proceed should things go wrong.
15. If the procurement had proceeded as originally planned, the award of the theory test contract would have been bound by the separate decision to award the framework. Clearly, when a framework in effect guarantees at least one call-off agreement, the scrutiny of both framework and call-off contracts should be considered simultaneously. Progression to award, or to indicate intention to award, should only take place when the relevant governance processes have run their course. Where a framework and call-offs are so connected, there should be no assumption that acceptance by one party equals scrutiny and acceptance by another.
16. Revised governance and assurance arrangements in the Department - not in place at the time – include a Procurement Approvals Board. This board separates the robustness of the procurement process from the investment decision making process. In addition, the new Crown Commercial Service will ensure that all future procurements involving more than one agency are governed by a Master Services Agreement.

Management of the procurement process

17. Having made the decision to pursue a specific procurement procedure, it is important to assess the skills and experiences of the procurement team and to close any gaps as appropriate. The Department will provide support to its

agencies when new and novel approaches are considered and DVSA will conduct a skills audit of its relevant staff and provide training and support as appropriate.

18. In this case, DSA was supported by a multi-disciplinary project team. Such teams should be drawn from an appropriately broad spectrum and include external and independent challenge where necessary. The correct deployment of legal support will be an important consideration particularly when such support, as here, is provided externally.

The financial standing test

19. A financial standing test is a standard and important part of the Department's assessment of potential contractors. It gives some assurance on their ability to carry out their contractual obligations. The financial standing test needs to be sufficiently robust to ensure that bidders can be properly assessed and compared, yet sufficiently flexible to allow for innovative market responses. The government is particularly interested in ensuring that its competitions do not exclude or prejudice small and medium sized enterprises. Similarly, it does not want inadvertently to rule out the most economically advantageous bids by overly rigid application of this test when other relevant factors might be considered. The use of sound business judgment, therefore, is an important additional component in the assessment of potential contractors.

20. In the light of the above, the financial standing test needs to be considered carefully in the circumstances of each competition and not simply rely on standard approaches. Its application should be stress tested against likely scenarios before the competition and, during the competition, the assessment of bids should be carried out robustly using additional and independent expertise as appropriate. The Department will review its use of the financial standing test to ensure that it remains fit for purpose. In any event, the Department will make clearer its reliance on sound business judgement to ensure contractor viability.

Dealing with procurement challenges

21. As highlighted above, it is an important part of the procurement process that bidders have the right to challenge. While something to be avoided if at all possible, there are lessons to be learned about how best, for all parties, to manage this process. There is a potentially unhelpful rhythm and process to litigation which can get in the way of otherwise sensible and open dialogue among the affected parties. The scope for commercial discussion and the prospect of mediation should always be considered as early in the process as is practicable.

22. Litigation is also costly and, as a matter of course, the Department should do all that it can to respond to bidders' enquiries and concerns promptly and openly to resolve them without recourse to formal action. The Crown Commercial Service has established a dedicated disputes resolutions team to support departments and agencies in this endeavour.

23. Should formal action be unavoidable, the pace of litigation and the resources and skills it requires becomes an important consideration. In this case, the challenges of running litigation (and other dispute resolution options) was complicated by the number of agencies involved. Much has to be done by a few key people to very demanding timescales and multiple players can make decision making slow and tactically less agile.

24. It is important, therefore, to establish clear lines of authority and an overall lead official to ensure a timely, coordinated and coherent response. A litigation strategy should be quickly agreed and the dedicated resource required to support it should be identified with a clear articulation of individual's roles, responsibilities and lines of accountability.